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.

OPENING BRIEF

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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REQUEST FOR ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34, Appellants hereby request oral argument on this appeal. Appellants suggest that 20 minutes per side will be sufficient and productive.

DATED: February 18, 2010

Respectfully submitted,

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants Elizabeth Aida Haskell, Reginald Ento, Jeffrey Patrick Lyons, Jr., and Aakash Desai (collectively "Plaintiffs") filed a civil-rights class action complaint pursuant to 42 U.S.C. § 1983 against Defendants Edmund G. Brown, Jr., Attorney General of California, and Eva Steinberger, Assistant Bureau Chief for DNA Programs, California Department of Justice (collectively "Defendants"), on October 7, 2009 in the United States District Court for the Northern District of California. ER0101, #1.[*] A First Amended Complaint was filed on December 1, 2009. ER0790, #56. Plaintiffs seek declaratory and injunctive relief stemming from the compulsory search, seizure, collection, analysis, and/or retention of their biological samples for DNA analysis pursuant to California Penal Code § 296(a)(2)(c). ER0729. Plaintiffs assert that § 296(a)(2)(C), both on its face and as applied, is unconstitutional and violates their rights under the Fourth and Fourteenth Amendments to the United States Constitution. ER0749-751. On October 30, 2009, Plaintiffs moved for a preliminary injunction to enjoin Defendants from enforcing § 296(a)(2)(C). ER 787, #12.

[*] Citations to the Excerpts of Record filed herewith are denoted as "ER_." Plaintiffs originally named Michael Hennessey, Sheriff for the County of San Francisco, as defendant. Plaintiffs subsequently agreed to dismiss him from the case, as any injunction against the Attorney General will bind him. ER0792, #81.

(a) *Subject-Matter Jurisdiction in the District Court*. Because Plaintiffs bring suit under 42 U.S.C. § 1983 for violations of the United States Constitution, the District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

(b) *Subject-Matter Jurisdiction in this Court*. Plaintiffs appeal from the District Court's denial of a preliminary injunction. Jurisdiction is proper in this Court under 28 U.S.C. § 1292(a)(1).

(c) *Entry of Order and Timely Notice of Appeal*. The District Court's order denying Plaintiffs' Motion for Preliminary Injunction was entered on December 23, 2009. *See* ER0792, #78. Plaintiffs timely filed a notice of appeal on January 21, 2010. ER0782.

STATEMENT OF ISSUES

Defendants' agents are taking DNA samples from every person arrested in California on suspicion of a felony, without a warrant or any judicial or prosecutorial oversight, so that they can analyze those samples and include the resulting profile in a criminal databank where it is searched against other DNA samples nationwide.

1. Does this violate the Fourth Amendment and this Court's holding in *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009), which held that taking a DNA sample from an arrestee for these purposes violates the Fourth Amendment?

Under *Winter v. N.R.D.C.*, 129 S. Ct. 365, 374 (2008), a preliminary injunction should issue if Plaintiffs show (a) a likelihood of success on the merits, (b) irreparable harm, (c) that the balance of equities tips in their favor, and (d) that an injunction is in the public interest.

2. If Defendants' conduct violates the Fourth Amendment, and therefore the District Court should have found that Plaintiffs had established a likelihood of success on the merits, are Plaintiffs now entitled to a preliminary injunction given that the District Court's findings on the three other *Winter* factors were based principally on its finding that Plaintiffs had not established a likelihood of success on the merits? Or should this Court remand for the District Court to re-balance these factors?

STANDARD OF APPELLATE REVIEW

Because this is an appeal of the denial of a preliminary injunction, the Court must employ three distinct standards of review. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1200 (9th Cir. 2009). First, and most relevant to this appeal, this Court reviews *de novo* issues of pure law. *Id*. This standard governs the central question in this case, which is whether the Fourth Amendment allows the government to seize and search the DNA of arrestees without a warrant. *United States v. Kriesel*, 508 F.3d 941, 946 n.6 (9th Cir. 2007) ("Whether a search is unreasonable under the Fourth Amendment is a question of law reviewed *de novo*.") (citation omitted); *accord Center for Bio-Ethical Reform v. Los Angeles Sheriff Dep't*, 533 F.3d 780, 795 (9th Cir. 2008); *Ornelas v. United States*, 517 U.S. 690, 691, 697 (1996). As the District Court "misapplied the law on the underlying issues," this Court should reverse. *Rendish v. City of Tacoma*, 123 F.3d 1216, 1219 (9th Cir. 1997) (citing *American Passage Media Corp. v. Cass Commc'n, Inc.*, 750 F.2d 1470, 1472 (9th Cir. 1985)).

Second, the Court will overturn the District Court's factual determinations if they are clearly erroneous. *Klein*, 584 F.3d at 1200. Third, the District Court's balancing of the various factors that figure into the preliminary-injunction calculus is reviewed for abuse of discretion. *See id.* Of course, a court that makes a legal error thereby abuses its discretion. *Id*; *Yokoyama v. Midland Nat'l Life Ins. Co.*, ---

F.3d ---, 2010 WL 424817, at *3 (9th Cir. Feb. 8, 2010) ("an error of law is an abuse of discretion.").

Where, as in the case at bar, the material facts are established and the appeal turns on a question of law, this Court undertakes "plenary" review of the case without any deference to the District Court's discretionary authority. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc); *accord Reed v. Town of Gilbert*, 587 F.3d 966, 973 (9th Cir. 2009); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 964-65 (9th Cir. 2002) ("Where, as here, the District Court's ruling [denying a preliminary injunction] rests solely on a premise of law and the facts are either established or undisputed, our review is de novo.").

STATEMENT OF THE CASE

The suit stems from a newly effective California statute that mandates the physically invasive and compulsory search and seizure of the DNA of anybody arrested for any felony. Cal. Penal Code § 296(a)(2)(C). These searches occur soon after arrest, without a warrant or any judicial review, and without any individualized suspicion that the search will uncover evidence of a crime. ER0180. As is the case with approximately 100,000 people every year in California who are arrested on suspicion of a felony, none of the named Plaintiffs were ever convicted of any crime following their arrests; indeed, three of them were never even charged with a crime. ER0157; ER0245; ER0251; ER0766; ER0769. The only purpose for the search and seizure of arrestee DNA is to upload DNA profiles into a criminal databank used to investigate unsolved crimes.

On October 7, 2009, Plaintiffs filed a class-action complaint against Defendants, state officials responsible for implementing, enforcing, and supervising the compulsory seizure and analysis of DNA samples under § 296(a)(2)(C). ER0101. On December 1, 2009, Plaintiffs filed a First Amended Complaint (FAC) adding two additional class representatives. ER0728, #56.

The suit challenges the constitutionality of § 296(a)(2)(C), facially and as applied, and requests injunctive and declaratory relief. ER0728-56. Plaintiffs bring their claims under the Civil Rights Act, 42 U.S.C. § 1983, alleging violations

of their Fourth Amendment right to be free from unreasonable searches and seizures, and their Fourteenth Amendment rights to procedural and substantive due process. ER0749-51.

On October 30, 2009, Plaintiffs moved for a preliminary injunction to enjoin Defendants from acting under the authority of § 296(a)(2)(C) to seize, search, analyze, or make any use or analysis of DNA samples taken from persons arrested for, but not convicted of, a crime. ER0787, #12. The parties stipulated that the Court would consider the declarations of all four named Plaintiffs – including those added in the FAC – when ruling on the motion for a preliminary injunction. ER0771-73. The parties also stipulated that any relief granted would apply to every person covered by Plaintiffs' proposed class definition. ER0458-59.

At the hearing on the motion, the District Court provisionally certified the plaintiff class. ER0028. On December 23, 2009, the Court denied the preliminary injunction, concluding that Plaintiffs had not demonstrated a likelihood of success on the merits. ER0001. The District Court found that, as a matter of law, because arrestees' privacy interests in their "identity" is "not weighty" and because the Ninth Circuit has held that all DNA does is "identify," Plaintiffs' privacy interests in their DNA did not outweigh the government's countervailing interests in solving

past crimes and accurately identifying offenders.[1] ER0014-18. In support, the District Court relied on Ninth Circuit cases regarding DNA testing of convicted felons. ER0015-16. The court did not distinguish this Court's 2009 opinion in *Friedman*, which held that the warrantless taking of a DNA sample from an arrestee violates the Fourth Amendment. Instead, the District Court declined to follow the case on the grounds that it believed that "Friedman did not engage in a thorough totality of the circumstances test" and failed to consider the proper interests. ER0019 (citing dissent in *Friedman*).

Based principally on its determination that Plaintiffs had not demonstrated a likelihood of success, the District Court also found that the balance of equities tipped in favor of Defendants given the costs of implementing mandatory DNA testing of arrestees in California. ER0021. The Court held that if the Plaintiffs could show a violation of their Fourth Amendment rights they would show irreparable injury and, most likely, that a preliminary injunction would be in the public interest. ER0020-21.

Plaintiffs timely filed a notice of appeal from the District Court's order on January 21, 2010.[2] ER0782.

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[1] The Court refused to accept Defendants' other asserted interests of preventing future crimes and exonerating the innocent. ER0018-19.

[2] On January 29, 2010, at the hearing on Plaintiffs' class-certification motion *continued*

BACKGROUND AND STATEMENT OF FACTS

I. History of § 296(a)(2)(C)

Section 296(a)(2)(C) was enacted by a 2004 voter initiative, Proposition 69, which immediately expanded California's requirement of DNA testing from individuals who had been ***convicted*** of certain serious and violent crimes, to include persons ***convicted*** of any felony. ER0537. Effective January 1, 2009, Proposition 69 further expanded mandatory DNA testing to cover any adult merely ***arrested*** for any felony. § 296(a)(2)(C). As a result, California now has one of the nation's most expansive programs for the compulsory seizure, retention, and sharing of DNA data. California's databank is the fourth largest in the world, behind only China, the United Kingdom, and the United States' national database. ER0484, ¶11.

II. Application of the New Statute to the Named Plaintiffs

The experiences of the named plaintiffs give some idea of how this statute operates from the perspective of those affected by it. Ms. Haskell was arrested on March 21, 2009 at a peace rally in San Francisco for allegedly trying to free another protestor who had been taken into custody. ER0245. Upon arrest,

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continued

and the government's motion to dismiss under Rule 12(b)(6), the court indicated it would certify the class and deny Defendants' motion to dismiss.

Ms. Haskell was taken to jail and ordered to provide a DNA sample. *Id*. She was told that if she refused to comply immediately and without advice from a lawyer, she would be charged with a separate misdemeanor and would not be released from jail until after arraignment. *Id.* Ms. Haskell would have refused to give a sample but she did not want to be charged with a misdemeanor for refusing to do so, as threatened by jail personnel. *Id.* Ms. Haskell was never charged with any crime, and no warrant authorized the search and seizure of her DNA. *Id.*

Reginald Ento was arrested in Sacramento County in early 2009 on suspicion of possessing stolen property. ER0251. Pursuant to § 296(a)(2)(C), and without a warrant, a sheriff's deputy collected a DNA sample from Mr. Ento by inserting a swab into his mouth and scraping cells from the inside of his cheek. *Id*. When he questioned the sampling, Mr. Ento was told that his DNA could be taken by force if necessary. *Id.* Mr. Ento was eventually released and the allegations against him were dropped without his ever appearing in court. *Id.*

Jeffrey Patrick Lyons, Jr. was arrested on March 16, 2009 while participating in a political demonstration outside the Israeli consulate in San Francisco. ER0612. During the demonstration, San Francisco police officers arrested Mr. Lyons for allegedly trying to take a person from police custody. He was then taken to jail and, without a warrant, ordered to provide a DNA sample. *Id.* He complied with this order. *Id.* The San Francisco District Attorney's office

charged Mr. Lyons with a felony, Penal Code § 405a, based on this arrest. On November 9, 2009, the case against Mr. Lyons was dismissed. *Id*.

Aakash Desai, a graduate student at the University of California, Berkeley, was arrested on Friday, November 20, 2009 while participating in a demonstration in Wheeler Hall on the Cal campus. ER0766. Mr. Desai was protesting custodial layoffs and furloughs, as well as tuition fee hikes. During the demonstration, U.C. Berkeley police officers arrested Mr. Desai and took him to the Berkeley city jail, where he was told he was being charged with felony burglary. Mr. Desai was then ordered to, and did, provide a DNA sample, although he did not want to. *Id*. He was eventually released on bail. When Mr. Desai went to court for his arraignment on the Monday following his arrest, he learned that no charges had been filed against him. *Id*. Mr. Desai "felt violated when the government took [his] DNA… I feel like the government now owns my genes . . . It seems like some ownership of myself has been lost and my privacy violated." *Id*.

Even though none of them was convicted of any crime – not even an infraction – as a result of their arrests, and Ms. Haskell, Mr. Ento, and Mr. Desai were never even charged with any crime, all Plaintiffs' DNA samples have been or soon will be analyzed and their respective DNA profiles uploaded into the Combined DNA Index System ("CODIS"), a national database whereby they will be subject to routine searching by law enforcement for the purpose of solving

crimes. ER0245; ER0251; ER0766; ER0769; ER0257-58, ¶¶14-16; ER0444-45, ¶¶18-20. Plaintiffs' seized biological samples are also retained and may be subject to further analysis. § 295.1(c). There is no legal basis for the retention of their seized DNA samples or profiles other than § 296(a)(2)(C). ER0245; ER0251; ER0766; ER0769. The government did not have a warrant to seize and analyze any of the Plaintiff's DNA, or even to arrest them.

III. How an Arrestee's DNA is Seized, Analyzed and Uploaded into CODIS

California law and the record in this case provide a more detailed picture of how this law operates. Persons arrested on suspicion of a felony are taken into custody and booked, meaning that they are fingerprinted and photographed. Cal. Penal Code § 7(21); *see In re Rottanak K.*, 37 Cal. App. 4th 260, 276-77 (1995). Law enforcement personnel then use the arrestee's fingerprints to determine that person's identity before they take DNA samples. ER0488-91, ¶20 ("The [DNA collection] kit requires local agency personnel to: identify the subject (preferably via prints); [and] determine that a DNA sample needs to be collected…."); ¶¶27-28. They do this by using the automated fingerprint identification systems, which exist on the state and federal level. *See* ER0575, ¶5. This identification procedure is both fast and reliable. The FBI guarantees that local law enforcement will get a response within two hours or less of submitting a fingerprint ID request. ER0174. It also

guarantees that the resulting identification is absolutely accurate because fingerprints provide "absolute proof" of identity. ER0173-77.

After they have positively identified the arrestee by means of fingerprints, the jailors determine whether he or she must provide a DNA sample. ER0144 ("Before [DNA] collection occurs, the collecting, agency should check the subject's criminal history record for a DNA collection flag[.]");[3] ER0488-91, ¶¶20, 28. Samples are not taken from arrestees who have previously provided a sample. ER0181. The statute requires that the DNA be collected upon arrest, without any opportunity for judicial or prosecutorial review of the legality of the arrest or access to counsel. *See* 296.1(a)(1)(A) (samples must be taken "immediately following arrest, or during the booking [] process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trail or any physical release from confinement or custody."); *see* ER0144. Collection is mandatory; refusal to submit is a misdemeanor and can result in the immediate, warrantless, forcible extraction of a tissue sample. § 296.1(a); § 296(d); § 298.1(a), (b).

This mandatory DNA seizure applies to anybody arrested for any felony, including felonies for which an individual's DNA would seem to have virtually no relevance, such as computer hacking, shoplifting, writing a bad check, accepting a

[3] These administrative bulletins constitute binding regulations. Cal. Penal Code § 295(h)(1), (2).

bribe to throw a sporting event, or unauthorized possession of a controlled substance, including codeine. *See* Cal. Penal Code §§ 502, 115.1, 476a, 532, 484, 666, 337c; Cal. Health & Safety Code § 11350.

After the initial seizure of biological material, the samples are sent to a lab (usually the Bashinski DNA Laboratory in Richmond, California) for analysis and uploading into CODIS. The backlogs in the lab, however, combined with the time required to analyze the sample, mean that, on average, a DNA sample will not be analyzed until about one month later. ER0018; ER0495, ¶40. This profile is then uploaded into the State's DNA databank, which is part of CODIS, a centralized, searchable law enforcement database accessible to local, state, and federal law enforcement agencies. ER0257-58, ¶¶14-16; ER0444-45, ¶¶18-20; ER0574, ¶2.

Once an arrestee's profile is uploaded into CODIS, it is compared to the thousands of crime-scene samples in the CODIS forensic database. ER0464-66, ¶¶15-20. A search of the entire system is performed once a week (all crime-scene DNA profiles are searched against one another and against all known individual profiles). ER0514, ¶12. The biological samples themselves are retained indefinitely at the lab so that they can be subjected to additional testing. § 295.1(c). For example, the entire database was reanalyzed in 2001. ER0494, ¶36.

CODIS searches can affect the person whose profile is included in the database in several ways. When an individual's profile exactly matches a crime-

scene profile – which could indicate that the person had been at a crime scene at some point – CODIS notifies the agencies that provided the samples. ER0464, ¶15. That agency will typically then provide the identity of the individual to the agency with jurisdiction over the crime so that it can follow up. ER0465, ¶18. California also authorizes the use of its database for so-called familial searching, where law enforcement uses the DNA database to focus on a person whose DNA does not match the crime-scene evidence – and who is therefore demonstrably innocent of the crime – but whose profile is instead similar to DNA taken from a crime scene, based on the hope that the culprit may be related by blood to the known person who provided the similar sample. ER0447-48, ¶26; ER0239-43; ER0475-80.[4]

This routine CODIS searching continues as long as an arrestee's profile is in the databank, even after an arrestee is released without charges, acquitted, or found factually innocent by a court. There is no automatic expungement procedure in California. To the contrary, individuals who wish to have their samples removed

[4] Although the government asserts it is not subjecting the arrestee database to familial searching, it also says that it is not moving – and cannot move – the profiles taken at arrest into the convicted offender database when those persons are convicted. ER0493, ¶34. Because it does not separate arrestee from convicted profiles, the government will necessarily begin including the arrestee database in its familial searching, or it will exclude the profiles of thousands of convicted persons.

must navigate a cumbersome process the district court found to be "rather lengthy." ER0004. The statute seems to require that individuals never charged with a crime must wait until the statute of limitations has run before they can apply for expungement. § 299(b)(1); ER0470. This would mean a delay of at least three years and, in some cases, much longer. *See* Cal. Penal Code §§ 799-801.[5] Then, after requesting relief and notifying the Department of Justice, individuals will face an additional delay of at least 180 days before any court can authorize expungement. § 299(c)(2)(D). Even then, the court has "the discretion to grant or deny the request for expungement," and "the denial of a request for expungement is a nonappealable order and shall not be reviewed by petition for writ." § 299(c)(1). The government will not destroy the sample if there is "an objection by the Department of Justice or the prosecuting attorney." § 299(c)(2)(D). This procedure, including the unreviewable discretion to deny expungement, applies even to individuals who have obtained a judicial declaration of factual innocence. § 299(b)(3). There is no provision for appointment of counsel to assist in the lengthy, multi-phased expungement process. ER0609-10.

[5] The government asserts that applicants who want expungement need not wait until the statute of limitations has run, although it is not clear how arrestees are supposed to know this in light of the statutory language.

Thus, a wrongfully arrested person – even one who has been found factually innocent and who hires a lawyer to pursue expungement of her DNA – will have her genetic blueprint included in a criminal database for continual search and her physical DNA sample stored and subject to further genetic analysis at any time, for long after she has been wrongfully arrested, with ***no recourse*** in the state courts. Arrestees who are not in a position to hire a private lawyer to navigate this complicated, time-consuming process will likely remain in the system forever. ER0769, ¶4.

Continued enforcement of § 296(a)(2)(C) will result in the seizure, analysis, and indefinite retention of the DNA of tens of thousands of innocent Californians every year. ER0157. This mandatory seizure of DNA poses a significant risk of irreparable harm to those individuals arrested but never charged with or convicted of a crime. California's warrantless, mandatory, suspicionless DNA testing of all felony arrestees pursuant to § 296(a)(2)(C) violates the Fourth and Fourteenth Amendment rights of these thousands of presumptively innocent people and should have been enjoined by the District Court pending a trial on the merits.

SUMMARY OF THE ARGUMENT

In this class action, Plaintiffs challenge, under the Fourth and Fourteenth Amendments, a newly-effective California statute that purports to authorize the warrantless, suspicionless, and compulsory collection of DNA from all adult felony ***arrestees***. Cal. Penal Code § 296(a)(2)(C). The collection occurs without any judicial or prosecutorial review, and regardless of the nature of the felony and regardless of whether DNA evidence is relevant to the crime for which the individual was arrested. The collection of DNA occurs without a warrant, probable cause, or exigent circumstances; it is based solely on the fact of arrest. Plaintiffs, on behalf of themselves and others similarly situated, contend that this statute violates the Fourth Amendment's prohibition on unreasonable searches and seizures, as well as the Fourteenth Amendment's guarantees of procedural and substantive due process. Plaintiffs bring a facial and as-applied challenge.

In *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009), this Court held that the warrantless, suspicionless search of DNA from a pretrial detainee violates the Fourth Amendment. *Id*. at 858. *Friedman* controls here, and the District Court committed legal error by failing to follow it in determining whether Plaintiffs were entitled to a preliminary injunction. Even if *Friedman* were not the law of this Circuit (it is), fundamental Fourth Amendment principles deem the warrantless, suspicionless DNA searches of arrestees unconstitutional. *Schmerber v.*

California, 384 U.S. 757, 769-70 (1966). As the Court recently made clear, making an arrest does not create a police "entitlement" to conduct warrantless searches unrelated to the preservation of officer safety, jail security, or evidence that may be destroyed. *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009). None of these interests are implicated by DNA testing. It is undisputed in this case that California law enforcement personnel searched and seized Plaintiffs' DNA without a warrant, without probable cause combined with exigent circumstances, and solely because they were arrested for felonies.

The District Court denied Plaintiffs' motion for preliminary injunction on the ground that Plaintiffs had not shown a likelihood of success on the merits, and that *Friedman* was not controlling because it was not "thorough" in its reasoning. ER0019. This is an improper basis for ignoring controlling circuit authority. *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) ("A District Court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided."). This fundamental error infected all of the District Court's determinations.

The District Court also clearly erred when it considered the government's purported interest in identifying the person from whom it is taking DNA. ER0015. This interest does not exist in this case. The record plainly shows that the government is ***not*** using DNA to identify arrestees, in the sense of who the arrestee

is. Rather, the government is using DNA to criminally investigate thousands of individuals our system of justice presumes to be innocent.

Thus, under the specific holding of *Friedman*, as well as the more general Fourth Amendment principles announced in *Schmerber* and *Gant*, the District Court's denial of Plaintiffs' motion for preliminary injunction should be reversed. This Court should grant the requested preliminary injunction. As the District Court erred as a matter of law, no further findings are necessary and a remand would simply waste judicial resources and further delay the issuance of preliminary relief, resulting in the violation of the constitutional rights of thousands more Californians.

ARGUMENT

I. INTRODUCTION

"The warrantless, suspicionless, forcible extraction of a DNA sample from a [pretrial detainee] violates the Fourth Amendment." *Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009).

This civil rights class action challenges the constitutionality of California's blanket, mandatory, suspicionless, and warrantless search and seizure of DNA from all adult felony arrestees. Cal. Penal Code § 296(a)(2)(C). Plaintiffs are individuals who have never been convicted of a crime (three of them were never even charged) and yet their bodies have been invaded, their DNA searched, and their personal genetic information remains available to the government for further analysis to this day. This is no small issue. Over 300,000 persons are arrested for felonies in California every year. ER0157. More than 100,000 of them are never convicted of anything, not even an infraction; many are never charged with any crime. *Id*.

In *Friedman*, this Court concluded that the search and seizure of DNA from an arrestee without a warrant or any individualized suspicion violates the Fourth Amendment. Relying in part on that holding, Plaintiffs brought this action and sought a preliminary injunction to stop an unconstitutional practice. The District

Court denied the injunction on the grounds that *Friedman's* analysis of the issue was not thorough enough to satisfy it.

Plaintiffs ask this Court to reverse the District Court's erroneous order and to confirm that the warrantless, suspicionless seizure and search of arrestees' DNA violates the Fourth Amendment. *Friedman*, 580 F.3d at 858.[6] Every other federal court to have considered Fourth Amendment challenges to mandatory DNA testing of arrestees has found such programs to be unconstitutional. *United States v. Mitchell*, --- F. Supp. 2d ---, 2009 U.S. Dist. Lexis 103575, *25-27 (W.D. Penn. Nov. 6, 2009); *United States v. Purdy*, 2005 WL 3465721, *7 (D. Neb. Dec. 19, 2005); *accord In the Matter of the Welfare of C.T.L.*, 722 N.W.2d 484, 488-91 (Minn. App. 2006).[7]

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[6] The Fourth Amendment prohibits the police from compelling an arrestee to provide a tissue sample unless they have a warrant or both probable cause to believe that the sample will provide relevant evidence of a crime *and* exigent circumstances exist that make obtaining a warrant impracticable. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966); *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (warrantless searches "are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.") (citations omitted).

[7] The only federal case Defendants have cited upholding DNA testing of anybody other than convicted felons specifically stated that its holding "does **not** authorize police officials to perform DNA sampling prior to a judicial finding of probable cause." *United States v. Pool*, 645 F. Supp. 2d 903, 913 (E.D. Cal. 2009) (emphasis added). That opinion was issued before this Court decided *Friedman*, and it is now on appeal in this Court, case number 09-10303. The ***only*** case to have upheld arrestee testing based solely on the fact of arrest did so by making the flawed analogy to fingerprinting. *Anderson v. Commonwealth*, 650 S.E.2d 702

continued

Some courts have justified DNA testing of ***convicted felons*** by weighing the government's need to supervise, to rehabilitate, and to control such persons against the limited privacy rights such persons enjoy as a result of their status as convicted felons. But this balancing approach, employed by the District Court below, cannot be applied to arrestees because *Schmerber* and *Friedman* have already determined the proper balance between an arrestee's right against bodily intrusions and the government's interest in collecting evidence. Under controlling law, warrantless arrestee DNA searches cannot be justified under a general balancing test.

Because the District Court relied on an erroneous legal premise – that the Fourth Amendment and *Friedman* allow the police to routinely seize and search arrestees' DNA without a warrant – this Court reviews its order *de novo* and should reverse the denial of the requested relief and order the court to issue a preliminary injunction. *Klein*, 584 F.3d at 1200, 1208; *Rendish*, 123 F.3d at 1219; *see Gorbach*, 219 F.3d at 1091; *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981) (when district court misunderstood or misapplied the law, "the denial of the preliminary injunction should be reversed and the injunction entered if necessary to protect the rights of the parties.").

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continued

(Va. 2007); *see* ER0615-18, ¶¶7-17. *Anderson*'s understanding of "identification" also runs contrary to this Court's opinion in *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004). *See* Part II.B, *infra*.

II. THE ROUTINE SEIZURE OF DNA FROM ARRESTEES VIOLATES THE FOURTH AMENDMENT.

A. *Friedman* Held that Warrantless, Suspicionless DNA Searches of Arrestees Violates the Fourth Amendment, and Therefore Plaintiffs Established a Likelihood of Success on the Merits.

The District Court erred when it failed to follow *Friedman*. That case squarely held that "[t]he warrantless, suspicionless, forcible extraction of a DNA sample from a [pretrial detainee] violates the Fourth Amendment." *Friedman*, 580 F.3d at 858.

Kenneth Friedman pled guilty to a crime in Montana, completed his sentence, and was unconditionally released from any government supervision. *Id.* at 851. Later, Friedman moved to Nevada where he was arrested on unrelated charges. *Id.* While he was in custody, a police detective asked him to provide a DNA sample and Friedman repeatedly refused. The officer then took a buccal swab from Friedman's mouth over his objection. *Id.* The search had nothing to do with the pending charges; rather, the prosecutor sought Friedman's DNA in order to see whether it would generate any "cold hits" for crimes. *Id.* Friedman brought a § 1983 suit arguing that this search had violated his clearly established rights under the Fourth Amendment. After the district court dismissed the case on qualified-immunity grounds, this Court reversed, *expressly rejecting* the government's argument that Friedman's status as a pre-trial detainee justified the seizure of his DNA, observing that "neither the Supreme Court nor this Court has

ever ruled that law enforcement officers may conduct suspicionless searches on pretrial detainees for reasons other than prison security." *Id.* at 856-57.[8]

Friedman establishes ***as a matter of law*** that the warrantless and suspicionless search, seizure, and DNA testing of a person merely arrested on suspicion of committing a crime violates the Fourth Amendment. And the likelihood of success on the merits in this case is even stronger than in *Friedman*. Friedman had already been convicted of a sex felony in another state before Nevada authorities unlawfully seized his DNA based only on his arrest for unrelated charges, a fact that the dissent found particularly important. *Friedman*, 580 F.3d at 851; *see id.* at 863-64 (Callahan, J., dissenting). Yet, this Court still found Friedman's Fourth Amendment rights had been violated.

Here, Plaintiffs have not been convicted of anything, much less a felony sex offense; their status as arrestees (and the mandate of § 296(a)(2)(C)) was California's only reason for the search. ER0245; ER0251; ER0612; ER0766. Plaintiffs' privacy interests in their DNA were therefore greater than that of Friedman, and it follows that they have therefore established a likelihood of success on the merits of their Fourth Amendment claims.

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[8] *See also Bull v. City and County of San Francisco*, --- F.3d ---, 2010 WL 431790, at *5 (9th Cir. Feb. 9, 2010) (en banc) (distinguishing between permissible searches that further jail security from "searches pursuant to an evidentiary criminal investigation").

Although the DNA search and seizure in *Friedman* was not specifically authorized by statute, that circumstance provides no basis to distinguish it. "Whether or not a search is reasonable within the meaning of the Fourth Amendment…has never depended on the law of the particular State in which the search occurs." *Virginia v. Moore*, 128 S. Ct. 1568, 1604 (2008) (citation and changes omitted). California cannot legislate away the Fourth Amendment's protections. *Cooper v. California*, 386 U.S. 58, 61 (1967) ("a search authorized by state law may be an unreasonable one"). The existence of a statute or other "extra-constitutional matter" that authorizes or prohibits a search is simply not material to the question of whether that search comports with the Fourth Amendment. *United States v. Guzman-Padilla*, 573 F.3d 865, 890 (9th Cir. 2009).

That Friedman's DNA was actually taken by force is also irrelevant. Nothing in this Court's opinion in *Friedman* suggests that the amount of force used was unreasonable or even discloses how much force was used. *See Bryan v. McPherson*, 590 F.3d 767, 772 (9th Cir. 2009) (in evaluating excessive force under Fourth Amendment, a court "must balance the amount of force applied against the need for that force.") (internal quotations omitted). If the government has the authority to seize DNA without consent, it makes no difference whether the arrestee "objects or resorts to physical violence in protest[.]" *Schmerber*, 384 U.S. at 760 n.4. In any event, California allows the taking of arrestee DNA by force,

§ 298.1(b)(1), and Plaintiff Ento was threatened with force if he refused to allow a biological sample to be taken. ER0251.[9]

There is thus no material difference between the search and seizure that this Court held violated Friedman's clearly established constitutional rights, and those at issue in this case. The District Court erred in refusing to follow *Friedman*.

B. The District Court's New Definition of "Identification" Led It to Conclude Erroneously that *Friedman* Was Not Controlling.

The District Court believed that because this Court has stated, in the context of testing convicted felons, that DNA serves to "identify" them, and because arrestees can "be forced to identify themselves upon arrest through photographs or fingerprints," then the government's interests in solving crime outweigh the Plaintiffs' rights to genetic privacy and bodily integrity. ER0013, 0015-16. But in doing so the court conflated two very different meanings of the term "identification." In the District Court's view, "identification means both who a person is (the person's name, date of birth, etc.) and *what that person has done* (whether the individual has a criminal record, *whether he is the same person who committed an as-yet unsolved crime*). ER0016 (emphasis added). Thus, to the District Court, seizing and analyzing an arrestee's DNA to try to connect him to

[9] Plaintiff Haskell was also threatened with additional criminal charges and an extended stay in police custody if she refused to provide a sample. ER0245.

unsolved crimes implicates nothing more than the arrestee's interests in concealing his "identity," which is minimal to nonexistent.

This is incorrect. That an arrestee may lack a privacy interest in his identity – his name, date of birth, etc. – does not mean that he additionally lacks a privacy interest in his bodily integrity, his DNA, or what he has ever done in the past.[10] The constitutional protection of privacy cannot be made subject to word games. The mere fact that the word "identification" can be applied to both who somebody is and what he has done does not mean that the Constitution must pretend there is no difference between the two uses of the term.

This Court made just this distinction in a case involving fingerprinting, *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004). Mr. Garcia-Beltran

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[10] In his *Kincade* dissent, Judge Reinhardt recognized this distinction:

> Claiming that DNA profiles are designed to "identify" the releasee, much like fingerprints, is disingenuous. *See ante*, at 837. Kincade, for instance, was identified and booked with fingerprints, and his identification was confirmed by a criminal conviction before a court of law, long before his DNA sample was taken. The collection of a DNA sample thus does not "identify" a conditional releasee any more than a search of his home does - it merely collects more and more information about that releasee that can be used to investigate unsolved past or future crimes.

United States v. Kincade, 379 F.3d 813, 857 n.16 (9th Cir. 2004) (Reinhardt, J., dissenting).

had been unlawfully arrested in an INS sweep and turned over to the U.S. Marshals Service, where he was fingerprinted. *Id*. at 865-66. The district court denied his motion to suppress his fingerprints on the grounds that it was merely evidence of his identity. *Id*. at 865. This Court reversed, holding that although the fingerprints could not be suppressed if they had truly been taken to identify him, if "the fingerprints were taken for an 'investigatory' purpose, *i.e.* to connect Garcia-Beltran to alleged criminal activity, then the fingerprint exemplars should be suppressed." *Id*. The court contrasted such investigatory purposes with "*identification* purposes (*i.e.*, to verify that the person who is fingerprinted is really who he says he is)[.]" *Id*. at 867 (emphasis in original); *see also United States v. Ortiz-Hernandez*, 427 F.3d 567, 576 (9th Cir. 2005) (drawing same distinction).

The distinction between these two different meanings of the term "identification" is important in other constitutional contexts, too. For example, the government can doubtless require that patients in the maternity ward of a government hospital "identify" themselves, but it cannot search their urine to "identify" them as drug users without violating the Fourth Amendment, no matter what the analysis. *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) (general balancing test); 85-86 (special needs test); 71 (purpose of urinalysis at issue was to "*identify*/assist pregnant patients suspected of drug abuse") (emphasis added). Similarly, under the Fifth Amendment, the government can routinely

require an arrestee to "identify" himself by providing his name, but it may not require him to "identify" himself as the culprit in some unsolved crime. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 191 (2004). As these cases illustrate, the government's legitimate ***administrative*** interest in determining "who has been arrested and who is being tried," *id.*, is very different from its ***investigatory*** interest in determining what that person may have done, and whether he may have committed a crime, over the course of his lifetime.

Friedman has already decided that the warrantless collection of DNA from an arrestee, detained pending trial, to try to connect him to unsolved crimes is unconstitutional. *Friedman* therefore ***necessarily*** held that arrestees have a legitimate privacy interest in "what they have done" that outweighs any countervailing government interest other than prison security.[11] *Friedman*, 580 F.3d at 856-57; *see also Bull*, 2010 WL 431790, at *5. The government cannot get around this holding simply by claiming that what it is doing is "identification," rather than "investigation."[12]

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[11] Defendants do not assert an interest in prison security in this case.

[12] *See United States v. Mitchell*, --- F. Supp. 2d ---, 2009 U.S. Dist. LEXIS 103575, *20 (W.D. Pa. Nov. 6, 2009) ("A DNA profile generates investigatory evidence that is primarily used by law enforcement officials for general law enforcement purposes. To allow such suspicionless searches, which are conducted in almost all instances with law enforcement involvement, to occur absent traditional warrant and probable cause requirements will intolerably diminish our protection

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There is no support in the law for the District Court's expansive definition of "identification" when applied to arrestees. The cases on which the District Court relied for its definition – *Rise*, *Kincade*, and *Kriesel* – all involved ***convicted felons*** who were still serving their sentences. ER0015-16. *Rise* involved prison inmates, specifically "persons convicted of murder, a sexual offense, or conspiracy or attempt to commit a sexual offense[.]" *Rise v. Oregon*, 59 F.3d 1556, 1558 (9th Cir. 1995). *Kincade* involved a convicted federal felon on supervised release who had pled guilty to robbing a bank using a firearm and who had served a 97-month prison sentence. *United States v. Kincade*, 379 F.3d 813, 820 (9th Cir. 2004) (plurality opinion). *Kriesel* also involved convicted felons on supervised release. *Kriesel*, 508 F.3d at 942. *Banks* and *Amerson* too – extracircuit authority on which the District Court relied – dealt with convicted felons. *Banks v. United States*, 490 F.3d 1178, 1181 (10th Cir. 2007); *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007); *see also Green v. Berge*, 354 F.3d 675, 679-81 (7th Cir. 2004) (Easterbrook, J., concurring) (describing continuum of privacy interests in DNA depending on individual's criminal status, from prisoner to "[t]hose who have never been convicted of a felony[.]"). And both the plurality in *Kincade* and the panel in

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from unreasonable intrusion afforded by the Search and Seizure Clause of the Fourth Amendment.").

Kriesel expressly stated that their holdings should not be taken as allowing arrestee testing.[13]

Convicted felons have greatly reduced privacy rights in all aspects of their lives. This necessarily encompasses their privacy interests in their "identity," however defined, including who they are ***and*** what they have done, or will do. Once convicted, the government is allowed to invade the person's privacy to solve crimes, almost without limit. The government can legitimately search a parolees' house to find evidence of an unsolved crime, without a warrant or even individualized suspicion, because that is a consequence of being *convicted* of a felony. *Samson v. California*, 547 U.S. 843, 853 (2006); *United States v. Scott*, 450 F.3d 863, 873-74 (9th Cir. 2006). Thus, when the Ninth Circuit says that DNA can legitimately be used to identify convicted persons, it does not matter what it meant by "identify." But an all-encompassing understanding of "identity" is not applicable to individuals who have been arrested. As recognized in *Friedman* and *Scott*, arrestees are not subject to the same restrictions on privacy as are convicted

[13] *Kriesel*, 508 F.3d at 948 ("We emphasize that our ruling today [upholding DNA testing of convicted felons on supervised release] does not cover DNA collection from arrestees or non-citizens detained in the custody of the United States[.]"); *Kincade*, 379 F.3d at 841 (Gould, J., concurring) ("I also write to emphasize what we do not decide today…. What we do not have before us is a petitioner who has fully paid his or her debt to society, who has completely served his or her term, and who has left the penal system.").

persons. *Scott*, 450 F.3d at 873-74. The controlling case for the constitutionality of warrantless DNA collection from an ***arrestee*** is *Friedman*.

C. The District Court Erred in Disregarding *Friedman* Because It Believed This Court's Opinion Was Not "Thoroughly" Reasoned.

The District Court believed that *Friedman* did not control because "Friedman did not engage in a thorough totality of the circumstances test: it did not consider government interests beyond supervision, nor did it examine the extent of Friedman's privacy interest." ER0019 (citing dissent in *Friedman*). What the District Court actually did, however, was "fill in" what ***it viewed*** as missing from the Ninth Circuit's opinion and arrived at a contrary result. *See id.*

This the District Court cannot do. It may not disregard a controlling point of law – here, that the warrantless, suspicionless DNA testing of arrestees violates the Fourth Amendment – because it thinks that had the Ninth Circuit weighed the circumstances differently, it would have reached a different conclusion. *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) ("A District Court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided."); *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996) ("under the doctrine of *stare decisis* a case is important only for what it decides–for the 'what,' not for the 'why,' and not for the 'how.'"). As this Court has explained,

> A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court. Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.

Hart, 266 F.3d at 1170 (emphasis in original); *see also id*. at 1171 ("Circuit law…binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.").

As this Court, sitting *en banc*, recently held, the courts of this circuit must follow a prior panel's holding even when that opinion conducted no analysis but simply followed prior cases that they did not realize had been abrogated by the adoption of new rules. *United States v. Contreras*, --- F.3d ---, 2010 WL 348004, *1 (9th Cir. Feb. 2, 2010) (en banc and per curiam) (vacating part of prior appellate opinion on ground that "we do not agree that the three-judge panel had authority to overrule cases decided after the 1993 amendment to the [Sentencing] Guidelines.").

The District Court's error in disregarding *Friedman* on the ground that it did not "engage in a thorough totality of the circumstances test" is even more apparent when one considers the government's losing arguments in *Friedman*. In *Friedman*, the government had argued that the legality of warrantless, suspicionless DNA testing of a pretrial detainee should be evaluated by "weighing the intrusion of the DNA sampling on the individual's privacy interests against the compelling governmental interest in collecting and retaining DNA samples for the purpose of maintaining a forensic DNA identification database[.]" Defendants-Appellees' Brief in *Friedman* at Argument, Part I.B.1, *available at* 2007 WL 2195653 (June 11, 2007). It also argued that "as a convicted sex offender and an arrestee, Friedman has a lowered expectation of privacy" and that the buccal swab was "even less invasive than a blood test." 2007 WL 2195653.[14]

This Court in *Friedman* paraphrased these arguments: "Defendants' final argument is that the search was 'reasonable,' contending that pre-trial detainees have limited privacy rights that must yield to the desires of law enforcement to collect DNA samples for use in law enforcement databases." *Friedman*, 580 F.3d at 856. It then rejected them, holding that seizing Friedman's DNA was "not

[14] *Compare* ER0019 ("Arrestees undoubtedly have a greater privacy interest than convicted felons, but Plaintiffs have not shown that that interest outweighs the government's compelling interest in identifying arrestees, and its interest in using arrestees' DNA to solve past crimes.").

justified under the 'special needs' exception, reliance on an extraterritorial statute, *or on general Fourth Amendment principles*. The search and seizure of Friedman's DNA violated the Constitution." *Id*. at 858 (emphasis added).

Regardless of whether this Court's analysis was as "thorough" as the District Court would have liked, *Friedman* squarely held that arrestee testing – even of a registered sex offender – was not reasonable and violated the Fourth Amendment. That holding is binding on the District Court. *Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (per curiam) (lower court erred in concluding it was not required to follow circuit authority on ground that issue had not been "necessary" to the circuit's disposition; issue had been "presented for review," Ninth Circuit "addressed the issue and decided it in an opinion joined in relevant part by a majority of the panel," and the issue "became law of the circuit, regardless of whether it was in some technical sense 'necessary' to our disposition of the case."); *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) ("We hold, instead, that where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense."); *cf. Naranjo-Aguilera v. INS*, 30 F.3d 1106, 1114 (9th Cir. 1994) ("When a court of appeals invalidates a regulation, even in the context of reviewing an individual petitioner's

order of deportation, that regulation is infirm across the circuit and in every case.").

The issue "germane to the eventual resolution of" this case, *Johnson*, 256 F.3d at 914, is whether the warrantless, suspicionless DNA testing of arrestees violates the Fourth Amendment. *Friedman* has already decided that it does.

D. The Warrantless Seizure of DNA from Arrestees Violates Basic Fourth Amendment Principles.

Even if *Friedman* were not the law of this Circuit, basic Fourth Amendment principles prohibit taking DNA from arrestees without a warrant. Warrantless searches "are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (citations omitted). The government thus bears the burden of showing that warrantless searches or seizures, like those here, are reasonable and therefore constitutional. *United States v. Davis*, 332 F.3d 1163, 1168 n.3 (9th Cir. 2003).

1. The Compulsory Taking of a Biological Sample and the Subsequent DNA Analysis Constitute a Search and a Seizure.

The compulsory seizure of body tissue by law enforcement for purposes of DNA testing constitutes a search. *Kriesel*, 508 F.3d at 946 n.6; *Kincade*, 379 F.3d at 821 n.15; *see Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (breath and urine tests for drugs). A further search occurs when the

government analyzes the seized body tissue, prior to uploading the resulting DNA profile into CODIS. *See Skinner*, 489 U.S. at 616 ("The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests."); *United States v. Mulder*, 808 F.2d 1346, 1348-49 (9th Cir. 1987).

The searches and seizures here are thus *per se* unreasonable unless the government can show that they fall within an established exception to the warrant requirement.

2. Seizing and Searching the DNA of People Simply Because They Have Been Arrested Violates the Fourth Amendment.

The Fourth Amendment prohibits law enforcement from intruding into the bodies of arrestees to seize biological evidence unless they have either a warrant *or* both probable cause to believe that an examination of the sample will produce relevant evidence of a crime *and* exigent circumstances exist that make obtaining a warrant impracticable. *Schmerber*, 384 U.S. at 769-70; *Ellis v. City of San Diego*, 176 F.3d 1183, 1191-92 (9th Cir. 1999). This heightened scrutiny applies to all "intrusions beyond the body's surface." *Schmerber*, 384 U.S. at 769; *see Skinner*, 489 U.S. at 616-17 (breathalyzer "implicates similar concerns about bodily integrity" as were present in *Schmerber*). The insertion of a swab into a person's mouth intrudes beyond the body's surface in a way that many would find unsettling, particularly when done to them at jail.

Neither probable cause nor exigent circumstances exists here. Section 296(a)(2)(C) applies indiscriminately to all felony offenses whether or not DNA evidence is relevant to the crime charged. The "mere chance that desired evidence might be obtained" cannot support such searches. *Schmerber*, 384 U.S. at 770. And even if probable cause were present, there is no exigency because DNA is immutable. *Barlow v. Ground*, 943 F.2d 1132, 1138 (9th Cir. 1991). Mandatory arrestee DNA sampling laws are thus unconstitutional under *Schmerber*. *United States v. Mitchell*, --- F. Supp. 2d ---, 2009 U.S. Dist. LEXIS 103575, at *11 (W.D. Pa. Nov. 6, 2009) (federal law requiring pretrial collection of DNA from arrestees violates Fourth Amendment under the totality of circumstances test); *United States v. Purdy*, 2005 WL 3465721, at *7 (D. Neb. Dec. 19, 2005) (state law requiring arrestees to provide DNA violates Fourth Amendment); *In the Matter of the Welfare of C.T.L.*, 722 N.W.2d 484, 488-91 (Minn. App. 2006) (statute mandating DNA collection of pre-trial detainee violates Fourth Amendment).

Nor is the special-needs exception to the warrant requirement applicable because the primary purpose of arrestee DNA testing is to solve crimes, a law-enforcement purpose.[15] *Kriesel*, 508 F.3d at 849-50. As the court below noted

[15] CODIS exists to solve crimes. ER0256, ¶10; ER0444-45, ¶¶17-20. Proposition 69 made it clear that the purpose of expanded testing was to solve crimes: it was intended "to substantially reduce the number of unsolved crimes; to help stop serial crime by quickly comparing DNA profiles of qualifying persons

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ER0006-07, such purposes do not constitute special needs, and the exception is therefore inapplicable. *Id*.; *see Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.15 (2001) ("special needs" not applicable if primary purpose of seizure of bodily fluid is law enforcement); *Purdy*, 2005 WL 3465721 at *4-7 (special needs cannot justify arrestee DNA testing).

Although many courts have justified DNA testing of convicted felons by weighing the government's need to supervise, to rehabilitate, and to control such persons against the limited privacy rights such persons enjoy as a result of their status as convicted felons, that rationale cannot justify arrestee testing. First, it is questionable whether this test can ever apply when the government seeks to test the bodily tissue of arrestees, because *Schmerber* has already determined the proper balance between an arrestee's right against bodily intrusions and the government's interest in collecting evidence. *C.T.L.*, 722 N.W.2d at 491; *see Purdy*, 2005 WL 3465721 at *4-7. Second, a general balancing test cannot justify searches of the bodily tissue of persons other than convicted felons unless the government first shows that the special-needs exception applies. *See Ferguson*, 532 U.S. at 83 n.21 (refusing to apply general balancing test and holding that drug testing of pregnant

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and evidence samples with as many investigations and cases as necessary to solve crime and apprehend perpetrators." Prop. 69 § II(c), (d)(1), *see* ER0128-38.

women by urinalysis for law-enforcement purposes violates Fourth Amendment). Instead, the courts only employ a balancing test as a component of the special-needs analysis in such cases: "When such 'special needs'-concerns other than crime detection-are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests." *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (striking down mandatory drug-urinalysis for political candidates). As this Court recently made clear, this is a "two-step analysis," and the government cannot even get to the balancing step unless it first shows that the special-needs exception applies. *United States v. Fraire*, 575 F.3d 929, 931-32 (9th Cir. 2009). The government here is attempting to justify a search under the special-needs balancing test without showing any special need. Because this is not a special needs case, the searches are "per-se invalid," and no balancing of interests can change that. *Id*. at 932.[16] Third, even if it were appropriate to use a general balancing test, arrestees' rights to bodily integrity and genetic privacy outweigh the government's legitimate interests in taking DNA from them, for the following reasons.

[16] Even when the special-needs exception does apply, it is only the government's special needs, not its law-enforcement interests, that are balanced against the individual's privacy interest. *Ferguson*, 532 U.S. at 78 (Court "weigh[s] the intrusion on the individual's interest in privacy against the "special needs" that supported the program.").

3. Arrestees Have Significant Rights to Bodily Integrity and Genetic Privacy.

As discussed at length in the expert declarations in the record, DNA is our genetic blueprint, and with every passing year science learns how to unlock its secrets to discover more and more about us. DNA analysis can reveal a host of private information about a person, including familial relationships, the existence of potential for physical diseases such as sickle-cell anemia, cystic fibrosis, and Alzheimer's disease. ER0351-57, ¶¶18-21; ER0441-48, ¶¶5-7, 21-22, 26-29; ER0416-18, ¶¶18-21; *see Kriesel*, 508 F.3d at 947-48; *Kincade*, 379 F.3d at 841-42 (Gould, J., concurring); *Kincade*, 379 F.3d 849-51 (Reinhardt, J., dissenting); *Kincade*, 379 F.3d at 873-75 (Kozinski, J., dissenting); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up."). As these same authorities discuss, the fact that our DNA contains – or is thought to contain – this extensive personal information leads to a potential for misuse of the seized tissues.[17] Thus, compulsory DNA seizure by law enforcement constitutes a serious intrusion into a person's genetic privacy. ER0353-58, ¶¶12-26; ER0044, ¶¶5-8; ER0446-47, ¶¶22-25.

[17] *See, e.g.*, ER0416-18, ¶¶19-21 (discussing history and concluding that "[t]he potential for misuse of this highly sensitive data is staggering."); ER0357-58, ¶¶22-25; ER0447-48, ¶¶26-27.

Although the government claims that it will not use the DNA for anything other than "identification purposes," its broad interpretation of the word "identification" eviscerates this promise of privacy. Already the government is using the DNA databank to try to determine familial relationships by the use of so-called familial searching, discussed above. ER0475-77. This Court must take into account such advances when evaluating privacy under the Fourth Amendment. *Kyllo v. United States*, 533 U.S. 27, 35-36 (2001) ("the rule we adopt must take account of more sophisticated systems that are already in use or in development"); ER0448-49, ¶¶29-31; ER0357-58, ¶24. And part of the injury here is simply that the government has the genetic material in its possession. *See* ER0766-67. The Fourth Amendment does not allow the government to seize a copy of a diary or an intimate letter just because it promises not to read it, and the law should be no less protective of our genetic profile. *See United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1000 (9th Cir. 2009) (en banc).

DNA testing, whether by blood draw or buccal swab, also implicates bodily integrity. The body, like the home, is entitled to the strongest protections of the Fourth Amendment. *Ferguson*, 532 U.S. at 83 n.21; *see Schmerber*, 384 U.S. at 767-68. It has thus long been recognized that blood draws, although they may be routine, require more justification than do searches of one's clothing or possessions because they intrude into the body. *Schmerber*, 384 U.S. at 767-70. Even intrusions

that do not pierce the skin – a breathalyzer test, for example – "implicate similar concerns about bodily integrity" that justify *Schmerber*'s special requirements. *Skinner*, 489 U.S. at 616-17. A buccal swab is a variety of body-cavity search, ER0576-77, ¶8, albeit one that is less intrusive than some, and is at least as intrusive as breathing into a breathalyzer.[18] "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber*, 383 U.S. at 767. DNA testing of arrestees constitutes a serious intrusion into these interests.

4. The Government Did Not Show that Its Actual, Legitimate Interests in Taking DNA from Arrestees Outweighed Arrestee's Privacy and Dignity Interests.

The government has (so far) advanced four interests in its program: solving past crimes, determining the identity (name, date of birth) of arrestees, preventing future crimes, and exonerating the innocent. The District Court held that the government had failed to produce sufficient, credible evidence to support the last two of these. ER0018-19. As discussed below, there is absolutely no evidence that the government is using, or could use, DNA to determine the identity of those it has

[18] Fingerprinting of arrestees implicates none of these concerns and probably is not even a search for purposes of the Fourth Amendment. *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005); *see Davis v. Mississippi*, 394 U.S. 721, 727 (1969) ("Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.").

arrested. ER0776-80. Thus, the sole legitimate interest the government has in taking DNA is to solve past crimes, the same interest it advances in essentially every Fourth Amendment case involving law enforcement.

This generalized interest in solving crime cannot trump the privacy rights of arrestees, any more than it would justify taking DNA samples from every law-abiding American to solve cold cases. Just last year, the Supreme Court made clear that arrestees retain privacy interests that cannot be overcome by the government's desire to know whether a person arrested for one crime has committed some other crime. *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (restricting search of car incident to arrest). Instead, searches of arrestees are only constitutional to the extent they serve to protect officer safety or prevent the destruction of evidence. *Id*. If "both justifications for the search-incident-to-arrest exception are absent [then] the rule does not apply" and the search violates the Fourth Amendment. *Id*.[19]

Notably, *Gant* involved the authority of the police to search a car, an area where our expectations of privacy are at their lowest. *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) ("Passengers, no less than drivers, possess a reduced

[19] Searches of persons booked into the general jail population are also allowed to maintain jail security by detecting contraband and weapons. *Bull*, --- F.3d ---, 2010 WL 431790, *10. DNA does not implicate jail security. *See id*. at *14 ("searches pursuant to an evidentiary investigation must be analyzed under different principles" than searches for jail contraband).

expectation of privacy with regard to the property that they transport in cars[.]"). There is no question that allowing the police to conduct a complete search of every car upon arrest of the driver would result in the recovery of large amounts of drugs, guns, and other evidence of crime. Nonetheless, the Supreme Court held that to allow searches of an arrestee's car without "genuine safety or evidentiary concerns" "would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." *Gant*, 129 S. Ct. at 1721.[20] "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber*, 384 U.S. at 767; *see Ferguson*, 532 U.S. at 83 n.21 (distinguishing balancing test used in roadblock seizure cases from cases involving the "intrusive search of the body"). The Fourth Amendment cannot permit the government to intrude into our bodies to search and seize our genetic blueprint based upon a rationale that cannot even justify the search of a car.

Moreover, requiring the government to wait until conviction to take DNA is much less of an impediment to obtaining this evidence than is prohibiting searches

[20] The Court also held that "circumstances unique to the vehicle context" would also justify a search if there is individualized suspicion to think it will uncover evidence related to the arrest. *Gant*, 129 S. Ct. at 1719. This is irrelevant to the case at bar, because people are not vehicles and DNA is taken regardless of whether it could produce evidence relating to the crime of arrest.

of arrestees' cars. People arrested for a felony will soon fall into one of two groups: they will be convicted or they will not be convicted. Those who are convicted will have their DNA taken under § 296(a)(1), which requires that anybody convicted of a felony provide a DNA sample, and the validity of which is not disputed. Thus, the question is not ***whether*** the government will get their DNA; it is ***when*** it will get it. And because the prosecution in California has the right to a speedy trial, it can make sure these delays are not prolonged. Cal. Const. art. I § 29. Also, in cases involving DNA evidence, prosecutors can get a warrant based solely on DNA evidence, without knowing whose DNA it is, so they need not worry that the statute of limitations will run. *People v. Robinson*, --- Cal. Rptr. 3d ---, 2010 WL 252110 (Cal. Jan. 25, 2010). Thus, the most that will happen is that the government will get a conviction a short time later, and then collect DNA at that point.[21] Although it might be more efficient or convenient for the government to take DNA from everybody they arrest, rather than waiting for a conviction, the quest for efficiency cannot justify disregarding the Fourth Amendment. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (cited for this point in *Gant*, 129 S. Ct. at 1723).

As to the other group – arrestees who are never convicted – the government has no legitimate interest in taking their DNA. Both state and federal law recognize

[21] Compare the rule announced in *Gant*, under which the government will never even have access to potential evidence in arrestees' cars.

this; people in this group may petition to have their DNA samples expunged if they are not convicted, albeit after a long delay and only if they can jump through the procedural hoops. § 299; 42 U.S.C. § 14132(d)(1)(A). But, as discussed above, most of the 100,000 people arrested in California every year who are never convicted of anything will simply not be in a position to jump through these hoops. ER0157. Their genetic profile will remain eternally in a criminal databank, and their biological material retained indefinitely in a government lab, simply because a single police officer suspected them of a crime (or wanted to collect their DNA). These people are not only presumed innocent as they await trial; many of them *are* innocent, and are no more likely to be convicted of a crime than anybody else.[22] The government should not be allowed to invade the genetic privacy and bodily integrity of 100,000 innocent people every year just because it finds it more convenient to take DNA at arrest rather than after conviction (any more than it should be allowed to take anticipated fines from an arrestee's wallet so as to avoid the delay and uncertainty of waiting until after a conviction).

[22] ER0015 (noting that "no evidence has been presented in this case that arrestees are more likely to commit future crimes than members of the general population."); *Scott*, 450 F.3d at 874 ("the assumption that [a pretrial releasee] was more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the presumption of innocence."); *Mitchell*, 2009 U.S. Dist. LEXIS 103575 at *22 (describing the presumption of innocence as "the moral polestar of our criminal justice system").

Not surprisingly, putting innocent people in DNA databanks does nothing to help solve crime. The most reliable data on this topic come from the United Kingdom, which began mandatory testing of all arrestees in April 2004.[23] ER0400, ¶13. Expansion of the databank to include arrestees failed to increase the databank's efficacy in solving crime. ER0400-04, ¶¶13-26; ER0690-91. This makes sense, because arrestees may well be innocent, or involved only in criminal activity for which DNA evidence is irrelevant. Resources being spent on arrestee testing would better be used to analyze and upload the backlog of crime-scene samples into CODIS in a timely matter, which would increase the databank's effectiveness. ER0233-37; ER0401, ¶17; ER0690-91, ¶¶6-8. Blanket DNA testing of arrestees drains resources and increases the backlogs and the resulting delays. ER0445-49, ¶¶20, 32; ER0484, ¶11. Such testing therefore actually *diminishes* the effectiveness of the databank and the ability of law enforcement to use DNA to timely solve crimes.

Given the similarities between the UK program and the one at issue here, these data show that California's inclusion of adult felony arrestees' DNA profiles

[23] The UK practice of retaining the DNA of persons arrested but not convicted was recently invalidated by the European Court of Human Rights. *S. and Marper v. United Kingdom*, 48 E.H.R.R. 50, 158 N.L.J. 1755, 2008 WL 5044408 (Dec. 4, 2008). The full opinion is available at http://www.bailii.org/eu/cases/ECHR/2008/1581.html.

will not lead to a material increase in the number of crimes solved. ER0400-04, ¶¶14-15, 26-29. And the foremost expert in the use of DNA and CODIS here in the United States agrees that there is no evidence that expanding CODIS to include seized tissues from individuals who have never been convicted of anything will increase CODIS's effectiveness. Professor Bruce Budowle, who during his 26 years with the FBI's Laboratory Division served as program manager for DNA research, as Chief of the Forensic Science Research Unit, and as Senior Scientist for the Laboratory Division of the FBI, is an expert in the use of DNA and DNA databanks in the criminal justice system and was largely responsible for finalizing the standards of CODIS as it is now used in DNA typing. *See* ER0254-64, ¶1-7. Professor Budowle explains that it is impossible to evaluate CODIS's effectiveness in solving crimes because of the inadequacies in how the government collects data. *Id.* ¶30. Specifically, the "hit rate" in the database shows nothing because "we cannot know the proportion of hits that result in assisting convictions, as data concerning the outcome of hits is not reported and analyzed." *Id.* ¶26.

The skeletal evidence that the government submitted in this case to try to show that arrestee testing has some positive effect, to the extent it shows anything at all, is consistent with Dr. Wallace's findings. Shortly before the preliminary injunction hearing the government submitted a supplemental declaration from the Lab Director for the state DNA Databank Program, Kenneth Konzak. ER0723.

Mr. Konzak attempted to rebut Dr. Wallace's findings using data from California's databank, using the state's hit rate (which, as Professor Budowle discusses, is problematic in itself). ER0262, ¶¶26-27. But an analysis of Konzak's data shows that arrestee testing has had ***zero positive effect*** on the "hit" rate for the databank. Specifically, the data show that, if the "hit" rate for persons subsequently convicted is the same as the rate for the convicted-person database (as it must be, since that is precisely the same population), and the hit rate for persons arrested but not subsequently convicted (the innocent arrestees) is 0%, then the expected number of hits in the arrestee database is 678. But the *actual* number of hits from samples in the arrestee database is only 453.[24]

It is not clear why arrestee testing has apparently impaired the efficacy of the database in generating hits. It may be a result of increased backlogs, or the hit rate may have dropped over the past five years after the database was expanded in November 2004 to include people convicted of any felony, not just serious or violent crimes. §296(a)(1). Perhaps the government's data is faulty. Or perhaps the government can explain why inclusion of arrestee profiles does not generate more hits. But what is clear is that these data, provided by the government's own witness, utterly fail to help the government meet its burden of showing that arrestee DNA

[24] The calculations are set forth in the table in the Appendix at 59-60.

testing is so useful that it merits creation of a new exception to the warrant requirement.

For these reasons, even if *Friedman* were not the law of this circuit, the DNA testing here at issue violates the Fourth Amendment.

E. The District Court Also Committed Reversible Error by Considering an Absent Governmental Interest in Determining an Arrestee's Name and Other Booking Information.

Beyond the failure to apply the rules of *Gant*, *Schmerber*, and *Friedman*, the District Court also clearly erred when it let the government justify arrestee testing as a means of identifying arrestees, because the government is not actually doing that. The District Court asserted that "the government's interest in accurately identifying the individuals ***from whom it is taking the DNA***, discussed in *Kincade*, ***is present here.***" ER0015 (emphasis added). The District Court's broad interpretation of the term identification makes it difficult to know what this means. To the extent the District Court was suggesting that the government is actually using DNA to determine an arrestee's name and booking information, this assertion is clearly erroneous.[25] And to the extent the District Court believed that

[25] That law enforcement is not using DNA to identify the person before them is further confirmed by the fact that California regulations require DNA collection to "occur…***after*** checking an arrestee's California automated criminal history record for a DNA collection flag." ER0180 (emphasis added). Clearly the government already knows who the person is – the rap sheet has already been checked – before seizing the DNA. ER0491, ¶28.

the government could justify DNA sampling by asserting a hypothetical, rather than its actual, purpose for taking these samples, it erred as a matter of law.

1. The Government Is Not Using DNA To Determine Arrestees' Names and Booking Information.

The record shows that California's arrestee DNA collection program is not being used ***at all*** to determine the correct name of the arrestee, or other routine booking information**.** This is because ***before collecting his or her DNA***, the government confirms the arrestee's identity through fingerprints in order to avoid taking duplicative DNA samples. ER0776-80; *see also* ER0575-56, ¶¶5-6; ER0585; ER0483-91, ¶¶8, 22, 28. Nor is there anything in the record – or anywhere else – to suggest that the lab takes the step that would be necessary to use DNA to identify arrestees: running the arrestee's DNA profile against the known offender database or the arrestee database (as opposed to the crime-scene database). Moreover, CODIS profiles in the arrestee and convicted person databases are tagged only with an identification number, not the names of the persons who submitted the samples. ER0496-97, ¶42. Therefore, if the arrestee sample matched another known arrestee/convicted person sample, the jailors must then contact the agency that originally submitted the earlier sample to determine the name associated with it. ER0464-65, ¶¶15-18; ER0512, ¶7. That agency would then have to verify "the identity of the person from who[m] the sample was collected" using fingerprints. ER0464, ¶16. Again, there is nothing in the record that remotely suggests this has

ever been done to identify a single arrestee, much less that it is routinely done. Moreover, DNA ***cannot*** be used to confirm identity before releasing the arrestee from custody because the DNA profile is not generated until weeks or months after the sample is collected. ER0495, ¶40. Finally, the integrity of the entire DNA database relies on the accuracy of fingerprint identification. ER0488-89, ¶20; ER0491, ¶¶27-28; ER0464, ¶16; ER0575, ¶5; ER0180; ER0182.

In order to prevent duplicate DNA samples, the government ***only*** takes DNA after it is satisfied, though fingerprints, that it knows who the arrestee is. ER0488-89, ¶20; ER0491, ¶¶27-28; ER0464, ¶16; ER0575, ¶5. Even after it takes and analyzes the DNA, the government does not even try to use that to confirm the prior identification. The uncontested evidence in the record is that this fingerprint identification is absolutely reliable. ER0173-77. And even if there were a problem with the fingerprint identification, DNA could not remedy it, because the DNA identity-confirmation process itself depends on the reliability of the fingerprint identification. ER0461-62, ¶5.

The District Court's reliance on a clearly erroneous factual determination in denying the preliminary injunction requires reversal. *Klein*, 584 F.3d at 1200.

2. The Government Cannot Rely on a Non-Existent Justification to Seize DNA.

As part of its burden to justify a warrantless, suspicionless search of an arrestee, the government must show that the search actually serves a purpose, not

just that it could conceivably have some legitimate purpose. For example, this Court has held that the police cannot force a person arrested for a DUI to provide a blood sample after that person has already taken a valid breath test, because the results of the first test eliminate any need for the blood evidence. *Nelson v. City of Irvine*, 143 F.3d 1196, 1201-03 (9th Cir. 1998). And, as the Ohio Supreme Court recently held, the police cannot justify searching an arrestee (more specifically, his cell phone) by claiming the search could help identify him when the police did not even try to use the results of the search for that purpose and had already identified the arrestee through other means. *State v. Smith*, Slip Op. No. 2009-Ohio-6426, --- N.E.2d ---, 2009 WL 4826991, at *6 (Ohio Dec. 15, 2009). Thus, the government's claim that DNA evidence could ***theoretically*** be used to determine the name of arrestees cannot justify what it is actually doing – seizing DNA for investigatory purposes.

F. This Court Should Grant Preliminary Injunctive Relief; Remand is Unnecessary.

Since Plaintiffs have shown a likelihood of success on the merits, this Court should grant Plaintiffs a preliminary injunction based on the robust factual record. A remand would waste judicial resources, as further findings are unnecessary. *See Klein*, 584 F.3d at 1207-08.

The District Court has already found that if "the harm [from] Plaintiffs' claim was likely, it would be irreparable." ER0020. The District Court found that

the balance of equities tipped in favor of the government, and that the public interest in advancing Fourth Amendment rights would not be served since "Plaintiffs have not demonstrated a likely infringement of their Fourth Amendment rights." ER0021. But the calculus now changes given that controlling authority shows Plaintiffs have a strong likelihood of success on the merits. Plaintiffs' and class members' constitutional rights are being violated, and surely the public interest would be advanced by granting a preliminary injunction.

The same goes for balancing the equities. No further findings of fact are needed when *Gant*, *Schmerber*, and *Friedman* already hold that the warrantless, suspicionless search and seizure of arrestees, done to obtain evidence of a crime, violates the Fourth Amendment. Moreover, the sensitive nature of DNA, and the effects of remaining in CODIS, means the equities should tip in favor of Plaintiffs. ER0353-58, ¶¶12-26; ER0621-23, ¶¶26-31; ER0625-27, ¶¶35-40; ER0619-20, ¶¶18-22; ER0441, ¶¶5-8; ER0446-48, ¶¶22-28; ER0413-23, ¶¶12-31. This is true regardless of any cost to implement an unconstitutional government program.[26]

[26] The fact that the government has sunk money into arrestee testing seems a particularly inequitable reason to deny relief in this case. The ACLU of Northern California challenged arrestee testing immediately after Proposition 69 was enacted, only to have the government successfully argue that the case was not yet ripe because the arrestee testing provisions were not effective until 2009. *Weber v. Lockyer*, 365 F. Supp. 2d 1119 (N.D. Cal. 2005). The government should not be able to insulate an unconstitutional program from judicial review simply by spending money on it before it starts applying it.

And although statutory protections against misuse of DNA information may deter abuse, these protections cannot "cleanse an otherwise unconstitutional search." *Friedman*, 580 F.3d at 858; *see also Mitchell*, 2009 U.S. Dist. LEXIS 103575 at *34 ("No amount of statutory protection of the sample or the information contained therein will undo the taint of an unconstitutional search to obtain such information."); ER0627, ¶41. This Court should grant a preliminary injunction.

III. CONCLUSION

For all of these reasons, this Court should reverse the District Court and find Plaintiffs have shown a likelihood of success on the merits on their Fourth and Fourteenth Amendment claims.

This Court should take the most efficient course and issue a preliminary injunction enjoining Defendants from seizing or analyzing biological samples from the plaintiff class for DNA analysis under the authority of Cal. Penal Code § 296(a)(2)(C), or from making any use of profiles already created or samples already taken, until and only if the subject is actually convicted of a felony, unless such seizure is supported by a warrant issued on probable cause, consent freely given, or exigent circumstances combined with probable cause. This is appropriate to protect Plaintiffs' constitutional rights and avoid unnecessary delay. *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981) (citing *Charles v. Carey*, 627 F.2d 772, 776 (7th Cir. 1980)).

In the event the Court concludes that further findings are necessary to the *Winter* analysis, a limited remand solely on the balance of equities and public interest factors may be appropriate. Remand on the irreparable harm factor would be unnecessary since the District Court already correctly concluded that if the harm were likely, the harm would be irreparable.

DATED: February 18, 2010

Respectfully submitted,

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APPENDIX

Analysis of Supplemental Declaration of Kenneth Konzak (ER0723-27.)

1	Total number of CAL-DNA hits (as of 11/30/09) (ER0725, ¶5.)	10,893
2	Number of hits involving samples originally submitted from arrestees (includes those later convicted) (ER0725, ¶5.)	453
3	Total number of hits involving samples originally submitted from convicted persons (line 1 minus line 2)	10,440
4	Annual number of people arrested for a felony in California (2007 statistics) (rounded) (ER0157, Cal. Dep't of Justice, *Crime in California 2007* at 147, Table 37.)	332,000
5	Annual number of California felony arrestees who were eventually convicted of a crime based on this arrest (2007) (rounded) (ER0157.)	231,000
6	Annual number of California felony arrestees who were **not** convicted of a crime (line 4 minus line 5)	101,000
7	Percentage of felony arrestees who **are** eventually convicted (line 5 divided by line 4)	69.6%
8	Percentage of felony arrestees **not** eventually convicted (line 6 divided by line 4, or 100% minus line 7)	30.4%
9	Total number of individual profiles in the CA-DNA database (ER0725, ¶5.)	1,480,294
10	Total number of arrestees in database (includes those subsequently convicted and those never convicted) (ER0725, ¶5; ER0493, ¶34.)	134,280
11	Estimated number of persons in arrestee database who have not been, and will not be, convicted (line 8 times line 10)	40,821
12	Total number of convicted-person profiles in database excluding felony arrestees not convicted (line 9 minus line 11)	1,439,473
13	Hit rate for database containing convicted individuals (line 3 divided by line 12)	0.725%
14	Expected number of hits from the arrestee database if hit rate for **all** arrestee profiles uploaded to database (including profiles from persons later convicted and from those not later convicted) is the same as the hit rate for convicted profiles (line 13 times line 10)	974
15	Expected number of hits from the arrestee database if the hit rate for persons subsequently convicted is the same as hit rate for the convicted-person database (as it should be) **and the hit rate for persons arrested but not subsequently convicted is 0%** (line 14 times line 7)	678

16	Actual total number of hits obtained from arrestee database (ER0725, ¶5.)	453

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 13,829 words, as determined by the word-count feature of the word processing system.

DATED: February 18, 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 February 18, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Nanette Cosentino
NANETTE COSENTINO

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