

Case No. 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-Appellants,

v.

KAMALA D. HARRIS, Attorney General of California; EVA STEINBERGER,
Assistant Bureau Chief for DNA Programs, California Department of Justice,

Defendants-Appellees.

**OPPOSITION TO MOTION TO STAY
EN BANC PROCEEDINGS**

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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Arguing that “most, if not all, of the claims presented in this case” *might possibly* be heard by the United States Supreme Court in the case of *Maryland v. King*, Appellees ask this Court to indefinitely stay this appeal pending a final disposition of *King*. (Motion to Stay at 1). Appellees fail to present any argument that would warrant bringing this appeal to a grinding halt. For the following four reasons, this Court should deny Appellees’ Motion to Stay En Banc Proceedings:

1. This case has already been pending in this Court for over two years, and a mere petition for a writ of certiorari – which has not yet been filed – should not cause even more delay. There is no guarantee that the Supreme Court will hear *Maryland v. King* during its 2012 term or at all.

2. Appellees assume that a timely petition for a writ of certiorari will be filed *and* that the Supreme Court will grant such a petition and hear the case. Neither is guaranteed. The chambers opinion of Chief Justice Roberts cited by Appellees granted a stay of the mandate pending the Court’s disposition of a petition for a writ of certiorari. *Maryland v. King*, 567 U. S. ___, 2012 WL 3064878 (“Op.”); Supreme Ct. Docket No. 12A48 (July 30, 2012). The opinion reflects Chief Justice Roberts’ prediction of the action of the Supreme Court. The State has not yet filed a timely petition, and even assuming it does, there is no

guarantee that there will be three other votes to grant certiorari. (Four votes are required.¹)

3. The Ninth Circuit's pending en banc review is one reason why the Supreme Court may decide to deny certiorari in the Maryland case and await further development. Unlike *King*, this case was specifically brought to test the constitutionality of arrestee testing and contains a robust factual record that will allow a court to make an informed analysis of the costs and benefits of taking DNA from arrestees, rather than from only those persons actually convicted of crimes.

4. This Court stayed this appeal when rehearing was granted in a related case, *United States v. Pool*, No. 09-10303, not when Pool requested en banc review. Appellees seek further delay where no petition for review has been filed in the Supreme Court. The State could have sought a stay in *King* simply to consider the Maryland ruling more closely before deciding whether to file a petition. Thus, a timely petition might never be filed. Even assuming the State does file a petition, there is no clear time frame for action by the Supreme Court.

This Case. This case's procedural history reflects that more than two years have passed since Plaintiffs' appeal was filed. A six-month delay occurred because an en banc hearing scheduled in a related case presented a reasonable

¹ See Justice Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 10-21 (1983) (acknowledging the Supreme Court's long-standing practice of granting certiorari on the votes of four Justices).

possibility than an en banc panel of this Court was going to resolve the issue. That en banc hearing never occurred. Now, based on the *mere possibility* that a state will file a petition for a writ of certiorari, Appellees request a stay in the hope that the Supreme Court will resolve the issue. Until there is more than a slight possibility that the Supreme Court will hear *Maryland v. King*, rehearing en banc should go on as scheduled.

The Maryland Case. Appellees cite Chief Justice Roberts' chambers opinion granting a stay of the Maryland court's mandate pending disposition of a petition for writ of certiorari as though it were a decision on the merits. The Chief Justice's opinion reflects nothing more than his prediction of what the Court might do. No petition for certiorari has been filed.² If the State files a petition, there is no guarantee that the Supreme Court will hear the case.

En Banc Review by This Court. Chief Justice Roberts acknowledged that rehearing en banc had been granted in this case. (Op. at 2.) One reason among many that the Supreme Court would refuse to hear *King* is this pending appeal and the Supreme Court's anticipation of an en banc opinion from this Court. An en banc decision from this Court might aid the Supreme Court's determination of the

² Appellees also cite *Golinski v. U.S. Office Personnel Management*, No. 12-15388, which vacated an en banc hearing after the United States Solicitor General sought writ of certiorari before judgment. A petition for writ of certiorari by the Solicitor General was *pending* before the United States Supreme Court. *See* Supreme Ct. Docket No. 12-16. Again, no petition is before the Supreme Court in *King*.

issues in *King*, this case, or a future case. Therefore, a petition in *King* might be denied or even held until this Court resolves this appeal. *See, e.g., Keney v. New York*, 388 U.S. 440 (1967) (granting petition after holding it for over two years until decisions were entered in other obscenity cases).

Both *King* and the Third Circuit's opinion in *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011), *cert. denied*, 566 U.S. __ (2012), involved challenges to DNA collection laws in criminal cases. In neither of them did the courts have before them any factual record as to the costs and benefits of DNA collection. Unlike those cases, this case was specifically brought as a test case under section 1983. The record includes numerous expert and lay declarations that both parties submitted in requesting and opposing a preliminary injunction, including declarations from experts on DNA databanks and genetic privacy, as well as statistics relating to the program's efficacy or lack thereof. An en banc opinion from this Court, grounded in this robust record, may further inform and aid the Supreme Court in its determination on these important Fourth Amendment issues.

CONCLUSION

Chief Justice Roberts' chambers opinion in *King* could be interpreted as *one vote* for certiorari in the Supreme Court, but no petition is pending. Without a petition, there is no writ before the Supreme Court at this time for the justices to even consider. In other words, there is no reason for a stay of this action. This

appeal should proceed. En banc hearing should take place as scheduled during the week of September 17, 2012. Appellee's Motion to Stay En Banc Proceedings should be denied.³

DATED: August 3, 2012

Respectfully submitted,

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By: /s/ Eric A. Long

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³ In the alternative to a stay, Appellees seek supplemental briefing. The parties have fully briefed this appeal and have sent a number of 28(j) letters to the Court regarding supplemental authorities. Plaintiffs do not agree that supplemental briefing is necessary, because – as Appellees recognize in their motion – the authority has been presented to the Court in letters. However, Plaintiffs do not oppose Appellees' motion for simultaneous supplemental briefing.

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 August 3, 2012.

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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