

No. 12-207

IN THE
Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

*ON WRIT OF CERTIORARI TO THE
MARYLAND COURT OF APPEALS*

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL
LIBERTIES UNION, ACLU OF MARYLAND, AND
ACLU OF NORTHERN CALIFORNIA
SUPPORTING RESPONDENT**

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INTERESTS OF *AMICI CURIAE*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Maryland and the American Civil Liberties Union of Northern California are two of the ACLU's affiliates. Like the national ACLU, they have been active participants in the debate over the expansion of DNA databanks. The ACLU of Maryland participated as *amicus* in this case before the Maryland Court of Appeals, and was instrumental in leading the legislative effort to oppose the bill at issue.

The ACLU of Northern California is currently litigating the constitutionality of California's arrestee-testing law, a statute that is even broader than the Maryland statute here at issue and has helped make California's database the third-largest DNA database in the world, after the United States' combined database and the United Kingdom's. That case, *Haskell v. Harris*, contains an extensive factual record about arrestee testing, statistics bearing on its efficacy, and the privacy issues it raises. See *Haskell v. Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2010) ("*Haskell I*"). It is currently before an *en banc*

¹ The parties have submitted blanket letters of consent to the filing of *amicus* briefs in this case. No counsel for a party has written this brief in whole or in part, and no one other than *amici*, their members or their counsel has made a monetary contribution for the preparation or submission of this brief.

panel of the Ninth Circuit on Plaintiffs’ appeal of the district court’s denial of preliminary injunctive relief. *See Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), vacated as moot, r’hrq *en banc* pending, 686 F.3d 1121 (2012) (“*Haskell II*”). After hearing argument, the Ninth Circuit stayed proceedings pending this Court’s decision here.

SUMMARY OF ARGUMENT

Amici fully endorse Respondent’s argument that the compulsory extraction and analysis of a person’s DNA is a search, and that the searches here at issue do not fall within any exception to the warrant requirement. Rather than repeating that discussion, this brief focuses on four discrete points.

First, contrary to the government’s argument, DNA is not used to identify arrestees. *See People v. Buza*, 129 Cal. Rptr. 3d 753, 773 (Cal. App.), rev. granted, 262 P.3d 854 (Cal. 2011) (“DNA is not used to verify who a person is” at arrest.).² The federal Combined Online DNA Index System (CODIS) does not allow for the routine comparison of arrestee samples with other known samples, which would be a necessary part of using the database to identify arrestees. Instead, DNA collected from arrestees is compared only with crime-scene samples. DNA

² The California Court of Appeal’s opinion in *Buza* contains a more thorough and accurate discussion of the factual and legal issues surrounding arrestee DNA testing than any other judicial opinion. The California Supreme Court has deferred further action in *Buza* while this Court considers the present case.

collection is therefore used solely to investigate unsolved crimes.

Second, arrestee testing implicates serious privacy concerns. It involves a bodily intrusion for an individual's genetic blueprint, and the information it reveals is increasingly used for familial searching, thus extending its reach far beyond the actual person arrested. In addition, the arguments advanced in support of arrestee testing have no obvious limiting principle. If DNA testing is (improperly) justified as a form of identification, like fingerprinting, then it is easy to imagine the day when the government will argue that DNA testing is appropriate in other situations where the government seeks to establish someone's identity. Indeed, that has been the history of fingerprinting, which began as a criminal justice tool and has now migrated to other uses.

Third, even if the government's general interest in solving crimes were adequate cause for an exception to the warrant requirement, taking DNA from people who are innocent before the law does not substantially serve this purpose. Although neither the federal government nor the states have been willing to release the data that would be needed to conduct a definitive analysis of databank efficacy, research from the RAND Corporation and the United Kingdom shows it is primarily the size of the *crime-scene* database that controls the efficacy of DNA databanks, so long as the known-offender database is populated with a sufficient number of persons who are actually involved in criminal activity. Thus, taking DNA from mere arrestees –

approximately 1/3 of whom (in California at least) will never be convicted of any criminal offense and 19% of whom will not even be charged with a crime – fails to contribute substantially to the states’ efforts to solve more crimes. As the RAND researchers concluded, “focusing on uploading proven offenders and crime-scene profiles has a greater impact on database matches (“investigations aided”) than uploading suspected offenders at the point of arrest.” Jeremiah Goulka, Carl F. Matthies, Emma Disley, and Paul Steinberg, *Toward a Comparison of DNA Profiling and Databases in the United States and England* (RAND 2010) at 18, available at http://www.rand.org/content/dam/rand/pubs/technical_reports/TR918.pdf.

Furthermore, many of the same cases that the State and its *amici* present here as purported proof of the value of arrestee testing were carefully considered by the *Haskell* court, which concluded “that mandatory testing at these offenders’ first convictions would have generated the same result.” *Haskell I*, 677 F. Supp. 2d at 1201 (internal quotation marks omitted).

Fourth, many DNA laws are even broader than Maryland’s. California, for example, seizes and searches the DNA of everyone arrested for *any* felony, including crimes such as stealing \$250 worth of fruits or nuts from a farmer’s field, unlawfully subleasing a car, or simple drug possession. The federal government takes DNA from persons arrested even for minor misdemeanors, which can include people arrested for walking a dog off-leash or distributing leaflets without permission. Like many

states, both of these jurisdictions analyze and upload into CODIS the DNA samples of every eligible arrestee, including those never charged with a crime, without any judicial involvement. And most states and the federal government lack any provision for automatic expungement for persons who are not convicted. Although Maryland's law is narrower than these other states', Petitioner's arguments, and those of its *amici*, are crafted to try to justify these much broader laws, with no limiting principle. In fact, if these arguments were correct then the government's authority to collect DNA would extend far beyond arrestees. Rather than accepting these overbroad arguments, this Court should restrict the government's authority to engage in suspicionless, warrantless collection of DNA to those who have crossed our criminal-justice systems' most fundamental line: conviction. Seizing and searching the genetic blueprint of Americans who have not been convicted of a crime should continue to require a warrant supported by probable cause.

ARGUMENT

I. DNA IS NOT A TOOL FOR IDENTIFYING ARRESTEES

Although the State and many of its *amici* frame their use of DNA as a means of "identification," this position rests on "an uncommonly capacious definition of 'identification.'" *Buza*, 129 Cal. Rptr. 3d at 771. In reality, the *only* reason the government is seizing DNA samples from arrestees is to connect them to unsolved crimes. Indeed, the structure of CODIS and the way that the

government takes and processes arrestee DNA samples renders the government incapable of using these samples to “verify who a person is,” in the sense of determining his name, criminal record, or outstanding warrants.³ *Id.* at 773. Several aspects of the program demonstrate this:

As an initial matter, like California and other states, Maryland expressly requires that the police identify an arrestee using an electronic fingerprint at the time they seize his DNA and then relies on this fingerprint identification to track the DNA sample. *See* Md. Code Regs. § 29.05.01.04(K); *accord Buza*, 129 Cal. Rptr. 3d at 773 (“[t]he individual collecting a sample shall verify the identity of the individual from whom a sample is taken[.]”). 99.6% of these identifying fingerprints are sent electronically to the FBI to process through its Integrated Automated Fingerprint Identification System (IAFIS).⁴ Within minutes, the FBI responds

³ A careful reading of the briefs submitted by the State and its *amici* confirm this: despite their continual references to “identification,” no one contends that the police are actually using arrestee DNA to determine whom they have arrested, or explains how the police could do this.

⁴ *See* http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts; *see also* Md. Code Regs. § 29.05.01.04(L). “AFIS systems are the primary identification tool for virtually every law enforcement agency in the United States.” Peter Komarinsk, *Automated Fingerprint Identification Systems (AFIS)*, at 4 (Elsevier 2005); *see id.* at 112-14 (discussing tenprint identification procedures). For a detailed discussion of AFIS, *see id.* and U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, *The Fingerprint Sourcebook*, Chapter 6, at <http://www.nij.gov/pubs-sum/225320.htm> §§ 6.2.4, 6.4.2 (2011).

with the identity of the arrestee or a report that the person's fingerprints are not on file (which also means that no DNA sample would be on file).⁵ This system provides "results that are better than 99% accurate";⁶ with proper procedures, "the accuracy rate can exceed 99.97%."⁷ Thus, arrestees are nearly always identified through fingerprints at the time they are providing a DNA sample, long before that

⁵ The FBI reports that it processed 58 million tenprint submissions in 2012, 55% of which were criminal inquiries. *See FBI, IAFIS Fact Sheet*, available at http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_facts. Its average response time to those requests for a person's criminal history was less than five minutes. *See id.* (data for November 2012 "Criminal Electronic (CAR) Fingerprint Submissions"); *cf. Buza*, 129 Cal. Rptr. 3d at 773 & n.18.

⁶ *The Fingerprint Sourcebook*, *supra* n.4, § 6.2.1.1. If there were a problem with this fingerprint identification, DNA could not cure it, because the FBI's entire criminal-records system relies on the accuracy of fingerprint identification; each record in that system is created and updated through the submission of arrestee fingerprints. *See* http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis_services ¶¶ 1, 3; *see also* <http://www.fbi.gov/about-us/cjis/background-checks> ("An FBI Identification Record—often referred to as a criminal history record or a "rap sheet"—is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests....").

⁷ *Automated Fingerprint Identification Systems (AFIS)*, *supra* n.4, at 122. This type of comparison involving two full sets of scanned fingerprints should be contrasted with those involving latent prints taken from crime scenes, which are often incomplete and may result in errors. *See id.* at 114. It is important to note, too, that DNA databank comparisons are far from error-free, which is why the initial database match is used only to show probable cause, not as evidence of guilt. *See* Md. Code Regs. § 29.05.01.12.

sample could possibly be used to identify them.⁸ In fact, jurisdictions including Maryland, California, and the federal government specifically waive collection of DNA from arrestees whom the government has identified as having already provided a sample. *See Buza*, 129 Cal. Rptr. 3d at 773; 73 Fed. Reg. 74932, 74941 (“to the extent that individuals entering the system through arrest or detention previously have had DNA samples collected . . . repetitive collection is not required.”); 28 C.F.R. § 28.12(e)(2); Md. Code Regs. § 29.05.01.04B(4). These provisions would make little sense if the police did not identify arrestees before seizing their DNA.

Maryland’s requirement that the government not analyze an arrestee’s DNA sample until after arraignment confirms that it does not use DNA to identify arrestees. “Arraignment” refers to a defendant’s first appearance in the circuit court. Md. Code Regs. § 29.05.01.01(B)(1). It occurs only after a defendant has had (or waived) a preliminary hearing in the district court, or when an arrest warrant or indictment has issued. *See* Md. Rules, Rule 4-201(c), 4-213. Thus, although Mr. King’s DNA was seized on April 10, 2009, it was not sent

⁸ In those rare cases where the police are not able to use fingerprints to identify the arrestee at the time they seize his DNA (because the person’s fingerprints are not on file), the sample itself is labeled with the arrestee’s fingerprints, and “[t]hese prints shall be used by the laboratory to check the individual’s identity.” Md. Code Regs. § 29.05.01.04(L). The fingerprints are then used to track the stored sample. *See id.* § 29.05.01.07(C).

for analysis until June 25, 2009. *See* J.A. at 71. By that time, the government had long since identified Mr. King by his fingerprints.

Finally, there is no mechanism for using DNA to identify an arrestee. Arrestees' (or convicted persons') DNA CODIS profiles are never compared with other known profiles; they are compared only against crime-scene samples. The only "hits" that CODIS generates are between an offender profile and a crime-scene profile, or between two crime-scene profiles.⁹ If the police were, in a specific case, to manually compare an arrestee's DNA profile against the known-person database and get a hit, the only information they would obtain is the CODIS ID number and the name of the laboratory that analyzed it. They would have to contact that lab to obtain the name of the person to whom that profile belonged. *See Buza*, 129 Cal. Rptr. 3d at 773.¹⁰ This

⁹ *See* <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

¹⁰ Using the database to identify arrestees seems to be prohibited: the FBI's Privacy Impact Assessment for CODIS, issued pursuant to 5 U.S.C. § 552a, lists the intended uses of the CODIS system and specifically states that the FBI is collecting DNA profiles only for the purposes of seeking matches between the offender index and the crime-scene index, or within the forensic index, not matches within the known-person index. Privacy Impact Assessment, National DNA Index System (DNS) (2004), ¶¶ A-C, available at <http://www.fbi.gov/foia/privacy-impact-assessments/dns>. Similarly, Maryland lists the permissible purposes for collecting and testing samples and specifically forbids "use for any purposes other than those specified," but the only identification purposes allowed involve missing persons or human remains. *See* Md. Code, Pub. Safety § 2-505(b)(2).

would entail another delay of at least three weeks while the lab confirms the match. *See* RAND 2010 at 10.

In sum, the State's own "protocol for DNA collection and analysis confirms that DNA is not used to verify who a person is." *See Buza*, 129 Cal. Rptr. 3d at 773. The *only* reason the State is collecting arrestees' DNA is to try to connect them with past or future unsolved crimes when it lacks probable cause for a warrant. As such, the State's assertion that arrestees lack the right to remain anonymous is irrelevant. The State is not seeking to overcome anyone's claim of anonymity; it is seeking evidence of unsolved crimes.

II. THE STATE CANNOT MEET ITS BURDEN UNDER A TOTALITY-OF-THE-CIRCUMSTANCES TEST

As discussed in Respondent's brief, settled Fourth Amendment doctrine prohibits the warrantless, suspicionless collection of DNA from persons merely arrested on suspicion of a crime. However, even under a totality-of-the-circumstances test, the compulsory search and seizure of DNA from arrestees is unconstitutional because the individual's privacy interests significantly outweigh the marginal benefits in solving crime from taking DNA from arrestees.

The government bears the burden to justify a warrantless search: here to show either that seizing DNA from persons who have never been convicted of a crime fits within an established exception to the

warrant requirement, *United States v. Jeffers*, 342 U.S. 48, 51 (1951), or to establish that this is an “exceptional situation” that merits a new exception to that requirement, *Mincey v. Arizona*, 437 U.S. 385, 390-91 (1978). Holding the government to this burden is particularly appropriate in a case such as this one where the government alone has access to the data that are needed to fully evaluate the efficacy of taking DNA at arrest, rather than from only those persons who are actually convicted of a crime.¹¹ Neither Petitioner nor any of its *amici* have met that burden.

A. Compulsory DNA testing implicates significant privacy interests

1. DNA sampling involves a significant physical intrusion into the body

On a purely physical level, the compulsory extraction of DNA by means of a blood draw or a buccal swab is more invasive than, for example, a search of a person’s clothing or possessions, and the government’s burden of justifying it is therefore

¹¹ As the RAND researchers lamented,

Most of our data requests were denied, and several organizations that promised data did not provide any or all of what was promised. It appears that many of the key elements of data that would be essential for policy analysis in the field of forensic DNA analysis do not exist, while other elements are not easily accessible.

RAND 2010 at 3.

commensurately higher. The federal protocol for collecting DNA using a buccal swab calls for the officer to first insert the swab into the subject's mouth, use it to "soak up as much saliva as possible by running the applicator along gum-line, at fold line in cheek, and under tongue," "[t]hen, swab inside of cheeks for 15 seconds, and then swab the cheek for 15 seconds, and then to repeat the entire procedure." FBI, Whatman EasiCollect™: Collection of Buccal Samples, available at http://www2.fbi.gov/hq/lab/images/easicollect_hires.jpg. As this Court has explained, "search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned." *Schmerber v. California*, 384 U.S. 757, 770 (1966).

2. Nonconsensual DNA sampling implicates serious genetic privacy interests

More importantly, taking biological samples for the purpose of DNA analysis raises additional issues relating to privacy. "One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998). DNA is our genetic blueprint, and with every passing year science learns how to unlock its secrets to discover more and more about us.¹² Beyond the

¹² The Court's Fourth Amendment analysis "must take account of more sophisticated systems that are already in use or in development." *Kyllo v. United States*, 533 U.S. 27, 36 (2001).

fact of bodily intrusion, the scientific examination, combined with the indefinite retention of the actual DNA samples for later re-analysis, implicates fundamental privacy interests protected by the Fourth Amendment. *See United States v. Kincade*, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting) (“[I]t is important to recognize that the Fourth Amendment intrusion here is not primarily the taking of the blood, but the seizure of the DNA fingerprint and its inclusion in a searchable database.”). With our genetic makeup, as with our homes, “all details are intimate details, because the entire area is held safe from prying government eyes.” *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

These privacy concerns are magnified where collection is mandatory and done in a law enforcement context, rather than a therapeutic, voluntary, medical one. As Congress recognized when it passed the Genetic Information Nondiscrimination Act of 2008, Americans want to have their genetic information used for medical purposes, but at the same time we worry that this same information could be misused by governmental or private entities.¹³ Research by the Johns Hopkins University Genetics and Public Policy Center found that although 86% of Americans surveyed would trust their doctors with their genetic test results, more than half (54%) stated that they had little or no trust in law enforcement having access to this

¹³ Genetic Information Nondiscrimination Act of 2008, PL 110-233, 122 Stat 881 § 2 (findings) (2008).

information.¹⁴ A more recent survey conducted by the Center in 2008 found that 84% of Americans indicated that it would be important to have laws protecting genetic research information from law enforcement access.¹⁵ Our society plainly recognizes the paramount importance of protecting our genetic privacy from infringement by law-enforcement officials.

That the government claims it will use DNA collected under this program only for law-enforcement identification purposes does not eliminate these concerns. The Fourth Amendment does not allow the government to seize and warehouse our personal papers just because it promises not to examine them, and the rule should be no different with our genetic blueprint. The same pressures that lead to violations of the Fourth Amendment and other statutory or legal privacy protections in more traditional investigations exist in our nation's crime labs, whether run by government or private contractors. For example, an investigation of the Houston, Texas crime lab found multiple instances of misconduct, including cases

¹⁴ U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination, at 2, available at http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf; see generally E.W. Clayton, *Ethical, legal, and social implications of genomic medicine*, N. Engl. J. Med. 349 (2003).

¹⁵ David J. Kaufman et al., *Public Opinion about the Importance of Privacy in Biobank Research*, 85 Am. J. Human Genetics (Nov. 13, 2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2775831>.

where analysts “reported conclusions, frequently accompanied by inaccurate and misleading statistics, that often suggested a strength of association between a suspect and the evidence that simply was not supported by the analyst’s actual DNA results” and other instances where lab personnel simply fabricated test results.¹⁶ Researchers who have long sought support for their claims that certain genetic traits or mutations lead to criminal behavior may well see DNA databanks as both a source of research samples and as a way to implement their theories, designating certain arrestees as more likely to offend based on their genetic profiles.¹⁷

3. The use of familial searching illustrates how DNA testing can invade privacy

Both the federal government and many states already allow CODIS to be used for so-called familial searching.¹⁸ In familial searching, law enforcement

¹⁶ Michael R. Bromwich, Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room, at 5 (June 13, 2007), available at <http://www.hpdlabinvestigation.org/reports/070613report.pdf>.

¹⁷ See Gina Kolata, *Seeking Answers in Genome of Gunman*, The New York Times (Dec. 25, 2012) at D5, available at <http://www.nytimes.com/2012/12/25/science/scientists-to-see-clues-to-violence-in-genome-of-gunman-in-newtown-conn.html>.

¹⁸ As of 2010, 19 states had approved or reported the use of a partial match in an effort to associate a crime-scene profile with the family member of a person whose profile is in CODIS, although 15 of these states prohibit the police from deliberately using CODIS to engage in familial searching. See Natalie Ram,

uses the DNA database to focus on a person whose DNA does not match the crime-scene evidence – and who is therefore demonstrably innocent of the crime – because that profile is *similar* to DNA taken from a crime scene, based on the hope that the culprit may be related by blood to the known person who provided the similar sample.¹⁹ The California protocol for familial searching in the CODIS database allows the government to create an “initial candidate list” comprising up to 168 individuals whose DNA profiles are similar to the one obtained from the crime-scene sample.²⁰ These samples are then subject to further investigation and analysis. “As part of this process the initial candidate list of offenders’ DNA samples will be profiled for Y-STR

Fortuity and Forensic Familial Identification, 63 Stan L. Rev. 751, 767-71 (Apr. 2011). The federal government allows states to engage in familial searching but does not itself use the technique in the national database. See Sheldon Krimsky and Tania Simoncelli, *DNA Databanks, Criminal Investigations, and Civil, Liberties*, at 76-81 (Columbia Univ. Press 2011); *FBI, Familial Searching*, available at <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/familial-searching>.

¹⁹ See Henry T. Greely, Daniel P. Riordan, Nanibaa’ A. Garrison, Joanna L. Mountain, *Family Ties: The Use of DNA Offender Databases to Catch Offenders’ Kin*, *Journal of Law, Medicine & Ethics*, 34:248-262 (Summer 2006).

²⁰ Cal. Department of Justice, Division of Law Enforcement Information Bulletin 2008-BFS-01, *DNA Partial Match (Crime Scene DNA Profile to Offender) Policy* (April 24, 2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1548_08-bfs-01.pdf.

type, meaning that they will be retested to check for a specifically paternal relationship.”²¹

This means that a person whose DNA is included in the databank may find himself subject to having his sample further analyzed at any time in the future simply because it, along with 167 other samples, is similar to one found at a crime scene. And, if this further analysis fails to exclude him as a potential family member of the person who left the sample at the crime scene, he – and his family – may be subject to other forms of investigation as well, investigation that could reveal previously unknown family relationships and disrupt the lives of completely innocent individuals and families.²² Thus, the government is already using DNA databanks in ways that are vastly more intrusive of personal and familial privacy than fingerprinting or many types of more conventional searches could ever be.

²¹ *Id.* at 27.

²² *Id.* (“Any offenders [with DNA profiles in CODIS] not eliminated by the Y-STR type comparison could be patrilineally related to the true perpetrator and will be candidates for further investigation and consideration as potential genetic relatives of the true perpetrator.”). For a discussion of the effects that familial searching and the subsequent follow-up investigation may have, see Krinsky and Simoncelli, *supra* n.18 at 83-88.

4. The Government's indefinite retention of the physical DNA samples poses a distinct danger to genetic privacy

As California's familial searching protocol shows, the reason many jurisdictions maintain the biological samples indefinitely is to allow them to conduct future analyses whenever they choose to do so. Only nine of the states that collect DNA from arrestees automatically expunge samples from individuals who are not eventually convicted.²³ The other states and the federal government retain these samples even when the subject has never been convicted, or even charged, of any crime, unless he completes what may be "a lengthy and burdensome expungement process that is far from guaranteed to succeed." *Buza*, 129 Cal. Rptr. 3d at 782-83; see 42 U.S.C. § 14132(d); http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis_expungement. As discussed below, this means that nearly 100,000 people every year in California alone will likely have their DNA seized and permanently databanked, even though they are never convicted of anything.

5. The State's rationale for testing would allow it to take DNA from people who have not even been arrested

²³ See RAND 2010 at 6. Maryland's automatic-expungement provision that it emphasizes in support of its law is thus unusual.

If Petitioner’s claim that DNA is nothing more than a high-tech fingerprint used for identification purposes were correct (which it is not), it would potentially justify taking, analyzing, and databanking the DNA of huge classes of people who have never even been arrested. Most directly, Petitioner and many of its *amici* cite this Court’s decision in *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004), as support for using DNA to “identify” arrestees. *Hiibel*, however, held that the police may require persons whom they merely *detain* based on less than probable cause to identify themselves; if *Hiibel* justifies seizing DNA from persons *arrested* for crimes, it must also justify seizing DNA from every person who is merely detained.

And if, as the State suggests, DNA sampling is simply a better, non-intrusive way to identify individuals, the pressure will inevitably grow to expand its use beyond law-enforcement. We must identify ourselves when we file our taxes, or simply because we are residents of the United States in a census year. Americans in these situations have no more right to “conceal” their identity (as the government puts it) than do arrestees or detainees. Even when it is not an absolute requirement, identifying ourselves to the government is often a necessary part of participating in modern life – enrolling in school, applying for a drivers’ license, passport, or firearm license, sitting for the bar, or entering federal buildings. Many of these already require fingerprinting, which – like DNA testing –

was initially used only in the criminal-justice system.²⁴

As our nation's experience with fingerprints and Social Security Numbers demonstrates, government identification databases tend to expand far beyond the uses that were initially used to justify them and authorized by the legislature.²⁵ In less than 25 years CODIS has expanded from including samples only from persons convicted of serious felonies, to the now-routine collection of DNA from persons convicted of any felony, to samples from persons who have not been convicted of anything but have merely been arrested for minor offenses.²⁶ There is little reason to think that this rapid

²⁴ See Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals' Constitutional Rights?*, 11 Wm. & Mary Bill Rts. J. 1273, 1279-82 (2003). Some states require that aid recipients submit to fingerprinting. See Kaaryn Gustafson, *The Criminalization Of Poverty*, 99 J. Crim. L. & Criminology 643, 675 (2009).

²⁵ See *supra* n.23; Carolyn Puckett, The Story of the Social Security Number, Social Security Bulletin, Vol. 69 No. 2, 55, (2009), available at <http://www.ssa.gov/policy/docs/ssb/v69n2/v69n2p55.html> ("Created merely to keep track of the earnings history of U.S. workers for Social Security entitlement and benefit computation purposes, [the Social Security Number] has come to be used as a nearly universal identifier.").

²⁶ See Michael T. Risher, Racial Disparities in Databanking of DNA Profiles, in Sheldon Krimsky and Kathleen Sloan, eds., *Race and the Genetic Revolution* (Columbia Univ. Press 2011) at 49-50. These changes have increased the number of persons who are required to provide samples in California by fivefold. See *id.* at 50.

expansion will stop here. The brightest, most fundamental line in our criminal-justice system is the one that separates those who have been convicted of a crime from those who are presumed innocent. If the government's authority to take DNA without a warrant or even individualized suspicion is allowed to cross that line, "then it's hard to see how we can keep the database from expanding to include everybody." *Kincade*, 379 F.3d at 872 (Kozinski, J., dissenting).

B. Taking and databanking DNA from persons not convicted of a crime does not improve CODIS's effectiveness at solving crime

Although DNA evidence and databanks have revolutionized the criminal-justice system, the benefits of adding samples taken from arrestees, rather than persons actually convicted, is limited, in large part because it results in the collection of many samples from people who are innocent or who have committed only minor crimes where DNA evidence is rarely involved.

1. Studies from the U.K. and RAND show that arrestee testing fails to significantly improve database hit rates

The experience in the United Kingdom is instructive on the limitations of arrestee DNA collection. The U.K. has the second-largest DNA database in the world and has had an arrestee-testing program since April 2004. In 2006, the

British Home Office evaluated its program and concluded that “the number of matches obtained from the Database (and the likelihood of identifying the person who committed the crime) is ‘driven’ primarily by the number of crime scene profiles loaded on the Database,” rather than from the number of arrestee/offender profiles.²⁷ The number of DNA database matches peaked in 2002-03, just before the UK started taking DNA at arrest, and then decreased in 2003-04 and 2004-05.²⁸ Not coincidentally, the number of new crime-scene DNA profiles loaded into the system also peaked in 2002-03. A 2006 report by Dr. Helen Wallace further analyzed these statistics and concluded that arrestee testing had failed to lead to increased hits:

[I]t is the number of DNA profiles from crime scenes added to the [National DNA Database]—not the number of individuals’ profiles retained—that largely determines the number of detections. This analysis is further confirmed by comparing the DNA-detection rate with those from previous years; this number has remained relatively constant for the years for which figures are available (38% in

²⁷ Great Britain Home Office, Forensic Science and Pathology Unit, *DNA Expansion Programme 2000-2005: Reporting Achievement* (2005), at 10 ¶ 32, available at <http://www.statewatch.org/news/2006/jan/uk-DNA-database.pdf>.

²⁸ *Id.* at 12; *see id.* at 6. The U.K. had previously taken samples only from persons actually charged with crimes. *See id.*

2002/2003, 43% in 2003/2004 and 40% in 2004/2005), whereas the number of individuals' profiles kept in the NDNAD has expanded rapidly during this period (from 2 million in 2002/2003 to 3 million in 2004/2005). This implies that detections have increased since 1999 because more crime-scene DNA profiles have been loaded, not because there have been more detections per crime-scene DNA profile. If adding or keeping more DNA from individuals rather than from crime scenes were important, the DNA detection rate—the likelihood of making a detection—would have increased as the NDNAD expanded.²⁹

Dr. Wallace submitted a declaration in the *Haskell* case that updated her research, concluding that “it is likely that California’s expansion of mandatory DNA testing to all adult felony arrestees . . . will not lead to a significant increase in the number of crimes being solved.”³⁰

The RAND Corporation reached the same conclusion in a 2010 report finding that:

²⁹ Helen Wallace, *The UK National DNA Database: Balancing Crime Detection, Human Rights and Privacy*, *European Molecular Biology Organization Report 7(SI)* (July 2006), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1490298>.

³⁰ *Haskell v. Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 19, Declaration of Helen Wallace, at ¶ 29.

database 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.³¹

None of the briefs filed by supporters of arrestee testing presents any independent studies that contradict the RAND report or the U.K. study. In fact, the only one of them that even attempts to present statistical support for arrestee testing is the brief of California and other states, which claims that arrestee testing has “more than doubled the crime-solving efficacy” of its database. Br. of California and Other States at 8. But the district court in *Haskell*, which had before it the actual California data through November 30, 2009, as well as additional data from government witnesses, specifically found to the contrary. *Haskell I*, 677 F. Supp. 2d at 1200-01 (“arrestee submissions contribute to the solution of crimes, but not to the same degree as convicted offender submissions.”). More recently, the California Court of Appeal also examined the documents that California presents here and rejected its argument that arrestee testing is effective at solving more crimes than testing only

³¹ RAND 2010 at 18, available at http://www.rand.org/content/dam/rand/pubs/technical_reports/TR918.pdf.

after conviction. *See Buza*, 129 Cal. Rptr. 3d at 776-77.

The RAND report also found that California’s focus on adding more known samples – rather than crime-scene samples – has led to a decrease in its databank’s efficacy. RAND 2010 at 20. Indeed, in comparison with other large states, most of which have much narrower laws, RAND noted that “California is anomalous in the relatively low number of investigations aided for such a large number of offender profiles.” *Id.* at 19. In light of these and other factors, it concluded that “a more effective means of increasing hit rates is to increase the number of crime-scene profiles uploaded into the database rather than continue to add more suspects and arrestees (and convicts to lesser crimes) to the database net.” *Id.* at 20.

The data that California presents are completely consistent with this conclusion. The increase in hits that it has experienced correlates directly to the tripling in size of its *crime-scene* database, which grew from 15,348 in January 2007 to 23,450 in December 2008 (just before the start of arrestee testing) to 50,752 as of November 2012.³² California’s analysis completely ignores this crucial

³² Compare Cal. Dep’t of Justice, Jan Bashinski DNA Laboratory Monthly Statistics, November 2012 updated monthly at <http://oag.ca.gov/sites/all/files/pdfs/bfs/Monthly.pdf>? with *Appellees’ Response to Appellants’ Request for Judicial Notice in Haskell II* (Sept. 10, 2012) at 24 of 63 and 63 of 63, available on the Ninth Circuit’s website at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000584.

fact, as well as research discussed above, and instead credits arrestee testing for its increased number of hits. This alone makes the limited data that California has chosen to present useless in evaluating the efficacy of arrestee testing.

Finally, “one must be cautious about equating more database matches with improved public protection.” RAND 2010 at 18. As one of the original CODIS architects explained in a declaration submitted in *Haskell*:

Some hits have been held at the databank laboratory; some hits have sat on an investigator’s desk; some hits have been useless . . . ; some hits are from cases where the suspect had been identified and only a confirmation is desired (i.e., not a ‘cold hit’). . . . Unfortunately, we cannot know the proportion of hits that result in assisting convictions[.]³³

2. Petitioner’s and its *amici*’s anecdotal evidence of efficacy do not support arrestee DNA collection

In the absence of research or statistics to support their claims that arrestee testing is effective at solving crimes, several of Petitioner’s *amici* instead present what they claim are examples of

³³ *Haskell v. Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 17, Declaration of Bruce Bedowle, at ¶ 26.

arrestee-testing success stories. But the district court in *Haskell* had an opportunity to examine many of these cases and case-studies – including the reports from Denver, Chicago, and Maryland, as well as the Chester Turner and Katie Sepich cases cited by several *amici* – and accorded them “little weight,” because “mandatory testing at these offenders’ first convictions would have generated the same result.” *Haskell I*, 677 F. Supp. 2d at 1201 (internal quotation marks omitted). For example, although several *amici* raise the Turner case to demonstrate that arrestee testing is useful, the reality is that Turner had been *convicted* of at least one felony long before he was required to provide a DNA sample following a more recent arrest. *See Haskell II*, 669 F.3d at 1077 (Fletcher, J., dissenting). The reason Turner escaped detection for so long was that he was not required to provide a sample when he was convicted.

The claim that arrestee testing would have prevented the wrongful conviction of another man for Turner’s crimes is nonsensical – that innocent man was convicted based on flawed *blood-typing* evidence.³⁴ Any DNA testing, had it been available, would have shown that the blood found at the scene was not his. No database of any sort was necessary.

In fact, DNA databases are generally not necessary for exonerating the innocent. *See RAND 2010* at 14. In any case where the police collect and analyze DNA from a crime scene, the same probable

³⁴ *See* DNA Saves Br. at 16; http://www.innocenceproject.org/Content/David_Allen_Jones.php.

cause that supported arrest will necessarily support a warrant to collect that arrestee's DNA for comparison with that crime-scene evidence. And, as this case shows, the government will have to collect and analyze this additional sample so that it can directly compare the resulting profile to the crime-scene evidence even if it has already obtained a database hit.³⁵ Even if the government for some reason chooses not to collect DNA from the arrestee, an innocent arrestee is free to provide a sample for independent analysis and comparison with the crime-scene evidence. *Cf.* 18 U.S.C. § 3600(a)(9) (applicant for DNA exoneration *must* agree to provide sample for comparison). Exoneration will occur when the two samples are analyzed and the direct comparison of the resulting profiles shows that they do not match, regardless of whether either profile is added to a database. *See House v. Bell*, 547 U.S. 518, 540-41 (that DNA found on victim belonged to her husband, not the habeas petitioner, was “of central importance” to claim of actual innocence). In fact, in more than half of DNA exonerations the actual perpetrator is never identified, which means

³⁵ *See* Md. Code Regs. § 29.05.01.12; FBI, Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System (CODIS hit is “used to establish probable cause” so that law enforcement can “obtain a court order authorizing the collection of a known biological reference sample from the offender”), available at <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

DNA databanks could not have been used to identify the actual culprits.³⁶

The evidence in *Haskell* also debunks the claim that arrestee testing solved the murder of Katie Sepich and exonerated a person falsely accused of that crime. The court reviewed these claims and concluded that they did not support the argument that arrestee testing could exonerate the innocent. *See Haskell I*, 677 F. Supp. 2d at 1201 n.12 (finding no “evidence that the taking of arrestees’ DNA has led to either an increase in exonerations or a decrease in false accusations/convictions”); *see also Haskell II*, 669 F.3d at 1077 (Fletcher, J., dissenting). As a declaration that DNA Saves founder Jayann Sepich submitted in *Haskell* makes clear, the man who killed her daughter was not released from custody until *after* he was convicted; seizing his DNA at conviction would have been just as effective as taking it at arrest.³⁷

³⁶ http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php.

³⁷ *Haskell v. Brown*, No. 3:09-cv-04779-CRB (N.D. Cal.), Dkt. 34, Declaration of Jayann Sepich, at ¶ 8 (“Avilla was convicted of the aggravated burglary in March 2004, but was released on bond before sentencing and promptly disappeared.”). It also appears that the murderer was at large for only a few months; most of the delay in linking him to the murder was simply due to the state’s failure to take a sample from him even after he had been sent to prison. *See* KFOX14, *Police Get Break In Katie Sepich Murder Case*, available at <http://www.kfoxtv.com/news/news/police-get-break-in-katie-sepich-murder-case/nKLbt/>.

The purported examples supporting arrestee testing that post-date the district court's decision in *Haskell* suffer from similar flaws. For example, the brief of California and other states discusses the arrest of Garcia Torres for the death of Sierra LaMar but fails to acknowledge that Torres had been convicted even before the arrest that led to his DNA being taken.³⁸ Similarly, Diego Alcalde was convicted of a crime soon after the murder to which his DNA was later connected.³⁹

The reality is that even these anecdotal examples – carefully selected by the proponents of arrestee testing and often based on incomplete media reports – provide little support for arrestee testing. Although there are doubtless some cases where taking DNA at arrest would solve a crime that would not be solved by taking a sample at conviction, so would taking DNA from any similarly-sized group of individuals. Law enforcement doubtless discovered probative evidence in many cases by conducting broad automobile searches whenever

³⁸ California discusses this fact on its own website. *Arrestee DNA Leads to Arrest of Suspect in Sierra LaMar Abduction*, available at http://oag.ca.gov/sites/all/files/pdfs/bfs/garcia_torres_sierra_lamar_abduction.pdf (“In 2010, Garcia-Torres had been arrested for a felony crime while he was on probation following a misdemeanor conviction.”).

³⁹ Tom McGhee, *Chase Suspect was in Denver Jail 6 Months*, Denver Post, Jan. 30, 2008, available at http://www.denverpost.com/perspective/ci_8118708?source=pkg. The State's brief even admits that another of its examples – Shelby Shamlin – had multiple convictions long before the felony arrest that resulted in his providing a DNA sample.

they arrested the driver, but that did not make those searches constitutional, even though drivers and passengers have reduced privacy rights. *See Arizona v. Gant*, 556 U.S. 332, 343 nn.2-3 (2009) (collecting examples). Even if there are some cases where taking DNA at arrest does solve a crime, this cannot justify a blanket rule allowing warrantless searches of hundreds of thousands of arrestees every year, particularly given the serious privacy interests at stake.

III. BECAUSE MANY JURISDICTIONS HAVE DNA COLLECTION LAWS EVEN BROADER THAN MARYLAND'S, THEY PRESENT ADDITIONAL CONSTITUTIONAL QUESTIONS BEYOND THOSE RAISED IN THIS CASE

The question presented in this case is limited to whether the State may “collect and analyze DNA from people arrested *and charged* with *serious* crimes.” As discussed above, the Court should answer this question in the negative. It is also essential to understand that other state laws are broader in scope than Maryland’s law and therefore raise critical constitutional issues in their own right. Specifically, the laws of the federal government and states like California allow collection from persons who have not been charged with anything; who may have been merely arrested for much less serious crimes than are covered by Maryland’s law; and whose samples will be analyzed, uploaded to CODIS, and retained indefinitely even if they are never charged with any crime, or are charged and acquitted. Those laws, of course, are not before the

Court. Nevertheless, they caution against a broad constitutional ruling in this case unless it is to invalidate arrestee testing in general.

A. Many jurisdictions take DNA at arrest for minor crimes

At least thirteen states take DNA at every felony arrest.⁴⁰ In California, for example, collection is required for crimes such as unlawfully subleasing a car, stealing \$250 worth of fruits or other crops from a field, or simple drug possession.⁴¹ In fact, three of the four named plaintiffs in *Haskell* were forced to provide DNA samples when they were arrested during non-violent political demonstrations. *See Haskell II*, 669 F.3d at 1066-67 (Fletcher, J., dissenting). Many of these offenses are “wobblers,” meaning that although they support a felony arrest with mandatory DNA collection, they will often bring at most misdemeanor charges. *See* Cal. Dep’t of Justice Information Bulletin 2008-BFS-02 at 2-3⁴²; *see generally* *People v. Statum*, 28 Cal. 4th 682, 685 (2002).

⁴⁰ *See* <http://www.dnaresource.com/documents/statequalifyingoffenses2011.pdf> (table summarizing state DNA collection laws).

⁴¹ *See* Cal. Penal Code §§ 487(b)/489, 570; Cal. Health & Safety Code §§ 11350, 11377; *see also* Cal. Penal Code §§ 17(a), 18 (defining felonies); Cal. Penal Code § 296(a)(2)(C) (requiring DNA collection from “any adult person arrested or charged with any felony offense.”).

⁴² Available at http://oag.ca.gov/sites/all/files/pdfs/bfs/69IB_121508.pdf?.

Federal law is even broader in that it covers persons arrested for misdemeanors.⁴³ This can include the following crimes on federal land:

- bathing at a faucet not provided for that purpose. 36 C.F.R. § 261.16(c);
- possession of alcohol. 36 C.F.R. § 261.58(bb);
- walking a pet with a leash longer than six feet. 36 C.F.R. § 261.16(j);
- distributing handbills without permission. 38 C.F.R. § 1.218(a)(9);
- illegal parking. 38 C.F.R. § 1.218(a)(12).⁴⁴

Taking DNA from persons arrested for improper leafleting or parking in front of a driveway raises concerns well beyond the case before this Court.

⁴³ 28 C.F.R. § 28.12(b) (“Any agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted”); *see id.* § 28.12(f)(2) (inclusion of samples in CODIS). *See also* 42 U.S.C. § 14135a(a)(1)(A) (authorizing, regulation). The Department of Justice specifically rejected a request from New Hampshire for “an exception to DNA-sample collection based on detention for minor, nonviolent offenses.” 73 Fed. Reg. 74932, 74941.

⁴⁴ All of these offenses are misdemeanors, punishable by up to 6 months in jail. *See* 38 U.S.C. § 901; 16 U.S.C. § 551; 36 C.F.R. § 261.1b.

B. Many jurisdictions take DNA from persons never charged with a crime

Maryland's law also differs from those of other jurisdictions in only authorizing collection from persons charged with, not merely arrested for, a crime. Other jurisdictions mandate collection "immediately following arrest, or during the booking . . . process or as soon as administratively practicable after arrest," with the samples analyzed as soon thereafter as possible. Cal. Penal Code § 296.1 (a)(1)(A); *see* 42 U.S.C. § 14135a(a)(1)(A); 28 C.F.R. § 28.12(b).

In 2011, there were 292,231 felony arrests in California.⁴⁵ Of those, 9,780 individuals (3.3%) were released by the police without referral for prosecution. Prosecutors refused to charge an additional 45,988 (15.7%) individuals.⁴⁶ Thus, 19% of those arrested for a felony were never charged with an offense. If California only seized DNA from persons actually charged with a crime, none of these 55,768 individuals would have provided a DNA sample. But under California law, all were forced to surrender their DNA though either the police or, in most cases, the district attorney had determined

⁴⁵ Cal. Dep't of Justice, *Crime in California 2011* at 50 (Table 38A, Dispositions of Adult Felony Arrests 2006-2011), available at <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd11/cd11.pdf?>.

⁴⁶ *Id.*

there were insufficient grounds for prosecution.⁴⁷ This lack of prosecutorial, much less judicial, oversight means that every individual police officer has the unreviewable discretion to force an individual to provide a DNA sample, which will be analyzed and uploaded to CODIS even if the person is never even charged with a crime: “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; cf. *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975) (noting that “a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention”).

C. Many jurisdictions analyze DNA samples without any judicial finding of probable cause

A judicial finding of probable cause is often what separates a lawful search or seizure from a warrantless one that presumptively violates the Fourth Amendment. Of course, Maryland’s law is not rendered constitutional by the provision that the State may not test DNA until after a judicial finding of probable cause, because probable cause to arrest a person for a crime does not suggest that there is probable cause to seize his DNA. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 556-57 & n.6 (1978).

⁴⁷ In California, as in most states, the decision to charge a person with a crime is made by a prosecuting attorney, not the police, although *amici* understand that in Maryland the police have the authority to file charges following a warrantless arrest. *See* Md. Rules, Rule 4-202(b), 4-211(b)(2).

But the requirement that samples not be analyzed until after judicial review does impose some check on the unbridled discretion and authority of a police officer to use an improper arrest as a means to obtain and databank an individual's DNA profile.

Jurisdictions like California and the federal government have no such safeguard. This means that:

[e]ven if the arrest is subsequently determined by a judicial officer to have been without sufficient cause, the DNA sample will have been taken and a profile developed, and the use of the profile and preservation of the sample will continue unless and until the arrestee succeeds in the cumbersome process of having them expunged. Without questioning the integrity of most law enforcement officers, it is not difficult to think that [California's] DNA Act might provide an incentive to pretextually arrest a person from whom the police desire a DNA sample.

Buza, 129 Cal. Rptr. 3d at 780.

And the government has no legitimate reason to seize and search a person's DNA before judicial review of the arrest, which must occur "as soon as is reasonably feasible, but in no event later than 48 hours after arrest." *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991). Just as the "State has no legitimate interest in detaining for

extended periods individuals who have been arrested without probable cause,” *id.* at 55, it has absolutely no legitimate interest in analyzing and databanking their DNA without some sort of probable cause. The Fourth Amendment requires that any such determination be made by a magistrate. *See Gerstein*, 420 U.S. at 114 (“Once the suspect is in custody . . . the reasons that justify dispensing with the magistrate’s neutral judgment evaporate.”). Although a judicial determination of probable cause to arrest cannot justify Maryland’s law because it does not imply probable cause to take a DNA sample, the complete absence of any judicial involvement under the federal or California statutes poses a particularly egregious threat to Fourth Amendment rights.

D. Expunging DNA samples in many jurisdictions is difficult

California, like most states, lacks automatic expungement and in fact makes it unreasonably difficult to obtain expungement. This means that in California, people who are arrested but not convicted will have “their DNA profiles remain in the state and federal databanks, and their DNA specimens and samples in the DOJ laboratory, in perpetuity, unless and until they are able to successfully negotiate a lengthy and burdensome expungement process that is far from guaranteed to succeed.” *Buza*, 129 Cal. Rptr. 3d at 782-83. This process includes a mandatory six-month waiting period; there is no right to counsel, and the court has the unreviewable discretion to deny expungement. *See id.* at 758-59, 769 n.16; Cal. Penal Code §§ 299(b)-(c);

Haskell I, 677 F. Supp. 2d at 1191-92. For people who are arrested but not charged, the statute requires that they wait until the statute of limitations has run before they can even begin the process. See Cal. Penal Code § 299(b)(1); *Buza*, 129 Cal. Rptr. 3d at 758-59. Even individuals who have been found factually innocent by a judge must follow this lengthy procedure. See Cal. Penal Code § 299(b)(3). Finally, there is no provision for notifying the innocent arrestee of whether expungement has occurred, and no remedy if the government wrongfully fails to expunge a sample. See *id.* § 299(d); *cf. id.* § 299.5(i)(2)(b).

This lack of an automatic-expungement provision has huge practical consequences. Approximately one-third of those arrested on suspicion of a felony in California – 33% or 96,410 individuals in 2011 – are never convicted of anything.⁴⁸ Under the Maryland law now before this Court, less than half of them would have their DNA taken in the first place (because they were not charged with a crime), even fewer would have their sample analyzed (because there was no judicial finding of probable cause), and none of them would have their samples retained. But under California law, all of them will have their DNA seized, analyzed, uploaded to CODIS, and maintained in perpetuity unless they successfully manage to obtain expungement.

⁴⁸ Cal. Dep't of Justice, *Crime in California 2011* at 50 (Table 38A, Dispositions of Adult Felony Arrests 2006-2011), available at <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd11/cd11.pdf?>

Thus, while *amici* strongly believe that Maryland's law is unconstitutional, the Court should be aware that the laws of many other jurisdictions sweep even more broadly and therefore present additional constitutional concerns that may not be present here.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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