Case No. 10-15152
(U.S.D.C. N.D. Cal., Case No. C-09-04779 CRB)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ELIZABETH AIDA HASKELL, REGINALD ENTO, JEFFREY PATRICK LYONS, JR., and AAKASH DESAI, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, JR., Attorney General Of California; EVA STEINBERGER, Assistant Bureau Chief for DNA Programs, California Department of Justice,

Defendants-Appellees.

REPLY BRIEF OF APPELLANTS

On Appeal from the United States District Court
for the Northern District of California
The Honorable Charles R. Breyer
Case No. C 09-04779 CRB

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I. INTRODUCTION

The government's case for the mandatory, suspicionless, and warrantless DNA testing of all individuals merely arrested for felonies in California rests on two fundamental legal errors. First, in order to justify its unconstitutional DNA collection program, the government ignores the distinction between individuals arrested and presumed innocent, versus individuals who have been convicted of committing felonies. Second, the government would have this Court impermissibly broaden a police officer's power to "identify" an individual he has arrested to encompass not only the power to determine "who you are" through DNA evidence but also "what you have done" and where you have been in the past, without limit. Such broad powers of the government to collect incriminating evidence without a warrant or even probable cause – from inside a person's body and from a person who is presumed innocent – is precisely the type of abusive government practice the Fourth Amendment was designed to protect against.

Acceptance of either of the government's faulty premises would run contrary to our deepest Fourth Amendment principles. The government does not – and cannot – deny that arrestees are not subjected to the same privacy infringements as convicted persons. Nor does the government deny that *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009), held that the extraction of DNA from an arrestee, done to generate cold hits in a criminal DNA databank, violates the

Fourth Amendment. Instead, it relies purely on cases involving convicted, sentenced felons to argue for a new exception to the warrant requirement. This Court has never held that the Fourth Amendment allows such intrusions into the bodies and genetic privacy of people who have never been charged – much less convicted – of any crime. The rights of innocent Americans are not defined by those of convicted felons. As the Supreme Court said just last year, the notion that an arrest creates a "police entitlement" to conduct warrantless investigatory searches is "anathema to the Fourth Amendment." *Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009). The District Court erred when it held otherwise. This Court should reverse.

II. CONTROLLING AUTHORITY HAS ALREADY DETERMINED THE BALANCE BETWEEN AN ARRESTEE'S PRIVACY INTERESTS AND THE GOVERNMENT'S INTEREST IN CONDUCTING WARRANTLESS, SUSPICIONLESS BODILY SEARCHES.

Relying on the convicted-person cases, the government contends that the totality of the circumstances test applies and that the District Court was correct to weigh the interests of individuals arrested against the government's interests when determining the constitutionality of arrestee testing. (Government's Answering Brief ("GAB") at 19.) The rules governing arrestees are completely different from the rules that apply to searches of post-conviction parolees and others who are serving felony sentences. This Court and the Supreme Court have already

determined the rules that govern police authority to search an arrestee for evidence of a crime. *Schmerber v. California*, 384 U.S. 757 (1966); *Gant*, 129 S. Ct. at 1721; *Friedman*, 580 F.3d at 858. In those circumstances, blanket DNA testing – like suspicionless home searches – has been justified as a component of the supervision, rehabilitation, and punishment of convicted felons. *United States v. Kincade,* 379 F.3d 813, 839 (9th Cir. 2004); *see Samson v. California*, 547 U.S. 843, 850-51 (2006); Appellants Opening Br. ("AOB") at 32; GAB at 21. But these interests are ***completely absent*** when a mandatory "programmatic warrant" for DNA testing is applied to individuals who have not been convicted of anything, and are not under any supervision of the criminal justice system. *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006). People who are presumed innocent are not in need of rehabilitation, punishment or parole supervision. And they cannot be forced to provide a DNA sample without either a warrant or *at least* individualized suspicion that the search will reveal relevant evidence, coupled with exigent circumstances.

The District Court should have followed *Friedman*, rather than engaging in a general balancing test based on the law that applies to searches of parolees and convicted felons. Its refusal to do so requires reversal.

III. EVEN UNDER A TOTALITY OF THE CIRCUMSTANCES APPROACH, § 296(A)(2)(C) VIOLATES THE FOURTH AMENDMENT.

Appellants' opening brief explains why a totality-of-the-circumstances analysis cannot be used to evaluate the search and seizure of bodily tissue from persons other than convicted felons.[1] Even if that test applied, arrestee testing would be unconstitutional because the marginal utility of arrestee DNA testing (compared with testing after conviction) does not outweigh the privacy and bodily integrity interests of arrestees so as to justify a new exception to the warrant requirement.

A. The Government Cannot Treat Arrestees as if They Were Convicted Felons with No Privacy Rights.

The government's main argument is that this Court should uphold testing of arrestees simply because it has upheld testing of convicts. But even the cases the government cites have anticipated and rejected the argument that arrestees should be lumped together with convicted felons for the purposes of blanket DNA testing.

In *Rise v. Oregon*, this Court upheld a law requiring prison officials to take DNA from persons convicted of murder or sex-related felonies, on the grounds that people convicted of such serious felonies have greatly reduced expectations of privacy. 59 F.3d 1556, 1559-61 (9th Cir. 1995). The Court was careful to note

[1] The government has abandoned any argument that DNA testing is justified by the special-needs doctrine. (GAB at 55.)

that the challenged statute did not authorize taking DNA from "mere arrestees." *Id*. at 1560. The same distinction was also expressly noted in subsequent cases challenging warrantless, suspicionless DNA searches of convicted persons. *See United States v. Kincade*, 379 F.3d 813, 833, 836 (9th Cir. 2004) (plurality opinion) (repeating the "well-established principle that parolees and other conditional releasees are not entitled to the full panoply of rights and protections possessed by the general public" and noting the "obvious and significant distinction between the DNA profiling of law-abiding citizens…and lawfully adjudicated criminals whose proven conduct substantially heightens the government's interest in monitoring them[.]");[2] *United States v. Kriesel*, 508 F.3d 941, 947, 948-49 (9th Cir. 2007) (noting that "based on Kriesel's status as a qualified offender on supervised release, he can claim only the most limited expectation of privacy, if any, in his identity given that he was lawfully convicted of a predicate offense" and that the panel's decision to uphold DNA testing "does not cover DNA collection from arrestees.").

That these cases took such care to distinguish between collecting DNA from convicted felons and taking it from "mere arrestees" shows the importance of this distinction. When, as here, the government seeks to justify the extraction and

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[2] An equal number of judges in *Kincade* would have held that even testing of convicted felons violated the Fourth Amendment. 379 F.3d at 870-71.

search of a person's bodily tissue based ***purely on that person's status***, it cannot then ignore the crucial differences between the status of convicted, sentenced felons and "mere arrestees." The police are entitled to search parolees for any purpose, without any justification other than their status as parolees; they cannot conduct such unlimited searches of mere arrestees. Compare *Samson*, 547 U.S. at 853 with *Gant*, 129 S. Ct. at 1716.

An arrestee who has not been – and may never be – charged, tried, or convicted of anything is not like a convicted offender. She does not have the same status, she does not present the same risks as a convicted felon on parole, and her privacy rights are correspondingly greater. *Scott*, 450 F.3d at 873-74 (discussing, *inter alia*, *Kincade*). *Friedman* confirmed as a holding what this Court had previously stated in *Rise*, *Kincade*, and *Kriesel*: because "[n]ot one of those cases [upholding DNA testing] involved a search of a pretrial detainee -- as opposed to a convicted prisoner -- or a state law that mandated searches of pretrial detainees," they cannot justify taking DNA from people merely arrested for a crime. *Friedman*, 580 F.3d at 857.[3]

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[3] The possibility that the government could obtain a DNA sample from discarded body tissue ("DNA Saves" Br. at 6, 29) is irrelevant: "The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001). We regularly "abandon" our urine, but that does not mean the police can make us pee in a cup to gather evidence of illegal

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B. **Arrestee Testing Is Not So Useful as To Merit Creating a New Exception to the Warrant Requirement.**

On the other side of the balance, the government has failed to show that arrestee testing is effective in advancing any significant governmental interest. It is important to remember that the government can – and does – take and databank DNA from persons upon conviction of a crime. *See* Cal. Penal Code § 296(a)(1). Thus, the undisputed usefulness and legality of *convicted*-offender databases is irrelevant to this appeal. Instead, the crucial question is whether the government can show that taking DNA from mere arrestees is so much *more useful than taking it after conviction* that it justifies creating a new exception to the warrant requirement. The government has not made this showing here. The Fourth Amendment creates definite rights. Warrants are the rule except in limited situations. Rules and rights cannot be breached without evidence, without cause, and without substantial justification.

1. **Arrestee Testing Does Not Enhance the DNA Databank's Effectiveness at Solving or Preventing Crime.**

As discussed in Appellants' opening brief, the government's own data fail to show that arrestee testing generates "hits" that would not also have been achieved by testing after conviction. (*See* AOB at 50-52, 59-60.) Despite the government's

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drug use. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

attempt to recast Appellants' brief as a "statistical analysis," Appellants did no more than an application of basic math to the government's own data – data submitted into evidence just three days before the December 4 preliminary injunction hearing when it was too late for Plaintiffs to respond to these data before the hearing.[4] (ER0723-27.)

In their opening brief, Appellants invited the government to explain why its evidence failed to show any increase in hits. (AOB at 51-52.) Appellants even suggested some possible answers. In response, the government and its *amici* neither contested Appellants' analysis of the evidence, nor offered alternative explanations of that evidence. Instead, the government relies only on its motion to strike. In a case involving Appellants' constitutional rights, wishing data didn't exist (an oddity since it is the government's data) is not good enough. The government needed to show results or an ends being served. The government has not done that and the numbers explain why.[5]

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[4] As reflected in Appellants' opening brief (AOB at 50-52, 59-60), Appellants' so-called statistical analysis involved the following tools: subtraction, multiplication, and division. No regressions were run, no models created, no confidence intervals applied. It was elementary math applied to existing data submitted by the government. This analysis could as easily (albeit less concisely) be expressed in prose, as Appellants do in footnote 1 of their Opposition to the Government's Motion to Strike.

[5] The government now seeks to introduce new evidence, relying on a declaration in which "Mr. Konzak clarifies" (more accurately, supplements and seems to contradict) his earlier declarations the government submitted to the

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Because this evidence refutes its claims, the government ignores it and asserts that arrestee testing is useful because "291 investigations have been aided through the use of arrestee samples." (AOB at 37.) But this assertion both misstates the evidence[6] and utterly fails to show that arrestee testing has any positive effect on the number or rate of hits or investigations. As of October 31, 2009, there were "over 120,000" samples stored in California's arrestee database (which includes all samples originally taken from arrestees, including arrestees who are later convicted). (ER0493.) California's entire "offender" database, which (as of October 31) includes 1,378,846 total samples taken from persons following arrest or conviction. (ER0484.) Thus, the 120,000 arrestee samples comprise 8.7% of the total database. But the 291 hits to the arrestee database

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District Court. (Mot. to Strike, Doc. No. 15-1.) If Mr. Konzak's initial declarations were so deficient that they now require 4 pages of "clarification," the government should not have submitted them to the District Court claiming that they support arrestee testing, particularly when it was too late for Plaintiffs to respond to them.

[6] The evidence states that "[o]f these 10,664 [total CAL-DNA] hits, so far 291 have involved arrestee submissions." (ER0485.) The government substitutes the word "investigation" for "hits" to inflate the importance of this evidence. Because a single offender profile can result in matches to multiple DNA samples collected from a single crime scene, the number of hits is not the number of investigations aided. As Professor Bruce Budowle, an expert in DNA testing and a 26-year veteran forensic scientist with the FBI, explains, the "hit rate" proves nothing about the efficacy of CODIS in solving crimes, because "we cannot know the proportion of hits that result in assisting convictions, as data concerning the outcome of the hits is not reported and analyzed." (*See* ER0254-64.)

comprise only 2.7% of the 10,664 total hits generated by California's database as of October 31, 2009. (*Id.*) Thus, the 8.7% of the total database that comprises arrestee samples has generated only 2.7% of the total hits. And this is so even though 2/3 of those arrestees have been – or will eventually be – convicted, which means that the arrestee database should be at least 2/3 as effective in generating hits as is the convicted offender database, even if the only arrestees who generate hits are those who are later convicted. But in practice it is only 1/3 as effective in generating hits as is the total database (2.7% vs. 8.7%).[7] Thus, the figure of 291 hits from the arrestee database that the government is extolling in this Court, far from showing that arrestee testing is effective, shows just the opposite.

The government also claims that the "average number of investigations aided by matches from offender profiles to crime scene profiles per month increased 50% from 2008 to 2009" when California began to collect DNA from felony arrestees. (GAB at 37 (citing ER0486-87).) Appellees again misstate the evidence by substituting "investigations" for "hits." (*See* ER0487; footnote 6, *supra*.) This increased number of hits includes matches between crime scenes (which can have nothing to do with arrestee testing) as well as matches to an offender. (ER0484-85.)

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[7] This actually overstates the efficacy of the arrestee database, because it compares the hit-rate of the arrestee database to that of the total-offender database, which includes both the arrestee database and the convicted-persons database.

More importantly, this same declaration shows that this increased hit rate has nothing to do with arrestee testing. The average number of monthly hits in 2009 through the end of October was 280, up from 183 in 2008. (ER0487.) This means that there were approximately 2,800 hits during those first ten months of 2009, as opposed to approximately 1,830 in the first 10 months of 2008, meaning an increase of 970. But as of October 31, there had only been 291 *total* hits to the arrestee database. (ER0485.) Thus, the majority of the increase in hits in 2009 *must have been* a result of increased hits to profiles in the convicted offender database, not to hits in the arrestee database. And this is true even though more than 2/3 of the profiles in the arrestee database are from people who will eventually be (or, at this point, already have been) convicted. Nothing about this increase in hits remotely suggests that even a single hit involved a profile taken from a person who was arrested and not later convicted. Again, to the extent it shows anything at all, this evidence, too, indicates that it is the convicted-offender database, not the arrestee database – and certainly not the profiles from arrestees who will not eventually be convicted – that is generating hits, as the number of crime-scene samples in the forensic database increases.

The failure of the government's own numbers to justify arrestee testing is entirely consistent with other evidence before the District Court. Dr. Helen Wallace's United Kingdom ("UK") Study discussed in Appellants' opening brief is

particularly relevant. The California and UK DNA testing programs are similar; the UK began mandatory testing of all arrestees in April 2004. (AOB at 49.) As a result, the UK's database, which contains an estimated 5 million unique offender profiles (1 million of which are for persons never convicted), is over three times larger than California's, and thus offers the most amount of data collected over the longest period of time. (ER0400, ¶14; ER0725, ¶5.) Because the government's goal is apparently to have as large a database as possible (GAB at 37), it should be interested in the UK's experience with its huge database, which includes arrestee samples and tracks its results more carefully than CODIS does. (ER0262, ¶26; ER0401-04, ¶¶18-26; ER0690-91, ¶¶4-7.) Instead, the government asks this Court to disregard the data from the UK. (GAB at 39.) The reason for this is clear: data from the UK database confirm that adding mere arrestees into DNA databanks does nothing to solve or to prevent crime. (ER0398-405; ER0690-91; AOB at 49-50.) Instead, what increases the effectiveness of DNA databanks is analyzing and adding crime-scene samples to compare with samples taken from proven criminals. (ER0398-405; ER0690-99.)

Finally, the government and its *amici* (some of whom are directly supervised by Defendant Brown[8]) try to justify arrestee testing with anecdotal evidence about

[8] Defendant Brown has "direct supervision over every district attorney" in California, including the prosecutors who signed the California District Attorneys

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specific crimes they claim it helped solve. None of this is persuasive. First, the government and *amicus* "DNA Saves" rely on evidence that the District Court expressly rejected. (ER0018-19.) In its brief, the government says it "presented numerous examples of instances where collecting DNA at the time of arrest" would have led to "many future criminal acts could have been prevented." (GAB at 42.) But the District Court rejected this evidence because Plaintiffs had examined it and had demonstrated that it failed to show what the government claimed. (ER0018-19.) For example, the government cites a 1-page "study" by the Denver District Attorney's office that selected five cases, dating back to 1985, out of the 17,000 cases Denver prosecutors handle every year,[9] that it claims support arrestee testing. (Appellees' Supp. ER017.) But even these cases do not support what the district attorney claims they do, because an examination of the actual court records (which Colorado makes available online) demonstrates that mandatory testing of *convicted* persons would have generated the same results.

For example, the Denver district attorney claims that "[i]f the state had required [Ned Pace] to give a DNA sample during his felony arrest for sexual assault on a child on October 8, 1995, a DNA match could have been obtained with

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Association's brief. Cal. Const. art. 5, § 13; *see Pitts v. County of Kern*, 17 Cal. 4th 340, 356 (1998) ("In California, each county district attorney is supervised by the Attorney General.").

[9] http://www.denverda.org/Office_Overview.htm.

the DNA evidence recovered from his first sexual assault/murder. Two subsequent sexual assault/murders and one subsequent sexual assault/kidnapping could have been prevented." (Appellees' Supp. ER017.) This claim is, at best, extremely misleading, because court records show that testing at the time of an *earlier* conviction would have supplied this evidence. Pace ***was*** arrested in 1995 for felony sexual assault on a child. (PSER018, ¶5.) But the district attorney ***omits*** the crucial fact that Pace pled guilty and was convicted of that same felony in 1996. (*Id.*) The sexual assaults, murders, and kidnappings that supposedly would have been prevented by arrestee testing did not occur until 1999 and 2000, *three years after Pace was convicted of a felony sex crime*. (*Id.*) It would therefore have made absolutely no difference whether Pace had provided DNA at his 1995 arrest or upon his 1996 conviction; in either event his DNA would have been in CODIS years before he committed more crimes in 1999 and 2000. The district attorney's other claims suffer from this exact same flaw – testing after conviction would have done just as much to prevent the crimes listed as arrestee testing would have accomplished.[10] (*See* PSER019-20.)

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[10] The government's claim that it may take years between arrest and conviction is based on citations to two capital cases, which are obviously not representative of felonies in general. (GAB at 40-41.) California law generally requires that felony trials be set "at the earliest possible time" and within 60 days of arraignment. Cal. Penal Code §§ 1049.5, 1050(a). Ironically, the opinions in both of these cases reflect that the prosecution had already obtained a DNA sample from the defendant

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Amici make similarly misleading claims. For example, "DNA Saves" discusses a declaration from its founder, Jayann Sepich, which claims that arrestee testing would have prevented 11 murders in the notorious Chester Turner case. In reality, if Turner had given a DNA sample after his first felony conviction – and the government had tested it in a timely manner – that would have had almost the same effect as testing him upon his first arrest. (PSER020-21, ¶9.) Similarly, the delay in taking DNA from Ms. Sepich's daughter's killer had little to do with arrestee testing – rather, the government failed to take DNA when he was convicted of a felony. (PSER020, ¶10.) This is why the District Court rejected these same claims when the government presented them below.

These same errors are repeated again and again in the government's and *amici*'s presentation of individual cases that they wrongly claim show the value of arrestee testing as compared with testing upon conviction. (PSER018-21.) An investigation into the details of the other anecdotal evidence presented, were that

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without the need for an arrestee-testing law. *See People v. Martinez*, 47 Cal. 4th 399, 411 (2009); *People v. Lewis*, 46 Cal. 4th 1255, 1275 (2009). This is not surprising, because in cases where DNA evidence is relevant the same probable cause that supports charging a defendant will also allow the government to get a warrant to collect his DNA.

information publicly available and were there space in this brief, would doubtless reveal similar errors.[11]

That even these cases, selected from the millions of crimes, arrests, and prosecutions that have occurred since 1985 (the date of the Denver District Attorney's first example) for the very purpose of illustrating the benefits of arrestee testing, fail to show any such benefit is telling, and is part of the reason the District Court rejected the government claims that they show that arrestee testing is effective. California's arrestee database contains more than 120,000 profiles. (ER0493.) But neither the government nor its *amici* can point to a single example where a person was arrested, sampled, and released, and then, after his DNA was analyzed (which occurs months later), rearrested because that sample had generated a hit. If arrestee testing could prevent crimes – or even solve past crimes better than testing after conviction – there should be at least one example out of

[11] *Amicus* CDAA's request that this Court take judicial notice of supposed instances where arrestee DNA testing led to "cold hits," or otherwise promoted early resolution of crimes, should be denied. (CDAA Br. at 6, 13.) The Federal Rules of Evidence, however, do not allow a court to take judicial notice of court records in other cases for the truth of the matters asserted. Only the existence of those records may be judicially noticed. *See Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). Moreover, the CDAA's submission of a declaration as part of its *amicus* brief is improper, and the Court must disregard that attempt to introduce new evidence on appeal. *Lowry v. Barnhart*, 329 F.3d 1019, 1025 (9th Cir. 2003). The Court should give CDAA's factual assertions whatever weight it affords such statements of any *amici*.

these 120,000 where this had occurred. When even the government's cherry-picked anecdotes fail to suggest the utility of arrestee testing, the only conclusion that can be drawn from them is that arrestee testing is not useful for solving or preventing crimes.

Because the actual evidence fails to support its position, the government falls back on a general "more is better" argument: "the more profiles that are in the database, the greater chance a crime scene profile will match a DNA profile in the database." (GAB at 37.) This argument, of course, would just as easily justify seizing DNA from all Americans. Moreover, it ignores the reality that filling the convicted-offender databanks with DNA from people who are not involved in crime does nothing (except to increase backlogs). The government apparently recognizes this, because it emphasizes the appropriateness (and the supposed availability) of the expungement process for people who are not ultimately convicted. (GAB at 11-12.) The government's agreement that CODIS should not ultimately include arrestees who are not convicted undercuts its rationale for testing at arrest: If profiles from arrestees who are never convicted are all expunged, the State will wind up with a database that resembles the pre-Proposition 69 database, containing only profiles from convicted offenders. What, then, is the state's interest in taking DNA from innocent arrestees, when it acknowledges that their DNA should not be included in the database at all?

Finally, the government suggests that even if arrestee testing lacks any efficacy, this Court should nonetheless uphold the suspicionless "programmatic" searches here. (GAB at 43-44, 50.) Neither of the government's arguments on this point is persuasive:

First, the government's argument that recidivism rates for *convicted offenders* supports testing *arrestees* is repugnant to the core values of the Fourth Amendment. The reason the Constitution requires probable cause – and usually a warrant – to authorize a search is to prevent the police from searching Americans with no justification other than a general idea that because some people must be guilty of something, the police should search everybody. The Fourth Amendment demands that the police have *individualized* suspicion to search a person (other than convicted felons) – or even an arrestee's car – for evidence of a crime (other than evidence that may be destroyed). *Gant*, 129 S. Ct. at 1716, 1721. Recidivism rates may support searches of persons who have been *convicted* of crimes and are being punished and rehabilitated; they cannot support searches of mere arrestees, particularly the thousands of arrestees who will never be convicted of anything. *Scott*, 450 F.3d at 873-74.

Second, the government argues that extracting and analyzing DNA should be treated like sobriety checkpoints, citing *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). But *Sitz* cannot justify searches – or even detentions –

made for general law-enforcement purposes. *City of Indianapolis v. Edmond*, 531 U.S. 32, 38-42 (2000). Moreover, the *Sitz* approach – like the totality-of-the-circumstances approach – applies only to detentions; it cannot be used to justify searches of bodily fluids or tissue. *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001).[12]

In sum, there is no evidence – in the record or anywhere else – to show that arrestee DNA testing furthers the government's interest in solving crimes more than a convicted-offender database does. This should not be surprising, because most violent felons have previously been convicted of a felony and whose DNA would therefore be included in a convicted-person database. As *amicus* "DNA Saves" emphasizes, most serious crimes are committed by serious career criminals with long conviction records. ("DNA Saves" Br. at 11-12.) Similarly, *amicus* California District Attorneys Association ("CDAA") argues that "violent criminals commit all kinds of predicate felony crimes, including drug offenses, fraud offenses, and lower level crime." (CDAA Br. at 4.) More than 69% of *all* felony arrestees will be convicted, and we should hope that the percentage of *guilty*

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[12] This is true even where the government does not have any access to the results of the analysis of bodily tissue. *See Chandler v. Miller*, 520 U.S. 305, 318 (1997) (striking down candidate drug-testing law even though the results were given only to the candidate, who controlled any further dissemination). The seizure and search of the tissue renders such laws unconstitutional, regardless of what the government does with the results of the analysis.

arrestees who are convicted is even higher. Individuals who commit and are arrested for these "lower-level" predicate felonies will almost certainly be convicted, if not after their first arrest than at least after the second, long before they graduate to more serious crimes where DNA is likely to be a useful forensic tool (few "drug offenses" or "fraud offenses" are solved through DNA). Thus, the biggest reason that arrestee testing is no more effective than testing after conviction is probably that very few hard-core criminals have previously been arrested but have never been convicted of at least one minor felony. Taking DNA from the tens of thousands of individuals who are arrested each year but never convicted of anything thus serves little purpose.[13]

2. The Government Has No Actual Interest in Using DNA To Determine Who It Has Arrested.

The government continues to distort the term "identify" to include the determination of whether the individual arrested has committed other unsolved crimes (or, more accurately, may have been present at some other crime scene) when reciting its interest in accurately "identifying" arrestees. (GAB at 36.) But in reality, this is just a misleading way of restating that the government wants to

[13] The CDAA brief shows that the same local labs that collect DNA from arrestees are equally able to collect DNA from persons after conviction, and thus that the government's claims about the disruption to DNA collection that an injunction would cause are overblown. (*See* CDAA Br. at 13.)

use DNA to try to connect arrestees to unsolved crimes. As a factual matter, the government is not using – and cannot use – DNA analysis to determine booking information (who they are, as opposed to connecting them to unsolved crimes) about the accused. Although the government insinuates in its brief that it is using DNA for this purpose, neither it nor its *amici* ever cites a single page in the record – or any fact at all – to support this. Nor do they challenge Appellants' discussion of the collection process. Law enforcement ***first*** identifies an arrestee through a computerized fingerprint-comparison system and ***only then*** takes a DNA sample after this positive, "absolutely accurate" identification is complete. (Compare AOB at 12-13 with GAB at 9-10; *see also* ER0588.) Nor does anybody claim that the government is processing – or could process – a DNA sample fast enough to use it to determine the identity of an arrestee, or even to make bail determinations. (*See* AOB at 14, ER495.) It is thus undisputed that DNA sampling here is being used for one purpose and one purpose only – to try to connect individuals who have not been convicted to unsolved crimes.[14]

[14] Appellants will not belabor this point, but the FBI's privacy notice (issued under 5 U.S.C. § 552a) makes it clear that known profiles will be used *only* to seek matches with crime-scene profiles, not with other known profiles: "The information in NDIS is used to match [known] DNA profiles with crime scenes and human remains." http://foia.fbi.gov/ndispia.htm (last visited 3/25/10); *see* 61 Fed. Reg. 37,495 (July 18, 1996) (original privacy act statement for CODIS).

Instead, the government argues that connecting arrestees to unsolved crimes is included in the term "identify," based on its reading of how that word has been used in convicted-felon cases. But this argument ignores the obvious distinction between arrestees and persons serving criminal sentences after conviction. As discussed above, once a person is convicted, his or her Fourth Amendment rights are so severely limited that it does not matter whether the DNA is taken to investigate past conduct, or whether it is taken as a means of determining that person's name and other directory information. Thus, cases involving convicted felons can use the term "identify" without distinguishing between these two very different concepts of the term. But the law is clear that, unlike parolees, arrestees cannot be subject to unlimited "programmatic" searches for the purposes of investigation. Referring to such investigation as "identification" cannot change this.

Nor can the government's reference to fingerprinting support its claim that arrestee testing is just another innocuous administrative add-on to California's routine booking procedures. (*See* GAB at 26, 30.) This argument ignores critical factual and legal distinctions between fingerprinting and DNA collection. First, as discussed above and in Appellants' opening brief, while the government truly is using fingerprints to determine who it has arrested, it does not use DNA for this purpose. Furthermore, DNA collection represents a much greater privacy intrusion

than fingerprinting because, unlike fingerprinting, DNA sampling – by buccal swabs or by blood draw – intrudes into the body. (ER0593-96.)[15] The government argues that because a buccal swab "can be taken in seconds without any discomfort," DNA sampling should only be considered a minimal invasion of the arrestee's interest in bodily integrity. (GAB at 30-31.) However, the line between minimal invasions and significant invasions is not determined by length of time or degree of comfort. Rather, any sampling for analysis of body tissue or fluid is a search, and the invasion becomes more serious as soon as the police procedure penetrates the body, even in ways as minor as having a person blow into a breathalyzer. (*See* AOB at 38.)

For this reason, courts have treated fingerprinting and DNA collection very differently. Fingerprinting is probably not even a Fourth Amendment search that requires probable cause. *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005); *see Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (taking arrestees fingernail scrapings is

[15] The government snipes that Appellants "cannot be serious when [we] suggest that a buccal swab is a type of 'body-cavity search.'" (GAB at 24 n.4.) But courts have long recognized that searches of the mouth are a type of body-cavity search. *See*, *e.g., Bruscino v. Carlson*, 854 F.2d 162, 165 (7th Cir. 1988); *Morgan v. Maricopa County*, 259 F. Supp. 2d 985, 987 n.2 (D. Ariz. 2003). This Court has held that the taking of a buccal swab is an invasion of the body and a search under the Fourth Amendment, and compared it to the search at issue in *Schmerber*. *Friedman*, 580 F.3d at 852-53. Such searches – or any other searches of arrestees – cannot be justified by a generalized police search for evidence (other than evidence that can be destroyed). *See id.* at 856-57; AOB at 44-46.

a search but fingerprinting is not); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969). In contrast, the law is clear that the government's seizure of an individual's DNA *is* a search. (AOB at 37-38.)[16] The government's claim that DNA sampling is just like fingerprinting is thus no more persuasive than its claim that mere arrestees are just like convicted felons.

3. The Government's Claim that DNA Databanks Are Useful To Exonerate the Innocent Is Meritless.

The only purported evidence that the government or its *amici* cite in support of their claim that DNA databanks can help exonerate the innocent is the Robert Gonzalez case. ("DNA Saves" Br. at 14.) The government relied on the same case below for this same purpose, but the District Court considered the actual facts of the case and found that "the government has not yet introduced any evidence that the taking of arrestees' DNA has led to either an increase in exonerations or a decrease in false accusations/convictions." (ER0019 n.12.) And for good reason: It was police misconduct, rather than any lack of DNA evidence, that caused the wrongful jailing and prosecution of Mr. Gonzalez. Gonzalez was arrested without probable cause. (PSER004, ¶15.) His DNA was soon taken and did **not** match the crime scene samples. (*Id.* ¶11.) Nevertheless, the police coerced Gonzalez, whose

[16] For these reasons, and because the primary purpose of fingerprinting arrestees is (and long has been) in fact to determine the name and directory information of those arrested, this case in no way implicates the constitutionality of fingerprinting. (*See* AOB at 29-30.)

IQ is less than 62, into confessing, and he was prosecuted based almost entirely on this confession. Long after the DNA evidence was matched to that of the actual perpetrator, the prosecutors still refused to release Gonzalez. (*Id.* ¶15.) It was only after the trial court suppressed the coerced confession that the case was finally dismissed. (*Id.*) That the government and *amici* point to this case as the exemplar of how DNA databanks supposedly exonerate the innocent is telling. In reality, DNA evidence exonerates the innocent (including the wrongly convicted) through a simple comparison of the crime-scene sample against a sample provided (usually voluntarily) by the wrongfully accused (or wrongly convicted); if they do not match, then the case for innocence is shown, irrespective of whether the actual perpetrator is identified.[17] *See e.g, People v. Dodds*, 801 N.E.2d 63 (Ill. App. 2003). Even the case cited by "DNA Saves" ("DNA Saves" Br. at 13-14) to show that arrestee testing can prevent wrongful convictions illustrates this: because the wrongful conviction in the Turner case was the result of inaccurate blood-type comparison between the crime scene and the accused, *id.*, accurate DNA testing of this same evidence would itself have cleared the man before trial, without any need for an arrestee database.

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[17] Usually no perpetrator is identified. The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, available at http://www.innocenceproject.org/Content/351.php.

4. The Government's Arguments Lead to Extreme Results.

The government's refusal to acknowledge that convicted felons are different from the rest of us – arrestees included – and its fixation on the term "identify," means that its argument necessarily leads to extreme results. Americans can be forced to identify themselves in a myriad of situations. In the criminal context, when the police detain individuals based on less than probable cause, they can force them to identify themselves. *Hiibel v. Sixth Judicial Dist*., 542 U.S. 177 (2004). The police lawfully can identify, and arrest, people who receive a minor traffic ticket punishable only by fine. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). We must identify ourselves when we file our taxes, or simply because we are residents of the United States in a census year.[18] Americans in these situations have no more right to "conceal" their identity (as the government puts it) than do arrestees. Even when it is not an absolute requirement, identifying ourselves to the government is often a necessary part of exercising constitutional rights or simply participating in modern life – enrolling in school, applying for a drivers' license, passport, birth certificate, or firearm permit, sitting for the bar, entering a federal building, or voting.[19] If, as the government claims, DNA sampling for inclusion in

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[18] *See* http://2010.census.gov/2010census/how/interactive-form.php (requiring individuals to provide, *inter alia*, name, date of birth, sex, age, and race). Refusal to provide this information is a crime. 13 U.S.C. § 221(a).

[19] *See*, *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 128 S. Ct.

continued

CODIS is simply another means of identification, then the Fourth Amendment must allow it in these situations too.[20] How can the government's arguments be limited to arrestees, then? It is no answer to say that existing laws do not require DNA collection in these circumstances. Ten years ago nobody would have imagined that people merely arrested for a minor traffic offense would have to provide DNA, but as *amici* explain (FPD Br. at 10-11.), federal law currently mandates just that. Already there are calls for a universal DNA database containing profiles from every American. *See, e.g., To Stop Crime, Share Your Genes*, NEW YORK TIMES, Mar. 14, 2010, at A23 (available at http://www.nytimes.com/2010/03/15/opinion/15seringhaus.html). If an arrestee's lack of a right to "conceal" her identity justifies taking her DNA and running it through CODIS, the same must be true for anybody who can be compelled to reveal her identity to the government, which ultimately means every one of us. *See Kincade*, 379 F.3d at 873-74 (Kozinski, J., dissenting). The Fourth Amendment protects against just this scenario.

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continued

1610, 1617-18 (2008).

[20] The fact that arrestees have been arrested cannot distinguish them from any other Americans, since *Gant* rejects the notion that an arrest creates a police entitlement to search the arrestee.

IV. CONCLUSION

The government has the burden of justifying a warrantless search. *United States v. Davis*, 332 F.3d 1163, 1168 n.3 (9th Cir. 2003). If the government fails to show that a law authorizing such searches is justified by a "concrete danger demanding departure from the Fourth Amendment's" established rules, this Court should strike it down. *Chandler*, 520 U.S. at 318-19 (1997) (striking down statute mandating drug tests for political candidates). Here, the government has provided no reason why the District Court's decision should be affirmed.

Appellants respectfully request that this Court reverse the District Court and issue a Preliminary Injunction.

DATED: April 1, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO

FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i) and Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 6,807 words, as determined by the word-count feature of the word processing system.

DATED: April 1, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 1, 2010.

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/s/ Nanette Cosentino
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