No. 09-10303

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY ARBERT POOL,

Defendant-Appellant.

On Appeal From The United States District Court For The
Eastern District of California (Garcia, J.)
No. 2:09-cr-15

RESPONSE OF THE UNITED STATES TO THE PETITION FOR REHEARING EN BANC

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INTRODUCTION

In the DNA Fingerprint Act of 2005, 42 U.S.C. § 14135a(a)(1)(A) (as amended),[1] Congress authorized the Attorney General to require an individual arrested, facing charges, or convicted of a federal offense to provide a "DNA fingerprint" for identification purposes. Congress also amended the Bail Reform Act to make a defendant's cooperation in DNA fingerprinting a mandatory condition of pretrial release. *See* 18 U.S.C. § 3142(b), (c)(1)(A). The Attorney General has implemented these statutes by requiring any federal agency "that arrests or detains individuals or supervises individuals facing charges" to obtain a saliva sample from such individuals in order to identify them. 28 C.F.R. § 28.12(b).

As the panel correctly held—and contrary to the claims of Pool and his supporting amicus—these requirements are not unprecedented and they do not violate the Fourth Amendment. It is well established that an individual who is arrested and indicted on a finding of probable cause lacks a privacy interest in his identity and is subject to routine, universal "booking" procedures designed to identify him. These procedures—which have traditionally included fingerprinting, photographing, and other means of identification—serve important government interests and have long been upheld as constitutional. DNA fingerprints are simply the technological progression of these older

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[1] Section 14135a(a)(1)(A) was amended by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, § 155, 120 Stat. 587, 611. For simplicity, we refer to both statutes as the "DNA Fingerprint Act" or the "Act."

(and less reliable) methods of identification. Moreover, as the panel properly recognized, the government's interests in accurately identifying individuals arrested and indicted on a finding of probable cause are largely the same as those underlying post-conviction collection of DNA for identification purposes, and every court of appeals (including this Court) has previously relied upon those interests in upholding federal DNA fingerprinting requirements.

The panel's decision in this case is correct, it is well supported by precedent, and it does not conflict with any other decision of this Court. The petition for rehearing en banc should be denied.

STATEMENT

1. DNA is a molecule found in virtually every living organism. It is comprised of pairs (known as "base pairs") of the chemicals adenine, cytosine, guanine, and thymine, that are replicated throughout the molecule. *See United States v. Pool*, 621 F.3d 1213, 1215 (9th Cir. 2010); *Banks v. United States*, 490 F.3d 1178, 1180 (10th Cir. 2007). In certain regions of the molecule known as short-tandem-repeat loci (or "STR loci"), the replication of base pairs "appears to 'stutter,' resulting in repeated iterations of a specific sequence of base pairs." *Pool*, 621 F.3d at 1229 (Lucero, J., concurring); *see also United States v. Kincade*, 379 F.3d 813, 818-819 (9th Cir. 2004) (en banc); *Banks*, 490 F.3d at 1180. The likelihood that two individuals will share the same sequence of base pairs at the same STR loci is "infinitesimal." *Kincade*, 379 F.3d at 819.

The repetition of base pairs at STR loci—like a person's facial features or the arches, loops, and whorls of his fingerprints—is a unique identifying characteristic, a "DNA fingerprint" that provides accurate and conclusive proof of a person's identity. Unlike traditional fingerprints or photographs, however, a person's DNA fingerprint cannot be changed, disguised, or obscured, and it is therefore a more reliable means of identification. *See Pool*, 621 F.3d at 1222; *United States v. Sczubelek*, 402 F.3d 175, 185-186 (3d Cir. 2005); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992); *see also* 42 U.S.C. § 14135, note (a)(1) (DNA is "the most reliable forensic technique for identifying criminals"); H.R. Rep. No. 106-900(I), at 9 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2323, 2325 ("DNA identification technology is one of the most important advances in criminal identification methods in decades").

The DNA identification process begins with the use of a buccal swab to collect a small amount of saliva from a defendant's mouth. *See* 28 C.F.R. § 28.12(f)(1); DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,935 (Dec. 10, 2008). The sample is then provided to the FBI, which analyzes the repetition of base pairs at thirteen specific STR loci, generates a DNA fingerprint, and loads it into a searchable database that is part of the Combined DNA Index System ("CODIS"). *See* 42 U.S.C. §§ 14132(a)(1), 14135a(b); 28 C.F.R. § 28.12(f)(2). CODIS is a national database system, created by statute and administered by the FBI, that catalogs DNA fingerprints from numerous sources, including federal and

state convicts; those arrested or indicted for a crime; and DNA samples recovered from crime scenes, unidentified remains, and relatives of missing persons. *See* 42 U.S.C. § 14132(a); *United States v. Kriesel*, 508 F.3d 941, 944 (9th Cir. 2007).[2]

Congress has gone to great lengths to assure that DNA fingerprinting is solely and strictly limited to identification. The thirteen STR loci approved for use in DNA fingerprinting are found on so-called "junk DNA," "non-genic stretches of DNA not presently recognized as being responsible for trait coding" that "'were purposely selected 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(I), at 27); *Pool*, 621 F.3d at 1215-1216, 1220 (same). The information analyzed and loaded into CODIS does not reveal anything about genetic traits, diseases, or predispositions. *See Pool*, 621 F.3d at 1221-1222, 1223 (DNA fingerprints "only . . . provide the government with the person's true identity"); *Kincade*, 379 F.3d at 837-838 (same). Indeed, it is a federal crime to use a DNA sample for such purposes. 42 U.S.C. § 14135e(c). And if a defendant's DNA fingerprint is collected and he is then acquitted, the charges against him are dropped or dismissed, or his conviction is overturned, he may have his DNA fingerprint expunged from CODIS. *See* 42 U.S.C. § 14132(d)(1)(A); *Pool*, 621 F.3d at 1220-1221.

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[2] Traditional fingerprints, too, are scanned and entered into a searchable database called the Integrated Automated Fingerprint Identification System. *See* http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis.

2. On January 8, 2009, a federal grand jury charged defendant Jerry Arbert Pool with possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B); and receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2). ER 1-2.[3] Pool pleaded not guilty, and a magistrate judge granted him pretrial release subject to several conditions. SER 1-5. For example, Pool must wear a radio frequency transmitter so that his location can be monitored by Pretrial Services; he is subject to a curfew; he cannot possess firearms; he cannot have a computer, access the Internet, change his residence, or leave the Eastern District of California without permission; and he cannot come within 100 feet of any school, park, playground, or other place primarily used by children. *Id.* at 1-2. He must also provide a DNA sample for identification purposes. *See* 18 U.S.C. § 3142(b), (c)(1)(A). Pool refused to provide this sample, contending that such a requirement violated his Fourth Amendment rights.

3. A magistrate judge rejected Pool's claims. The judge concluded that DNA fingerprinting is no different from traditional fingerprinting, photographing, and other methods of identification to which pretrial defendants have long been subject. *See* ER 13-14, 16. Applying the "totality of the circumstances" test this Court adopted in *Kincade*, the magistrate judge determined that a finding of probable cause to believe that a defendant has committed a federal crime is a "watershed event" that diminishes the

[3] References to the defendant's excerpts of record are captioned "ER." References to the government's supplemental excerpts of record are captioned "SER."

defendant's privacy interest in his identity and vests the government with compelling interests in obtaining the defendant's identifying information, thus justifying the "minimal" intrusion of collecting a saliva sample. *Id.* at 12-15. The district court affirmed the magistrate judge's decision and adopted his reasoning. *Id.* at 26-29.

4. This Court affirmed the district court's decision. Citing longstanding precedent, the panel held that individuals arrested and indicted on a finding of probable cause have long been subject to restrictions on their liberty and mandatory compliance with routine identification procedures, and that their privacy interests in their identities are greatly diminished. *Pool*, 621 F.3d at 1218-1222. The panel rejected Pool's claim that analyzing his DNA sample "could reveal much more than [his] identification," noting that the law strictly prohibits the use of DNA for such purposes and that there was no indication that any such misuse was likely. *Id.* at 1221-1222, 1223. The panel also found (again based on established precedent) that the government's interests in obtaining DNA fingerprints through the "minimal" intrusion of a buccal swab are "'undeniably compelling' and 'monumental.'" *Pool*, 621 F.3d at 1220, 1222 (quoting *Kriesel*, 508 F.3d at 949). DNA fingerprinting is the most accurate and reliable means of identification; it is highly useful in determining whether individuals are implicated in other crimes and in exonerating the innocent; it assists the government and courts in judging the appropriateness of pretrial release and the necessity of release conditions; and it helps to deter future criminal conduct while the defendant is awaiting trial. *Id.* at 1222-1223.

The panel further determined that Pool's situation was not analogous to cases in which pretrial searches were found to violate the Fourth Amendment. In *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009), for example, local police officers were held civilly liable for extracting DNA from a detainee by force (and with threats of even greater violence) for the sole purpose of solving unknown "cold cases," without statutory authority or any reasonable security concern. *Id.* at 851, 857-860. The panel noted that the situation here—a DNA fingerprint taken for recognized identification purposes pursuant to a court order and statutory booking procedures that apply to all pretrial defendants—is quite different. *Pool*, 621 F.3d at 1224-1225. In *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), the Court held that random drug tests and searches in a pretrial defendant's home were not permissible under the totality of the circumstances test because an indictment does not diminish a defendant's privacy interest in his home and the searches were not supported by a compelling government interest. *Id.* at 872-875. In contrast, a defendant's interest in concealing his identity *is* diminished by a finding of probable cause, and obtaining his identifying information as part of routine booking procedures directly furthers compelling government interests. *Pool*, 621 F.3d at 1225.

Judge Lucero concurred. He reiterated that DNA fingerprints are not functionally distinguishable from traditional fingerprints and other forms of identification, and that the "uniform burden" on all pretrial releasees imposed by federal law is no different than other booking procedures. *Pool*, 621 F.3d at 1229-1230, 1234. He further explained that

the panel's opinion did not reach other issues, such as whether an arrest without a judicial finding of probable cause could justify DNA fingerprinting, whether actual misuse of CODIS might affect the totality of the circumstances analysis, or whether the government may retain a DNA sample indefinitely. *Id.* at 1231-1233. Judge Schroeder dissented, arguing that a pretrial defendant's privacy interests are not diminished and that, because a DNA sample could be used to glean more information than just identity, the risk to privacy outweighed the government's interests. *Id.* at 1236-1238.

ARGUMENT

The panel's decision is correct, it is consistent with longstanding precedent, and it does not conflict with any decision of this Court or of the Supreme Court. The petition for rehearing en banc should be denied.

I. THE PANEL CORRECTLY HELD THAT INDIVIDUALS ARRESTED AND INDICTED ON A FINDING OF PROBABLE CAUSE MAY BE REQUIRED TO COMPLY WITH STANDARD, UNIVERSAL IDENTIFICATION PROCEDURES AS A CONDITION OF PRETRIAL RELEASE.

The collection of DNA for identification purposes, though a "minimal" intrusion, is nonetheless a "search" that must be justified under the totality of the circumstances test adopted in *United States v. Knights*, 534 U.S. 112 (2001). *Pool*, 621 F.3d at 1217-1218, 1220, 1223 n.11 (citing cases); *see also Kincade*, 379 F.3d at 821 n.15, 832 (same); *Kriesel*, 508 F.3d at 946-947 (same). Under this test, a court must balance "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree

to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-119 (quotation marks omitted).

A. The Totality Of The Circumstances Test Applies In This Case.

Pool has never disputed that the totality of the circumstances test, if satisfied, would justify the collection of his DNA fingerprint. *See, e.g.*, Def.'s Opening Br. 21-22 (conceding that totality of the circumstances test is an independent exception to the warrant requirement). Amicus contends (Br. 10-12), however, that even if the balance under the totality of the circumstances test favors the search, the Fourth Amendment is violated unless the "special needs" test is also satisfied. This Court "do[es] not review issues raised only by an amicus curiae" or issues raised for the first time on rehearing, *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998), and so amicus's argument is not properly before the Court.

In any event, amicus is wrong. The totality of the circumstances test is not an additional requirement for existing warrant exceptions, nor does it require the government to first satisfy the "special needs" balancing test. Rather, both tests are independent exceptions to the warrant requirement that apply in different circumstances. The totality of the circumstances test applies when an individual already has a diminished expectation of privacy and the government's interest in particular information outweighs the individual's interest in concealing it. *See Samson v. California*, 547 U.S. 843, 850-855 (2006); *Kincade*, 379 F.3d at 833, 836-839; *Kriesel*, 508 F.3d at 946-950. The panel in this

case recognized that "there must be some legitimate reason for the individual having less than the full rights of a citizen" in order to apply the totality of the circumstances test, and it found such a reason in the longstanding limitations that apply to pretrial defendants, including restrictions on liberty and requirements that they submit to routine booking procedures to establish identity. *See Pool*, 621 F.3d at 1219.

The special needs test, in contrast, applies to searches that are reasonable means of satisfying compelling needs apart from general crime control, even if the subject of the search is an ordinary citizen with full privacy interests. *Compare Ferguson v. City of Charleston*, 532 U.S. 67, 78-81 (2001) (urine tests of pregnant women do not satisfy special needs test where only government interest was in identifying drug users for prosecution), and *Chandler v. Miller*, 520 U.S. 305, 313-314, 319-322 (1997) (symbolism of drug testing candidates for public office not a "special need"), with *Veronia School Dist. 47J v. Acton*, 515 U.S. 646, 653-665 (1995) (upholding drug tests of student athletes under special needs test), and *United States v. Fraire*, 575 F.3d 929, 931-934 (9th Cir. 2009) (same for vehicle checkpoint designed to deter poaching in national park). None of these cases suggests, however, that the special needs test is a prerequisite to the totality of the circumstances test, and both this Court and the Supreme Court have confirmed that either test may justify a search if its requirements are met. *See Knights*, 534 U.S. at 117 (search may be justified based on totality of circumstances even if special needs test is inapplicable); *Kincade*, 379 F.3d at 832 (upholding DNA collection requirement under

totality of circumstances test rather than under special needs test); *Scott*, 450 F.3d at 872-874 (considering whether totality of circumstances test justifies warrantless search of defendant's home after rejecting special needs test).

B. A Defendant Lacks A Privacy Interest In His Identity.

Pool's assertion that collecting identifying information from an individual arrested and indicted on a finding of probable cause is "unprecedented," Pet. 1, 6, is incorrect. Traditional fingerprinting, like the collection of DNA, is a "search" under the Fourth Amendment, *see Hayes v. Florida*, 470 U.S. 811, 813-817 (1985), yet courts have long recognized that the government may collect fingerprints from pretrial defendants for identification purposes without a warrant because those individuals lack any justifiable privacy interest in their identity. As this Court observed in *Kincade*:

> "The gathering of fingerprint evidence from 'free persons' constitutes a sufficiently significant interference with individual expectations of privacy that law enforcement officials are required to demonstrate that they have probable cause, or at least an articulable suspicion, to believe that the person committed a criminal offense and that the fingerprinting will establish or negate the person's connection to the offense. Nevertheless, everyday 'booking' procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence. Thus, in the fingerprinting context, there exists a constitutionally significant distinction between the gathering of fingerprints from free persons to determine their guilt of an unsolved criminal offense and the gathering of fingerprints for identification purposes from persons within the lawful custody of the state."

Kincade, 379 F.3d at 836 n.31 (quoting *Rise v. Oregon*, 59 F.3d 1556, 1559-1560 (9th Cir.

1995)); *see also Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (Burger, J.) ("it is elementary that a person in lawful custody may be required to submit to . . . fingerprinting . . . as part of routine identification processes"); *Napolitano v. United States*, 340 F.2d 313, 314 (1st Cir. 1965) (fingerprinting individuals as a condition of pretrial release "is universally standard procedure, and no violation of constitutional rights").

The panel's conclusion that "once there has been a determination of probable cause to believe that an individual has committed a federal felony, the individual no longer has any 'right' or legitimate expectation of keeping his or her identity from the government," *Pool*, 621 F.3d at 1223, is therefore hardly novel. And every court of appeals that has addressed the question, including this one, has recognized that DNA fingerprinting is no different from traditional fingerprinting in this respect. *See, e.g.*, *Kincade*, 379 F.3d at 837 (an offender "can claim no right of privacy" in his DNA fingerprint "once lawfully convicted of a qualifying offense (indeed, once lawfully arrested and booked into state custody)"); *Rise*, 59 F.3d at 1559-1560 ("everyday 'booking' procedures routinely require even the merely accused to provide fingerprint identification," and DNA identification information "is substantially the same as that derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived"); *Jones*, 962 F.2d at 306-307 (noting "the universal approbation of 'booking' procedures that are followed for every suspect arrested for a felony," including fingerprinting and DNA collection, and concluding that "when a suspect is

arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it"); *cf. Pool*, 621 F.3d at 1229-1230 (Lucero, J., concurring) ("Despite Pool's protestations to the contrary, at present CODIS DNA profiles are essentially useless for all but identification purposes. In this respect, they are quite similar to the information gained from fingerprinting and photographing—routing booking procedures . . . the near universal acceptance of [which] casts a long shadow over this case.").[4] Indeed, the implementing regulations make clear that DNA fingerprinting is to be used in the same circumstances as (and as a complement to) traditional fingerprinting, and that the standards governing those procedures should be consistent. *See* 28 C.F.R. § 28.12(b); 73 Fed. Reg. at 74,934.

Furthermore, as the panel noted, the minimal intrusion of DNA fingerprinting occasioned by an arrest and indictment pales in comparison to the many other restrictions triggered by a finding of probable cause. *See Pool*, 621 F.3d at 1219. The government may, for example, incarcerate the defendant pending trial if he is dangerous. *Id.* at 1219-1220. If the defendant is released, he (like Pool) may be subject to a host of

[4] *See also Sczubelek*, 402 F.3d at 185-186 ("'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.'"); *Nicholas v. Goord*, 430 F.3d 652, 671 (2d Cir. 2005) ("The collection and maintenance of DNA information, while effected through relatively more intrusive procedures such as blood draws or buccal cheek swabs, in our view plays the same role as fingerprinting.").

other restrictions, such as wearing a radio frequency transmitter, abiding by a curfew, not possessing guns, and not traveling or using computers without permission. SER 1-2.

There is not, therefore, any merit to Pool's contention that only a conviction would diminish his privacy interest in his identity. Quite the contrary, once Pool was arrested and indicted for a federal felony, his identity became a matter of public interest and he could no longer refuse to comply with the routine, universal identification procedures required of all pretrial releasees.

C. The Government Has Legitimate And Compelling Interests In Identifying Pretrial Defendants.

In contrast to the diminished expectation of privacy a pretrial defendant has in his identity, the government has "'undeniably compelling' and 'monumental'" interests in identifying individuals who have been charged with a crime and are subject to its supervision. *Pool*, 621 F.3d at 1222 (quoting *Kriesel*, 508 F.3d at 949). These interests are much the same as those underlying the collection of DNA fingerprints post-conviction, which have been relied upon by this and other courts of appeals in unanimously affirming federal DNA fingerprinting requirements.

First, and most obviously, the government has a significant interest in maintaining an accurate record of those who have been charged with a federal crime and are subject to its supervision while on release. Pool contends that fingerprints and photographs are sufficient for this purpose, Pet. 7, but the panel, other courts of appeals, and Congress

have concluded differently. *See, e.g.*, *Pool*, 621 F.3d at 1222 (DNA fingerprinting "is the most accurate means of identification available"); *Sczubelek*, 402 F.3d at 184 ("DNA is a further—and in fact a more reliable—means of identification" than fingerprints); *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) ("DNA is the most reliable evidence of identification—stronger even than fingerprints or photographs"); 73 Fed. Reg. at 74,933 (same); *supra* at 3 (citing legislative findings). "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"—including by using disguises, "changed names, and even changed physical features"—and while "[t]raditional methods of identification by photographs, historical records, and fingerprints often prove inadequate" to deal with such subterfuge, DNA fingerprints are "unique to each individual and cannot, within current scientific knowledge, be altered." *Jones*, 962 F.2d at 307; *Sczubelek*, 402 F.3d at 185 (same). The fact that other, less reliable methods of identifying offenders exist does not mean that Congress is constitutionally precluded from authorizing DNA fingerprinting.

Likewise, the government has a substantial interest in determining whether an individual accused of a crime is identified as a suspect in other criminal activity. *Pool*, 621 F.3d at 1222-1223 & n.9. Knowing whether a pretrial defendant is implicated in other crimes—particularly the sort of violent crimes in which DNA evidence is often found—is important to determining whether the person may safely be released pending trial, what restrictions should be placed on the individual if he is released, and what

precautions should be taken if he is placed in pretrial detention. *Id.* at 1223; 73 Fed. Reg. at 74,934; *see also Kincade*, 379 F.3d at 838-839 (same post-conviction). Requiring DNA fingerprint information as a mandatory condition of pretrial release thus directly furthers the goals of the Bail Reform Act by helping to assure that decisions concerning pretrial placement are appropriate and align with the public interest.

The government also has more general, but equally compelling, interests in identifying perpetrators of crimes and exonerating those who are innocent—interests that exist at every stage of the criminal justice process and have been repeatedly recognized as legitimate. *See Pool*, 621 F.3d at 1222; 73 Fed. Reg. at 74,934; *see also Kincade*, 379 F.3d at 839 & n. 38 (post-conviction DNA fingerprinting justified in part because it "contribut[es] to the solution of past crimes," "helps bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large," and "help[s] absolve the innocent"); *Kriesel*, 508 F.3d at 950; *Banks*, 490 F.3d at 1188-1189; *Sczubelek*, 402 F.3d at 185; *cf. Schall v. Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted.").

Maintaining an accurate record of a defendant's DNA fingerprint also helps deter the commission of future crimes while the defendant is on pretrial release because it increases the likelihood that such violations of the terms of his release will be detected. *Pool*, 621 F.3d at 1223; 73 Fed. Reg. at 74,934; *see also Kriesel*, 508 F.3d at 949-950 (same

for post-conviction supervised release); *Kincade*, 379 F.3d at 838-839 & n.37; *Banks*, 490 F.3d at 1189; *Sczubelek*, 402 F.3d at 186. "The government's interest in preventing crime by arrestees is both legitimate and compelling," *United States v. Salerno*, 481 U.S. 739, 749 (1987), and that is particularly true of Pool, who has been accused of serious federal felonies and who, the district court found, could be safely released pending trial only if he agreed to possess no firearms and to stay away from children. SER 1-2.[5]

Pool's assertion that "the only 'identity' at issue is the attempt to identify [him] as a suspect in other crimes," Pet. 9-10, is therefore incorrect. Identifying or excluding potential suspects in other crimes is one benefit of the system, and it is a legitimate one—just as using photographs, fingerprints, and other information lawfully collected from pretrial defendants to assist in other investigations is permitted. But the panel correctly recognized, and this and other courts have repeatedly agreed, that the federal DNA fingerprinting system serves many other compelling purposes.

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[5] Amicus contends (Br. 7 n.4) that the government cannot realize its objectives because of "huge backlogs" in processing DNA samples. Amicus made the same argument before the panel, *see* Amicus Panel Br. 23-24, based on a report concerning backlogs in *state* laboratories as of 2007. *See* U.S. Dep't of Justice, *Audit of the Convicted Offender DNA Backlog Reduction Program* 15-17 (2009). This report casts no doubt on the FBI's capacity to promptly analyze samples collected from federal arrestees, defendants, and convicted offenders.

II. THE PANEL'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF THE SUPREME COURT.

As the panel explained, its decision in this case is fully consistent with cases holding that searches of pretrial defendants violated the Fourth Amendment, and nothing in the panel's opinion calls into question the continued validity of those decisions. *See Pool*, 621 F.3d at 1224-1225.

In *Friedman*, 580 F.3d 847, a defendant who was in police custody refused to provide a DNA sample to Las Vegas police officers, at which point the officers chained him to a metal bar, threatened to beat him and "hurt [him] pretty bad," and forcefully extracted the sample. *Id.* at 851. No statute permitted the officers' actions, they obtained no court order, and their sole reason for wanting the sample was to "solve cold cases." *Id.* at 851, 854. They apparently targeted Friedman because he had been convicted of a sex offense in Montana twenty years earlier. *Id.* at 851, 854-855.

The Court concluded that, under these circumstances, the search was unreasonable and the officers could be held civilly liable. *See Friedman*, 580 F.3d at 860. The Court placed great weight on the fact that the officers had no statutory or judicial authority to take the sample and that Friedman was no longer in custody or subject to supervision for the Montana crime that the Nevada authorities relied upon as a basis for the search. *Id.* at 854-856. The Court noted that DNA collection could have been justified by prison security concerns, but the Nevada authorities identified no such concerns, and their

general interest in comparing the defendant's DNA profile to evidence from "cold cases" simply because he was a sex offender was insufficient to justify the violent and unauthorized extraction of his DNA. *Id.* at 857-858.

The panel in this case concluded that the interests, criteria, and circumstances of the search at issue were very different from those in *Friedman*, resulting in a different weighing of the totality of the circumstances. *Pool*, 621 F.3d at 1224-1225. Nothing in that determination conflicts with *Friedman* or warrants en banc review. For example, unlike in *Friedman*—where the officers used their own unfettered discretion to decide whether to extract the defendant's DNA—the collection requirement in this case was authorized as part of a routine booking procedure established by statute and regulation and backed by a court order. This procedure permitted a minimally intrusive search of the sort to which pretrial defendants have long been subject for the purpose of obtaining identification information in which they have no privacy interest. Moreover, the federal government's reasons for collecting a DNA fingerprint from all defendants as a condition of pretrial release go far beyond a general interest in solving "cold cases," and federal law certainly does not empower officers to selectively target individuals for DNA collection based on their criminal histories, as was the case in *Friedman*. Nor did anyone use or threaten to use force or violence against Pool.

Neither Pool nor amicus adequately addresses these distinctions. Pool simply asserts that the government's only interest in obtaining his DNA fingerprint is to help

solve other crimes, Pet. 9-10, but as explained above (and as the magistrate judge, district court, and panel all held), the government's interests are much broader. Amicus, for its part, argues that because "the government" chose not to assert other justifications for DNA collection in *Friedman*, it is stuck with that choice in this case. Amicus Br. 7-8. The obvious fallacy in this argument is that the Las Vegas police officers in *Friedman* were not a proxy for Congress, and the reason those officers gave for collecting DNA (without any authority to do so) says nothing about the compelling federal interests Congress sought to vindicate in federal law. The panel in *Friedman* was under no obligation to construct better arguments for the state defendants, but that hardly means that the federal government is somehow estopped from asserting Congress's interests in this case, or that the panel was required to ignore them.

Pool and amicus further claim that the absence of any statutory or regulatory authority for the officers' actions in *Friedman* is "irrelevant." Pet. 10; Amicus Br. 8-9. They rely on the maxim that the Constitution trumps statutes, but the panel did not misunderstand that principle. Rather, the panel merely found that the federal statutory and regulatory regime governing this case was relevant to its analysis of the totality of the circumstances. *See Pool*, 621 F.3d at 1224-1225. As explained, federal law requires the non-discretionary collection of DNA fingerprints from all individuals arrested and indicted on a finding of probable cause as part of routine booking procedures, contains strict limitations to protect genetic privacy and to assure that DNA fingerprints are used

solely for identification, and serves several well-documented legislative and regulatory interests. These factors clearly affect the reasonableness of the defendant's expectation of privacy and the weight of the government's interests in obtaining the information. *See ibid.* The presence of "standardized criteria" governing a search has long been deemed relevant to the search's constitutionality, *see id.* at 1224 & n.13; *id.* at 1233-1234 (Lucero, J., concurring) (citing cases), and the same is true here.[6]

The Court's decision in *Scott*, 450 F.3d 863, is even further afield. There, the defendant was required to agree to drug tests and random searches of his home at any time of the day or night as a condition of his pretrial release. *Id.* at 865. This Court held that these requirements—which essentially rendered the defendant's body and all of his personal effects subject to search at any time—failed the totality of the circumstances test because a pretrial defendant retains a legitimate expectation of privacy in his home and the government's asserted interests (preventing crime and assuring the defendant's appearance in court) bore a tenuous relationship to the "intrusive" searches at issue. *Id.* at 868, 871-874. This case, in contrast, involves a single, minimal intrusion to obtain

[6] Pool and amicus also argue that, as a detainee facing charges, the defendant in *Friedman* presumably was subject to a judicial determination of probable cause to believe he had committed a crime. Pet. 10; Amicus Br. 5-6. *Friedman* is silent on this issue, but regardless, it is beside the point. The officers in *Friedman* did not request a DNA sample as part of any standard booking procedures triggered by a finding of probable cause, nor did they rely on the defendant's status as a detainee to justify the search. Instead, the officers relied on the defendant's criminal history and their unsubstantiated belief that, as a past sex offender, his DNA might prove useful as evidence in "cold cases."

identification information in which a pretrial defendant can claim no privacy interest, collected outside the home, for purposes that have long been recognized as legitimate and compelling. Indeed, *Scott* noted that if the pretrial release order in that case had required the defendant to go to the police station and submit to a drug test as a condition of his release, "the balance [would likely] be struck differently." *Id.* at 872 n.10.

Finally, the panel's decision does not conflict with *Arizona v. Gant*, 129 S. Ct. 1710 (2009). *See* Pet. 7; Amicus Br. 15. *Gant* holds that when an individual is arrested following a traffic stop, the search-incident-to-arrest exception to the warrant requirement permits a search of the vehicle if the arrestee could still gain access to the vehicle or if the arresting officers could reasonably believe that the vehicle contains evidence related to the crime. *Gant*, 129 S. Ct. at 1719. There is a vast difference between allowing the police to "rummage at will among a person's private effects" after every traffic offense, which is what concerned the Supreme Court in *Gant*, *id.* at 1720, and obtaining, as a condition of pretrial release, limited identification information from individuals arrested and indicted on a judicial finding of probable cause to believe they have committed a federal crime.[7]

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[7] Pool also notes (Pet. 8 n.7) that the Third Circuit has decided to consider a related issue (DNA fingerprinting of pretrial detainees) en banc in the first instance, see *United States v. Mitchell*, No. 10-145, but that fact does not support his request for further review in this case. There was no panel decision in *Mitchell*, nor has the Third Circuit previously considered federal DNA collection requirements en banc. In contrast, the panel's decision in this case is correct and conforms to established precedent (including

III. THE PANEL'S DECISION IS LIMITED TO THE COLLECTION OF IDENTIFICATION INFORMATION FROM FEDERAL DEFENDANTS ARRESTED AND INDICTED ON A FINDING OF PROBABLE CAUSE.

The panel explicitly and carefully limited its decision to the collection of DNA fingerprints from federal pretrial defendants arrested and indicted on a finding of probable cause. *See Pool*, 621 F.3d at 1214-1215; *id.* at 1231-1233 (Lucero, J., concurring). Nonetheless, defendant and amicus argue that en banc review is warranted to address other factual scenarios that are not presented in this case and that were not addressed by the panel. This Court should decline that invitation.

The panel did not, for example, address whether DNA fingerprinting is permissible when an individual is arrested without a judicial finding of probable cause or is ticketed for an infraction or a "minor traffic offense[ ]." Pet. 4; Amicus Br. 16. Pool was arrested and indicted on a judicial finding of probable cause to believe that he committed serious federal felonies. *See Pool*, 621 F.3d at 1215; ER 2-3. Whatever additional considerations might arise in cases involving less serious offenses or lacking a judicial finding of probable cause, they are not presented here. Indeed, neither the DNA Fingerprint Act nor its implementing regulation requires DNA sample collection from individuals who are not also fingerprinted, such as those ticketed for minor traffic offenses or infractions. *See* 28 C.F.R. § 28.12(b); 73 Fed. Reg. at 74,934. And in any

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this Court's en banc decision in *Kincade*), and further review is therefore unwarranted.

event, while the panel's decision may inform the analysis of future panels confronted with different facts, that is not a reason to grant en banc review in this case.

Nor does this case concern DNA collection requirements enacted by the states. *See* Amicus Br. 12-13. Amicus argues that a statute enacted by California is unconstitutional, *ibid.*, and it suggests that statutes in Alaska and Arizona, and proposed legislation in Washington, Hawaii, and Nevada, may suffer similar deficiencies, *id.* at 13. Whatever the merit of amicus's views, those statutes (some of which have not even been enacted) are not at issue here. Indeed, amicus elsewhere admits (Br. 1-2) that the legality of California's statute is currently pending before a panel of this Court in a case in which amicus represents the plaintiffs, *see Haskell v. Brown*, No. 10-15152, and amicus will therefore have ample opportunity to make its arguments to the Court in that case.

Finally, Pool and amicus repeat their claim that DNA fingerprinting is really just a surreptitious way for the government to "seize the genetic blueprint" of every person, thus placing "the genetic privacy of every American at risk." Amicus Br. 16; *see* Pet. 5. Nothing in the law or record supports this concern. As explained, Congress has carefully limited DNA fingerprinting to non-genic portions of DNA that do not reveal anything other than identity, and there are numerous other safeguards (including criminal penalties) to prevent misuse of DNA information. Moreover, DNA fingerprinting is only authorized for those arrested, charged, or convicted of a federal crime. The panel found no evidence that "(1) the government could, at this time, actually use the DNA

information for arguably improper purposes, (2) the government could do so without further legislation, or (3) the government has any intent to so use the information." *Pool*, 621 F.3d at 1223; *see also Kincade*, 379 F.3d at 837-838 (rejecting same "parade of horribles"). Pool's concerns are not implicated by the facts of this case or by the law as it currently exists, and they do not merit en banc review.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in a proportionally spaced, 14-point typeface using WordPerfect X4, and meets the 25-page length limitation set forth in this Court's November 22, 2010 order.

s/ Robert A. Parker
Robert A. Parker

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2010, I filed the foregoing Response of the United States to the Petition for Rehearing En Banc with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to the following registered users:

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