10-15152

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 and Appellants,

**v.**

**KAMALA D. HARRIS, 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

# APPELLEES' SUPPLEMENTAL BRIEF

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## INTRODUCTION

Since this case was briefed and argued over two years ago, several courts have analyzed the constitutionality of collecting forensic DNA samples from felony arrestees. Courts that have found such statutes to withstand Fourth Amendment scrutiny, like the Third Circuit sitting en banc, have relied heavily on this Court's reasoning in *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), and have analyzed the totality of the circumstances to conclude that the minimal intrusion suffered by the arrestee is outweighed by substantial government interests. *See, e.g., United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc). The courts that have found statutes like California's DNA Act to be unconstitutional share three basic errors of law, and their reasoning should not be adopted by this Court.

The first error found in these cases is the failure to recognize that an adult arrested upon probable cause that he has committed a felony offense does not have the same interests as an ordinary citizen in the privacy of his identity. *See King v. State*, 42 A.3d 549 (Md. 2012), *stayed pending disposition of writ of certiorari*, *Maryland v. King*, No. 12-207, 2012 WL

3064878 (Roberts, Circuit Justice 2012).[1] An arrestee's reduced expectation of privacy is well established: arrestees are subject to imprisonment, around the clock monitoring in jails, full body cavity searches, and a close visual inspection while undressed. *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012). But, in decisions striking down laws such as California's, courts have improperly applied the presumption of innocence in concluding that arrestees have an interest similar to that of private citizens. The presumption of innocence, however, only applies in the context of the burden of proof in criminal trials, and does not confer on arrestees the same privacy interests as an ordinary citizen who is not in police custody. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

The second common error rests the Fourth Amendment analysis on speculation about the possible misuse of a DNA sample, despite the lack of any evidence of any actual abuse and irrespective of the significant precautions in state and federal law to prevent the misuse of any samples or information. *See People v. Buza*, 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011), *review granted and opinion superseded by* 262 P.3d 854 (Cal. 2011).

[1] Maryland filed its petition for certiorari on August 14, 2012, Supreme Court Docket No. 12-207.

In considering the constitutionality of DNA sample collection after conviction, this Court has firmly declined to engage in such speculation, and has instead concluded that such collection is constitutional because DNA profiles drawn from those samples only reveal an individual's identity. *Kincade*, 379 F.3d at 838. Because the same standards and protections apply to DNA profiles generated from samples collected at arrest, it is error to speculate about potential abuses that have never occurred rather than evaluating the limited use of DNA samples collected pursuant to the DNA Act.

The third error ignores or discounts the government's substantial and legitimate interests in identifying arrestees and solving past crimes. While some means of "identifying" arrestees, such as fingerprinting, are already available to the government, the Fourth Amendment does not prohibit the government from using other, more reliable, methods to identify arrestees. Moreover, as both the district court and the panel correctly recognized, identity "encompasses not merely a person's name, but also other crimes to which the individual is linked." *Haskell v. Harris*, 669 F.3d 1049, 1062 (9th Cir. 2012), *pet'n for reh'g en banc granted, opinion vacated* ___ F.3d ___, 2012 WL 3038593 (9th Cir. July 25, 2012) ("*Haskell II*"); *see also Haskell v.*

*Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009) ("*Haskell I*"). In any event, law enforcement officials have a compelling interest in using DNA profiles to connect arrestees with past crimes, an interest properly cognizable in the totality of the circumstances analysis. *Kincade*, 379 F.3d at 838. The Maryland and California courts of appeal erred by adopting an exceedingly narrow (and incorrect) view of identification, and by refusing to consider the government's interest in solving crime and distinguishing between low level and violent criminals as soon as possible after arrest. *Mitchell*, 652 F.3d at 414 ("Whether an arrestee is possibly implicated in other crimes is critical to the determination of whether or not to order detention pending trial.")

The consequences of following the flawed reasoning of these courts and invalidating California's DNA Act would be far reaching. As the district court and panel recognized, collecting DNA from adults at the time of felony arrest has helped California officials solve numerous past crimes and taken criminals off the street who would have remained at large but for the collection of DNA at the time of arrest. *Haskell I*, 677 F. Supp. 2d at 1200–01; *Haskell II*, 669 F.3d at 1603–04. Moreover, taken to its logical conclusion, the reasoning adopted by *Buza*, and Judge Fletcher in his panel dissent, would not only rob law enforcement of an effective crime-fighting

tool, it would call into question the routine collection of fingerprints during the booking process, which in many cases is primarily used to determine if an individual is connected with prior criminal activity. *See Buza*, 129 Cal. Rptr. 3d at 771 (citing *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004); *see also Haskell II*, 669 F.3d at 1073 (Fletcher, J., dissenting). The Fourth Amendment should not be interpreted to tie the hands of police, either with respect to fingerprints, or its modern equivalent, a DNA profile.

## ARGUMENT

### I. ARRESTEES HAVE A MINIMAL INTEREST IN MAINTAINING THE PRIVACY OF THEIR IDENTITY

Each of the four cases decided since briefing in this case was completed examined the totality of the circumstances in addressing challenges to laws similar to California's DNA Act, Cal. Penal Code § 295 *et seq*., but reached different conclusions about arrestees' privacy interests. *See Mitchell*, 652 F.3d at 415; *Buza*, 129 Cal. Rptr. 3d at 1461; *King*, 42 A.3d at 580; *Mario W. v. Kaipo*, 282 P.3d 476 (Ariz. 2012). In *Mitchell*, the Third Circuit held that the arrestee's privacy interests are minimal. Noting that the Supreme Court has concluded that the bodily intrusion occasioned by a blood draw is "not significant," *Skinner v. Ry. Labor Executives' Ass'n*,

489 U.S. 602, 625 (1989), the court found that the less intrusive buccal (cheek) swab is similarly minimal. *Mitchell*, 652 F.3d at 407.

The court also concluded that obtaining a DNA profile from a forensic DNA sample does not significantly affect arrestees' privacy interests. First, the information obtained from a DNA profile is limited by law to identification. In rejecting Mitchell's argument that DNA contains a great deal of information other than an individual's identity, the court noted that "every one of our sister circuits to have considered the concerns raised by Mitchell has rejected them given their speculative nature and the safeguards attendant to DNA collection and analysis." *Id*. at 407 (citing *United States v. Kriesel*, 379 F.3d at 948 & n.10). As is the case here, there was no evidence in the record of misuse of a DNA sample or profile. The court also recognized that there are substantial statutory safeguards to prevent using the arrestee's DNA sample to obtain any information other than a DNA profile, which only shows the DNA at thirteen non-coding loci, so-called "junk DNA." *Mitchell*, 652 F.3d at 407.

Second, the Third Circuit distinguished arrestees from ordinary citizens, from whom the government could not collect a forensic DNA sample without a warrant. Just as the fingerprinting of arrestees is justified

by the fact that the individual has been arrested on probable cause that he has committed a crime, so too does the existence of probable cause justify the collection of his DNA:

> The universal approbation of fingerprinting as a method of identifying arrestees despite the invasion of privacy "is not surprising when we consider that probable cause had already supplied the basis for bringing the person within the criminal justice system. With the person's loss of liberty upon arrest comes the lost of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment."

*Id*. at 411 (quoting *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992)). This argument finds full support in Ninth Circuit case law, as the Third Circuit recognized in *Mitchell*. 652 F.3d at 411; *see also Kincade*, 379 F.3d at 813 (concluding that arrestees "are not entitled to the full panoply of rights and protections possess by the general public," and "are properly subject to a broad range of [restrictions] that might infringe constitutional rights in a free society"); *id*. at 864 (Reinhardt, J., dissenting) ("Arrestees' privacy interests . . . appear to be *significantly reduced*") (emphasis added).

The court in *Mitchell* concluded that an arrestee's reduced privacy interest—arising from the existence of probable cause to bring him into custody—coupled with the limited information obtained from his DNA and precautions against its misuse, weigh strongly in favor of the government's

authority to collect a forensic DNA sample without a warrant. The *Mitchell* analysis mirrors that of the panel and the district court in this case, and is fundamentally sound.

In contrast, the analyses of the courts that have concluded that the collection of a forensic DNA sample at arrest violates the Fourth Amendment do so on the basis of an erroneous application of the presumption of innocence in the context of booking procedures, as well as on the basis of a hypothetical (and unrealized) threat that DNA might be illegally mishandled to reveal personal information about an arrestee. Adopting this analysis would mark a stark departure from this Court's precedents, and it should be rejected.

### A. Probable Cause to Arrest Distinguishes the Interests of an Arrestee from That of Ordinary Citizens.

In light of the fact that an arrestee, unlike an ordinary citizen, may be photographed and fingerprinted, subject to routine strip searches, incarceration, and electronic monitoring—all without a warrant—it should be beyond dispute that an arrestee does not have the same Fourth Amendment rights afforded an ordinary citizen. *See Florence*, 132 S. Ct. at 1510 (permitting prison officials to conduct a close visual inspection of misdemeanor arrestee while undressed). For purposes of Fourth

Amendment analysis, the critical difference between ordinary citizens and a felony arrestee is the existence of probable cause to believe that the arrestee has committed a felony. *See United States v. Davis*, ___ F.3d ___, No. 09-4890, 2012 WL 3518479 (4th Cir. Aug. 16, 2012) at *14 (distinguishing parolees, convicted felons and arrestees from the victim of a crime and the general public at large in considering the totality of the circumstances).

The courts in *King* and *Mario W.* both erred by importing the presumption of innocence, which determines the prosecution's burden of proof at trial, into the Fourth Amendment analysis of the booking process. These courts relied on the presumption of innocence to conclude that an arrestee has a Fourth Amendment privacy interest similar to that of the general public and distinct from that of convicted felons. *See King*, 42 A.3d at 597; *Mario W.*, 2012 WL 2401343 at *6.

The presumption of innocence, however, has no application to the booking process. In determining that an arrestee can be subject to a strip search, the Supreme Court expressly rejected an argument that the presumption of innocence applies to a claim concerning the conditions of arrest. "Without question, the presumption of innocence plays an important role in our criminal justice system. . . . But it has *no application to a*

*determination of the rights of a pretrial detainee* during confinement before his trial has even begun." *Bell*, 441 U.S. at 533 (emphasis added). It is similarly the case that the presumption of innocence has no application to a determination of the Fourth Amendment rights of an arrestee, whose "status as a presumed-innocent man has little to do with the reduced expectation of privacy attendant to his arrest, processing, and pre-trial incarceration (even if but for a short time)." *King*, 42 A.3d at 582 (Barbera, J., dissenting). An arrestee's privacy interests are at their nadir when it is the arrestee's *identity* that is at issue.

### B. Speculation About Possible Misuses of a Forensic DNA Sample Cannot Form the Basis of a Legitimate Fourth Amendment Analysis.

The possibility that a DNA sample could be misused is meaningfully addressed by safeguards in the DNA Act. Accordingly, hypothetical concerns about misuse have been repeatedly rejected by courts as a basis to invalidate laws authorizing the collection of a DNA sample. These decisions have predominantly occurred in the context of DNA sample collection after conviction, but identical information is obtained from the forensic DNA sample whether upon arrest or following conviction, as required by state and federal law. For purposes of determining what

information the government obtains from a DNA sample, it should be irrelevant that the donor is an arrestee rather than a convicted offender. Just as the potential for misuse was rejected as a basis for finding the collection of a forensic DNA sample in the context of convicted criminals, so too should it be rejected in the context of adult felony arrestees.

In *Kincade*, the parties argued that because DNA samples "conceivably could be mined for more private information or otherwise misused in the future," the future invasion of personal privacy outweighed the government's interests. 379 F.3d at 837. This Court rejected that argument, observing that "our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented." It based its decision on the facts in the record, not what it called "dramatic Hollywood fantasies." *Id.* Although the context of the search has changed from *Kincade*, the scope of the search has not—the DNA profile generated from an arrestee's sample only contains a record of his identity, not the "vast genetic treasure map" that some courts fear will fall into the wrong hands.

Each of the courts to hold that law enforcement cannot lawfully collect a forensic DNA sample at the time of arrest has ignored what is actually being searched in creating a DNA profile—fifteen loci out of thousands,

none of which are known to code for any functional genes—in favor of focusing on other uses of the DNA sample that the law explicitly prohibits and have never occurred. ER 483, 517. In *King*, the Maryland Court of Appeal stated that a DNA sample contains "unarguably much more than a person's identity. Although the Maryland DNA Collection Act restricts the DNA profile to identifying information only, we can not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." 42 A.3d at 569. The court in *Buza* made a similar argument, *Buza*, 129 Cal. Rptr. 3d at 769, even though California law expressly precludes and criminalizes and such misuse of a databank sample.

In order to properly address appellants' facial challenge, this Court should scrutinize the *actual analysis and use* of an arrestee's DNA sample authorized by the DNA Act. In *Veronia School District v. 47J Acton*, 515 U.S. 646, 658 (1995), the Supreme Court looked to the actual urine test that was performed in examining the students' interests. ("[I]t is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic.") California uses a semi-automated process to reveal the sequence at the thirteen "core" loci required by the federal National DNA Index, as well as two additional loci and a sex-

typing locus. ER 490. The instruments, robots, and software are designed specifically—and exclusively—to reveal the sequence of the specific loci needed for a DNA profile. ER 490–492. This DNA profile

> . . . is a series of numbers. The numbers have no meaning except as a representation of molecular sequences at DNA loci that are not indicative of an individual's personal traits or propensities. In this sense, the CODIS 13-STR "profile" is very much like a social security number—though it is longer and is assigned by chance, not by the federal government. In itself, the series of numbers can tell nothing about a person. But because the sequence of numbers is so likely to be unique (with the exception of identical twins), it can be linked to identifiers such as name, date of birth, or social security number, and used to determine the source of DNA found in the course of criminal investigations or to identify human remains or persons who are lost or missing.

*State v. Raines*, 857 A.2d 19, 45 (Md. 2004) (Raker, concurring) (quoting D. Kaye & M. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 Wis. L. Rev. 413, 431–32 (2003)).[2] The DNA profile, like a fingerprint, is one indicia of identity, and an arrestee has little privacy interest in it or any other indicia of identity, whether it be a photograph, fingerprint, or social security number.

[2] An example of a DNA profile can be found at ER 509.

## II. DETERMINING AN ARRESTEE'S IDENTITY AND CONNECTIONS TO OTHER CRIMES SERVES COMPELLING GOVERNMENT INTERESTS.

As numerous courts have recognized, the government has a compelling interest in identifying criminals as well as in solving past crimes and preventing future ones, interests that are directly served by collecting a forensic DNA sample at arrest. *Mitchell*, 652 F.3d at 413–16. Courts issuing decisions such as those in *Buza* and *King* have erroneously rejected the government's interest in identification, however, reasoning that law enforcement officials also typically identify an arrestee by his fingerprints prior to collecting a DNA sample and developing a DNA profile. The court in *Buza* argued that DNA collection does not serve the government's interest in identification because a forensic DNA sample taken at the time of arrest takes 30 days to analyze and so cannot be immediately used for identification. *Buza*, 129 Cal. Rptr. 3d at 772. Moreover, California's DNA Act requires officials to "identify" the person through fingerprints, if available, before collecting the DNA sample. *Id*. at 773. Since the State uses other means to identify the person, the court in *Buza* reasoned, identification cannot be a valid justification for collecting DNA at the time of arrest for purposes of the totality of the circumstances analysis. Rather, the sole justification is investigation. *Id*. at 776. The Maryland Court of

Appeal and the Arizona Supreme Court have reached a similar conclusion. *King*, 42 A.3d at 578; *Mario W.*, 2012 WL 2401343 at *2.

This reasoning fails. As an initial matter, the courts in *Buza*, *King*, and *Mario W.* are simply incorrect to suggest that the government has no interest in using DNA profiles to identify arrestees, even in the narrow sense appellants use that term. The Fourth Amendment does not limit the state to a single method of identification. *City of Ontario v. Quon*, ___ U.S. ___, 130 S. Ct. 2619, 2632 (2010) (noting that the Supreme Court has repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment). For example, law enforcement officials are not, nor should they be, prohibited from collecting fingerprints from an arrestee known to them personally by sight. And once fingerprinted, officers are not precluded from taking photographs of the individual or recording any tattoos or other identifying marks. As the district court observed, "[t]he more ways the government has to identify who someone is, the better chance it has of doing so accurately." *Haskell I*, 677 F. Supp. 2d at 1199–2000. Appearances, and even fingerprints, can be altered. In contrast, the value of a DNA profile lies in its accuracy and its immutability; a match can ensure that the individual is who he says he is. Securing

alternative means of identification is an important governmental interest. *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992).

Moreover, an unduly narrow definition of "identification" is inconsistent with the Supreme Court's understanding of identity. Below, Judge Breyer accurately noted that "[p]ut simply, identification means both who that 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.)." *Haskell I*, 677 F. Supp. 2d at 1199. The district court further noted "[t]he second component of identity, what the person has done, is no less important. Nor is it new." *Id*. Indeed not: the Supreme Court relied on a similar understanding in *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 186 (2004). Judge Breyer's understanding of identity was also expressly adopted by the Third Circuit in *Mitchell*, 652 F.3d at 414. Understanding what crimes an individual may have committed is often the primary reason law enforcement officials wish to establish identity in the first place. As the dissent in *King* noted, "The majority's definition [of identity] raises the rhetorical question: 'Why law enforcement would want to know a person's

name, if not to know whether that person is linked to crime?'" *King*, 42 A.3d at 611 (Barbera, J., dissenting).

The argument that the DNA profile is not used to "identify" the arrestee is flatly inconsistent with *Kincade* and *Kriesel*. In both cases, this Court relied on the government's interest in identifying convicted criminals. *Kincade*, 379 F.3d at 839; *Kriesel*, 508 F.3d at 949. At the time the government collected a DNA sample post-conviction, it knew who the convicted offender was in the most limited sense, just as it sometimes (but not always) knows an arrestee's identity. Having found that the purpose of collecting a forensic DNA sample after conviction is to identify an individual, it is illogical to conclude, as did the court in *King*, that the purpose of the same statute, using the same procedures and obtaining the same profile, cannot be to identify arrestees. *See King*, 42 A.3d at 578. As Judge Breyer stated, "This court has no illusions—nor does it believe the Ninth Circuit in *Rise*, *Kincade*, and *Kriesel* was either confused or disingenuous—about what 'identification' means in this context." *Haskell I*, 677 F. Supp. 2d at 1199.

Even if one concludes that the primary purpose of collecting a DNA sample is to use the resulting indicia of identity to solve crimes, this

investigatory interest is in itself valid and compelling and, in the totality of the circumstances analysis, justifies the minimal intrusion on an arrestee's privacy. First, there is no "primary purpose" inquiry in the totality of the circumstances analysis; that inquiry is only appropriate in special needs cases involving government intrusions on free citizens. *See, e.g., Ferguson v. City of Charleton*, 532 U.S. 67, 81 (2001). Second, the fact that the government uses an indicia of identity to solve other crimes does not change the nature of the information it collects from the arrestee when it generates the DNA profile: it remains non-coding information. Third, as the panel majority recognized, this Court has held that solving past crimes is a compelling governmental interest. "Solving crimes is a legitimate factor in our totality of the circumstances analysis because it 'helps bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large.' *Kincade*, 379 F.3d at 839; *see also Mitchell*, 652 F.3d at 414 ('Collecting DNA samples from arrestees can speed both the investigation of the crime of arrest and the solution of any past crime for which there is a match in CODIS.')." *Haskell II*, 669 F.3d at 1063–64.

The court in *Buza*, like the panel dissent, refused to credit the government's interest in crime solving out of a mistaken belief that the

government cannot collect a forensic DNA sample for investigatory purposes. The court noted that "in the context of fingerprinting, courts have drawn a distinction between identification—fingerprints taken to 'verify that the person who is fingerprinted is really who he says he is,' and investigation—fingerprints taken 'to connect [the person fingerprinted] to a crime with which he was not already connected." *Buza*, 129 Cal. Rptr. 3d at 1445–46 (quoting *United States v. Garcia-Beltran*, 389 F.3d 864, 867). But like the panel dissent, the court in *Buza* failed to acknowledge that this line of cases applies only when fingerprints are taken pursuant to an *illegal arrest*. As explained in Appellees' Opposition to Rehearing En Banc, the *Garcia-Beltran* line of cases stands only for the proposition 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) (emphasis added). *See* Docket # 62 at 9–11. In these circumstances, where there is no dispute that appellants were lawfully arrested, the distinction between identity and investigation is irrelevant. Officers were permitted to take their fingerprints for investigatory purposes as well as to establish their identity, and the same is true of their DNA profile.

As noted in appellees' opposition to en banc review, the logic of the dissent, which mirrors that of *Buza*, would not only restrict the use of DNA profiles, it would also compromise the longstanding ability of law enforcement to take fingerprints as a routine part of booking. The extension of *Garcia-Beltran* to *lawful* arrests would forbid police officers from taking forensic identification samples at arrest for investigatory purposes. The unspoken premise of the dissent's logic—which distinguishes forensic DNA samples from fingerprints—is that fingerprints are taken for identification, but this is not always the case. An arresting officer may already have established the arrestee's identity by photograph, driver's license, or social security number. Or, the arrestee may have had no prior contact with law enforcement, and so his fingerprints cannot be used to identify him in the narrow sense of the word. In these cases, law enforcement officers could *only* be collecting fingerprints for purposes of linking an arrestee with prior crime scenes, which under the logic of *Buza* would constitute an impermissible invasion of an arrestee's privacy rights.[3] This reveals the

[3] This threat to the validity of routine fingerprinting is explicit, not imagined. The majority of the panel decision and *Mitchell* both note that the constitutionality of routine fingerprinting at arrest is unquestioned. *Mitchell*, 652 F.3d at 411 ("It is 'elementary' that blanket fingerprinting of individuals (continued…)

flaw in trying to distinguish between identity and investigatory uses of identifying evidence. This Court should therefore reject the expansion of *Garcia-Beltran* and reaffirm that law enforcement officers may use an indicia of identity collected at arrest for investigatory purposes as well as to confirm an arrestee's identity.

Finally, *Buza* erroneously discounted the value of collection of DNA at the time of felony arrest to the government's interest in solving past crimes. *See Buza*, 129 Cal. Rptr. 3d at 1453. As of October 31, 2009, when appellants sought an injunction, arrestee samples had already generated 291 "hits" to crime scene profiles, a fifty percent increase from the period before Proposition 69 went into effect. ER 485. That number has since grown dramatically, with arrestee samples aiding 743 investigations in the first half

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(…continued)
who have been lawfully arrested or charged with a crime does not run afoul of the first amendment"); *see also Haskell II*, 669 F.3d at 1060. Courts advocating for the extension of *Garcia-Beltran* to lawful arrests, however, ominously warn that the "debate" over fingerprinting is far from settled. *Buza*, 129 Cal. Rptr. 3d at 1445 ("The view of DNA testing as analogous to fingerprinting is also problematic because the practice of fingerprinting has never been subject to Fourth Amendment analysis under tests that might be used to analyze the constitutionality of DNA sampling") (citations omitted); *see also King*, 42 A.3d at 596.

of 2011 alone, contributing to a 125 percent increase in hits.[4] Even though Maryland's equivalent provision only aided 58 investigations total, Justice Roberts concluded in granting Maryland's application for a stay of a decision invalidating its law that "[c]ollecting DNA from individuals arrested for violent felonies provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population." *Maryland v. King*, ___ S. Ct. ___, 2012 WL 3064878 (Roberts, Circuit Justice, 2012).

Finally, as the facts in *King* demonstrate, it is vital that law enforcement officials obtain the DNA sample at arrest, before conviction. King's DNA sample was collected when he was arrested on assault charges. Pursuant to an *Alford* plea, he was found guilty of a misdemeanor charge; accordingly, his DNA sample would have never been collected but for Maryland's statute authorizing officers to collect a sample at arrest. 42 A.3d at 553 & n.3. That sample, however, enabled police to connect King to an unsolved rape. *Id*. at 553. Similarly, press reports indicate that law enforcement officers in Morgan Hill, California were led to Sierra LaMar's accused killer through a crime scene sample that matched the accused's

[4] http://oag.ca.gov/bfs/prop69/faqs

DNA profile, which had been collected after an earlier unrelated arrest on obstruction of justice charges. Julia P. Sulek et al., *Missing Teen's DNA in Car Led to Arrest; While Sheriff's Office Remains Convinced of Murder, Family Holds Out Hope Girl Is Alive*, San Jose Mercury News, May 23, 2012, at 1A. Such cases, as well as those highlighted by the panel majority, *Haskell II*, 669 F.3d at 1064, help illustrate why the government's compelling interest in collecting a forensic DNA sample at arrest outweighs any interest an arrestee may have in the privacy of his identity.

## CONCLUSION

The decision of the district court should be affirmed.

Dated: August 31, 2012

Respectfully Submitted,

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☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

August 31, 2012
Dated

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

# CERTIFICATE OF SERVICE

Case Name: **Elizabeth Aida Haskell, et al. v. Kamala Harris, et al.** No. **10-15152**

I hereby certify that on August 31, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**APPELLEES' SUPPLEMENTAL BRIEF**

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 August 31, 2012, at San Francisco, California.

| Susan Chiang | s/ Susan Chiang |
|---|---|
| Declarant | Signature |

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