No. 09-10303

IN THE

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY ARBERT POOL,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
in Case No. 2:09-CR-5
Judge Edward J. Garcia

BRIEF FOR AMICUS CURIAE DNA SAVES IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENTS PURSUANT TO FED. R. APP. P. 29(a), 29(c)(5) AND NINTH CIRCUIT RULE 29-2(a)

Pursuant to Fed. R. App. P. 29(a) and Ninth Circuit Rule 29-2(a), counsel for DNA Saves states that all parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(c)(5), counsel for DNA Saves states that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that the following persons—other than the amicus curiae or its counsel—contributed money that was intended to fund preparing or submitting the brief:

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INTEREST OF AMICUS CURIAE

DNA Saves is a 501(c)(4) non-profit association that educates policy-makers and the public about the value of forensic DNA. It was formed by Jayann and David Sepich in late 2008, marking the five year anniversary of the vicious murder of their daughter, Katie. Had a DNA sample been taken from Katie's murderer, Gabriel Avilla, upon arrest for an unrelated crime, the Sepichs would have discovered who killed their daughter only three months after her death. Instead,

Avilla remained free for over three years to victimize more daughters, while the Sepichs waited for answers. The Sepichs hope that by advocating for better DNA testing laws they can prevent other parents from asking "why?"

DNA Saves is committed to working with every state and the federal government to pass laws allowing DNA to be taken upon arrest, and to provide meaningful funding for DNA programs. In January 2007, New Mexico implemented "Katie's Law," which requires DNA profiles for most felony arrestees to be included in the database. New Mexico's DNA database program has already registered at least 196 matches of unsolved crimes to 166 individual arrestee DNA profiles. Fourteen of those matches identified suspects in unsolved murders, and 33 identified suspects in unsolved sex-related crimes. The very first arrestee sample was matched to a double homicide case, leading to a conviction.

DNA Saves is also vitally committed to ensuring that courts correctly apply the Constitution and allow legislatures to enact these sensible and effective laws. The resolution of this issue will have a direct and profound effect on DNA Saves' efforts to expand the use of DNA identification of arrestees throughout the country so that more recidivist crime can be prevented.

INTRODUCTION

DNA identification of arrestees is a crucial law enforcement tool that saves lives, prevents crimes, and protects the public and the innocent. It serves the same

purposes as fingerprinting, which has never raised any constitutional concerns as applied to arrestees. Like fingerprinting, DNA sampling under the stringent protections of the governing statute and regulations is minimally intrusive, and is useful only for identification. The only difference is it is a ***better*** means of identification that is more effective in protecting the public from recidivists.

DNA Saves believes that most of the analysis in the now-vacated panel opinion in this case is sound. However, one aspect of that opinion—the focus on Pool's status as a pretrial releasee who received a judicial finding of probable cause—is unnecessary to the decision of this case and could unduly restrict the important law enforcement and public safety concerns underlying the federal DNA Fingerprint Act of 2005 ("DNA Fingerprint Act"), Pub. L. No. 109-162, § 1004, 119 Stat. 3085, and similar state laws. Although Pool has been released pending trial, Congress (like many states) has authorized DNA identification of ***all*** arrestees, not just those indicted or released pretrial. *See* 42 U.S.C. § 14135a(a)(1)(A). And the Department of Justice has directed that DNA samples be taken, at the time of booking, from any federal arrestee subject to fingerprinting. Because DNA identification is equally constitutional as applied to all arrestees—regardless of whether they have been indicted or released pre-trial—DNA Saves urges this Court not to rely upon such distinctions in affirming the order in this

case. The status of a defendant as a pre-trial releasee is irrelevant to the constitutionality of the DNA Fingerprinting Act as applied in this or any case.

That is so because DNA identification is no different, either constitutionally or practically, from the settled practice of fingerprint identification, to which all arrestees have long been subject. Courts do not require judicial findings of probable cause before allowing ordinary fingerprinting, and the same should be true for DNA fingerprinting. In both instances, the practice serves compelling public interests and defendants have no privacy interest in concealing their identifying characteristics. Moreover, identification of arrestees involves more than knowing their names. Courts do not prohibit subjecting arrestees to ordinary fingerprinting whenever a person's name is already known, and DNA fingerprinting is no different. Nobody has a legitimate interest in concealing identifying characteristics, whether fingerprints or the thirteen so-called "junk" DNA markers that are the only information used in DNA identification. The Constitution does not prohibit the government from employing the most effective state-of-the-art identification technique available.

Given the child pornography charges against Pool, it is unsurprising that he resists DNA identification. But accepting his arguments would further no legitimate privacy concerns and would only result in countless crimes by recidivists against future victims whose lives could be saved, or injuries prevented,

by this effective identification tool. Simply put, if this Court prohibits DNA testing of arrestees, innocent people will die who would otherwise be saved and preventable harm will befall others. If there were real privacy interests at stake, perhaps these dire consequences would have to be tolerated in the higher cause of safeguarding the Constitution. But just as with traditional fingerprinting and other forms of identification, no arrestee has a protected interest in concealing his identity so that nobody can link him to crime scene evidence.

BACKGROUND

A. Like Fingerprints, DNA Testing Is Solely An Identification Tool.

For more than 100 years, law enforcement agencies have routinely collected fingerprints from arrestees. Fingerprinting not only can solve the crime for which the suspect is arrested, but maintains a record to solve other past and future crimes. *See Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007); *U.S. v. Kincade*, 379 F.3d 813, 819 (9th Cir. 2004) (en banc); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992). Fingerprints reveal nothing about a person other than the lines on his fingers, but they are an important tool because that identifying information can be matched to evidence left by a perpetrator at a crime scene.

Although fingerprinting was long the "gold standard" in identification, recent years have seen the "spectacular rise to prominence in DNA technologies in the forensic arena." Sandy L. Zabell, *Fingerprint Evidence*, 13 J. L. & Pol'y 143

(2005). DNA is the fingerprint of the 21st century. DNA identification is "one of the most important advances in criminal identification methods in decades." H.R. Rep. No. 106-900, pt. 1, at 9 (2000). "The information derived from [DNA] is substantially the same as that derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived." *Rise v. Oregon*, 59 F.3d 1556, 1559 (9th Cir. 1995). But "DNA is a further—and in fact a more reliable—means of identification" than fingerprints. *U.S. v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005). Indeed, "DNA is the most reliable evidence of identification—stronger even than fingerprints or photographs." *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004).

Here, the government requested a DNA sample from Pool before his pre-trial release under the Bail Reform Act, 18 U.S.C. § 3142(b). But the government's ultimate authority derives from the DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726, amended in 2005 by the DNA Fingerprint Act. *See* 18 U.S.C. § 3142(b), (c)(1)(A), which authorizes the Attorney General to "collect DNA samples from individuals who are arrested, facing charges, or convicted." 42 U.S.C. § 14135a(a)(1)(A). Under the Attorney General's implementation, U.S. agencies are to "collect DNA samples from individuals who are arrested, facing charges, or convicted ... under the authority of the United States," 28 C.F.R. § 28.12(b), without limitation to individuals who

have received judicial findings of probable cause. With only limited exceptions, samples are collected from all individuals from whom the agency collects fingerprints. *Id*. *See* 73 Fed. Reg. 74,932, 74,934 (Dec. 10, 2008). The effect of these provisions "is to add DNA to the types of identification information that are routinely taken in booking, generally on a par with fingerprinting." U.S. Dep't of Justice, *DNA Sample Collection from Federal Arrestees and Defendants* (Nov. 18, 2010), at 2 (www.justice.gov/ag/ag-memo-dna-collection111810.pdf).

The authorized method of DNA sample collection from federal arrestees is the buccal (cheek) swab. *Id*. Pool's DNA sample would be used solely for identification purposes. Except for identical twins, each person's DNA is unique, and found in samples from blood, hair, and other body tissues and biological products. *See* U.S. Dep't of Justice, DNA Initiative ("DNA Initiative"), *About Forensic DNA* (www.dna.gov/basics). DNA can be found almost anywhere, such as on eyeglasses, a cigarette, a bite mark or a ligature; only a tiny sample is needed. DNA Initiative, *Identifying DNA Evidence* (www.dna.gov/basics/evidence collection/identifying).

Pool's sample will be provided to the FBI for analysis and inclusion in the Combined DNA Index System ("CODIS"). 42 U.S.C. § 14135a(b); 28 C.F.R. § 28.12(f)(2). CODIS includes only a very small amount of identifying information for each individual, referred to as a DNA profile or DNA fingerprint. DNA

profiles include only thirteen "short tandem repeat" ("STR") regions found on DNA. *See* DNA Initiative, *Research* (www.dna.gov/research). The likelihood that any two individuals, except identical twins, will have the same thirteen-loci DNA profile is smaller than one in one billion. *See* DNA Initiative, *STR Analysis* (www.dna.gov/basics/analysis/str).

DNA profiles include only non-coding DNA, sometimes referred to as "junk" DNA. *See Kincade*, 379 F.3d at 818-19; *Johnson v. Quander*, 440 F.3d 489, 498 (D.C. Cir. 2006). The thirteen STR loci identify an individual uniquely, but do ***not*** disclose traits, disorders, or dispositions. *Id*. *See* H.R. Rep. No. 106-900, pt. 1, at 27. Reflecting Congress's intent to maintain CODIS strictly as an identification tool, the "core genetic markers" used in CODIS cannot be changed unless the Department of Justice notifies Congress at least 180 days beforehand and "explain[s] the reasons for such change." Pub. L. No. 108-405, § 203(f), 118 Stat. 2271. Presently, no prediction of future disease status can be made from a CODIS profile. D.H. Kaye, *Mopping Up After Coming Clean About "Junk DNA"* at 2 (Nov. 22, 2007) (homepages.law.asu.edu/~kayed/pubs/genlaw/07-MoppingUp.pdf).

CODIS "operates much like an old-fashioned fingerprint database (albeit more efficiently)." *Johnson*, 440 F.3d at 499. Profiles are entered into CODIS at the local, state, and national levels. *See* DNA Initiative, *Levels of the Database*

(www.dna.gov/dna-databases/levels). The database contains forensic profiles, including from cases where the perpetrator is unknown, called "cold" cases, as well as profiles from convicts. In addition to the federal government, 25 states have passed legislation to allow for collection of arrestee profiles. *See* 42 U.S.C. § 14135a; DNA Resource, State DNA Database Laws (www.dnaresource.com/documents/statequalifyingoffenses2010.pdf); H.B. 3238, 79th Ill. Gen. Assem., 1st Sess. (2010-11). CODIS permits the more than 180 participating law enforcement laboratories to share and compare data by providing a central database of DNA profiles from all user laboratories, known as the National DNA Index System ("NDIS"). *See* FBI, *CODIS Combined DNA Index System* (www.fbi.gov/about-us/lab/codis/codis_brochure). Profiles in NDIS are searched weekly, and matches to forensic data are automatically returned by the software to the laboratory that originally submitted the profile. DNA Initiative, *Combined DNA Index System* (www.dna.gov/dna-databases/codis).

Matches between forensic and offender profiles can provide the identity of a suspect. *Id*. And a match made between forensic profiles can link crime scenes to each other, possibly identifying serial offenders. *Id*. When an offender hit is made, a new DNA sample is typically obtained from that suspect so the match can be confirmed by a crime laboratory before a new arrest is made. *Id*.

B. Use Of DNA Samples Is Narrowly Circumscribed By Law.

CODIS's design and the legal rules governing its operation "reflect the system's function as a tool for law enforcement identification, and do not allow DNA samples or profiles within the scope of the system to be used for unauthorized purposes." 73 Fed. Reg. at 74,933.

DNA samples may be used ***only*** (1) for law enforcement identification purposes; (2) in judicial proceedings if admissible; (3) for criminal-defense purposes; and (4) for statistical research or quality control purposes, but only if personally-identifiable information is removed. *See* 42 U.S.C. §§ 14135e(b), 14132(b)(3). Defendants may receive their own profiles in charged cases, but cannot access other profile information. *Id*. § 14132(b)(3). Unauthorized disclosure or collection of a DNA sample is punishable by a one-year term of imprisonment or a fine not to exceed $250,000. *Id*. §§ 14133(c), 14135e(c). Law enforcement access to CODIS may be cancelled for failure to meet quality control and privacy requirements of federal law. *Id*. § 14132(c); 61 Fed. Reg. 37,495, 37,497 (July 18, 1996).

Participating laboratories may not upload case or donor names to CODIS. "CODIS records contain only an identifier for the agency that provided the DNA sample, a specimen identification number, and the name of the personnel associated with the analysis." *Kincade*, 379 F.3d at 819 n.8. Only the originating

laboratory can identify an individual by name, and only after there is a "cold hit" matching DNA from a crime scene to a DNA profile in the database. *See* 61 Fed. Reg. at 37,497 ("Since NDIS records contained in NDIS do not include personal identifiers of the individuals from whom the DNA samples were collected, retrieval by personal identifiers of these record subjects is not possible."). Thus, a wrongdoer who somehow gained access to CODIS would be unable to learn ***any*** information about any specific individual. The only information stored in CODIS consists of the identifying markers; it is impossible to use CODIS to match that information to a name.

Annual audit procedures ensure that participating laboratories adhere to CODIS requirements, including use and disclosure restrictions. *See* 42 U.S.C. § 14131. The DNA Advisory Board established by Congress publishes quality assurance standards for audits. *See* FBI, *Standards for Forensic DNA Testing Laboratories* (www.fbi.gov/about-us/lab/codis/stds_testlabs); *Quality Assurance Standards for DNA Databasing Laboratories* (www.fbi.gov/about-us/lab/codis/qas_databaselabs).

C. Arrestee DNA Identification Solves And Prevents Crime.

DNA identification gets results. CODIS has achieved remarkable success, in large part due to the number of available profiles. As of May 2011, the NDIS contained 9,748,870 offender profiles and 375,375 forensic profiles. FBI,

CODIS—NDIS Statistics (www.fbi.gov/about-us/lab/codis/ndis-statistics). And CODIS had produced over 144,400 hits assisting in more than 138,700 investigations. *Id*. Arrestee profiles expand the database, and enhance its ability to help solve crimes and prevent others.

Virginia, which began arrestee DNA testing in 2003, shows how arrestee profiles can assist in solving and preventing crime. As of May 31, 2011, there were 335,416 DNA samples in the state database, resulting in 7,312 hits. *See* State of Virginia, Department of Forensic Science, *DNA Databank Statistics* (www.dfs.virginia.gov/statistics/index.cfm). These hits assisted 7,161 investigations, including 561 murders and over 1000 sex crimes. *Id*. Of these hits, 670 were obtained from the Arrestee Database, with 102 of those associated with sexual assault cases. *Id*.

Arrestee DNA can catch repeat offenders before they strike again. Seventy percent of America's crime is committed by only six percent of its criminals. *See* James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 Mich. L. Rev. 1951, 1951 n.3 (1991). From 1990-2002, 56% of violent offenders had prior convictions. U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Felons In Large Urban Counties* (bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf). And this does not include the many crimes that are never resolved. Studies show that for every burglary conviction

obtained through DNA matches, 7.4 additional crimes are avoided. John K. Roman, *et al*., *The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes* 13 (Urban Inst. Justice Pol'y Ctr. 2008). Some serial burglars are individually responsible for more than 200 crimes a year. J.M. Chaiken *et al*., *Varieties of Criminal Behavior* 44 (1982). Sexual assault offenders commit an average of eight sexual assaults for every one detected. A. Nicholas Groth, *et al*., *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime & Delinquency 450-458 (1982).

Moreover, arrestees are far more likely than the general public to be recidivists. Approximately 77% of arrestees have prior arrests, 69% have multiple prior arrests and 61% have at least one prior felony conviction. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties* 4, 5 (bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf). By contrast, only about 6.5% of the U.S. population has ever had a felony conviction. *See* Joan Petersilia, *When Prisoners Come Home* 215 (2003) (data as of 2002).

These general statistics are borne out by individual case profiles. In 1987, Chester Turner was arrested for assault in California, but freed due to lack of evidence. At that time, California law did not require that his DNA be taken on arrest. Turner continued to terrorize a Los Angeles community and was arrested nineteen more times before being convicted of rape in 2002. Only then was his

DNA taken, and it matched evidence found on twelve rape and murder victims, the first murdered only two months after his 1987 arrest. *See* Andrew Blankstein, *et al*., *DNA Analysis Links Inmate to 12 Slayings*, L.A. Times, Oct. 23, 2004, at A1; *see also* 151 Cong. Rec. S9528 (July 29, 2005) (Sen. Kyl). Those crimes could have been prevented had Turner's DNA been taken upon his initial arrest, rather than only after a conviction.

In Texas, Christopher Dye raped three women before being arrested in 1993 for burglary. Unaware he was a serial rapist, authorities released him on bail. Over the next six months, Dye raped four more women before being arrested for burglary. After two months in jail, he raped seven more women before finally being caught. Testing Dye upon his first burglary arrest could have led to a DNA match from his first three crimes, and prevented eleven others. *See* Laylan Copelin, *Texas Legislature Expands Use of DNA Testing*, Cox News Service (June 8, 2001).[1]

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[1] *See also Chicago's Study on Preventable Crimes* (www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf); Maryland Criminal Justice Info. Sys., *Maryland Study on Preventable Crimes* (www.denverda.org/DNA_Documents/MarylandDNAarresteestudy.pdf); Denver DA, *Denver's Study on Preventable Crimes* (www.denverda.org/DNA_Documents/Arrestee_Database/Denver%20Preventable%20Crime%20Study1.pdf) (studies from Illinois, Maryland and Colorado on repeat offenders identifiable by earlier DNA testing).

This statistical and anecdotal information confirms common sense: DNA sampling upon arrest—even for non-violent crimes—prevents and solves crimes, and saves lives.

D. DNA Identification Exonerates And Reduces Unnecessary Investigations Of The Innocent.

The Chester Turner story is made even worse by the fact that another man was wrongfully convicted of three of Turner's murders based on blood-typing evidence and served eleven years in prison for crimes he did not commit. *See* Blankstein, *supra*. Had Turner's DNA been sampled upon his first arrest, this wrongful conviction likely never would have occurred. Likewise, an arrestee DNA match obtained under Katie's Law both solved the murder of an 11-year-old New Mexico girl and exonerated a mentally challenged man who had wrongfully confessed to the crime and was jailed for two years. *See Charges Dismissed Against Child Rape, Murder Suspect: DNA Test Exonerates Gonzales In Victoria Sandoval Case* (June 27, 2008) (www.koat.com/news/16732539/detail.html). Thus, DNA identification upon arrest not only catches the guilty, but can exonerate the innocent.

DNA identification also helps reduce invasions of privacy resulting from inefficiency, inaccuracy or bias in law enforcement. DNA is a "silent biological witness at the crime scene." DNA Initiative, *History of Forensic DNA Analysis* (www.dna.gov/basics/analysishistory). DNA identification does not leave

prosecutions to the memory of witnesses or the discretion of law enforcement officers and leads police immediately to the right suspect, reducing the need for intrusive investigations of the innocent and eliminating racial profiling or other biases that might otherwise creep into investigations. Moreover, unlike fingerprints, DNA profiles are stored as numeric files without any personal information or criminal background.

Lack of arrestee DNA information also prolongs investigations and the suffering of victims' families and wastes resources. A 2003 study found that analyzing the DNA evidence in 366,460 sexual assault incidents that year would have cost $366 million. But about $12.9 billion would have been saved by apprehending serial offenders early. Ray A. Wickenheiser, *The Business Case for Using Forensic DNA Technology to Solve and Prevent Crime* 58 (2004) (raywickenheiser.com/pdf/Business%20Case%20for%20Forensic%20DNA.pdf).

ARGUMENT

I. THE TOTALITY OF THE CIRCUMSTANCES TEST APPLIES TO THIS CASE.

There is no dispute among the parties that a buccal swab, albeit a minimal intrusion, is nonetheless technically a "search." *See* Appellants' Br. 20-21; Appellees' Br. 15 n.10. Therefore, the principal question is whether DNA identification of arrestees is "reasonable" under the Fourth Amendment. As this Court has held, that question is analyzed under a totality-of-the-circumstances test,

which determines the reasonableness of a search "'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *U.S. v. Kriesel*, 508 F.3d 941, 947 (9th Cir. 2007) (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)) (additional citation omitted). *See also Kincade*, 379 F.3d at 836.

Without deciding the issue, the now-vacated panel decision suggested that use of the totality-of-the-circumstances test "may" require that an individual have diminished privacy expectations as compared to the general public. *U.S. v. Pool*, 621 F.3d 1213, 1219 (9th Cir. 2010). However, the Fourth Amendment standard should not vary person-to-person. In every case, intrusion on privacy interests must be balanced against governmental interests. But regardless, arrestees have greatly diminished expectations compared to the general public in withholding their identifying information, which is the only alleged privacy interest implicated here. And this is so whether or not an arrestee has been indicted or has received a judicial finding of probable cause.

Arrestees' reasonable privacy expectations are far less than the general public's. Based on an officer's determination that there is probable cause to believe they have committed crimes, arrestees are forcibly detained and put in jail. They can be subjected to numerous intrusions—even non-abusive strip searches—

not faced by the general public. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520 (1979). And importantly, arrestees are always required—forcibly if necessary—to provide multiple forms of identification, including fingerprints, photographs, and documents, which can be matched with other information already in the government's possession to determine if the person is linked to other events. Wherever the privacy interests of arrestees may fall along a continuum, they have no greater interest in withholding the identifying information contained in the thirteen "junk" markers used in CODIS than in withholding their fingerprints. The *de minimis* inconvenience of a buccal DNA swab is just as reasonable. Courts have never demanded a judicial determination of probable cause before an individual can be fingerprinted, and the law should be no different for DNA identification.

II. DNA IDENTIFICATION SERVES COMPELLING GOVERNMENT INTERESTS.

Under the totality-of-the-circumstances test, DNA identification of arrestees is constitutional because the government's compelling interests far outweigh an arrestee's non-existent interest in resisting minimal intrusion in order to conceal his identifying information.

The government has a compelling interest in solving and preventing crimes, and DNA identification serves it by making criminal investigations more effective and efficient. "The governmental justification for [DNA] identification … relies

on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods." *Sczubelek*, 402 F.3d at 185-86 (quoting *Jones*, 962 F.2d at 307). "As with fingerprints, the collection of DNA samples at or near the time of arrest ... can serve purposes relating directly to the arrest and ensuing proceedings." 73 Fed. Reg. at 74,934. DNA identification is much more effective than fingerprinting or name searching to determine if an arrestee is wanted elsewhere and aids identification if he flees prosecution. *Anderson*, 650 S.E.2d at 706. Thus, the government has a compelling interest in obtaining DNA identification information to process the arrestee for the immediate offense, even where it learns a defendant's name by other means.

But DNA identification also serves far broader interests. As with fingerprinting, the government has a compelling interest in using DNA identification to accurately link the arrestee's identifying information to other crimes. *See Kincade*, 379 F.3d at 838; *Sczubelek*, 402 F.3d at 185 ("The interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance."). It serves the public interest by taking criminals off the streets. *Kincade*, 379 F.3d at 839 (convictions based on DNA profiling "help[] bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large").

"[W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it." *Jones*, 962 F.2d at 306. And identification is not just knowing a person's name. According to appellant, "once [Pool] was arrested, there was no need to obtain his DNA at the time of arrest to further identify him" because "[h]e was necessarily identified prior to arrest." Appellant's Reply Br. 9. *See* Appellant's Br. 32 (arguing that the government "failed to explain why the actual fingerprints taken at the time of arrest or booking are insufficient to verify identity"). But the government always takes fingerprints from arrestees even when it already knows their names by other means. Indeed, fingerprinting does not reveal a name; at most, it associates a name learned through other means if a person was ever fingerprinted before. Fingerprinting is instead used largely to ascertain if identifying information is connected with other records, and the fingerprint record is placed in a database to enable future searches. This process invades no legitimate privacy interests because only identifying information is obtained, which no arrestee ever has a legitimate right to conceal, regardless of whether the government already has other such information.

The analysis is no different with DNA identification. As this Court has held, a DNA profile "establishes only a record of the defendant's identity—otherwise personal information in which the qualified offender can claim no right of privacy

once lawfully convicted of a qualifying offense ***(indeed, once lawfully arrested and booked into state custody)***." *Kincade*, 379 F.3d at 837 (emphasis added). Traditional fingerprinting identifies a person by a particular set of lines on his fingers. Photography identifies a person by a particular set of facial characteristics. Production of a driver's license identifies a person by the license information. Likewise, DNA fingerprinting identifies a person by a particular set of otherwise meaningless DNA markers; the markers themselves constitute the person's identity. This serves the same purposes as regular fingerprint identification. The only difference is that DNA identification can often do the job better.

Virginia's experience shows the benefits of DNA arrestee sampling. In *Anderson*, 650 S.E.2d at 703, a woman was raped, sodomized and robbed while walking to work in 1991. A forensic DNA sample was taken, but the case went unsolved until 2003, when Virginia began to take arrestee DNA. *Id.* at 704. The perpetrator was arrested on unrelated charges, a DNA sample was taken and entered into a database, and a routine analysis resulted in a "cold hit" that matched his DNA to the 1991 crime. *Id*. Analogizing to ordinary fingerprinting, the Virginia Supreme Court found the original sampling constitutional.

Potential criminal victims are not the only people who benefit from arrestee DNA identification. Catalogued DNA identification "will help to exculpate individuals who are serving sentences of imprisonment for crimes they did not

commit and will help to eliminate individuals from suspect lists when crimes occur." *Sczubelek*, 402 F.3d at 185. *See also id*. ("While the presence of Sczubelek's DNA in CODIS may inculpate him in the future, it may also exonerate him."). As discussed above, DNA evidence obtained upon arrest has been instrumental in saving wrongfully convicted individuals from years of incarceration, and in preventing wrongful arrests.

DNA identification also makes the government more effective and more efficient by directly targeting investigatory resources on the guilty. *See supra* at 11-16. Communities will therefore be safer, and the innocent will face fewer police intrusions, because police will follow fewer wrong leads. *Kincade*, 379 F.3d at 839 n.38 ("use of CODIS promptly clears thousands of potential suspects—thereby preventing" unnecessary intrusions on innocent people and "'advancing the overwhelming public interest in prosecuting crimes ***accurately***'") (citation omitted; emphasis in original). Police can focus their resources on other suspects, saving taxpayers billions of dollars and freeing up strained law enforcement resources for other cases. *See* Wickenheiser, *supra*, at 58.

This Court has already recognized that DNA identification serves compelling governmental interests by supplementing other identification methods to solve crimes. *Kincade*, 379 F.3d at 838-39. Other circuits have as well. *See, e.g.*, *Sczubelek*, 402 F.3d at 186 (noting that "the collection of DNA samples will

protect society"). Fingerprinting is a useful identification tool, but it is not as effective as DNA identification. *Id*. at 185. "It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity." *Id*. (quoting *Jones*, 962 F.2d at 307). He may wear disguises or gloves or change his physical features or name. *Id*. But DNA identification "provides a dramatic new tool" for identifying perpetrators because "[e]ven a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank or left at the scene of a crime within samples of blood, skin, semen, or hair follicles." *Id*. And the government always has a great interest in checking identity by multiple means because "[t]he more ways the government has to identify who someone is, the better chance it has of doing so accurately." *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009).

Finally, the government has a compelling interest in collecting DNA samples upon arrest, rather than waiting until later. As with fingerprints, DNA identification at arrest can prevent and deter subsequent criminal conduct—benefits that may be lost if samples are not taken until conviction. 73 Fed. Reg. at 74,934. An arrestee DNA profile may match crime scene evidence from another serious crime. *Id*. Collection of a DNA sample may also provide an alternative means of ascertaining or verifying identity, where fingerprint records are

unavailable, incomplete, or inconclusive. *Id*. *See Anderson*, 650 S.E.2d at 706 (value of DNA identification of arrestees is "knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution").

We will never know the exact number of people whose lives will be saved, or crimes that will be prevented, by DNA identification of arrestees. But the data summarized above suggest that the benefits are enormous. DNA Saves appears here to advocate for these potential future victims whose lives and safety would be jeopardized if this Court prohibits this effective state-of-the-art identification method. If even a single life is lost by not allowing the government to employ this simple tool to identify recidivists before they strike again, that is one life too many. Future victims and their loved ones should not have to suffer and grieve because arrestees want to hide their identities. The illegitimate interest of arrestees in withholding their identifying information pales in comparison with the vital interests of these countless unknown future victims.

III. THE ACT IMPLICATES NO LEGITIMATE PRIVACY INTERESTS OF ARRESTEES.

A. Methods Used For Taking DNA Samples, Like Fingerprinting, Are An Insignificant Intrusion.

Like fingerprinting, DNA identification "can only be described as minimally invasive—both in terms of the bodily intrusion it occasions, and the information it

lawfully produces." *Kincade*, 379 F.3d at 838. *See Pool*, 621 F.3d at 1220 ("Precedent establishes that the physical intrusion required to take a DNA sample is minimal."). Previously, DNA samples were generally obtained by drawing blood from the arm. 73 Fed. Reg. at 74,935. But now, as in this case, they are generally collected by buccal swab. *Id*. When performed this way, DNA sampling "is perhaps the least intrusive of all seizures—it involves no penetration of the skin, pain, or substantial inconvenience." Jules Epstein, "*Genetic Surveillance"—The* Bogeyman *Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech. & Pol'y 141, 152 (2009). This procedure is a *de minimis* intrusion, especially when compared with drawing blood, which the Supreme Court has already recognized as minimally invasive. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989).

B. Samples Are Used Solely For Identification Purposes.

The intrusion on arrestees' legitimate privacy interests in their DNA identification is non-existent because only identifying information is obtained. The thirteen markers used in CODIS are useful for no purpose other than identification. As this Court has explained, they are "non-genic stretches of DNA not presently recognized as being responsible for trait coding," and were "'purposely selected'" for DNA analysis because they are not "'associated with any known physical or medical characteristics.'" *Kincade*, 379 F.3d at 818 (quoting H.R. Rep. No. 106-

900 pt. 1 at 27). Moreover, the DNA Fingerprint Act provides additional protections, mandating that authorities use and keep only those thirteen specific markers used for identification, and providing criminal penalties—including up to a year in prison—for misuse of collected information. 42 U.S.C. § 14133(c).

It is highly doubtful that a "rogue" employee would risk a career and criminal penalties to disclose confidential DNA information, and doing so poses such significant technical hurdles that it is unlikely such wrongdoing could be accomplished. *See* 155 Cong. Rec. S12904-12907 (Dec. 10, 2009) (remarks of Sen. Kyl). This is borne out by the FBI's experience. Although millions of offender profiles have been added to the NDIS database over more than ten years, and the FBI has been analyzing DNA for over twenty years, "there has never been one noted case in which a lab employee has ever made an unauthorized disclosure of DNA information." *Id*. at S12905. Therefore, "[t]he risk that lab employees will undertake such acts is not substantial enough to merit consideration in a reasoned analysis of the privacy risks posed by the operation of NDIS." *Id*.

Nevertheless, without any supporting evidence, appellant argues that "the specter of discrimination and stigma could arise where one or more STRs is found to correlate with another genetic marker whose function is known, so that the presence of the seemingly innocuous STR serves as a 'flag' for that genetic predisposition or trait." Appellant's Br. 12. He also contends that "DNA samples

can provide insights into disease predisposition, physical attributes, race and ancestry" as well as "human behaviors such as aggression, substance addiction, criminal tendency, and sexual orientation." *Id*. at 15. And he posits that the information collected could contain errors and might be insecure. *Id*. at 16-18.

A court's "job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented" and "courts base decisions not on dramatic Hollywood fantasies, ... but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record." *Kincade*, 379 F.3d at 837-38. Thus, as this Court has held, if and when "some future program permits the parade of horribles the DNA Act's opponents fear—unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics, ... we have every confidence that courts will respond appropriately." *Id*.[2] Indeed, the same potential for abuse and technological advancements exists for a DNA search pursuant to a warrant, but no court has ever disallowed such a search because of that unrealized potential.

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[2] *See also U.S. v. Karo*, 468 U.S. 705, 712 (1984) ("we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment"); *Boroian v. Mueller*, 616 F.3d 60, 70 (1st Cir. 2010) ("In the absence of any factual allegations of abuse, we cannot presume that the government has acted contrary to law and subjected Boroian's sample to new scientific analyses or other unauthorized uses."); *U.S. v. Weikert*, 504 F.3d 1 (1st Cir. 2007) (constitutionality of DNA identification should be decided based on current technology, with any challenge on the basis of potential future technology considered only if that potential is ever realized).

Appellant's fears of abuse are nothing short of fantasy. The only information stored in CODIS are the thirteen "junk" markers, which are not associated with a name. Thus, even if someone illegally gained access to CODIS, the ***only*** way to learn any genetic information about a specific arrestee would be to (1) find out where that person was arrested; (2) conspire with that agency to gain access to the physical sample taken at arrest; and (3) perform additional laboratory tests on that sample to generate additional data. There is no apparent reason why anyone would be motivated to obtain such information in the first place. But it is far-fetched to think that someone would risk criminal sanctions to carry out such an elaborate plot, which would be revealed as soon as the information were used. If someone truly had a nefarious reason to learn a person's genetic information, would be far easier to test a strand of hair or another discarded sample.

The safeguards of the DNA Fingerprint Act easily distinguish this case from *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009). There, the Court assessed the reasonableness of a blood sample taken by physical force at the discretion of an individual detective and prosecutor, with ***no*** legal or other safeguards on how it would be used or stored. *Id*. at 851-53. Here, by contrast, officers are strictly limited by law—enforced by significant criminal penalties—regarding how DNA samples may be used. As this Court has recognized, such a statutory scheme makes DNA cataloging more reasonable. *See, e.g.*, *Rise*, 59 F.3d at 1561 (noting

that rules regarding use of sample and lack of discretion for agents make DNA cataloging under the applicable statute more reasonable). Other circuits agree. *Sczubelek*, 402 F.3d at 187; *Nicholas v. Goord*, 430 F.3d 652, 670 (2d Cir. 2005).

Just as with fingerprints, DNA identification is not a search of private information for evidence of a crime. The physical evidence against which the comparison is made is not obtained through any new search but rather was abandoned at a crime scene, and an arrestee has no legitimate interest in concealing that he is the person who has those identifying characteristics. No one can assert a Fourth Amendment right to the privacy of his past criminal endeavors. *See U.S. v. Cardoza-Hinojosa*, 140 F.3d 610, 616 (5th Cir. 1998) ("the 'subjective expectation of not being discovered' conducting criminal activities is insufficient to create a legitimate expectation of privacy") (citation omitted). As with fingerprints, photographs, handwriting samples, and other forms of identification, using DNA identification to link a person with another event does not involve or justify any additional, more intrusive searches for evidence of wrongdoing.

C. Arrestees Have No Protected Privacy Interests In Concealing Their Identifying DNA Information.

As noted, arrestees have a lesser privacy interest than the general population. *See supra* at 17-18. As with fingerprinting, DNA identification of arrestees "occurs after (at a minimum) a determination of probable cause that the subject has been involved in criminal activity. That probable cause determination may have

been made by a police officer rather than an independent magistrate, but it remains a prerequisite to the seizure and sampling." Epstein, *supra* at 157.

Given these lessened interests, sampling under the Act represents no intrusion on any legitimate privacy interests. An arrestee has no protected interest in concealing his fingerprints, and even less of an interest in preventing DNA identification. By the time a DNA sample has been taken formally, an arrestee has already left his DNA all over the police station, at the place of arrest, and almost everywhere he has been. Our "DNA is exposed to the public and abandoned every time we move." *Id*. at 151. No one has a reasonable expectation of privacy in information they leave lying about. For example, there is no reasonable expectation of privacy in trash left on the curb for collection. *California v. Greenwood*, 486 U.S. 35, 41 (1988). That is because "plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id*. at 40.

DNA samples are no different. Thus, the Fourth Amendment does not prohibit police searches of DNA inadvertently provided to police even when the suspect has ***not*** been arrested. In *State v. Athan*, 158 P.3d 27, 31 (Wash. 2007), police obtained a DNA sample by posing as a law firm inviting a suspect to join a class action suit. They tested his DNA from saliva left on the return letter, and he was convicted of a 20-year-old rape and murder. *Id*. at 31-32. The Supreme Court

of Washington held that the search was reasonable because he had no reasonable expectation of privacy in the DNA information left in his saliva. *Id*. at 37. Other courts have reached similar conclusions.[3]

Given that police can lawfully test found DNA samples to determine the identity of a suspect who has not been arrested—even without statutory safeguards—it follows that the government can use minimally invasive methods to take a DNA sample from someone who has been arrested on probable cause, subject to stringent restrictions on the use of the information. DNA profiles catalogued under the Act are useful only for identification purposes, and samples cannot be used for any other purposes. And in the normal process of arrest and booking, an arrestee has just as little interest in keeping his identifying DNA information a secret as he does his name, fingerprint, or photograph.

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[3] *See*, *e.g.*, *U.S. v. Posadas*, No. 09-cr-147, 2009 WL 3021163 at *3 (D. Neb. Sept. 17, 2009) (no reasonable expectation of privacy in DNA sample on abandoned bag); *Piro v. State*, 190 P.3d 905, 912 (Idaho 2008) (suspect had little reasonable expectation of privacy in DNA taken from water bottle left in interrogation room); *Commonwealth v. Ewing*, 854 N.E.2d 993, 1001 (Mass. App. Ct. 2006) (no reasonable expectation of privacy in DNA contained on cigarette butts left in interrogation room).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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This brief complies with the word limit of Ninth Circuit Rule 29-2(c)(3) because this brief contains 6,997 words according to the word count program of Microsoft Word, including the statement of interest and all footnotes and headings but excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 7, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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