Case No. 10-15152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before the En Banc Panel
(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.

SUPPLEMENTAL BRIEF OF APPELLANTS

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

Peter C. Meier
Eric A. Long
Jamie L. Williams
PAUL HASTINGS LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
Telephone: (415) 856-7000
Facsimile: (415) 856-7100

Michael T. Risher
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

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

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I. INTRODUCTION

Since the original panel issued its opinion in this case, two state high courts have held that the Fourth Amendment prohibits the government from seizing and analyzing DNA of mere arrestees. *See Mario W. v. Kaipio*, 281 P.3d 476, ¶ 1 (Ariz. 2012); *King v. State*, 42 A.3d 549, 561 (Md. 2012). The California Court of Appeal, after briefing was complete but before the panel issued its opinion, reached the same conclusion, while a sharply divided Third Circuit disagreed. *People v. Buza*, 129 Cal. Rptr. 3d 753 (Cal. App. 2011), review granted 262 P.3d 854 (2011); *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc). These new opinions make several important points:

First, the government is not using DNA to "identify" arrestees in the sense of confirming their names or discovering outstanding warrants or arrest records. As discussed below, nothing in the 793-page record even suggests that arrestee testing has ever actually been used to determine or authenticate the identity of any arrestee, or even that it could be used for that purpose. As the California Court of Appeals concluded after a detailed analysis of the State's statute, regulations, and procedure, "DNA is not used to verify who a person is" at arrest. *Buza*, 129 Cal. Rptr. 3d at 773. Rather, DNA collected from arrestees is used solely to investigate unsolved crimes.

Second, mass testing of arrestees constitutes both a warrantless search *and* a suspicionless search. In cases where DNA evidence is relevant to the charge of arrest, the government does not need an arrestee-testing law because the same probable cause that justifies the arrest will necessarily support a warrant for the suspect's DNA.[1] *See Green v. Nelson*, 595 F.3d 1245, 1252 (11th Cir. 2010). Conversely, in arrests for crimes that do not involve DNA, the existence of "probable cause for arrest…cannot serve as the probable cause for a DNA search of an arrestee." *King*, 42 A.3d at 578. Taking DNA in such cases violates the Fourth Amendment—not just for lack of a warrant but also for lack of probable cause. *United States v. Rodgers*, 656 F.3d 1023, 1028-29 (9th Cir. 2011) (probable cause to arrest is not probable cause to search); *King*, 42 A.3d at 576; *Mario W.*, at ¶ 31; *Buza*, 129 Cal. Rptr. 3d at 777-78; *Mitchell*, 652 F.3d at 427 (Rendell, J., dissenting).

Testing arrestees is a wholly separate question from testing convicted felons, as the government itself suggests. Testing those who are actually convicted serves the State's legitimate interests in obtaining samples from proven criminals while avoiding the threats to privacy created by testing everyone arrested, including those who are innocent. *King*, 42 A.3d at 600; *Mario W.*, at ¶¶ 27-32. In contrast, testing at arrest provides every individual police officer with unreviewable

[1] Or, in appropriate cases, the probable-cause prong of the exigency exception to the warrant requirement.

discretion to force an individual to provide a DNA sample, because "[w]hile the actual taking of DNA samples from arrestees is not a matter of discretion, there is no check on the discretion of the officers who make the arrests that create the opportunity for DNA sampling." *Buza*, 129 Cal. Rptr. 3d at 780-81. Those officers may in fact have an incentive to conduct pretextual arrests to obtain DNA samples. *Id.*

The government recognizes that it has no legitimate interest in samples taken from innocent arrestees, for state and federal law provide a means for arrestees not subsequently convicted to seek expungement of their DNA profiles. *Mario W.*, at ¶ 28; *King*, 42 A.3d at 597; *Mitchell*, 652 F.3d at 423 (Rendell, J., dissenting). This would not be the case if the government had any interest in retaining these samples. The government nevertheless insists on its right to seize, analyze, and upload into CODIS the DNA samples of those, like three of the Plaintiffs, who are released without charges within days of their arrests. And the significant barriers to expungement, including the mandatory six-month waiting period, guarantee that innocent arrestees will have their DNA analyzed and databanked, even despite expedient attempts to have the process halted.[2] *See Buza*, 129 Cal. Rptr. 3d at 758-

[2] In addition to the lack of automatic expungement even where the arrestee has been found factually innocent, additional barriers include the need to wait until the statute of limitations has run, the lack of appointed counsel, and the courts' unreviewable discretion to deny expungement. *See Buza*, 129 Cal. Rptr. 3d at 758-59, 769 n.16; Appellants' Opening Br., Dkt. 5, at 15-16.

59, 780-81. That the government recognizes it has no legitimate interest in maintaining these samples but nonetheless insists on its right to seize, search, upload, and include them in its weekly databank search shows just how unreasonable its position is.

Third, *Mario W.* and *King* underscore the privacy interests at stake when the government seizes and analyzes a person's DNA, "reveal[ing] uniquely identifying information about individual genetics."[3] *See Mario W.*, at ¶ 20. Each physical DNA sample that the government seizes and retains for later analysis "contains within it unarguably much more than a person's identity…. A person's entire genetic makeup and history is forcibly seized and maintained in a government file[.]" *King*, 42 A.3d at 577 (citation omitted); *see* ER0350-58, 410-50. Just as the government could not justify seizing a person's medical records by claiming that it would only examine that part of those records that served to identify the patient (or justify intercepting every email sent over the Internet with the promise that it would not read them without proper authorization), the government cannot justify its seizure of such a "vast genetic treasure map" of a person's genotype simply by citing laws against disclosure. *See King*, 425 A.3d at 577, 580-81;

[3] Despite the suggestion put forth by *amicus* DNA Saves, DNA cannot be equated to "identifying characteristics." *See* DNA Saves En Banc Br., Dkt. 89, at 4. DNA is not used to identify. Not only does DNA contain sensitive genetic information, as underscored by *Mario W.*, *see Mario W.*, at ¶ 20, but it is also ***evidence***, which can be used to link a person to a crime.

Mitchell, 652 F.3d at 424 (Rendell, J., dissenting). The mere fact that this sensitive genetic information is in the hands of the police is itself a violation of privacy. *See Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998); ER0766, at ¶ 3. The question in this case is whether the government has a legal right to take samples from everyone it arrests (rather than from only those who it convicts or from whom there is probable cause to take a sample), recognizing that doing so invades the privacy rights of arrestees without either probable cause or a warrant. *See Camara v. Mun. Ct.*, 387 U.S. 523, 533 (1967). As discussed below, it does not.

II. DISCUSSION

Warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (citation omitted). The government thus bears the burden to show the need for an exception from the warrant requirement. *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *United States v. Davis*, 332 F.3d 1163, 1168 n.3 (9th Cir. 2003). That a statute purports to authorize the searches does not matter. Courts have repeatedly invalidated searches that were specifically authorized by statute when the government failed to show compliance with the Fourth Amendment. *See, e.g.*, *Chandler v. Miller*, 520 U.S. 305, 318-19 (1997) (invalidating state drug-testing statute); *Marshall v.*

Barlow's, Inc., 436 U.S. 307, 325 (1978) (invalidating federal statute authorizing warrantless searches of business); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (invalidating federal statute authorizing automobile searches near border); *See v. City of Seattle*, 387 U.S. 541 (1967) (invalidating local ordinance authorizing warrantless searches of warehouse); *Camara*, 387 U.S. at 530 (invalidating local law authorizing warrantless inspection of apartment, even though such inspection "is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime"); *King*, 42 A.3d at 594; *Mario W.*, at ¶ 32. And they have invalidated such searches without any suggestion that the government would misuse the information, and even where the statute expressly prohibited the government from disseminating the results of the search. *See Chandler*, 520 U.S. at 318; *King*, 425 A.3d at 580-81. That Proposition 69 was enacted by initiative does not affect the analysis. *See Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 194 (1999).

A. The Government Cannot Rely On A General Balancing Test To Avoid Complying With The Warrant Requirement Because The Supreme Court Has Already Prohibited The Suspicionless Search Of Arrestees For Evidence Of Crimes

Because no established exception to the warrant requirement allows warrantless searches and seizures of arrestees' DNA, the government asks this Court to create a *new exception* that covers arrestees, based on the totality-of-the-circumstances approach taken with felon parolees in *Samson v. Cal.*, 547 U.S. 843,

852 (2006). But "nothing in *Samson* suggests that a general balancing test should replace special needs as the primary mode of analysis of suspicionless searches outside the context of the highly diminished expectation of privacy presented in *Samson*." *United States v. Amerson*, 483 F.3d 73, 79 (2nd Cir. 2007). Beyond that limited context, a general balancing test can only be employed as the second part of the special-needs test—*i.e.*, after the government has first demonstrated that it has a special need. *United States v. Fraire*, 575 F.3d 929, 931-32 (9th Cir. 2009).[4]

Accordingly, when the Supreme Court has examined the seizure and analysis of bodily tissue from persons other than convicted felons, it has consistently refused to employ a freestanding balancing test like the one in *Samson* and has instead used the special-needs test. *See, e.g.*, *Chandler*, 520 U.S. at 305, *Ferguson v. City of Charleston*, 532 U.S. 67, 78, 83 n.21 (2001) (expressly refusing to apply balancing test to allow government to test pregnant women for drugs); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (same for testing government employees). Similarly, in a case involving drug-interdiction checkpoints, because the special-needs exception did not apply, the Court refused to apply a balancing test to justify the minor intrusion at issue, rejecting the dissent's argument that it should do so. *Indianapolis v. Edmond*, 531 U.S. 32, 38,

[4] Even convicted felons on probation have stronger privacy rights than Samson, who was on parole. *United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc).

40, 42-43 (2000); *cf. id.* at 52-53 (Rehnquist, C.J., dissenting).[5]

As these cases and *Gant* make clear, "a warrantless, suspicionless search [of an arrestee's DNA] cannot be upheld by a 'generalized interest' in solving crimes." *King*, 42 A.3d at 598. When the police seek to search an arrestee to obtain evidence of an unrelated crime, they must comply with the warrant requirement or point to an established exception to it. They cannot merely rely on some general balancing test. Otherwise, an individual officer's decision to make an arrest becomes "a police entitlement" to conduct a suspicionless, warrantless search for evidence of other crimes, "and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." *Gant*, 556 U.S. at 347.

B. The Government Cannot Rely On The Special-Needs Exception Because The Government Is Testing Arrestees' DNA For Criminal Investigation Purposes

The special-needs exception cannot justify a warrantless search when the "primary purpose" of the search program is detecting crime or enforcing criminal laws. *Ferguson*, 532 U.S. at 81-82, *Edmond*, 531 U.S. at 46-47; *Fraire*, 575 F.3d at 931-33. And California's DNA statute itself announces that "[t]he purpose of

[5] Although a recent case involving jail security does not use the term "special-needs," it applied the special-needs test. *See Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1516 (2012). *Florence* balanced only the government's special needs for jail security against the prisoners' privacy interests, without including any governmental interest in detecting crime in its analysis. The primary authority that the Court relied upon, *Bell v. Wolfish*, 441 U.S. 520 (1979), is itself a special-needs case (although decided before the term was coined). *See Skinner*, 489 U.S. at 620 (listing *Bell* as special-needs case).

the DNA and Forensic Identification Database and Data Bank Program is to assist federal, state, and local criminal justice and law enforcement agencies within and outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes[.]" Cal. Penal Code § 295(c). Proposition 69's arrestee-testing provisions are specifically intended "to substantially reduce the number of unsolved crimes; to help stop serial crime by quickly comparing DNA profiles of qualifying persons and evidence samples with as many investigations and cases as necessary to solve crime and apprehend perpetrators[.]" Prop. 69 § II(c), at ER0542;[6] *see also Buza*, 129 Cal. Rptr. 3d at 756-57. As the head of the FBI's DNA database (NDIS) confirms, the "function of NDIS is to generate leads for the law enforcement community." ER0514. Because generating leads in an attempt to solve crimes is a core law-enforcement function, the special-needs exception cannot apply.

C. The Government Could Not Meet Its Burden Under The Totality Of The Circumstances

Even if it were appropriate to apply a totality-of-the-circumstances balancing test without first assessing the government's special need (it is not), the compulsory search and seizure of DNA from mere arrestees is unconstitutional.

[6] *See also* Ballot Pamp., Gen. Elec. (Nov. 2, 2004), Argument in Favor of Proposition 69, at ER0540 ("Taking DNA during the booking process…helps police conduct accurate investigations.").

§ 296(a)(1). The crucial question is whether the government can show that taking DNA from mere arrestees, rather than waiting until conviction or using a warrant in appropriate cases, is so useful as to justify a new exception to the warrant requirement.

1. The government does not use DNA to identify who it arrests

The government has no actual interest in using DNA to identify who it arrests because it does not – and cannot – use DNA for that purpose. "DNA is not used to verify who a person is" and "DNA profiles are neither necessary nor helpful for verifying who a person is at the time of arrest." *Buza*, 129 Cal. Rptr. 3d. at 770-76.

The record in this case confirms this. In addition to the evidence discussed in Appellants' Opening Brief[7] and the information on the State's website,[8] the declarations from state and federal officials involved with CODIS submitted by the government confirm that the government has no interest in using DNA to identify

[7] *See* Dkt. 5, at 53-54.

[8] For example, the State's website states that collection "requires local agency personnel to (1) identify the subject." *See* Office of the Attorney General of California, DNA Frequenty [sic] Asked Questions, Collection Mechanics, http://oag.ca.gov/bfs/prop69/faqs. The California protocol states that DNA will not be taken from persons until after they have been identified through fingerprint comparison and found not to have given samples. ER0144-46. Similarly, federal regulations governing CODIS state "to the extent that individuals entering the system through arrest or detention previously have had DNA samples collected…repetitive collection is not required." 73 Fed. Reg. 74932, 74941 (Dec. 10, 2008); *see also* 28 C.F.R. § 28.12(e)(2).

arrestees. These declarations describe in detail the procedures for arrestee testing and the various functions it is supposed to serve. Yet, nowhere do they ever even suggest that DNA is being used – or can be used – to identify arrestees, in the sense of confirming their names, outstanding warrants, or arrest or conviction records.[9] To the contrary, the government's witnesses consistently confirm that arrestees are identified before they are required to give a sample:

- The manager of the State's DNA database writes that "identification [is] achieved at the time of collection" and that the purpose of a "standard search of the DNA database" is to "identify a person associated with a crime." ER0463-64.
- The Director of California's DNA laboratory confirmed, as mandated by California regulations, that "agencies must, prior to collection, check the individual's rap sheet in the criminal history system," a step that obviously requires that the person first be identified. ER0491; *accord* ER0180-82.
- An administrator with the State's DNA program explains that the LiveScan fingerprint "device is used to capture…the identification of who is being collected. The device identifies fingerprints using

[9] This is itself telling. *See Singh v. Gonzales*, 491 F.3d 1019, 1024 (9th Cir. 2007) (adverse inference from party's failure to produce evidence in its control), superseded on unrelated grounds by Pub. L. No. 109-13.

[the Automated Fingerprint Identification System], to ensure that the DNA samples to be collected are positively linked to the verified identity of the subjects using their fingerprints." ER0575.

- The head of the FBI's NDIS explains that the "function of NDIS is to generate leads for the law enforcement community" and describes how NDIS is used without ever suggesting that the system can be used to identify an arrestee. ER0511-12, 514. Four maps attached to his declaration show a state-by-state breakdown of various types of CODIS results—none of which contains any mention of using the system to identify an arrestee. ER0529-32.

Finally, the FBI's NDIS Privacy Impact Assessment, issued pursuant to 5 U.S.C. § 552a, lists all the uses to which DNA profiles will be used.[10] This list never mentions identification of arrestees. This confirms what the record in this case shows and what other courts have already concluded: DNA is not used to determine an arrestee's identity in the sense of determining that person's name, prior record of arrests or convictions, or outstanding warrants. *Buza*, 129 Cal. Rptr. 3d at 773; *see Mario W.*, at ¶ 31; *Mitchell*, 652 F.3d at 422-24 (Rendell, J., dissenting); Appellants' Opening Br., Dkt. 5, at 53-54.

[10] FBI Privacy Impact Assessment National DNA Index System (DNS) February 24, 2004, ¶ C, http://www.fbi.gov/foia/privacy-impact-assessments/dns.

2. Taking and databanking DNA from persons not convicted of any crime does not help solve crimes

The government has failed to show that collecting DNA from *all* felony arrestees, including those not ultimately convicted, is any more effective at fighting crime than was the pre-existing *convicted-offender* database. Although collecting DNA at arrest advances the time of collection for the two-thirds of DNA profiles that would have been collected anyway after conviction, this is an insufficient justification to invade the privacy of tens of thousands of people arrested every year who are never convicted of any crime, many of whom are never even charged with a crime. *Mario W.*, at ¶ 28.

Plaintiffs have already explained why the evidence that the government submitted to the District Court utterly fails to show that arrestee testing is any more effective at catching criminals than is testing those persons who are actually convicted of a crime. Appellants' Opening Br., Dkt. 5, at 49-52; Appellants' Reply Brief, Dkt. 25, at 7-20. The government's response has been not to defend that evidence or to try to show that it helps them meet their burden, but to try to put new "evidence" in front of this Court, most recently by citing to its own website. *E.g.*, Government's 28(j) Letter (July 24, 2012), Dkt. 67. This raises several fundamental problems. First, this Court will generally not consider such new evidence on appeal. *See United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007). There are only three exceptions to this general rule: (1) to correct

inadvertent omissions from the record, (2) to take judicial notice upon proper request of matters subject to judicial notice, and (3) to exercise inherent authority in extraordinary cases. *See id.* Briefs often discuss reliable scholarly works to assist the court by broadening its perspective on issues raised by the parties. But the government cannot put before this Court purported "facts" that are not part of the record, were not tested below, and do not qualify for judicial notice.

Lest the point be lost, the information that the government presents is *from its own website*, not some neutral source. The government cannot transform arguments – much less contested claims that are *not* subject to judicial notice – into evidence simply by posting them on its website. Although some facts on the government's website may be correct (*e.g.*, the number of felony arrests made each year), most of the material the governments cites to support its position is the subject of intense dispute. For example, the Defendants and their *amici* have repeatedly claimed that various individual cases show the utility of arrestee testing for solving crime, but, as the District Court recognized, a closer examination of the facts of those cases (when possible using publicly available information) has revealed that they did not support the government's claims. *See* Appellants' Reply Br., Dkt. 25, at 12-17; ER0018-19 (Dist. Ct. Opn.). Since those cases do not support its argument, the government now claims that the recent arrest in the Sierra LaMar case supports arrestee testing. But again, it provides only part of the story –

the part that supports its case – and fails to acknowledge that the suspect in that case, Antolin Garcia-Torres, had two prior criminal convictions and had been charged with a sex crime in the past.[11] Even assuming the suspect is guilty (which our system does not), taking Garcia-Torres's DNA when he was convicted of those prior crimes would have provided the police with a DNA sample. The government should not be allowed to use incomplete, unverified information to spin anecdotes that likely prove the fallacy, not the wisdom, of its position.

In any event, even if the government is right that arrestee testing has resulted in a handful of cases being solved more quickly than they otherwise would have been, this cannot justify taking DNA from tens of thousands of innocent Californians every year. California has been taking DNA from some arrestees since 2004 and from every person arrested on suspicion of a felony since January 2009. Although the State apparently does not track how many samples it takes each year from individuals who are never convicted, it reports that in 2009 it was collecting 26,500 new samples per month, a number that dropped to 20,500

[11] Sheila Sanchez & Corinne Speckert, *Violent Past for Sierra LaMar Murder, Kidnap Suspect, Court Records Reveal*, Los Altos Patch (May 22, 2012), http://losaltos.patch.com/articles/violent-past-for-sierra-lamar-murder-kidnap-suspect-court-records-reveal-06670e88#pdf-10030186.

samples per month in 2010 "due to the impact of recidivism."[12] Even if two-thirds of these individuals were eventually convicted[13] (which seems high, since the police do not seize repeat samples from people with prior felony arrests or convictions, who are far more likely to reoffend than those without priors[14]), that still means that every year the government is taking DNA from 82,000 Californians who will not subsequently be convicted. Databanking DNA from 82,000 people a year selected at random would undoubtedly result in some CODIS hits. But the fact that the government may now, after years of collecting DNA from arrestees, be able to point to some purported "success" stories simply cannot justify seizing and analyzing the genetic blueprints of so many innocent people. Not only is this type of dragnet approach inconsistent with our system of *individual liberty*, but the overall effect may in fact be to *decrease* public safety by diverting laboratory and other resources away from the important work of promptly and thoroughly analyzing crime-scene DNA evidence and/or convicted offenders' DNA. Indeed, as the RAND Corporation has explained, "focusing on uploading proven offenders and crime-scene profiles has a greater impact on database

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[12] Office of the Attorney General of California, http://oag.ca.gov/bfs/prop69/faqs. California has taken DNA from everyone convicted of any felony since November 2004; samples are not taken from arrestees who have already provided one.

[13] Approximately two-thirds of the approximately 300,000 people arrested on suspicion of a felony in California are eventually convicted of some crime (not necessarily a felony). *See* ER0157.

[14] *See* DNA Saves En Banc Br., Dkt. 89, at 17 n.3.

matches ('investigations aided') than uploading suspected offenders at the point of arrest."[15] Spending resources on arrestee testing means that less time and money are available to test crime-scene evidence and convicted-offender samples in a timely manner. As an August 2012 report from the Department of Justice makes clear, the expansion of arrestee testing is a significant contributor to the backlogs in our crime labs.[16]

Finally, even the numbers posted on the government's own website fail to support its claims that arrestee testing has contributed in any significant way to solving crimes. As with the numbers that it submitted to the district court, the government provides too little detail for the numbers to prove anything at all; the government, which alone possesses all the relevant data, cannot use such incomplete numbers to justify a statute authorizing suspicionless searches. *See Almeida-Sanchez*, 413 U.S. at 272 n.5.

Moreover, the data the government does provide suggests that California's increase in hits results from the increase in the number of *crime-scene samples* in the database—not from the increased number of offender samples, much less from

[15] RAND Report: Toward a Comparison of DNA Profiling and Databases in the United States and England 17-18 (2010), Dkt. 40-2 (faulting California for devoting resources to arrestee testing, when focusing on crime-scene testing would be more effective).

[16] U.S. Department of Justice, Bureau of Justice Statistics, Census of Publicly Funded Forensic Crime Laboratories, 2009 (August 2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpffcl09.pdf.

samples of individuals who are never convicted.[17] The clearest demonstration of this is the government's acknowledgment that its hit rate has continued to increase even as the number of new arrestee DNA samples has dropped:

> While the number of [arrestee] submissions had started to decrease by 2010, as expected, due to the impact of recidivism…. [T]he number of hits made per month continued to increase[.][18]

This directly contradicts the government's claim that increasing the number of known samples taken from arrestees in the database is what has led to the increased number of hits. The actual numbers that the State publishes on its website make this even clearer: from January 2010 to July 2012, the number of new profiles uploaded into the database every month *decreased* by about one-third—from 21,285 to 15,559 profiles.[19] But during this same period, the number of monthly hits *increased* by 58 percent—from 255 to 403 hits. The average monthly new profiles and hits for 2010, 2011, and 2012 confirm this inverse correlation: the number of hits has consistently risen even as the number of new

[17] Meaning matches between offender samples and crime-scene samples, or between two crime-scene samples. *See* ER0257.

[18] Office of the Attorney General of California, http://oag.ca.gov/bfs/prop69/faqs.

[19] *See* Plaintiffs-Appellants' Motion for Judicial Notice and Declaration of Michael Risher in support ("Risher Decl."), ¶¶ 7-8 & Ex. 1, both filed concurrently.

known (arrestee or convicted offender) samples has plummeted.[20]

The cause of this result is exactly what scholarly work would predict: the increase in hits was a result of a 60 percent increase in the total number of crime-scene (forensic unknown) profiles in the system.[21] This is consistent not only with the expert evidence in this case, ER0397-402, 689-720, but also with the 2010 RAND Report, which concluded:

> [D]atabase matches are more strongly related to the number of crime-scene samples than to the number of offender profiles in the database. This suggests that "widening the net," which research indicates has only a minimal deterrent effect, might be less cost-effective than allocating more effort to samples from crime scenes. Indeed, the UK Home Office reached this same conclusion in an analysis of its National DNA Database[.][22]

Even if one accepts the government's claim that hits equate with success (and there are reasons to reject this claim[23]), its own data utterly fails to show that arrestee testing increases the number of hits that the database generates. Instead,

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[20] From 2010 to 2012, the average number of monthly hits increased from 361 to 397, as the number of new samples added to the database dropped from 20,931 to 15,749. *See* Risher Decl., ¶¶ 9-11 & Ex. 3.

[21] *See id*. at ¶¶ 7-8 & Ex. 1.

[22] Dkt. 40-2 at 1.

[23] Both RAND and the experts in this case caution against "equating more database matches with improved public protection." A mere report of a "hit" provides no insight into whether the hit resulted in an offender being apprehended and prosecuted, nor whether the offender (if apprehended) would have been apprehended without the use of the database. Dkt. 40-2 at 17; *see* ER0262-64.

these data confirm that it is the size of the forensic-unknown database – coupled with an offender database including samples from *convicted* criminals – that produces results. *See Buza*, 129 Cal. Rptr. 3d at 776-77.

Accordingly, the government cannot show that taking DNA from mere arrestees, rather than waiting until conviction, is so useful as to justify a new exception to the warrant requirement. Taking DNA from mere arrestees is not useful, and a new exception to the warrant requirement is not justifiable.

III. CONCLUSION

As the Supreme Court stressed in striking down a statute that, like Proposition 69, purported to authorize suspicionless searches, "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Almedia-Sanchez*, 413 U.S. at 273. Warrants based on probable cause are the rule except in limited situations. Where there is DNA evidence left at the scene, the police can use the same probable cause that supported the arrest to *get a warrant* to obtain the arrestee's DNA. They also can take samples from convicted felons without a warrant. But the State has failed to show that the *warrantless*, *suspicionless search* of DNA from mere arrestees comports with the Fourth Amendment. This Court should therefore hold that the arrestee-testing

provision here at issue is unconstitutional, facially and as applied to Plaintiffs and the Plaintiff class.

Respectfully submitted,

Dated: August 31, 2012

PAUL HASTINGS LLP

By: /s/ Eric A. Long
Eric A. Long

Dated: August 31, 2012

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: /s/ Michael T. Risher
Michael T. Risher

Attorneys for Plaintiffs-Appellants Elizabeth Aida Haskell, Reginald Ento, Jeffrey Patrick Lyons, Jr., and Aakash Desai, on behalf of themselves and others similarly situated

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i) and Circuit Rule 32-1, the attached supplemental brief is proportionately spaced, has a typeface of 14 points or more and contains 4,974 words, as determined by the word-count feature of the word processing system. In compliance with Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this number includes headings, footnotes, and quotations but not the caption, table of contents, table of citations, or certificate of counsel.

Dated: August 31, 2012

/s/ Eric A. Long
Eric A. Long

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 31, 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.

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