10-15152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before the Honorable William A. Fletcher, Milan D. Smith, Jr., Circuit Judges, and James Dale Todd, Senior District Judge.

(Opinion Filed February 23, 2012)

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

Plaintiffs and Appellants,

v.

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

Defendants and Appellees.

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

RESPONSE TO PETITION FOR REHEARING

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INTRODUCTION

Virtually every federal court to have considered the question agrees that the collection of a DNA sample for forensic identification, pursuant to a lawful arrest and subject to statutory restrictions on collection, use and confidentiality, comports with the Fourth Amendment. Under California law, the collection of forensic DNA samples at booking, like fingerprints, can only be used to establish identity. As the panel recognized, the government's "compelling interests" in identifying arrestees, solving past crimes, preventing future crimes, and exonerating innocent suspects "far outweigh arrestees' privacy concerns." Slip op. at 1954. In affirming the constitutionality of California's Proposition 69, the panel majority properly applied this Court's existing precedents, including *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc); and *United States v. Kriesel*, 508 F.3d 941 (9th Cir. 2007).

Moreover, since this Court granted the petition for rehearing in *United States v. Pool* last year, 646 F.3d 659 (9th Cir. 2011), the legal landscape has changed. Several federal courts have concluded that the federal analogue to California's law is constitutional, most notably the Third Circuit sitting en banc. *See United States v. Mitchell*, 652 F.3d 897 (2011), *cert denied* March 19, 2012. In addition, since *Pool*, three different courts have concluded that

Friedman v. Boucher, 580 F.3d 847 (9th Cir. 2009), which addressed the forceful of extraction of DNA from a single individual without statutory authorization, does not control the analysis of this case. *See* slip op. at 1966; *Haskell v. Brown*, 677 F.Supp.2d 1187 (N.D. Cal. 2009) (*Haskell I*); *Mitchell*, 652 F.3d at 413 n.23.

Nor does the line of cases beginning with *Davis v. Mississippi*, 394 U.S. 721 (1969), which concerns application of the exclusionary rule to evidence collected pursuant to an illegal arrest, conflict with the panel's decision. Instead, Appellants invite this Court to create a split of authority within the federal circuits by dramatically extending the exclusionary rule to searches occasioned by a lawful arrest. The Court should decline the invitation to rewrite Fourth Amendment law and to create an inter-circuit split where none exists. The petition for rehearing should be denied.

ARGUMENT

I. THE THIRD CIRCUIT AND THE OTHER DISTRICT COURTS TO ADDRESS LAWS AUTHORIZING THE COLLECTION OF A DNA DATABASE SAMPLE AT ARREST HAVE HELD THAT SUCH STATUTES COMPORT WITH THE FOURTH AMENDMENT

The panel's conclusion that the collection of forensic DNA samples for identification purposes at felony arrest is constitutional is shared by the other federal courts that have addressed the issue. In *Mitchell*, the Third Circuit,

sitting en banc, rejected a Fourth Amendment challenge to the federal statute requiring adults arrested for a felony to provide a DNA sample. 652 F.3d 387, 415. Like the panel in this case and in *Pool*, the Third Circuit applied a totality of the circumstances test, balancing the arrestees' interest against those of the federal government. *Id*. at 403. In concluding that the arrestees' privacy interests are minimal, the Third Circuit relied on cases from this Circuit, including *Rise, Kincade,* and *Kriesel*. Because the DNA profile is "a tool for establishing identity," and is taken only in conjunction with a lawful felony arrest, the Third Circuit, like the panel here, concluded that an arrestee's Fourth Amendment privacy interest is minimal. *Mitchell*, 652 F.3d at 412.

Against this reduced privacy interest, the Third Circuit weighed the United States' interests. Those interests include identifying arrestees, particularly in cases not involving fingerprint or eyewitness evidence. *Id*. at 414. Expressly adopting the reasoning of the district court in this case, the Third Circuit held that identity includes both "who the 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 across town, etc.)" *Id*. at 414 (quoting *Haskell I*, 677 F.Supp.2d at 1199). Thus, the panel majority's view of the

various elements of identity is not "idiosyncratic" as suggested by the dissent, *see* slip op. at 1996. To the contrary, the majority's analysis of identity precisely echoes both that of the Third Circuit and of the United States Supreme Court, which has also included among the elements of identity what the individual has done in the past. See *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 186 (2004) ("[k]nowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder.")

In addition to establishing identity, the Third Circuit noted that "DNA profiling assists the Government in accurate criminal investigations and prosecutions" as well as in solving past crimes. *Mitchell*, 652 F.3d at 415. These interests, the Court concluded, outweigh the arrestee's interest in the privacy of his identity. *Id.* at 416. Like the panel majority in this case and in *Pool*, the Third Circuit concluded that the Fourth Amendment does not prohibit the collection of forensic DNA samples from adult felony arrestees.

The vast majority of courts to have considered similar statutory programs agree that they do not violate the Fourth Amendment. In *United States v. Fricosu*, the District of Colorado concluded that the federal DNA Act, 42 U.S.C. § 14135a, was constitutional. In so doing, it employed the same totality of the circumstances test as the panel majority. See ___

F.Supp.2d ___, No. 10–00509, 2012 WL 592322, at *1-*3 (D. Colo. Feb. 22, 2012). The Supreme Court of Virginia has reached the identical conclusion. *See Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007). And in *United States v. Thomas*, the Western District of New York concluded that the federal DNA Act was constitutional, employing the "special needs" framework applicable in the Second Circuit. No. 10-CR-2172, 2011 WL 1599641 (W.D.N.Y. Feb. 14, 2011), report of magistrate adopted, 2011 WL 1627321 (April 27, 2011) (defendant's status as an indicted person "does not materially affect the analysis of the privacy rights at stake" as compared with DNA collection from convicted offenders.) [1]

Accordingly, unlike when *Pool* was decided, there is uniformity among the federal courts that have considered this issue, and thus no cause to grant rehearing en banc in this case.

[1] The only case in which a federal court reached a contrary conclusion was *United States v. Purdy*, 8:05-CR-204, 2005 WL 3465271 (D. Neb. Dec. 19, 2005). But in that case, law enforcement officials collected DNA pursuant to a 1971 statute that did not actually authorize the collection of DNA, and would have permitted DNA collection from all individuals in police custody, including those charged with misdemeanor or traffic violations.

II. THE PANEL DECISION DOES NOT CONFLICT WITH THE PRECEDENTS OF THE UNITED STATES SUPREME COURT OR THIS CIRCUIT

A. *Friedman v. Boucher* Does Not Govern the Statutory Program Here at Issue, and Does Not Conflict with the Panel Decision.

Consistent with *Pool*, *Mitchell*, and the district court below, the majority correctly determined that *Friedman* does not control the outcome in this case. *See* slip. op. at 1966; *Haskell I,* 677 F.Supp.2d at 1201-02; *Pool*, 2009 WL 2152029 at *2 n.3, *aff'd* 621 F.3d at 1225–26, *vacated as moot*, 659 F.3d 761; *Mitchell*, 652 F.3d at 413 n.23. As the panel noted, although *Friedman* contains "broad dicta" that appellants have argued is dispositive, its holding was limited to the unique and very different facts of that case. Slip op. at 1964. In *Friedman*, Nevada authorities forcibly took a buccal swab of an arrestee in order to compare his DNA against "cold cases." 580 F.3d at 851. In contrast with this case, no statute authorized the collection of a DNA sample. *Id*. at 853–54. Rather, the prosecutor, acting alone, ordered a detective to forcibly take the arrestee's DNA sample. The facts of *Friedman* were vastly different from those presented here: a rogue prosecutor, forcibly collecting DNA in the absence of any statutory scheme either authorizing the collection, maintaining a convicted offender database,

or ensuring the kind of confidentiality and use restrictions required by California and federal law. *Compare Kincade*, 379 F.3d at 838.

The panel majority further observed that California's statute, which applies to all adults arrested for a felony, does not implicate the "essential purpose" of the warrant clause, which is "to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." Slip op. at 1965 (quoting *Skinner v. Ry Labor Executives' Ass'n*, 489 U.S. 602, 621-22 (1989)). Specifically, *Friedman* simply did not consider the routine, statutorily authorized collection of forensic identification DNA from all adult felony arrestees as part of the booking process, which under the Fourth Amendment is analyzed differently from the ad hoc decisions of individual law enforcement officers.

The dissent's view that *Friedman* controls the case at bar dramatically understates the factual differences between *Friedman* and California's statutory DNA database program, as well as their legal significance. The dissent dismisses the fact that California collects DNA from all adult felony arrestees pursuant to a comprehensive statutory program by noting the truism that "adherence to a state statute does not guarantee compliance with the Fourth Amendment." Slip op. at 1989 (quoting *Virginia v. Moore*, 553

U.S. 164, 171 (2008)). Just because adherence to a statute does not *guarantee* compliance with the Fourth Amendment does not mean that the existence of a statute is irrelevant to the constitutional analysis. In *Kincade* this Court explicitly relied upon the confidentiality and use restrictions under federal law in concluding that the collection of forensic DNA samples are reasonable under the Fourth Amendment. *See Kincade,* 379 F.3d at 837–38; *see also Mitchell*, 652 F.3d at 412 ("In light of the restrictions built in the DNA profiling process, Mitchell's arguments that it constitutes a significant invasion of privacy are unavailing."). Moreover, as this Court recognized in *Rise*, the existence of a statutory standard governing DNA collection ensures that officers act according to an objective standard, rather than their own discretion, which "fulfills a principal purpose of the warrant requirement." 59 F.3d at 1562. *Cf. Florida v. Wells*, 495 U.S. 1, 4 (1990) (standardized criteria or an established routine can prevent a search from being a "ruse for a general rummaging in order to discover incriminating evidence"). The dissent's dismissive view that statutory rules are irrelevant to the constitutional analysis finds no support in the case law of the Supreme Court or this Circuit. Because this case and *Friedman* are readily distinguishable, *Friedman* does not warrant en banc review in this case.

B. The *Davis v. Mississippi* Line of Cases Does Not Apply to the Collection of Forensic DNA Samples Incident to a Valid Arrest

Similarly, the dissent's novel argument that the majority's decision conflicts with *Davis v. Mississippi* and its progeny is incorrect and provides no basis for the Court to grant rehearing en banc. In *Davis v. Mississippi*, 394 U.S. 721 (1969), and *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004), courts considered the proper application of the exclusionary rule to evidence of identity taken pursuant to an *unlawful* arrest. These cases have no place in a Fourth Amendment analysis of Proposition 69, which provides statutory authorization for routine collection of a forensic DNA sample pursuant to a lawful arrest based on probable cause or a warrant.

In *Davis v. Mississippi*, officers were investigating a rape in which the victim informed the police that her assailant was a young black man. Without either a warrant or probable cause, officers brought 24 individuals matching this description to police headquarters, where they were questioned and fingerprinted. 394 U.S. at 722. The police sent those fingerprints along with 23 other sets they had collected to the FBI. The defendant's prints matched those at the crime scene, and he was ultimately convicted of the rape. *Id*. Mississippi argued that the fingerprints should not be excluded because they were taken during an "investigative" phase of the

proceedings rather than an accusatory phase, and that detention for the sole purpose of obtaining fingerprints does not require probable cause. *Id*. The Court rejected both contentions, concluding that the warrantless seizure of the defendant violated the Fourth Amendment, and consequently, that his fingerprints should have been excluded as the fruit of an unlawful seizure. *Id*. at 728. *See also Hayes v. Florida*, 470 U.S. 811 (1985).

In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court appeared to limit application of *Davis* in concluding that a defendant's identity could not be suppressed, even if it was discovered during an illegal arrest. The court concluded that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." *Id*. at 1039. This Court has construed *Lopez-Mendoza* to hold that "a defendant's identity need not be suppressed merely because it is discovered as the result of an illegal arrest or search." *United States v. Guzman-Bruno*, 27 F.3d 420, 421 (9th Cir. 1994). Accordingly, the Court has refused to suppress the fact of an individual's identity or records of his previous convictions and deportations. *Id*. at 422.

In *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004) this Court explored the tension between *Davis* on the one hand, and *Lopez-*

Mendoza on the other. In *Garcia-Beltran*, the government conceded that the defendant was illegally arrested in an immigration sweep. While the defendant claimed that his fingerprints and other evidence should be excluded under *Davis*, the Government argued that it should not be excluded under *Lopez-Mendoza*. The ultimate question, this Court concluded, was: "were Garcia-Beltran's fingerprints taken for an investigatory, or identification, purpose (or both)?" 389 F.3d at 868. If law enforcement obtained the defendant's fingerprints "to pursue a criminal immigration law violation" they would be excluded, whereas if they were taken merely to identify the defendant, they would not. *Id*. at 868. As the record was not clear on that point, the Court remanded for further proceedings. The holding in *Garcia-Beltran* was followed in *United States v. Ortiz-Hernandez*, where the Court excluded fingerprints that had been taken for an investigatory purpose. 427 F.3d 567, 576 (9th Cir. 2008).

These cases stand for the unremarkable proposition that when the police make an illegal arrest *without a warrant or probable cause*, fingerprints and other evidence taken for investigatory purposes will be subject to the exclusionary rule. In these cases, however, application of the exclusionary rule is triggered by an unlawful arrest; had there been a warrant or probable cause, then the exclusionary rule would not have applied.

Plaintiffs here do not challenge the legality of their arrest (and in any event for purposes of their facial challenge to Proposition 69, the lawfulness of the arrest must be assumed). *Cf. United States v. Salerno*, 481 U.S. 739, 745 (1987). The *Davis* line of cases has no bearing on the collection of a DNA databank sample as part of the booking process performed after a lawful arrest.

Applying the *Davis* line of cases to lawful arrests would fundamentally alter what is now understood as the routine booking process. Currently, when an arrest is made based upon probable cause or pursuant to a warrant, officers take fingerprints during the booking process, without determining whether the collection is for identification or investigatory purposes, or distinguishing between the two. The dissent, however, would apply the *Davis* line of cases to instances of a *lawful* arrest. Thus, even when police make an arrest with probable cause or pursuant to a warrant, officers would be forced to determine, when taking any forensic samples such as fingerprints, a photograph, or DNA, whether those samples are being collected for identification in the very narrow sense advanced by the dissent, or whether they are for an investigatory purpose.

No court, however, has questioned whether, once *validly* in police custody, an officer may routinely take the fingerprints, mugshot, or any

other forensic evidence of an arrestee, and then use such evidence to identify him, to attempt to solve the crime for which he was arrested, or to use that information to solve another crime. *See Rise*, 59 F.3d at 1559–60 ("everyday 'booking' procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence.") The use of forensic information in this manner, which is precisely how a forensic DNA sample in California is used, is a consequence of arrest. At that stage, the arrestee has no valid interest in protecting the privacy of his identity or withholding forensic evidence of his identity. *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992) ("Once "a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it."); *Kincade*, 279 F.3d at 837 (observing that "one lawfully arrested and booked into state custody" can claim "no right of privacy" in his identity). *See also Id.*, at 864 (Reinhardt, J., dissenting) ("Arrestees' privacy expectations, too, appear to be significantly reduced.") All *Davis* and its progeny teach is that where the arrest is *illegal* such forensic evidence must be excluded, although the fact of the person's identity cannot be.

The dissent's interpretation of *Hayes* would effectively prohibit officers from collecting fingerprint samples when they already know the identity of

an individual (say, in a small town) and when no fingerprints are left at the crime scene, since in that case the fingerprints would be useful only for purposes of investigating another crime. This is clearly not the law. It is at this point "elementary that blanket fingerprinting of individuals who have been lawfully arrested or charged with a crime does not run afoul of the Fourth Amendment." *Mitchell*, 652 F.3d at 411 (citing *Johnson v. Quander*, 440 F.3d 489, 499 (D.C. Cir. 2006), and noting "staggering" consequences "if every 'search' of an ordinary fingerprint database were subject to Fourth Amendment challenges.")

As the majority recognizes, *Hayes* and its progeny would properly prohibit the collection of DNA from a citizen when the government lacks probable cause or at least reasonable suspicion to believe that person has committed a crime. Slip op. at 1973. Those cases stand for nothing more. There is therefore no conflict for the en banc Court to address.

C. The Panel's Decision Correctly Interpreted *Kincade* and *Kriesel* in Applying the Totality of the Circumstances Test

On three separate occasions, this Court has articulated the legal standard for evaluating the collection of forensic DNA samples pursuant to statutory authorization, the standard the panel correctly applied in this case. First in *Rise*, then in an en banc decision in *Kincade,* and again in *Kriesel*,

this Court has consistently applied the totality of the circumstances framework to analyze the practice of collecting forensic DNA samples, which it "determined by assessing, on the one hand, the degree to which [the search or seizure] intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Kriesel*, 508 F.3d at 947 (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)); *see also Kincade*, 379 F.3d at 842. While those cases concern conditional releasees, there is no reason the analysis should differ when considering the identical collection of DNA database samples from adult felony arrestees.

Analyzing the totality of the circumstances in this case, the panel, like the district court, correctly concluded that California's statutory framework of collecting forensic DNA samples from adult felony arrestees, with its myriad protections of that information, is reasonable. The panel observed that the buccal swab is less intrusive than a blood draw, which the Supreme Court has stated constitutes a minimal intrusion. Slip op. at 1969 (citing *Schmerber v. California*, 384 U.S. 757, 758 (1966).) The panel also noted that under this Court's decision in *Rise*, the information obtained from a DNA sample is "substantially the same as that derived from fingerprinting,"

and that the collection of DNA "does not significantly intrude upon felony arrestees' privacy." Slip op. at 1975.

Against those interests, the panel decision weighed the same type of interests identified as compelling in *Kincade* and *Kriesel*: identification of the arrestee, "which may inform an officer that a suspect is wanted for another offense," *Hiibel*, 542 U.S. at 186; solving past crimes; preventing future crimes; and exonerating innocent suspects. Weighing these against the minimal interests of the arrestee, the panel concluded that "the balance of interests tilts strongly in favor of upholding the constitutionality" of Proposition 69. Slip op. at 1980–81.

The dissent's reasoning, on the other hand, is at bottom based on conjecture and hypotheticals that disregard both the statutory protections in Proposition 69 and the current state of science. It is precisely this sort of speculation this Court has previously rejected. *See Kincade*, 379 F.3d at 838 ("[O]ur job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented[;] … courts base decisions not on dramatic Hollywood fantasies, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record.")

In reaching its conclusion, the dissent relied on many of the arguments this Court specifically rejected in *Kriesel*. With respect to the arrestee's interests, the dissent recognized that both this circuit and several other circuits have concluded that the information obtained through analysis of a DNA sample is substantially the same as that derived from fingerprinting. Slip op. at 2006 (citing *Rise*, 59 F.3d at 1559–60; *Mitchell*, 652 F.3d at 410; *Boroian v. Mueller*, 616 F.3d 60, 67 (1st Cir. 2010); *Banks v. United States*, 490 F.3d 1178, 1192 (10th Cir. 2007)). Against this weight of authority, the dissent cites a footnote in *Kincade* noting that some studies have suggested that "junk" DNA may reveal some genetic programming material. Slip op. at 2007. The dissent fails to mention that *Kincade* nevertheless concluded that "the DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity. . . ." 379 F.3d at 837; *see also Kriesel*, 508 F.3d at 947 (noting the studies mentioned in *Kincade*, but concluding that the DNA analyzed by the government did not contain useful genetic information). The appellants did not introduce any evidence in the district court to suggest the state of the science has changed. Rather, as the district court noted, "the Court must address the facts as they are—and as they are understood—today." *Haskell I*, 677 F.Supp.2d at 1190 n. 1. Those facts, as the district court found, are that the regions of DNA that are tested

in a profile do not contain useful genetic information and that they are akin to fingerprints. *Id.*

The dissent also disregarded the findings of the district court in dismissing the government's interests. Like the majority, the district court concluded that "unsurprisingly [ ] arrestee submissions contribute to the solution of crimes. . . ." 677 F.Supp.2d at 1201. The dissent acknowledges that the collection of DNA at the time of felony arrest "well help solve some crimes" but complains that there is insufficient evidence to evaluate the strength of this interest. Slip op. at 2003. In addition to ignoring the evidence in the record, this complaint is inappropriate in the procedural posture in which the case came to this Court. Proposition 69 had been in effect for less than a year when appellants sought a preliminary injunction,[2] and it is *appellants'* burden to show a likelihood of success on the merits.

[2] California's data, available on its website and cited by California in its briefs, shows that the average number of monthly hits between offender DNA profiles and DNA profiles from unsolved crime scene samples has increased from 183 per month in 2008 (the year preceding full implementation of Proposition 69's collection of samples at felony arrest) to over 400 hits per month—an increase of over 125 percent. (See DOJ Website <http://ag.ca.gov/bfs/content/faq.php> [as of Sept.6, 2011].) With the advent of DNA sample collection from felony arrestees, California has cleared or aided in the investigation of over 50 percent of the unsolved cases added to its database between January 2009 and July 31, 2011—with over 9,000 DNA matches between offender DNA database identification profiles and profiles from crime scene evidence. *Id*.

Moreover, the Supreme Court has cautioned courts against gauging the effectiveness of a program when considering whether it comports with the Fourth Amendment: such an analysis is left to law enforcement officials. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990). The panel decision, like that in *Pool* and the Third Circuit sitting en banc in *Mitchell*, correctly concluded that the collection of forensic DNA samples at the time of felony arrest is consistent with the Fourth Amendment, as well as the decisions of this Court.

CONCLUSION

The Court should deny appellant's petition for rehearing en banc.

Dated: April 5, 2012

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 10-15152

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing enbanc/answer is: (check (x) applicable option)

[X] Proportionately spaced, has a typeface of 14 points or more and contains _4,172__ words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

April 5, 2012
Dated

s/ Daniel J. Powell
Daniel J. Powell
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Elizabeth Aida Haskell, et al. v. Edmund G. Brown Jr., et al.** No. **10-15152**

I hereby certify that on April 5, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

RESPONSE TO PETITION FOR REHEARING

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 5, 2012, at San Francisco, California.

Susan Chiang	s/ Susan Chiang
Declarant	Signature

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