10-15152

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellants,

v.

EDMUND G. BROWN, JR., Attorney General of California; and EVA STEINBERGER, Assistant Bureau Chief for DNA Programs, California Department of Justice,

Defendants and Appellees.

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

APPELLEES' BRIEF

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INTRODUCTION

At its core, this case presents a simple legal question: whether an adult felony arrestee's interest in the privacy of his identity outweighs the vital interests of California in identifying arrestees, solving past crimes, preventing future criminal activity, and exonerating innocent individuals. Under well-developed Ninth Circuit precedent, the answer to this question is no. This Court has repeatedly recognized that arrestees have a minimal interest in the privacy of their identity, and that the governmental interests in maintaining a DNA database are compelling. Given California's statutory framework—enacted directly by California voters—which ensures that DNA is used only for identification purposes and is never divulged outside of law enforcement under pain of criminal prosecution, the collection of DNA from adult felony arrestees is reasonable under the Fourth Amendment. Accordingly, the district court properly denied appellants' attempt to enjoin the collection of DNA from all adult felony arrestees, including those charged with rape, murder, kidnapping, and other violent crimes, and its decision should be affirmed.

JURISDICTIONAL STATEMENT

Appellees agree with Appellants' jurisdictional statement contained in their opening brief at page 2.

STATEMENT OF ISSUES

1. In light of this Court's decisions in *Rise*, *Kincade*, and *Kriesel*, does the totality of the circumstances test apply to California's programmatic collection of DNA from adult felony arrestees?

2. Did the district court properly conclude that an adult felony arrestee's interest in the collection of DNA is "not weighty" where the sole information that is obtained from an arrestee's DNA profile is his identity, and where the DNA profile is shared only with other law enforcement officials?

3. Does California have a substantial interest in identifying arrestees, solving past crime, preventing future criminal activity, and exonerating innocent individuals that is furthered by the mandatory collection of DNA at the time of adult felony arrest, and do those interests outweigh that of an adult felony arrestee in the privacy of his identity?

STATEMENT OF THE CASE

On October 7, 2009, plaintiffs brought a complaint styled as a class action challenging Cal. Penal Code § 296(a)(2)(C),[1] which requires law enforcement officials to collect, through buccal swab, the DNA of any adult

[1] Unless otherwise specified, all references are to the California Penal Code.

arrested for a felony offense. On December 1, 2009, plaintiffs filed their first amended complaint (FAC), which added two new named class representatives. The FAC, premised on 42 U.S.C. § 1983, alleges California's collection of DNA from adult felony arrestees violates the Fourth Amendment insofar as the DNA is obtained without a warrant or judicial determination as to probable cause. The FAC further alleges that the collection of DNA violates the putative class's right to informational privacy as protected by the Fourteenth Amendment, and that the expungement procedures provided in the DNA Act do not comport with due process.

On October 30, 2009, plaintiffs filed a motion requesting that the district court enjoin operation of section 296(a)(2)(C) on the basis that it violated the Fourth Amendment and the right to informational privacy. In a comprehensive opinion issued on December 23, 2009, Justice Breyer denied the request for a preliminary injunction. (Excerpts of Record (ER) 0001.) Following *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (*en banc*) and *United States v. Kriesel*, 508 F.3d 941 (9th Cir. 2007), the court applied the totality of the circumstances analysis and weighed the interest of the adult felony arrestee against that of the government. With respect to arrestees' interest, the court noted that "[w]hile arrestees certainly have a greater privacy interest than

prisoners, it is this Court's view that they also have a lesser privacy interest than the general population." (ER at 12 [citing *Kincade*, 379 F.3d at 864 (Reinhardt, J., dissenting)].) Moreover, the court concluded that "Plaintiffs have not articulated how DNA differs in a legally significant way from other means of identification," and noted that the Ninth Circuit had reached this same conclusion. (ER at 13 [citing *Rise*, 59 F.3d at 1559].) Since "Plaintiffs have not shown that arrestees cannot reasonably be forced to identify themselves upon arrest through DNA evidence," (ER at 14), the court concluded that "arrestees' privacy interest, while greater than that in *Kincade* and *Kriesel*, is not weighty." (*Ibid*.)

Turning to the government's interests, the district court concluded that California had a "compelling" interest in identification as well as interest in solving past crimes, and that together these interests outweighed arrestees' minimal interest in the privacy of their identity. With respect to identity, the court noted that "the Ninth Circuit has unequivocally held that what DNA evidence does is identify." (ER at 15.) That was true "both in terms of who the person is" as well as "what the person has done." (ER at 16.) With respect to the former meaning of "identification," the court concluded that DNA was simply another means of identification that was more reliable than other forms of identification. (ER at 17.) With respect to what it called

"forensic identification," the court noted that, just as fingerprints could be compared to crime scene samples for investigative purposes, so too could DNA be used to determine what a person has done in the past.

In addition, the Court found that the collection of DNA samples at the time of arrest furthered the State's interest in solving past crimes. Rejecting Appellants' reliance on a United Kingdom study that purportedly suggested that the collection of arrestee samples did not assist law enforcement officials in solving past crimes, the court instead relied on California data which showed "not surprisingly, that arrestee submissions contribute to the solution of crimes . . . ." (ER at 18.) Combined with California's compelling interest in the identification of felony arrestees, the court concluded that collecting DNA from adult felony arrestees was reasonable for purposes of the Fourth Amendment. (ER at 19.)

The court rejected plaintiffs' arguments that the decision in *Friedman v. Boucher*, 580 F.3d 847, 852 (9th Cir. 2009), controlled the outcome of the case. The court noted that "*Friedman* did not engage in a thorough totality of the circumstances test: it did not consider government interests beyond supervision, nor did it examine the extent of Friedman's privacy interest." (ER at 19 [citing 80 F.3d at 862-65 (Callahan, J., dissenting)].) Because both *Kincade* and *Kriesel* mandated that the court consider the totality of the

circumstances, the fact that the Ninth Circuit panel in *Friedman* did not rendered that decision inapplicable to California's comprehensive statutory framework.

The court then balanced the low likelihood of success against the prospect of irreparable harm, the government's interests, and those of the public. Because the court concluded that law enforcement officials did not violate a felony arrestees' constitutional rights by collecting DNA at the time of arrest, it concluded that plaintiffs had not shown irreparable harm. In balancing the equities, the court noted the significant cost to the State if it were required to re-train officials to collect DNA at conviction rather than at arrest. (ER at 21.) Finally, the court noted the public interest weighed against granting the injunction, as over 62% of Californians had approved the challenged provisions in passing Proposition 69. (*Ibid*.) Balancing these interests, the court concluded that entry of a preliminary injunction was not warranted. (ER at 22.) Petitioners have appealed this decision.

STATEMENT OF FACTS

California's DNA Database program is an effective law enforcement tool used to link forensic DNA profiles of qualifying offenders to matching DNA profiles from unsolved case evidence nationwide. *See* §§ 295–300.3. It is administered by the California Department of Justice (DOJ), and is part

of the FBI's national Combined DNA Index System (CODIS), §§ 295(g)–(h). In addition to specifying what samples may be collected, the program also provides substantial restrictions as to the use of DNA samples and their disclosure.

The DNA Fingerprint, Unsolved Crime and Innocence Protection Act (Act) is designed to "assist federal, state, and local criminal justice and law enforcement agencies within and outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes, the exclusion of suspects who are being investigated for those crimes, and the identification of missing and unidentified persons." § 295(c). Originally, the Act required the collection of DNA from individuals convicted of certain violent felonies and sex crimes through a blood draw. It was subsequently amended to require the collection of DNA from any individual convicted of a felony. § 296(a)(1).

DNA Databases such as California's have been extraordinarily effective. Since its inception, California's database has reported over 10,000 offender hits to law enforcement agencies in California and throughout the nation. (ER 0463.) At the national level, through September 2009, over 97,000 investigations have been aided through CODIS and state-operated

DNA Databases. (ER 0485.) Currently, 47 states collect DNA samples from all felony offenders. (ER 0518.)

In 2004, voters passed Proposition 69, which amended the Act to fill a "critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime." (ER 0542.) Proposition 69 expanded the class of individuals for whom DNA must be collected to include individuals convicted of any felony and adults arrested for a felony offense. Recognizing that this would result in a significant increase in the number of samples collected and tested, Proposition 69 provided for the phased implementation of the arrestee provisions. Effective immediately upon passage of Proposition 69, DNA collection was expanded to include adults arrested for enumerated violent felonies such as murder and manslaughter, as well as adults arrested for sex-based crimes. § 296(a)(2)(A)–(B). Thus, the State has been collecting DNA from certain adult arrestees—who are included in the plaintiff class—for over 5 years. Starting in 2009, law enforcement began collecting DNA for identification purposes from adults arrested for any felony. § 296(a)(2)(C). Importantly, Proposition 69 permits no discretion on the part of law

enforcement in collecting these samples. *People v. King*, 82 Cal.App.4th 1363, 1373 (2000).

While expanding the class of individuals from whom DNA was collected, Proposition 69 also made the process of collection less invasive. Rather than obtaining DNA from a blood draw, Proposition 69 requires law enforcement officials to obtain DNA though the use of a buccal swab, which as the district court found, "consists of gently scraping the inner cheek repeatedly with a small stick." (ER at 2.) After it is collected, the buccal swab is submitted to the Department of Justice's Richmond DNA Laboratory for PCR-STR DNA analysis. *Coffey v. Sup. Ct.*, 129 Cal.App.4th 809, 814 (2005). This analysis tests at least 13 genetic markers that are located in sections of the DNA that do not have any known function and accordingly, reveal nothing about the arrestee other than his or her identity. *Kincade*, 379 F.3d at 818; *United States v. Weikert*, 504 F.3d 1, 3 (1st Cir. 2007) ("DNA analysis uses only 'junk DNA'—DNA that differs from one individual to the next and thus can be used for purposes of identification but which was 'purposefully selected because [it is] not associated with any known physical or medical characteristics.'") Indeed, the district court specifically found that "the sample may only be tested to reveal an individual's identity." (ER at 2.) This DNA fingerprint is then

compared to samples collected at crime scenes through the use of California's DNA Database and CODIS. If there is a "hit" between the offender's DNA profile and a crime-scene profile, "a confirmation process takes place, which includes a de novo analysis of the offender DNA sample." (ER at 4, citing Von Beroldingen Decl. at ¶¶ 15-17.) Thus, while California retains the DNA sample, it does so in order to confirm a match between an offender profile and a crime scene profile. "Once the hit has been confirmed, the CODIS unit sends a written notification of the offender's identity to the submitting laboratory, which then may forward the notification on to the client law enforcement agency." (ER at 4.)

Use of the DNA sample for any purpose other than identification, or disclosure of the sample or profile for any purpose other than law enforcement, is a crime. The buccal swab may only be tested to reveal an arrestee's identity; under no circumstances may the sample be tested to reveal anything else, such as an underlying medical condition. *See* § 295.1 ("The Department of Justice shall perform DNA analysis . . . pursuant to this chapter only for identification purposes."); *cf. Alfaro v. Terhune*, 98 Cal.App.4th 492, 508 (2002). Furthermore, the Act limits disclosure of the sample and results of the testing to law enforcement personnel. § 299.5(f). The penalties for violating these provisions of the Act are severe. Any

individual who uses a sample or DNA profile other than for identification purposes or discloses the sample or DNA profile faces up to a year in prison. §299.5(i)(1)(A). The Act further provides for a civil fine of up to $50,000 against an employee of the DOJ for misusing or improperly disclosing a sample or an individual's DNA profile. § 299.5(i)(2)(A). These restrictions are reinforced by similar federal penalties applicable to California by virtue of its participation in CODIS. *See* 42 U.S.C. § 14132 *et seq*; *see also* 61 Fed. Reg. 37497 (July 18, 1996) ("[C]riminal justice agencies with direct access to CODIS must agree to…restrict access to DNA samples and data."). Law enforcement access to CODIS may be cancelled for failure to meet the quality control and privacy requirements of federal law. 42 U.S.C. §§ 14132(c), 14135e(c). As the district court found, "[t]o date, there has not been one instance in which charges were brought against an employee of the DOJ for violating the DNA Act." (ER at 4.) Moreover, "no audit has ever cited a California CODIS lab for any violation of confidentiality or use restrictions." (ER at 5.) California's restrictions on the use and (limited) dissemination of DNA information are thus highly effective.

Finally, while not required by the Fourth Amendment, Proposition 69 also provides for expungement of any samples collected from an individual arrested for a felony but who is not ultimately convicted. Where no charges

are filed, the case is dismissed, or the arrestee ultimately is found not guilty or factually innocent, the arrestee may request that the trial court order the sample be destroyed and the DNA profile expunged. § 299(b); *see also* 42 U.S.C. § 14132(d)(2). Contrary to the assertion by Appellants, nothing in the statute requires that an individual wait until the statute of limitations has run before seeking expungement. Moreover, while the statute provides for a court-ordered expungement, nothing in the statute *requires* a court order for DOJ to expunge a sample. Rather, if an individual provides proof that they meet the requirements for expungement, DOJ will expunge their sample from the DNA Data Bank. (ER 0462–63.) Although Appellants characterize this process as cumbersome, it is no different than the process whereby other criminal records are expunged. Indeed, the process for expunging arrest records is much more elaborate. *See* Cal. Penal Code § 851.8 (requiring that law enforcement agency wait three years after receiving petition, requiring arrestee to prove factual innocence, and providing for a court hearing as to whether the records shall be expunged).

SUMMARY OF ARGUMENT

On three separate occasions, this Court has articulated the standard for whether the collection of DNA for purposes of identification is reasonable for purposes of the Fourth Amendment, and those cases compel the

conclusion that California's practice of collecting DNA from adult felony arrestees is consistent with the requirements of the Fourth Amendment. First in *Rise*, then in an *en banc* decision in *Kincade* and again in *Kriesel*, this Court has consistently applied the totality of the circumstances framework to analyze the practice of collecting DNA from conditional releases, which it "determined by assessing, on the one hand, the degree to which [the search or seizure] intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Kriesel*, 508 F.3d at 947 (quoting *Samson v. California*, 547 U.S. 843, 848); *see also Kincade*, 379 F.3d at 842. Applying that test to the facts of this case, the district court correctly concluded that California's statutory framework of collecting DNA from adult felony arrestees, with its myriad protections of that information, is reasonable.

As this Court has noted numerous times and as the district court correctly found, the sole purpose of collecting DNA is to identify the arrestee. *Kincade*, 379 F.3d at 837. As a result, the collection of DNA is no different from the taking of a fingerprint: both reveal an individual's identity, and nothing more. *Rise*, 59 F.3d at 1559. Since an arrestee's identity is a matter of legitimate state interest such that "he has lost any legitimate

expectation of privacy in the identifying information derived from his blood sampling," *id*. at 1560, the arrestee's interest is minimal.

Weighed against an arrestee's minimal interests are the important interests advanced by the collection of DNA at the time of felony arrest. While California identifies arrestees through fingerprints, photographs, and other means, DNA is an important method of identification as well, one that is more accurate than any other means. The State's interest in identification includes determining what other crimes the individual has committed in the past. Further, collecting DNA at the time of arrest leads to the solution of past crimes, which takes dangerous criminals off the street and provides closure to the victims of those crimes. California also has an interest in preventing future crime, which is furthered by collecting DNA at the time of arrest. According to Appellant's own data, two-thirds of felony arrestees will be convicted of a crime, and, given the high rate of recidivism, many of those individuals will commit additional crimes in the future. Moreover, by focusing on the correct suspect, DNA collection prevents law enforcement from wasting scarce resources in investigating the wrong individual, and saves innocent individuals from the time, expense, and embarrassment of being investigated for a crime they did not commit. These interests strongly

outweigh those of the arrestee, such that the seizure of DNA from adults at the time of felony arrest is reasonable under the Fourth Amendment.

Appellants' assertion that the totality of the circumstances test does not apply is based on a misreading of this Court's decision in *Friedman* and ignores an evolution in Fourth Amendment jurisprudence culminating in *Samson v. California*. Appellants incorrectly assert that the district court did not apply *Friedman* because it disagreed with this Court's ruling in that case. To the contrary, the district court correctly observed that in *Friedman* this Court did not apply the totality of the circumstances test mandated by *Kincade* and *Kriesel*. That the *Friedman* panel did not apply the totality of the circumstances test must be read in light of the specific (and unusual) facts of that case: the forcible collection of DNA from a single individual, which stand in stark contrast to a statutory framework such as California's with its numerous use and confidentiality restrictions. *Alfaro*, 98 Cal.App.4th at 508. Further, while Appellants point to *Schmerber v. California*, 384 U.S. 757 (1966) and *Ferguson v. City of Charleton*, 532 U.S. 67 (2001) as providing the applicable standard for considering their Fourth Amendment claim, they ignore that the Supreme Court has upheld a program of warrantless, suspicionless searches in *Samson*, a fact on which

this Court relied in *Kriesel* to apply the totality of the circumstances test to the federal program of DNA collection.

Because the district court correctly found that Appellants have little chance of success on the merits, it properly denied the preliminary injunction. And the district court's conclusion that the public interest weighed against granting the injunction and that the government would suffer injury if the injunction were to be granted further supported its denial of Appellants' request for a preliminary injunction.

ARGUMENT

I. STANDARD OF REVIEW

In order for an injunction to issue, a party must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, --- U.S. ----, 129 S.Ct. 365, 374 (2008)). A district court's decision denying preliminary injunctive relief is subject to limited review. *See Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 760 (9th Cir. 2004) ("Our review of a decision regarding a preliminary injunction 'is limited and deferential.'"). An order denying a preliminary

injunction is reviewed for abuse of discretion. *See Cummings v. Connell*, 316 F.3d 886, 897 (9th Cir. 2003) Accordingly, the district court's decision in this case should be affirmed unless it abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See FTC v. Enforma Natural Products*, 362 F.3d 1204, 1211-12 (9th Cir. 2004). The district court's findings of fact are reviewed for clear error. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). "Clear error review is deferential to the district court, requiring a 'definite and firm conviction that a mistake has been made.'" *Ibid*. (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001)). A district court's conclusions of law are reviewed *de novo*. *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001).

II. THE COLLECTION OF DNA AT THE TIME OF FELONY ARREST IS REASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES

A. The Totality of the Circumstances Test Articulated in *Kincade* Applies to the Collection of DNA

The seizure of DNA from adults arrested for a felony is entirely consistent with Fourth Amendment guarantees.[2] The Fourth Amendment

[2] Although Appellants mention the Fourteenth Amendment in their brief, they appear to have abandoned a separate Fourteenth Amendment challenge in their appeal, and for good reason. Both the Fourth and

(continued…)

has two clauses: one that guarantees that individuals will not be subject to "unreasonable" searches and seizures, and one that "describes the procedures that must be followed in obtaining a warrant." *See United States v. Barona* , 56 F.3d 1087, 1092, n. 1 (9th Cir. 1995). While a search and seizure often requires a warrant and probable cause based on individualized suspicion, there are numerous instances in which a warrant is not required. *Ibid*. (citing instances in which a warrant is not required). Rather, the touchstone of the Fourth Amendment is "the reasonableness…of the particular governmental invasion of a citizen's personal security." *Kincade*, 379 F.3d at 821. As the Supreme Court has stated:

> Under our general Fourth Amendment approach, we examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment. Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and

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(…continued)
Fourteenth Amendments protect an individual's right to privacy. *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1268-69 (9th Cir. 1998). Where, as here, both amendments are implicated, the Ninth Circuit analyzes the potential disclosure of such information under the rubric of the Fourth Amendment, and "balance the government's interest in conducting [ ] particular tests against the plaintiffs' expectations of privacy." *Id*. at 1269. As they did in the proceedings below, Appellants "merge their Fourteenth Amendment and Fourth Amendment arguments in their papers." (ER 6.) Thus, as Appellants do here, and as the district court did below (*ibid.*), Appellees focus on the Fourth Amendment arguments.

> on the other, the degree to which is needed for the promotion of legitimate governmental interests.

Samson, 547 U.S. at 848 (citations and internal quotations omitted).

In a line of cases dating back 15 years, this Court has routinely applied the totality of the circumstances test to programs mandating the warrantless collection of DNA samples without probable cause, in each case finding that such collection was reasonable. *See Rise*, 59 F.3d at 1562; *Kincade*, 379 F.3d at 839–40; *Kriesel*, 508 F.3d at 947. This approach is the same one taken by the majority of the circuits. *Banks v. United States*, 490 F.3d 1178, 1183 (10th Cir. 2007) (collecting cases). This Court first addressed the issue in *Rise* when considering an Oregon statute that authorized the collection of DNA samples through a blood draw from individuals convicted of certain serious crimes. *Rise*, 59 F.3d at 1558. The Court noted that "[e]ven in the law enforcement context, the State may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified by law enforcement purposes." *Id*. at 1559. The Court then "examine[d] separately the privacy interests implicated by the state's derivation and retention of identifying DNA information from a convicted felon's blood, and the interest in bodily integrity implicated by the physical intrusion necessary to obtain the blood

sample." *Ibid*. Against these interests, which the Court found to be "minimal," the Court balanced "the gravity of the public interest served by the creation of a DNA data bank, the degree to which the data bank would advance the public interest, and the severity of the resulting interference with individual liberty." *Id*. at 1560. Balancing these factors, the *Rise* panel concluded that Oregon's statutory scheme was reasonable. *Id*. at 1562.

An en banc panel of this Court revisited the issue in *Kincade*, and after an exhaustive analysis of Supreme Court case law, the plurality concluded that the totality of the circumstances test announced in *Rise* was the correct method to analyze federal law enforcement's collection of DNA from certain convicted felons through a blood draw, a practice the en banc panel found to be reasonable.[3] As in *Rise*, this Court concluded that "the intrusion

[3] In a separate opinion, Judge Gould concluded that the special needs analysis applied rather than considering whether a search is reasonable under the totality of the circumstances. That view is shared by the Second Circuit and the Seventh Circuit. *United States v. Amerson*, 483 F.3d 73, 82 (2d Cir. 2007); *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006). Although Appellees focus on the totality of the circumstances analysis since that is the settled approach taken in this Circuit, the collection of DNA from adult felony arrestees would also be reasonable under a special needs analysis.

Appellants also suggest that the court must conduct a special needs inquiry before balancing the interests of the arrestees and the government. (Br. at 41.) That is not the state of the law in this circuit. *Kincade* and *Kriesel* expressly rejected a special needs approach in the context of DNA collection programs such as California's.

occasioned by a blood test is not significant." *Kincade*, 379 F.3d at 837. Moreover, this Court noted, "the DNA profile derived from a defendant's blood sample establishes only a record of 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)." *Ibid*. As a result, this Court concluded that the collection of DNA "can only be described as minimally invasive—both in terms of the bodily intrusion it occasions, and the information it lawfully produces." *Id*. at 838.

Against this minimal invasion of parolees' interests, this Court weighed what it concluded were "undeniably compelling" interest of the government. (*Ibid*.) The *Kincade* court noted three primary interests served by the collection of DNA from parolees. First, this Court noted that

> by establishing a means of identification that can be used to link conditional releasees to crimes committed while they are at large, compulsory DNA profiling serves society's overwhelming interest in ensuring that a parolee complied with the requirements of his release and is returned to prison if he fails to do so.

Id. at 838. Second, the Court observed that such collection would reduce recidivism. Third, because DNA profiling of parolees contributed to the solution of past crimes, the government had a substantial interest in bringing

closure to victims of crimes. *Ibid.* These interests, the Court concluded, were "monumental," and when weighed against the minimal interest of the parolees in the privacy of their identity, were sufficient to overcome those interests such that the collection of DNA from parolees was reasonable. *Id.* at 839. This conclusion, the Ninth Circuit noted was consistent "with every other state and federal appellate court to have considered these issues." *Ibid.*

Finally, in *Kriesel* this Court applied the holding in *Kincade* to the collection of DNA from *all* conditional releasees. Noting that the Supreme Court in *Samson v. California* had affirmed the warrantless, suspicionless search of a parolee, the panel in *Kriesel* affirmed the use of the totality of the circumstances approach set forth in *Rise* and *Kincade*. 508 F.3d at 946-47. As in *Kincade*, this Court noted that "as a direct consequence of Kriesel's status as a supervised releasee, he has a diminished expectation of privacy in his own identity specifically, and tracking his identity is the primary consequence of DNA collection." *Id.* at 947. The *Kriesel* panel also noted the same governmental interests that were present in *Kincade*. In doing so, it rejected the notion that DNA evidence was only important in violent crimes, noting that "[a]lthough fingerprint evidence might often be sufficient to identify a past offender, DNA collection provides another means for the government to meet its significant need to identify offenders who continue

to serve a term of supervised release." *Id*. at 949. Once again agreeing with every circuit to consider the issue, this Court concluded that the collection of DNA from convicted offenders of any crime was reasonable under the Fourth Amendment. *Id*. at 950.

B. Arrestees Have a Minimal Interest in the Privacy of Their Identity

Applying the teaching of *Rise, Kincade,* and *Kriesel*, the collection of DNA from adult felony arrestees is reasonable when considering the totality of the circumstances. Collection and forensic testing of DNA pursuant to a comprehensive statute that functions much like a programmatic warrant in describing the classes of persons to be searched and the things to be seized is justified because it does not intrude on an expectation of privacy "society is prepared to recognize as legitimate." *See, e.g., New Jersey v. T.L.O.*, 496 U.S. 325, 338 (1985). As with parolees and probationers, arrestees—who are in police custody because there is probable cause that they have committed a felony—have a diminished expectation of privacy vis-à-vis private citizens. To be sure, they are not in the same position as individuals who have been convicted of a crime. Nevertheless, because law enforcement has probable cause to believe they have committed a crime, arrestees stand in a very different position with respect to the State than do

individuals not implicated in criminal activity. Most importantly, they can be incarcerated. Arrestees can be fingerprinted, photographed, and their identifying information collected. They can be interrogated, their liberties restricted, and their rights curtailed in numerous ways while they are released on bail.[4] Thus, as with parolees, and conditional releasees, arrestees "are not entitled to the full panoply of rights and protections possessed by the general public," and "are properly subject to a broad range of [restrictions] that might infringe constitutional rights in a free society." *Kincade*, 379 F.3d at 813.

As this Court recognized in *Rise* 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

[4] Although Appellants cannot be serious when they suggest that a buccal swab is a type of "body-cavity search" (Br. at 44), it is worth noting that an arrestee can be subject to an actual body-cavity search, showing just how different a position they occupy when compared to citizens not arrested for or convicted of the commission of a felony. *Bell v. Wolfish*, 441 U.S. 520, 560 (1979). Importantly, in considering the Fourth Amendment claim of pre-trial detainees—individuals who, like the plaintiff class, had not been convicted of any crime—the Supreme Court in *Wolfish* expressly employed a reasonableness inquiry, "balancing the need for the particular search against the invasion of personal rights that the search entails." *Id*. at 559. In doing so, it expressly rejected the argument that the "presumption of innocence" required a different result, holding it "had no application to determine the rights of a pretrial detainee during confinement before his trial has even begun." *Id*. at 533.

criminal offense and the gathering of fingerprints for identification purposes from persons within the lawful custody of the state." *Rise*, 59 F.3d at 1559–60, cited in *Kincade*, 379 F.3d at 836 n. 31. The same is true of a DNA profile, which derives information "substantially the same as fingerprinting." *Id*. at 1559. Indeed, if law enforcement were required to obtain a warrant prior to collecting an adult's DNA sample at the time of booking, it is difficult to see how law enforcement could collect a fingerprint sample without a warrant. And since both fingerprinting and DNA collection represent minimal intrusions on an arrestee's privacy interest, both are reasonable under the Fourth Amendment.

Indeed, while arrestees have greater privacy interests in other areas, they have no greater interest in the privacy of their identity than do parolees. The entire booking process is designed to ensure that the state accurately verifies the identity of the arrestee: he or she is photographed, fingerprints are taken, and detailed information about any identifying characteristics is recorded to ensure police ascertain his or her true identity. "It is elementary that a person in lawful custody may be required to submit to . . . fingerprinting . . . as part of the routine identification process." *Rise*, 59 F.3d at 1560 (quoting *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (Berger, J.)). Once "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 v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992). *See also Kincade*, 279 F.3d at 837 (observing that "one lawfully arrested and booked into state custody" can claim "no right of privacy" in their identity). Moreover, that California voters in Proposition 69 expressly found that "[t]he state has a compelling interest in the accurate identification of criminal offenders, and it is *reasonable to expect qualifying offenders [i.e. adult felony arrestees]* to provide forensic DNA samples for the limited identification purposes set forth in this chapter" directly undermines any notion that society is prepared to recognize as legitimate an adult arrestee's privacy interest in his identity. (ER 0542, emphasis added.) At the very least, it shows that the arrestee's privacy interest in his or her identity, to the extent he or she has one, is minimal. This is not simply a conclusion reached by California voters: 22 states and the federal government have enacted legislation requiring law enforcement to collect DNA samples from some class of arrestees. (ER 0518; 0527.)

There is no legal difference between obtaining DNA for identification purposes and obtaining fingerprints at booking. § 295(d) ("Like collection of fingerprints, the collection of DNA samples pursuant to this chapter is an administrative requirement to assist in the accurate identification of criminal

offenders."). An arrestee's DNA is tested at 13 loci[5] that do not code for any medical characteristics. Rather, the *only* information that can be obtained from the tests that are performed on an arrestee's DNA is his or her identity, and any other use of the DNA sample is a crime. §§ 295.1; 299.5(i)(1)(A). "[A]t least in the current state of scientific knowledge, the DNA profile derived from the offender's blood sample establishes only a record of the offender's identity." *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007); *see also Kincade*, 379 F.3d at 837.

Thus, "[g]iven the limits imposed on the collection, analysis, and use of DNA information by the statute . . . the intrusion on privacy effected by the statute [is] similar to the intrusion wrought by the maintenance of fingerprint records." *Nicholas v. Goord*, 430 F.3d 652, 670 (2d Cir. 2005). As this Court has observed, "[t]he information derived from the blood sample [and the subsequent testing of DNA] is substantially the same as that derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived." *Rise*, 59 F.3d at 1559. *See also Banks v. United States*, 490 F.3d 1178, 1185–86 (10th Cir. 2007); *Jones v. Murray*,

[5] Testing at 13 loci is the minimum required by CODIS. California, however, currently tests at 15 loci, including the "core 13" and two other similar loci from non-coding regions of the DNA, increasing the accuracy of the hits in its database. (ER 0496-97.)

962 F.2d 302, 306–07 (4th Cir. 1992). Just as fingerprinting an arrestee does not implicate any constitutionally protected interest in his identity, *United States v. Kraph*, 285 F.2d 647, 650 (3d Cir. 1961), neither does the collection of DNA solely for identification purposes.

Appellants attempt to distract the Court from how California *actually* uses DNA—to identify—with suggestions that DNA can be tested for "the existence of potential for physical diseases such as sickle-cell anemia, cystic fibrosis, and Alzheimer's disease." (Br at 42.)[6] As found by the district court, California has never even been accused of testing DNA for anything other than identity, and any state employee who did so would be criminally

[6] Appellants once again mention that California conducts familial analysis on convicted offender samples. (Br. at 15.) Contrary to Appellants' assertion, Appellees do not perform familial analysis on samples collected from arrestees. (ER 0463-64.) Appellants own papers filed in support of their request for a preliminary injunction confirm this fact. (ER 0199-0207 [referencing offender index only, and not arrestee index].) Appellants also note that California has separate indices for convicted offender profiles and for the provisional samples collected from arrestees. (Br. at 15.) California only conducts familial searches of the convicted offender index, *not* the arrestee index. (ER 0199–0207.) Amici are thus incorrect in stating that the California protocol for familial searching includes arrestee samples. (Amicus Br. at 22.) And it is true that because profiles cannot be automatically moved from one index to the other, California excludes a significant number of DNA profiles from the limited familial searches conducted by law enforcement. (Br. at 15.) It does *not* suggest that California will begin conducting familial searches of arrestee samples.

prosecuted. § 299.5(i). Moreover, such speculation is not part of the Fourth Amendment inquiry. *Skinner*, 489 U.S. at 626-27 n. 7; *Veronia Sch. Dist. v. Acton*, 515 U.S. 616, 652 (1995). Rather, the mere potential for misuse of arrestees' DNA is insufficient to alter their privacy interest in the collection of their DNA, and does not justify issuing an injunction. "The hypothetical possibility of some future abuse does not substantiate a justiciable controversy." *Wilson v. Collins*, 517 F.3d 421, 430 (6th Cir. 2008); *see also Amerson*, 483 F.3d at 86-87.

The Ninth Circuit has explicitly rejected this precise argument. In *Kincade*, the parties and *amici* argued that because DNA samples "conceivably could be mined for more private information or otherwise misused in the future," the future invasion of personal privacy outweighed the government's interests. In rejecting this argument, the Ninth Circuit observed:

> [B]eyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented. In our system of government, 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. If . . . some future program permits the parade of horribles the DNA Act's opponents fear . . . we have every confidence that courts will respond appropriately.

> As currently structured and implemented, however, the DNA Act's compulsory profiling of qualified federal offenders can only be described as minimally invasive-both in terms of the bodily intrusion it occasions, and the information it lawfully produces.

Id. Rather than being judged for its hypothetical uses that have not come to pass and are expressly outlawed, the collection of DNA must be judged for its actual use: to identify.

C. The Collection of DNA Insignificantly Invades an Arrestee's Interest in Bodily Integrity

The actual collection of the DNA sample similarly constitutes a minimal invasion of the arrestee's interest in bodily integrity. In considering the federal DNA Act's requirement that law enforcement personnel obtain a DNA sample through a blood draw, this Court has held that "[i]t is firmly established that 'the intrusion occasioned by a blood test is not significant. . . ." *Kincade*, 379 F.3d at 836 (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989)). Under the DNA Act, which generally requires that DNA be taken by a buccal swab, the invasion of bodily integrity suffered by an arrestee is even less. *See, e.g., United States v. Amerson*, 483 F.3d at 84 n. 11 (2d Cir. 2007) ("If . . .the DNA were to be collected by a cheek swab, there would be a lesser invasion of privacy [than a blood draw] because a cheek swab can be taken in seconds without

any discomfort."). (ER 0576-77; 0584-0603 [describing the collection process and showing a picture of a buccal swab].) Thus, the arrestee's interest is even less than that considered in *Kincade* to be a minimal invasion of bodily integrity.[7]

D. California Has a Compelling Interest in Collecting Samples for its DNA Database at the Time of Arrest

In contrast with the minimal impact on arrestee's privacy and bodily integrity interests, California's interests in the collection of arrestee DNA samples for its DNA database are compelling. In enacting Proposition 69, California voters specifically recognized the critical importance of expanding the State's DNA Database to include collect of samples from adult felony arrestees. The voters found that "the state has a compelling interest in the accurate identification of criminal offenders, and DNA testing at the earliest stages of criminal proceedings for felony offenses [i.e., arrest]

[7] Appellants make much of the fact that, as a theoretical matter, DNA can be collected through force. (Br. at 27.) Of course, none of the named plaintiffs in this case had their samples taken by force. While it is true that law enforcement officials may compel an individual to provide a DNA sample, there are elaborate protections, regulations, and safeguards to ensure that any use of force is reasonable and carefully controlled and limited to that necessary to collect the sample. § 298.1(c)(2). The use of force must be authorized by prior written approval of the supervising officer, and must "be preceded by efforts to secure the voluntary compliance with this section." *Id*. § 298.1(c)(2)(C).

will help thwart criminal perpetrators from concealing their identities and thus prevent time-consuming and expensive investigations of innocent persons." (ER 0542.) As the voters recognized, the collection of DNA at the time of felony arrest serves several vital state interests: the accurate identification of arrestees, solving past crimes, ensuring arrestees comply with the conditions of their release pending trial, and the prevention of future criminal activity.

1. The collection of DNA at the time of felony arrest assists the State in accurately identifying arrestees

The district court properly concluded that California has a compelling interest in the accurate identification of arrestees. As this Court has noted time and again, the sole purpose of collecting DNA is to identify. *See Rise*, 59 F.3d at 1559; *Kincade*, 379 F.3d 837; *Kriesel*, 508 F.3d at 947. While it is true that California employs other methods of identification when arresting an individual, that fact should not prohibit it from using a method of identification that is far superior to other methods. *People v. Robinson*, 47 Cal.4th 1104, 1141 (2010) ("for purposes of identifying 'a particular person' as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible"). As the district court itself recognized, "[t]he more ways the government has to identify who

someone is, the better chance it has of doing so accurately." (ER at 16.) According to the Fourth Circuit:

> 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. Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features. Traditional methods of identification by photographs, historical records, and fingerprints often prove inadequate. The DNA, however, is claimed to be unique to each individual and cannot, within current scientific knowledge, be altered.

Jones, 962 F.2d at 307. The accuracy of DNA justifies the maintenance of a DNA databases such as California's. "The governmental justification for this form of 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." *Amerson*, 483 F.3d at 87.

Further, the concept of identification is broad enough to include the past crimes an arrestee has committed. As the Supreme Court noted in *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 186 (2004), "[k]nowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder." Such a determination not only assists law enforcement's

investigation of the crime for which the individual is arrested, it is also lawfully used to determine what level of security is appropriate in detaining the person, and whether the arrestee is properly held to answer for other charges. *See, e.g.,* § 1275 (requiring a judge or magistrate to take into consideration the protection of the public and any previous criminal history); *Loder v. Municipal Court*, 17 Cal.3d 859, 867 (1976). Even if the individual has been released on bail before his DNA sample is tested against other crime scene profiles, law enforcement officials can re-arrest him if they subsequently determine that he may be implicated in a past crime such as murder or rape. *Cf. Kincade*, 379 F.3d at 838 ("compulsory DNA profiling serves society's overwhelming interest in ensuring that a parolee complies with the requirements of his release and is returned to prison if he fails to do so") (internal citations and quotations omitted).

Moreover, the electronic comparison of an arrestee's DNA profile to other crime scene profiles is no different from an officer running an individual's license at a traffic stop to determine if that individual has any outstanding warrants, or running an arrestee's fingerprints through a fingerprint database to determine if his or her prints match a crime scene

profile.[8] *See, e.g., United States v. Villagrana-Flores*, 467 F.3d 1269, 1277 (10th Cir. 2006) ("We hold that Mr. Villagrana-Flores's Fourth Amendment rights were neither violated when his identity was obtained during a valid *Terry* stop nor when his identity was shortly thereafter used to run a warrants check."); *Doe v. Sheriff of Dupage County*, 128 F.3d 586, 588 (7th Cir. 1997) (the 'booking' of an arrestee [which included photographing, fingerprinting, and conducting a medical exam of the arrestee], which for one thing confirms the person's identity, does not violate the Fourth Amendment."). Just as it does not violate the Fourth Amendment for an officer to collect fingerprints and run them through a fingerprint database even where the officer already knows the individual's name, so too is it legitimate for the State to compare an arrestee's DNA profile to forensic unknowns in its DNA database.

The fact that DNA can be used to identify a person in terms of what prior crimes he may have committed does not render the State's interest in identification somehow invalid. Appellants seem to suggest that the fact that

[8] As the district court properly held, the electronic comparison of an arrestee's DNA profile is not a search for purposes of the Fourth Amendment. (ER 17.) *See also Johnson v. Quander*, 440 F.3d 489, 498 (D.C. Cir. 2006) (holding that "the process of matching one piece of personal information against government records does not implicate the Fourth Amendment").

the collection of DNA from adult felony arrestees has a law enforcement purpose somehow renders the statutory framework suspect. However, it is *because* the collection of DNA has a law enforcement purpose that the totality of the circumstances test, rather than the special needs analysis, applies. *Kincade*, 379 F.3d at 825 (noting that more recent "special needs" cases have emphasized the absence of a law enforcement motive underlying the search). Indeed, in concluding that the totality of the circumstances test applied, the Ninth Circuit in *Kincade* specifically noted that it was applying the test "even if the absence of some non-law enforcement 'special need.'" *Id*. at 835; *see also Rise*, 59 F.3d at 1559. Indeed, when the Ninth Circuit was considering whether the collection of DNA from convicted offenders was valid in *Kincade* and *Kriesel*, it clearly understood identification in this broader sense, since clearly law enforcement already knew the identity of the individuals it was currently incarcerating. Thus, the fact that California uses an arrestee's DNA profile to confirm the identity of the individual and, as it does with fingerprints, to determine if he has been implicated in any prior crimes does not render the search unreasonable under the totality of the circumstances.

2. The collection of DNA at the time of felony arrest assists the State in solving past crimes

As the district court recognized, the collection of DNA at the time of felony arrest furthers the important state interest in solving past crimes. In the district court proceeding, Appellees presented uncontroverted evidence that the average number of investigations aided by matches from offender profiles to crime scene profiles per month increased 50 percent from 2008 to 2009, when California began collecting samples from all adult felony arrestees. (ER 0486-87.) As Judge Breyer noted, as of October 31, 2009, 291 investigations have been aided through the use of arrestee samples. (ER at 17–18.) Given that the full implementation of Proposition 69 occurred in January 1, 2009, that is a significant number of investigations. Indeed, at the national level, there have been over 1,000 hits based on arrestee submissions. (ER 0485.) As the district court found, these statistics "suggest, unsurprisingly, that arrestee submissions contribute to the solution of crimes." (ER at 18.) And that conclusion *is* unsurprising: the more profiles that are in the database, the greater chance a crime scene profile will match a DNA profile in the database. While Appellants seem to suggest that only adding crime scene profiles to a DNA database will increase its efficacy, the fact is that both crime scene profiles *and* offender profiles are needed to

make a match. Just as it takes two to tango, so too does it take an offender profile and a crime scene profile to result in an investigatory lead: by increasing the number of offender profiles through collecting DNA at the time of felony arrest, California furthers its interest in solving cold cases. (ER 0486-87.)

That the solution of past crimes is a vitally important state interest cannot be doubted. First and foremost, solving crimes allows the state to prosecute individuals who have committed crimes, serving both deterrent and retributive functions. Prosecuting those who have engaged in criminal activity also takes dangerous individuals off the street, thus reducing future criminal activity. Moreover, by assisting law enforcement officials in solving past crimes, collecting DNA at the time of felony arrest "helps bring closure to countless victims of crime who have long languished in the knowledge that perpetrators remain at large." *Kincade*, 379 F.3d at 839.

The sole evidence on which Appellants rely to show that there is no connection between collecting DNA at the time of felony arrest and solving past crimes is a study from the United Kingdom that purports to show that including arrestees in the United Kingdom's DNA databank failed to increase the databank's effectiveness in solving crime. (Br. at 49.) As explained by California Laboratory Director Kenneth Konzak, however, the

statements appellants' expert selectively extracted from the UK report were taken out of context. Read as a whole, the UK report actually refutes Appellants' theory that collecting DNA from felony arrestees will not assist the state in solving crime. For example, the study showed a 74% increase in DNA matches from 1999-2000 through 2004-2005 over the course of the UK's expanding DNA collection program, which included the period of the expansion to arrestee collections. (ER 0486-87.) Notwithstanding the fact that the UK report supports a conclusion that DNA collection solves crimes, the report is of limited utility to this case because the UK collects DNA from a larger pools of arrestees than California. Specifically, the UK collected DNA from any individual charged with or reported for a recordable offense. (ER 0696.) A recordable offense in the UK includes any offense punishable by imprisonment. *See* United Kingdom Statutory Instrument 2000/1139 Reg 3 (available on Westlaw at UK SI 2000/1139 Reg 3). Accordingly, the UK program collected DNA from a much larger pool than does California, and would include individuals arrested for misdemeanors. Just as the district court expressly declined to rely on the data from the UK study (ER at 17), so too should this Court. The study does not even purport to suggest that collection of DNA from adult felony arrestees is not an effective crime

solving tool, and even if it did, it concerns a collection program that is vastly different from California's.

Appellants' suggestion that California wait until conviction to collect DNA would hamstring law enforcement's ability to solve crime. First, many felony arrestees will be released into the general population pending trial. It is likely that some of them will commit crimes while released on bail, crimes that the State can quickly and more easily solve if it has the DNA profile of the arrestee. Crimes will be prevented where an arrestee has been implicated in a prior crime, because the State can then make a more informed decision regarding whether the felony arrestee should be released or held to answer for other charges. Given the high rate of recidivism noted above, it is likely that some of these arrestees who would otherwise be released will commit crimes pending trial: crimes that could be prevented or solved by collecting DNA at the early stage in the criminal proceeding as California voters envisioned when they passed Proposition 69.

Moreover, by obtaining a DNA sample at the time of arrest, rather than after an individual is convicted, law enforcement officials will be more effective in solving past crimes. It can often take years for a person arrested for a felony to be tried. *See, e.g., People v. Martinez*, 47 Cal.4th 399, 406, 415 (defendant arrested in 1990, jury trial commenced in 1997); *People v.*

Lewis, 46 Cal.4th 1255, 1267, 1306, 1321 (defendant arrested in 1992, convicted in 1998). During that time, witnesses can become unavailable or their memories can fade, evidence can be lost, and the statute of limitations can run. Law enforcement could be wasting valuable resources and potentially investigating innocent persons when, by collecting DNA from a perpetrator at the time of an unrelated arrest, investigators could have focused on the actual perpetrator much earlier. The victim of the crime being solved through the use of the DNA profile obtained at the time of arrest would not be forced to wait the years between arrest and conviction of the person that committed the crime against them. Like its interest in solving crimes, the State's interest in bringing "closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large" are substantial. *Kincade*, 379 F.3d at 839. In short, the State's interest in solving past crimes will be better served by collecting DNA at the time of arrest rather than post-conviction.

3. The collection of DNA at the time of felony arrest furthers the State's interest in preventing future crime

The collection of DNA at the time of felony arrest also serves to prevent future crime by incarcerating criminals earlier, criminals who, given the high rate of recidivism, may well reoffend. As discussed above,

collecting DNA at the time of arrest can lead to solving past crimes that would have otherwise remained unsolved. By incarcerating such criminals, the State can prevent future crime that could have occurred had they never been convicted of the prior crime. In the district court, the State presented numerous examples of instances where collecting DNA at the time of arrest could have alerted law enforcement to the fact that the individual had committed prior crimes. If the individual were convicted of those past crimes, many future criminal acts could have been prevented. (ER 0569 [statement in Congressional Record noting that 22 murders and 30 rapes could have been prevented had samples from eight individuals been collected at the time of arrest]; Supplemental Excerpts of Record 1–17.)

Moreover, as this Court has noted, collecting DNA has a deterrent effect on would-be criminals. *Kincade*, 379 F.3d at 839. By collecting DNA at the time of arrest, individuals know that they are more likely to be caught should they commit some other criminal activity in the future. *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999). Just as arrestees who are fingerprinted as part of the booking process understand that they will be caught should they leave their fingerprints at a future crime scene, so too do arrestees in California know that they will be apprehended should they leave their DNA at a future crime scene. As courts have recognized, while it is

easy to wear gloves, it is not as simple to ensure that no DNA is left behind. *Jones*, 962 F.2d at 307. California has a strong interest in deterring future criminal activity that is directly served by collecting DNA at the time of arrest.[9]

The district court discounted this interest due to an erroneous conclusion that individuals arrested for a felony are no more likely than the population at large to commit future crimes. To the contrary, however, Appellants' own evidence shows that arrestees are much more likely than the general population to commit crimes in the future. Appellants introduced evidence below that of the 332,000 people arrested for felonies in California in 2007, 231,000 ultimately will be convicted of a crime. And

[9] Appellants claim that collecting DNA samples from adult felony arrestees deprives the state of resources that it could better allocate elsewhere to solve crimes and thus, has a negative effect on its crime-solving ability. First, it is not for Appellants, or this Court, to second-guess the decision of California voters as to how to allocate its resources. Second, Proposition 69 guarantees a funding source for the collection and testing of DNA from adult felony arrestees, such that no funds were taken from existing programs. *See* Cal. Govt. Code, § 76104.6(a) (increasing criminal fines by 10 percent and devoting those funds to State to add the needed infrastructure to test the additional samples being collected pursuant to Proposition 69, and to local law enforcement agencies to fund the collection of the additional samples from adult felony arrestees). Third, as the district court found, plaintiffs did not put forward any evidence that the collection and testing of DNA from felony arrestees has actually had a negative impact on the databank's effectiveness. (ER 18.)

once convicted, we know that most felons will commit future crimes. In *Samson*, the Supreme Court noted that as of November 30, 2005, California had a recidivism rate between 68 and 70 percent. 547 U.S. 843, 853 (2006). Assuming that rate has remained relatively constant, of the 332,000 people arrested for felonies, approximately 157,000 of them will commit a crime in the future, some while they are released pending trial. Ultimately, 47 percent of individuals arrested for a felony offense will likely commit a crime in the future. And when they do, the State will already have their DNA and will be more likely to solve those crimes when they happen.

Even if there is some dispute as to the efficacy of the State's collection of DNA at the time of felony arrest, the Supreme Court has made clear that government officials are entitled to determine how best to allocate their resources. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453 (1990). In *Sitz*, the Court considered a highway sobriety checkpoint program, balancing the interests of the motorists being stopped with the interests of the State. The Court noted that it had previously approved checkpoint programs aimed at catching illegal aliens where the stop revealed the presence of an illegal alien in only 0.12 percent of cases. The 1.5 percent success rate in *Sitz* was therefore more than sufficient to justify the intrusion on drivers. *Id*. at 454. More important, however, was the Court's

observation that while "[e]xperts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. . .for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id*. at 453-54. Thus, California's choice to collect DNA at the time of arrest, with its clear benefits, is a reasonable one, and one that should not be overturned by this Court.

4. Collecting DNA at the time of arrest helps to focus investigations and exonerate the innocent

Finally, as many courts have recognized, DNA databases such as California's promote the State's interest in exonerating innocent individuals and in ensuring that law enforcement focus on the correct suspect. *Banks v. United States*, 490 F.3d 1178, 1188 (10th Cir. 2007); *United States v. Sczubelek*, 402 F.3d 175, 185 (3d Cir. 2005). By having additional DNA profiles in its database, California will more likely be able to link an individual to DNA evidence left at a crime. While additional forensic evidence, eyewitness accounts and more traditional police work will be needed to determine if the individual is in fact the perpetrator of the crime,

this additional piece of evidence will more often than not allow law enforcement to focus its scarce resources on the actual perpetrator. In addition to conserving investigative resources, it also can spare an innocent individual the time, expense, and embarrassment of being investigated for a crime he did not commit.

5. The totality of the circumstances shows that the collection of DNA at the time of felony arrest is reasonable

Balancing the minimal interest of an arrestee in maintaining the confidentiality of his identity and the minor violation of his bodily integrity occasioned by a buccal swab against the substantial interests of the State, it is clear that the State's interests dominate such that the collection of DNA from adult felony arrestees is reasonable for purpose of the Fourth Amendment. This is the same conclusion reached in *United States v. Pool*, 645 F.Supp.2d 903 (E.D. Cal. 2009), which applied the totality of the circumstances test as required by *Kincade*, 379 F.3d at 839. *See also Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007).

Although some district courts in other circuits have reached a contrary conclusion, their analysis does not hold weight when considering the state of binding case law in the Ninth Circuit. For instance, in *In the Matter of the Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006), the Minnesota Court

of Appeal did not address the interests of Minnesota in requiring the collection of a DNA sample at the time of arrest; *Kincade* and *Kriesel*, however, expressly require the Court to balance the individual's interests against that of the state. In *United States v. Mitchell*, on the other hand, the court's principal reason for overturning the federal statute approved in *Pool* was that "the search in this instance is one that reveals the most intimate details of an individual's genetic condition, implicating compelling and fundamental interests in human dignity and privacy." 2009 U.S. Dist. Lexis 103575 (W.D. Penn. Nov. 6, 2009). As this Court held in *Kincade* and *Rise*, however, the DNA testing at issue here in fact reveals no such thing: rather, all it does is reveal an individual's identity. The *Mitchell* court also concluded that "to compare the fingerprinting process and the resulting identification information obtained therefrom with DNA profiling is pure folly." *Id*. Yet that is the precise comparison the Ninth Circuit made in *Rise*. 59 F.3d at 1559 ("The information derived from the [DNA] sample is substantially the same as that derived from fingerprinting."). Whatever the status of case law in other jurisdictions, in light of *Rise*, *Kincade*, and *Kriesel*, Ninth Circuit case law compels the conclusion that California's practice of collecting DNA from adult felony arrestees is consistent with the Fourth Amendment. *See Pool*, 645 F.Supp.2d at 910.

E. The Totality of the Circumstances Test is the Appropriate Test for Determining if the Collection of DNA from Adult Felony Arrestees is Reasonable

Appellants point to three cases that they claim absolutely bar the collection of DNA from adult felony arrestees, without regard to any balancing or analysis as to whether the collection is reasonable: *Friedman*, *Schmerber*, and *Ferguson*. None of these cases, however, bear the weight Appellants place on them. First, *Friedman* does not control the case at bar. In *Friedman*, Nevada authorities forcibly obtained a buccal swab of an arrestee in order to compare his DNA against "cold cases." *Id*. at 851. Importantly, no statute authorized the Nevada authorities' actions. *Id*. at 853–54. Rather, the prosecutor, acting alone, ordered a detective to forcibly take the arrestee's DNA sample. This Court was thus faced with a case vastly different from that presented here: a rogue prosecutor collecting DNA through the use of force outside of any statutory scheme ensuring the kinds of confidentially and use restrictions present in California, and without the many interests present in maintaining a convicted offender database like that of California. *Kincade*, 379 F.3d at 838.

The fact that California's DNA collection is performed systematically without any discretion on the part of law enforcement—all pursuant to a detailed and specific statutory scheme with numerous protections and

assurances that the DNA will be used only for identification purposes by law enforcement—distinguishes this case from *Friedman*. Indeed, many circuits that have examined the issue have relied on the fact that all individuals are treated identically in concluding that DNA testing is reasonable under the totality of the circumstances. As the First Circuit noted, "the DNA Act includes no discretionary component. Courts have acknowledged that the presence of such discretion affects the balancing of interests. . . ." *United States v. Weikert*, 504 F.3d 1, 14 (1st Cir. 2007) (quoting *Samson*, 126 S.Ct. at 2202.)

In concluding the search in *Friedman* was not reasonable, this Court relied on the admonition in *Schmerber v. California* that the warrant requirement was designed to ensure "informed, detached, and deliberate determinations of the issue of whether or not to invade another's body in search of evidence of guilt. . . ." *Friedman*, 580 F.3d at 857 (quoting 384 U.S. 757, 770 (1966)). As *Schmerber* went on to note, obtaining a warrant from a detached magistrate avoids a situation of "being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id*. at 771 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). Indeed, "[a]n essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such

intrusions are not the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 621–22. In *Friedman*, of course, this is precisely the problem: a law enforcement official made an arbitrary decision about a specific individual to determine if he was involved in other crimes. It is in the very circumscribed factual situation in *Friedman* that the Ninth Circuit concluded that the search was unreasonable: the situation the Court faced there implicated the very abuses that the warrant clause and the Fourth Amendment generally were designed to protect against.

In stark contrast to the facts of *Friedman*, California's statutory framework essentially acts as a programmatic warrant in which the voters have made a determination that in *all* cases where an adult is arrested for a felony, the value of collecting DNA far outweighs the minimal privacy interests of an arrestee in his identity.[10] As noted above, law enforcement

[10] Appellants cite *Virginia v. Moore*, 553 U.S. 164, 128 S.Ct. 1568, 1604 (2008) for the proposition that the existence of a statute has no bearing on the Fourth Amendment inquiry. To the contrary, what the Court held in *Moore* was that if a state offers *additional* protections over what the Fourth Amendment would require, there is no Fourth Amendment violation if those additional protections are ignored by a law enforcement officer. *Moore* does not suggest that the protections afforded by a statute are not relevant in determining if a search is *consistent* with the Fourth Amendment; indeed, this Court has explicitly referenced the protections afforded under federal law for individuals whose DNA is subject to collection in concluding such collection was reasonable in *Kincade*.

officials have no discretion whatsoever in determining whose DNA to collect. *King*, 82 Cal.App.4th at 1373; *see also* ER at 2. For that reason, a warrant is not required to ensure the "informed, detached, and deliberate determinations" that the warrant clause is typically designed to protect. Indeed, in concluding that Oregon's DNA collection program was valid despite the fact that there was no warrant or particularized suspicion, this Court concluded:

> Chapter 669 is evenhanded. Every person convicted of one of the predicate offenses listed in O.R.S. § 137.076(1) is required to submit a blood sample for analysis . . . . Prison officials retain no discretion to choose which persons must submit blood samples. By ensuring that blood extractions will not be ordered randomly or for illegitimate purposes, Chapter 669 fulfills a principal purpose of the warrant requirement.

Rise, 59 F.3d at 1562; *King*, 82 Cal.App.4th at 1378 ("the reasons for requiring a warrant do not exist [in collecting DNA pursuant to California law] because there is no discretion on the part of the officials who take the samples, and little or no potential for surprise on the part of those required to provide samples.") Accordingly, both factually and legally, California's statutory framework governing the non-discretionary collection of DNA is entirely distinguishable from the situation facing this Court in *Friedman*.

Moreover, as noted by Judge Breyer below and by Judge Garcia in *Pool*, the court in *Friedman* did not apply the balancing test that is required by *Kincade*. In discussing *Friedman*, the court observed

> *Friedman* did not engage in a thorough totality of the circumstances test: it did not consider government interests beyond supervision, nor did it examine the extent of Friedman's privacy interest. See 580 F.3d at 862-65 (Callahan, J., dissenting) (dissent, instead, conducted balancing analysis between individual's privacy interests and government's legitimate interest in identification).

ER 19 *see also Pool*, 2009 WL 2152029 *2 fn. 3 (E.D. Cal. July 15, 2009) (noting that "the court in *Friedman* did not analyze the issue under the 'totality of the circumstances test' found applicable in the instant case"). Rather, in determining that the search was not "reasonable," the *Friedman* court simply held that the search did not constitute an administrative search, which can only be justified by security concerns. *Friedman*, 580 F.3d at 857.[11] Appellees do not claim that the collection of DNA is justified by an administrative search, but rather that it is consistent with Fourth Amendment guarantees under the totality of the circumstances analysis described above

[11] Appellants cite to the arguments made in the briefs to support their conclusion that *Friedman* did conduct a totality of the circumstances analysis. The proper source to determine what the Court actually held, however, is the opinion itself.

and required by *Rise*, *Kincade*, *Kriesel*, and *Samson*: an issue the panel in *Friedman* utterly failed to address. Nor did the *Friedman* court consider the felony arrestee's diminished privacy interests, or the state's interests in collecting DNA at the time of arrest. If the panel had, because there was no systematic, nondiscretionary collection of DNA for inclusion in a database, the interests would have been vastly different than California's. Accordingly, *Friedman* presents a totally different set of facts from the case at bar, and its legal analysis is not relevant to this case.

Nor does *Schmerber* announce any specific rule governing the collection of biological material from an individual. (Compare Br. at 38.) At issue in *Schmerber* was the seizure of blood from an individual who was arrested at a hospital while receiving treatment for injuries suffered in an automobile accident. 384 U.S. at 758. The blood, which was drawn at the order of a police officer, indicated that the individual had been driving under the influence of alcohol. *Id*. at 759. In concluding that the seizure was valid under the Fourth Amendment, the Court observed that "the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood *respected relevant Fourth Amendment standards of reasonableness*." *Id*. at 768 (emphasis added). Although the

Court concluded that a warrant was not required because exigent circumstances existed, *id*. at 770, it nowhere suggests that the *only* way in which police can seize biological materials is through exigent circumstances, or that probable cause is always needed. Rather, *Schmerber* expressly engages in a reasonableness inquiry, just as this Court has done in *Rise*, *Kincade*, and *Kriesel*. Moreover, Appellants' blind reliance on *Schmerber* ignores the significant doctrinal changes in Fourth Amendment jurisprudence since that case was decided in 1966, culminating in *Samson*. Simply because *Schmerber* upheld the seizure of blood in that case does not mean that it set a ceiling for what other seizures could be considered reasonable under the Fourth Amendment. *Cf. Samson*, 574 U.S. at 849-50 (noting that while the Court had relied on the existence of probable cause in affirming the warrantless search of a probationer's house in *United States v. Knights*, that case did not resolve the question of whether a warrantless search *without* probable cause was reasonable, and resolving that issue in the affirmative).

Finally, *Ferguson* has no bearing on California's collection of DNA samples from adult felony arrestees. *Ferguson* concerned a program where hospital officials would, without the consent of patients, test pregnant woman to determine if they had been using cocaine and then give those

results to law enforcement officials. 532 U.S. at 72. Several women were arrested for suspected cocaine use as a result of these tests. *Id*. at 73. The Supreme Court concluded that the testing program was invalid under a special needs analysis. It based this decision on the fact that the invasion of privacy was much more substantial than in other situations where the Supreme Court has affirmed drug testing, since in those other cases, "there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties." *Id*. at 78. The "critical difference," however, was that the nature of the special need in the previous drug testing cases was unrelated to law enforcement purposes, whereas the "central and indispensable feature" of testing program in *Ferguson* was law enforcement. *Id*. at 79. Accordingly, the search in *Ferguson* did not fit within the special needs balancing approach.

Ferguson does not apply to this case for the simple reason that Appellants are not seeking to justify the collection of DNA from adult felony arrestees under the special needs approach at issue in that case. *Kincade* expressly rejected a special needs approach to analyzing these cases precisely because the collection of DNA serves law enforcement purposes. *Kincade*, 379 F.3d at 826-832 (noting that *Ferguson* strengthened the

emphasis on non-law enforcement purposes in special needs analysis, but noting that *Knights* permitted of a law enforcement rationale in a totality of the circumstances analysis, and adopting the latter to evaluate the collection of DNA samples from conditional parolees). *Ferguson*, which focused on a special needs analysis, thus has no bearing on whether under the totality of circumstances the collection of DNA by law enforcement officials at the time of felony arrest is reasonable. Moreover, the differences between California's statutory program of collecting DNA from adult felony arrestees could not be more stark. As an initial matter, the purpose of collecting DNA is not hidden from arrestees: it is clearly to determine their identity and to determine if they are implicated in any past crimes. That purpose is spelled out in the text of Proposition 69, and in any event would be clear from the circumstances of the DNA collection: rather than occurring in a hospital, the DNA collection is part of the ordinary booking process, performed at the same time an individual is fingerprinted and photographed. Moreover, there are *substantial* protections to ensure that the information is not released to third parties.

III. THE DISTRICT COURT PROPERLY DENIED THE REQUEST FOR A PRELIMINARY INJUNCTION

As the district court correctly applied this Court's decisions in *Rise*, *Kincade*, and *Kriesel* in concluding that California's collection of DNA at the time of felony arrest is reasonable under the totality of the circumstances, it properly denied appellant's request for a preliminary injunction. Indeed, this Court's "inquiry is at an end" once it determines that "the district court employed the appropriate legal standards which govern the issuance of a preliminary injunction, and ... correctly apprehended the law with respect to the underlying issues in litigation." *Harris*, 366 F.3d at 760 (quoting *Cal. Prolife Council Political Action Comm. v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999)).

With respect to the other factors governing whether injunctive relief is appropriate—irreparable injury, balance of the equities, and the public interest—Appellants do not seriously contend that the district court erred in concluding that they all weighed in favor of the government. And with good reason, since each of those clearly favor the government in this case. As the court noted, since Appellants' Fourth Amendment rights have not been violated, they have suffered no irreparable injury. Even if, contrary to law, their Fourth Amendment rights were implicated, Appellants would always

be able to have their samples expunged even if they were to ultimately succeed on the merits. Moreover, as found by the district court, the balance of equities favors the government in this case:

> Most problematic, Plaintiffs' argument that the government would not suffer comparable harm overlooks the tremendous expense that appears likely if an injunction is granted… [Appellant's proposed injunction] would—it would seem—require the government to retrain law enforcement officers across the state, research which individuals in the arrestee index have subsequently been convicted of a crime, and remove all other arrestee profiles from CODIS. See Konzak Decl. at ¶¶ 31-34. This cost appears to be significant. In light of these various factors, the balance of the equities tips in the government's favor.

(ER 21.) Finally, given the significant governmental interests in solving crime, coupled with the fact that the public has already declared Proposition 69 to be in its interest by approving it with over 62 percent of the vote, the district court correctly found that its continued enforcement is in the public interest.

Finally, Appellants are incorrect when they suggest that, should this Court conclude that Appellants have stated a likelihood of success on the merits, it should simply order the district court to grant the preliminary injunction instead of remanding for further proceedings. Given that the district court has already stated that the public interest and the balance of

equities tip in favor of the government, it should be permitted to balance those factors against whatever chance of success this Court ultimately concludes Appellants have in their Fourth Amendment claims. *Idaho Watershed Projects v. Hahn*, 187 F.3d 1035, 1037 (9th Cir. 1999) (holding that the district court erred in evaluating plaintiff's likelihood of success on the merits, reversing the denial of the request for a preliminary injunction, and remanding "to consider the possibility of irreparable injury and whether the balance of hardships tips in favor of the Appellants"). Again, however, as the district court correctly applied this Court's teachings in *Kincade*, *Kriesel*, and *Rise*, this Court should simply affirm the district court's denial of Appellants' request for a preliminary injunction.

CONCLUSION

The district court properly denied Appellants' request for a preliminary injunction. As this Court and others have repeatedly recognized, an arrestee has no interest in the privacy of his identity, and the manner in which the State establishes it—the collection of DNA through a buccal swab—is minimally invasive. Balancing that interests against those of the State as *Rise*, *Kincade*, and *Kriesel* instruct, it is clear that the collection of DNA at the time of felony arrest is reasonable. As the voters of California recognized, such collection furthers compelling state interests in identifying

arrestees, solving past crimes, preventing future criminal activity, and exonerating innocent individuals. The district court correctly held Appellants have not established a likelihood of success on the merits and properly balanced the interests of the government and the public. Accordingly, the decision of the district court should be affirmed.

Dated: March 18, 2010

Respectfully submitted,

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10-15152

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs and Appellants,

v.

EDMUND G. BROWN, JR., Attorney General of California; and EVA STEINBERGER, Assistant Bureau Chief for DNA Programs, California Department of Justice,

Defendants and Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

The following related case is pending: *United States v. Pool*, Case No. 09-10303.

Dated: March 18, 2010

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 10-15152

I certify that: (check (x) appropriate option(s))

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

March 18, 2010
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