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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CENTER FOR GENETICS AND SOCIETY, EQUAL JUSTICE SOCIETY, and PETE SHANKS, Plaintiffs, v. XAVIER BECERRA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF JUSTICE Defendants.	Case No. CPF-18-516440 **PLAINTIFFS' OPPOSITION TO DEMURRER**

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INTRODUCTION

Plaintiffs challenge two aspects of California's program of analyzing and retaining DNA seized from people arrested for a felony: (1) the analysis of DNA collected from people who are arrested but not charged with or convicted of a crime, and (2) the indefinite retention of DNA taken from this same class of people if they have no qualifying past or present offenses or pending charges. Although the California Supreme Court upheld the requirement that arrestees provide a biological sample—and Plaintiffs do not challenge that point—it expressly declined to address the constitutionality of other aspects of the State's DNA collection program. *See People v. Buza.* 4 Cal. 5th 658, 665, 691, 692-93 (2018) (repeatedly stressing that the "sole question" before court was the legality of the initial DNA sample collection).

First, the chemical analysis of samples taken from people who are arrested, but not charged with or convicted of a crime, reveals information that is not otherwise accessible about that person—including personal information. This makes it a search and an intrusion upon the arrestee's privacy that the state must justify under article I §§ 1 and 13 of the California Constitution. (Counts I and II). Plaintiffs also challenge the uploading of the resulting genetic profile and its repeated comparison against other profiles in the database as violating the state right to privacy. The state cannot justify these intrusions because it has no legitimate interest in analyzing DNA samples or profiles taken from arrestees who have been released without charges or whose charges have been dismissed.

Second, indefinite retention of DNA samples and profiles taken from people not convicted of any qualifying offense violates the right to privacy protected by article I § 1. (Count III). Article I § 1 provides broader protection in this area than does § 13 because it prohibits "stockpiling unnecessary information" about Californians. *See Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35 (1994). Californians have a strong privacy interest in their DNA because DNA contains all of a person's genetic information. The state has no legitimate interest in retaining samples taken from people who have never been convicted of a qualifying offense; in fact, the statute recognizes this and allows people who are not convicted and have no prior qualifying convictions to have their DNA

samples expunged.[1] Any minimal governmental interest in placing the burden of initiating the expungement process on individuals who were forced to provide samples at arrest cannot justify the substantial infringement on privacy. For this reason, retaining these samples and profiles violates Californians' reasonable expectation of privacy, and the state therefore has an affirmative duty to destroy DNA samples of people who are eligible for expungement under Penal Code § 299, along with the profiles generated from these samples.

Plaintiffs have public-interest standing to request a writ of mandate where, as here, the state's actions violate the California Constitution. One of the Plaintiffs additionally has standing as a taxpayer to request mandamus, injunctive, and declaratory relief under Code of Civil Procedure § 526a. Defendants' procedural arguments are meritless. The Court should overrule the demurrer.

LEGAL STANDARD FOR DEMURER.

The Court must deny a demurrer if "the allegations of the operative complaint [state] facts sufficient to state a claim for relief." *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal. 4th 861, 866 (2012). "[T]he complaint need only allege facts sufficient to state a cause of action;" it need not include "each evidentiary fact that might eventually form part of the plaintiff's proof." *Id.* at 872.

PARTIES AND FACTS

Plaintiff Center for Genetics and Society ("CGS") works to ensure that human genetic technologies are used equitably and for the common good. Petition ¶ 8.[2] Plaintiff Equal Justice Society ("EJS") fights against racial inequality. ¶ 9. Both organizations are concerned that the overexpansion of criminal DNA databases is an unnecessary invasion of personal privacy that exploits and reinforces existing institutional racial inequalities. ¶¶ 8, 9. Both organizations are based in Northern California. ¶¶ 8, 9. Plaintiff Pete Shanks is a writer, editor, and researcher who has been a consultant for the Center for Genetics and Society since its founding. He has written broadly about DNA and DNA databanks. He is a California resident and taxpayer. ¶ 10.

Since 2009, California has required every person arrested on suspicion of a felony to provide

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[1] This requires that people know of the process and have the wherewithal to complete it (the vast majority of eligible people do not).

[2] All paragraph references are to the First Amended Complaint ("FAC"); all undesignated statutory references are to the Penal Code.

a DNA sample for inclusion in the State's DNA database. ¶ 16; *see* § 296(a)(2)(C). Before taking a sample, law enforcement first fingerprints the arrestee and uses those prints to identify the arrestee using state and national automated fingerprint identification systems. ¶ 18. This process allows them to see the arrestee's criminal history information and whether the arrestee has already provided a California DNA sample. ¶ 18. They then seize the DNA sample and send it to the state DNA lab for analysis. ¶ 16-17, 21. This analysis involves a multistep process that generates a genetic profile that is then entered into the state's DNA Database. ¶ 22. It generally takes at least a week for the sample to be analyzed. ¶ 23. The lab analyzes samples even if the arrestee is released without charges, a judge finds there is no probable cause supporting any charges, or charges are dismissed. ¶ 1.

Once a DNA profile is uploaded to the state database, it is automatically shared with law enforcement agencies across the country through the FBI-managed database called the Combined DNA Index System, or "CODIS." ¶ 25. After a DNA profile is entered into CODIS, that profile is then regularly and automatically accessed, searched, and compared with millions of other DNA profiles collected from crime scenes and other locations. In general, these searches occur at least once every week. ¶ 30. Plaintiffs' FAC includes examples of five individuals who were arrested but not convicted—and in some cases not charged—and were still required to give DNA samples which were then analyzed and uploaded to the database, where they will remain indefinitely. ¶¶ 58-65.

California law fails to provide for the automatic expungement of DNA samples and profiles seized from people who are arrested but never convicted, even people who are found by a court to be factually innocent of the offense for which they were arrested. ¶ 24, 33; *see Buza*, 4 Cal.5th at 679-680. Approximately one-third of felony arrests do not result in any type of conviction, violation, or other finding of guilt. ¶¶ 46, 48. In 2017, for example, 218,933 people were arrested on suspicion of a felony in California; of these, some 73,000 (33.3%) were not convicted of any crime or found to have violated any term of supervision. ¶ 46. Police released 7,910 people without referral for prosecution, prosecutors declined to prosecute 39,815 people, and 26,678 people were acquitted or had their cases dismissed. ¶ 46. Others were convicted only of misdemeanors. ¶ 47.

Although Section 299 allows people who have no qualifying past or present offense or pending charges to request expungement of their DNA samples and profiles, only a tiny percentage

successfully do so. ¶ 51. As of 2018, the Department had granted a total of 1,282 out of 1,510 expungement requests. ¶ 51. This most likely represents less than 0.34% of eligible samples. ¶ 52. The statutory expungement process is, on its face, lengthy and uncertain, with long delays built into the process ¶ 34; *see Buza*, 4 Cal.5th at 696-98 (Liu, J., dissenting). Defendants have created a non-statutory expungement process which requires the applicant to complete and mail a form to the DOJ, along with a variety of other documents, sometimes including a letter from the prosecutor, although prosecutors have no duty to provide these letters. ¶¶ 35; *see Buza*, 4 Cal. 5th at 682. There is no requirement that arrestees be informed of either of these processes, or even of the fact that their DNA is included in a database, and many arrestees do not know about the expungement procedures. *See* ¶ 43; *see also* ¶ 59 (Kalani Ewing protested having a DNA sample taken from her upon arrest, but never knew she could have it expunged until she heard about the instant suit).

Social-science research has shown that even minor transactional burdens – such as the need to complete a form – can significantly reduce the number of people who sign up for a program, even when that program has serious, concrete financial benefits. ¶¶ 38-41. This, combined with the lack of knowledge about the process, is why so few eligible people manage to have their samples expunged. *See* Elizabeth E. Joh, *The Myth of Arrestee DNA Expungement*, 164 U. PA. L. Rev. Online 51, 57-58 (2015) (discussing barriers to expungement in states like California); *cf.* Prescott, J.J. and Starr, Sonja B., *Expungement of Criminal Convictions: An Empirical Study* (2019), Univ. of Michigan Law & Econ Research Paper No. 19-001 at 28-33 (discussing why so few eligible people seek expungement, despite clear benefits).[3] Not surprisingly, states that automatically remove samples have much higher expungement rates (more than 30% in Maryland, for example). Joh, *supra*, at 57.

Defendants are capable of implementing automatic expungement procedures. Defendants require CODIS administrators to automatically expunge other types of samples after two years, even though the statute only authorizes this "[u]pon written notification from" the submitting agency. *Compare* § 297(c)(2) *with* ¶¶ 54-57; Pet. Ex. B at 3-4; *see* Request for Judicial Notice at 1 and

[3] Available at SSRN: https://ssrn.com/abstract=3353620.

Risher Declaration Exhibit A.[4]

Although fingerprints and DNA can both be used to identify people, the seizure, analysis, and indefinite storage of DNA samples differs fundamentally from the mere taking and retention of a fingerprint. ¶¶ 77-79. Unlike fingerprints, DNA can reveal a vast array of highly private information, including familial relationships, ethnic traits and other physical characteristics, genetic defects, and propensity for certain diseases. *Id.* Some scientists have suggested that DNA analysis can be used to predict personality traits, propensity for antisocial behavior, sexual orientation, and an ever-expanding variety of existing and future health conditions and physical traits. ¶ 79. Even the CODIS profiles generated from these samples contain indisputably private information, albeit much less so than the samples themselves. For example, CODIS profiles can be used to identify a person's family members, although California does not currently allow "familial searching" using arrestee DNA. ¶¶ 80-82.

Having one's DNA profile included in CODIS carries serious consequences. A person with a profile in CODIS may be implicated in crimes they didn't commit, based on a CODIS match between their profile and DNA found at a crime scene. ¶ 67-69. For example, an innocent 18-year-old man spent nearly four years in prison before a crime lab realized it had accidentally switched his sample with another suspect's. ¶ 68. A man in Santa Clara County was erroneously jailed for 5 months on capital-murder charges following a CODIS hit apparently caused by sample contamination. ¶ 70; *see* ¶ 69 (discussing laboratory errors). At a broader level, arrestee testing threatens to exacerbate racial disparities in the criminal-justice system. ¶¶ 71-75; *see Buza*, 4 Cal. 5th at 698 (Liu, J., dissenting). People of color in California have a greater-than-average chance of being arrested for reasons that have little to do with their level of criminality, like racial profiling and the racially discriminatory allocation of police resources. Many of these individuals may never be charged or convicted of a crime, but their DNA will remain in the database indefinitely. Its mere presence there could implicate them or their family members—rightly or wrongly—for crimes; a risk that they are unfairly forced to take under the current system. ¶ 75.

[4] Because of an editing error, the Petition states that arrestees who are cited out of custody are entitled to automatic expungement. Felony arrestees cannot be cited out; and as far as plaintiffs know, the state does not automatically expunge any arrestee samples.

ARGUMENT

I. Defendants' Procedural Arguments are Meritless

Plaintiffs have standing to bring this lawsuit. Plaintiffs are not bringing a facial challenge to the statute; instead, they are challenging the ongoing governmental conduct described in the complaint as unconstitutional under the doctrine of public-interest mandamus standing and under CCP § 526a, the taxpayer statute.

Mandamus: A writ of mandate is a proper remedy to "enforce statutory and constitutional rights." *In re Head*, 42 Cal. 3d 223, 231 n.7 (1986); *see Zubarau v. City of Palmdale*, 192 Cal. App. 4th 289, 305 (2011). A person or organization that is not itself affected by an unconstitutional government action may nevertheless request mandamus to stop that action under "citizen" or "public interest" standing: "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the petitioner need not show that he has any legal or special interest in the result." *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 52 Cal. 4th 155, 166 (2011). This case, which seeks to protect the constitutional rights of thousands of Californians, meets this standard. *See Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 29-30 (2001) ("a claim that such a program violates [constitutional principles] is precisely the type of claim to which citizen and taxpayer standing rules apply.").

Taxpayer Claim: Plaintiff Shanks additionally brings a taxpayer claim under Cal. Code of Civil Procedure § 526a (Count IV). This "general citizen remedy for controlling illegal governmental activity" allows a taxpayer to sue state or local officials to stop them from violating the constitution. *See Van Atta v. Scott*, 27 Cal. 3d 424, 447 (1980).[5] "No showing of special damage to the particular taxpayer [is] necessary." *Blair v. Pitchess*, 5 Cal. 3d 258, 268 (1971). The law authorizes facial challenges to a statute, *see id.* at 267, and also challenges to ongoing conduct that violates the constitution, regardless of whether it is required by statute. *See California DUI Lawyers Ass'n v. California Dep't of Motor Vehicles*, 20 Cal. App. 5th 1247, 1257, 1259, 1262 n.4 (2018) (reversing superior court ruling that "[t]axpayers do not have standing to challenge the manner of implementation" of a statute, holding instead that "[i]f the [challenged] system violates [third

[5] *Van Atta* has been abrogated on unrelated grounds. *See In re York*, 9 Cal. 4th 1133 (1995).

parties'] due process rights, it is illegal … under section 526a."). Section 526a authorizes injunctive, declaratory, and mandamus relief. *Van Atta,* 27 Cal. 3d at 449-450. An action that "meets the criteria of section 526a satisfies the case or controversy requirements" for declaratory relief. *Id.* at 450 n.28.

These established rules, the detailed allegations in the FAC showing that Defendants' ongoing conduct violates the California Constitution, and the examples of how the statute has affected specific individuals combine to defeat Defendants' claims that Plaintiffs are asserting only a facial challenge to the statute.[6]

II. Plaintiffs' Allegations in the First Amended Complaint Are Sufficient to State a Claim for Relief

A. Past Cases Addressing DNA Collection Do Not Preclude Plaintiffs' Claims.

None of the cases cited by Defendants bar Plaintiffs' claims here. First, all of Plaintiffs' claims arise under the California Constitution, not the federal Constitution, so *Haskell v. Brown*, 317 F. Supp.3d 1095 (N.D. Cal. 2018), and *Maryland v. King*, 569 U.S. 435 (2013)—in which the courts ruled on solely *federal* constitutional grounds—are inapplicable. Second, while *People v. Buza,* 4 Cal.5th 658 (2018), involved a claim under this state's constitution, the *Buza* court explicitly declined to address any of the claims that Plaintiffs raise here.

While California courts defer to the U.S. Supreme Court on issues of federal import, that rule applies neither to *Haskell*—a federal district court case—nor to *King*—which didn't decide any of the issues that Plaintiffs raise here.[7] Mr. King had been not just arrested, but also charged with and arraigned on a serious felony before his sample was analyzed, as state law required. *Maryland v. King*, 569 U.S. at 443. This requirement ensured that no sample would be analyzed without a judicial

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[6] In reality, the court probably need not even hold that the statute is unconstitutional as applied to grant the requested relief: Although the statute requires arrestees to provide a DNA sample immediately after arrest, no statute requires Defendants to analyze a sample before conviction. *See* § 296.1(a)(1)(A). Nor does any statute prohibit the state from automatically expunging samples that meet the criteria for expungement, which is why Defendants themselves have been able to develop the two non-statutory expungement protocols discussed above.

[7] California courts interpreting the state constitution do not defer to a federal district court's interpretation of the federal charter. *See Buza*, 4 Cal. 5th 658, 684-86; *cf. id.* at 701-704 (Liu, J., dissenting); *id.* at 706-713 (Cuellar, J., dissenting). Deference to a federal trial court would be particularly inappropriate here, where the court in *Buza* was so careful to limit its discussion of Article I § 13 to the facts before it, and where Plaintiffs invoke the state right to privacy, which has no federal counterpart. In addition, *Haskell* did not involve any claim for automatic expungement.

finding of probable cause. *Id.* Without this finding, or if charges were dropped or resulted in an acquittal, the sample and any profile would be "immediately destroyed." *Id.* at 443-44. The Court held that the government's interests in jail security and in monitoring defendants as they move through the criminal justice system in and out of custody, combined with the reduction of privacy that occurs when a person is arrested and detained or released pending trial, justified both the initial seizure and subsequent analysis of the DNA under the federal Constitution. *Id.* at 449-456. The case did not involve people who were not being prosecuted or any request for automatic expungement.

The defendant in *Buza*, too, was not just arrested but also charged with and convicted of a serious felony. He had additionally been convicted of refusing to provide a DNA sample. As the court noted, its "holding today [was] limited. The sole question before [the court was] whether it was reasonable, under either the Fourth Amendment or article I, section 13 of the California Constitution, to require the defendant in this case to swab his cheek as part of a routine jail booking procedure following a valid arrest for felony arson." *Buza*, 4 Cal. 5th at 691. The majority relied on *King's* broad holding to reject a challenge to California's law under the Fourth Amendment. The court also rejected Buza's challenge under article I § 13, but on the much narrower grounds that because the requirement that he provide a sample was constitutional as applied in his case, he could not challenge it as it might apply to somebody who had not been charged or convicted. *Id.* at 692-94. The court stressed the narrowness of its state-law holding in four separate places. *See id.* at 665 ("we express no view on the constitutionality of the DNA Act as it applies to other classes of arrestees."); *id.* at 691 ("Our holding today is limited"); *id.* at 694 ("the DNA Act may raise additional constitutional questions that will require resolution in other cases"); *id.* at 692-93 (An "arrestee may, at least in some circumstances, have a valid as-applied challenge to the adequacy of the DNA Act's expungement procedures or to application of the Act's other operative provisions."). Three justices dissented and would have held that the collection of DNA from arrestees facially violates the California Constitution. *See id.* at 709–17 (Liu, J., dissenting); *id.* at 718–35 (Cuellar, J., dissenting).

Because neither *King* nor *Haskell* nor *Buza* addressed the specific facts or claims raised here, they do not foreclose this lawsuit.

B. Analyzing a DNA Sample Taken From a Former Arrestee Who Has Been Released Without Charges, or Against Whom Charges Have Been Dismissed, Violates the California Constitution.

Plaintiffs' FAC states facts sufficient to support its claims that the analysis of an arrestee's DNA sample and the uploading and use of the resulting profiles violate both the search-and-seizure provision, article I § 13, and the privacy provision, article I, § 1, of the California Constitution.

1. The analysis of arrestee DNA samples violates article I § 13.

"California citizens are entitled to greater protection under [article I § 13 of] the California Constitution against unreasonable searches and seizures than that required by the United States Constitution." *People v. Brisendine*, 13 Cal. 3d 528, 551 (1975); *see Buza*, 4 Cal.5th at 684-86. In particular, this provision requires a closer fit between a search of an arrestee and the justifications for that search, as discussed below. Because article I § 13 generally prohibits warrantless searches and seizures, the government has the burden to show that a warrantless search or arrest falls within an exception to this requirement. *People v. Laiwa*, 34 Cal. 3d 711, 725 (1983). In fact, in the absence of any evidence to the contrary, the Court must presume that any arrest that did not result in criminal charges was without probable cause. *People v. Marquez*, 31 Cal. App. 5th 402, 410-411 (2019) (taking DNA sample violated 4th Amendment where prosecutor failed to show that arrest was supported by probable cause where no charges ever filed); *see* Evidence Code § 664.

a) The analysis of a DNA sample taken from a former arrestee is a search.

The analysis of a DNA sample taken from an individual without consent is a search, separate and distinct from the original seizure of the sample:

> it is well established that the analysis of a DNA sample is independent from the taking of that sample, and presents its own distinct privacy concerns. Those concerns arise because a person has a privacy interest in his or her own DNA profile and genetic information, even if only obtained and used for identification purposes. Courts have also recognized that DNA contains an extensive amount of sensitive personal information beyond mere identifying information, and people therefore have a strong privacy interest in controlling the use of their DNA.

Cty. of San Diego v. Mason, 209 Cal. App. 4th 376, 381 (2012); *see also People v. Thomas*, 200 Cal. App. 4th 338, 341 (2011) ("When an individual is compelled to provide a biological sample for analysis, the collection and subsequent analysis of the sample are treated as separate searches

because they intrude on separate privacy interests."); *Mario W. v. Kaipio*, 230 Ariz. 122, 126–29, (2012) (holding that although the police may take a DNA sample at arrest, they cannot analyze it unless the subject fails to appear in court or is found guilty.) *Buza* itself recognizes that the "sensitive information that can be extracted from a person's DNA" "implicate[s] … article I, section 13." *Buza*, 4 Cal. 5th at 689–90. Although a person who has been arrested and is facing criminal charges or has been convicted may have a drastically reduced expectation of privacy, that is not true for "an arrestee who is released without charges being filed" or "one against whom charges are filed and then dismissed," because such an individual "suffers no restraints on his liberty and is [no longer] the subject of public accusation" *People v. Price*, 165 Cal. App. 3d 536, 541 (1985); *cf. Thomas*, 200 Cal. App. 4th at 341 ("even when used solely for purposes of identification, DNA testing intrudes on the reasonable expectation of privacy that a defendant not yet in police custody would have in his identifying information").[8] In fact, the analysis of the sample is more intrusive than the "minimal" physical intrusion of the collection. *See, e.g., Mario W.*, 230 Ariz. at 128.

b) The search of a sample taken from a former arrestee no longer facing charges is unjustified and thus unreasonable

Article I § 13 requires a closer connection between a search of an arrestee and the government's justification for the search than does the Fourth Amendment. *See Buza*, 4 Cal.5th at 690-91 (court has "rejected the [federal rule permitting] full body searches of all individuals subjected to custodial arrest, as well as their effects, regardless of the offense, and regardless of whether the individual is ultimately to be incarcerated."). Thus, unlike federal law, article I § 13 prohibits the police from subjecting every arrestee to a full search, because the justifications for those searches—jail security and inventorying the arrestee's possessions—are "inappropriate in the context of an arrestee who" may be released without being booked into jail. *Id.*; *see, e.g, Laiwa*, 34 Cal. 3d at 726-728. Similarly, article I § 13 prohibits the government from justifying a search of an arrestee with a rationale that no longer applies by the time of the search. *See Laiwa*, 34 Cal. 3d at

[8] *Thomas* refers to the privacy rights of a person not "yet" in custody because it involved a person who, after the DNA test, had been arrested, jailed, charged, convicted, and sentenced to prison. It does not suggest that the fact that a person was previously in custody means that he permanently loses this privacy interest in his DNA.

727 ("the legitimate purposes of the booking search exception do not justify a belated search conducted after the booking process has ended" or "a premature search performed before that process has begun."). A search that is no longer justified at the time it is commenced is unreasonable and violates article I § 13.

The state apparently justifies taking DNA from an arrestee as part of a booking search, *See* Demurrer at 14:6-10. If the arrestee has been charged and had a probable-cause determination, the state may be allowed to analyze the sample because it has an interest in making decisions related to the criminal justice process, and people booked into jail or released pending trial have reduced privacy protections. *See Buza*, 4 Cal. 5th 658, 690 (discussing *King* factors); *cf. In re York*, 9 Cal. 4th 1133, 1149 (1995) (discussing reduced privacy right of defendants on pretrial release). But neither of these considerations can justify retaining and searching the DNA of people who have been released and are not facing any charges; they are not involved in the criminal justice system and have the same privacy rights as any other Californian. If the state does later decide to charge the person with a crime, it has their DNA sample in its possession and can test it then, assuming there is probable cause to believe the person is guilty. *See Mario W.*, 230 Ariz. at 129. But the fact that the state may, at some point in the future, decide to charge a person cannot justify testing a sample before any charges are filed, any more than jail-security-concerns can justify searching an arrestee who may—but may not—later go to jail. *See id.; see also Buza*, 4 Cal. 5th at 690; *Laiwa*, 34 Cal. 3d at 715; *People v. Longwill*, 14 Cal. 3d 943, 948, 952 (1975) (in light of "significant probability" that class of arrestees will be released without being jailed, officers cannot search them based on jail needs "until such time as they are actually to be incarcerated") (disapproved of on other grounds by *Laiwa*, 34 Cal. 3d 711).

C. Analyzing DNA samples when no charges are pending violates the right to privacy.

Every Californian has an "inalienable right" to privacy. Cal. Const. article I § 1. This provision is "broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts." *In re Carmen M.*, 141 Cal. App. 4th 478, 491 n.11. (2006) quoting *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 326 (1997) (plurality

opinion). "Informational privacy is the core value furthered by the Privacy Initiative." *See Hill*, 7 Cal. 4th at 35. Article I § 1 thus "prevents [the] government … from [1] collecting and stockpiling unnecessary information about us and from [2] misusing information gathered for one purpose in order to serve other purposes." *Id.* at 35–36.

The framework for analyzing whether a government action violates the constitutional right to privacy was first developed in *Hill* and is now well established:

1. A plaintiff states a prima facie case by showing a "significant intrusion on a privacy interest," meaning a "genuine, nontrivial invasion of a protected privacy interest." *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal. 4th 992, 999 (2009).

2. A defendant may rebut that case by negating this initial showing "or by proving, as an affirmative defense, that the invasion of privacy is justified because it substantially furthers one or more countervailing interests." *Id.* at 998

3. A plaintiff may then prevail "by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests." *Hill*, 7 Cal. 4th at 40.

1. The chemical analysis of a person's DNA is a significant intrusion into privacy

"[T]he heightened privacy interests in the sensitive information that can be extracted from a person's DNA" "implicate …the privacy rights enjoyed by all Californians under the explicit protection of article I, section 1." *Buza*, 4 Cal. 5th at 689–90. Thus, under article I § 1 "a person has a privacy interest in his or her own DNA profile and genetic information, even if only obtained and used for identification purposes." *Cty. of San Diego v. Mason*, 209 Cal. App. 4th 376, 381 (2012); *see also Loder v. City of Glendale*, 14 Cal. 4th 846, 897 (1997) (drug testing of urine sample taken for other medical purposes implicates privacy protection, even though "the testing [did] not impose the usual intrusion on privacy that results when an individual is required to provide a separate urine sample on demand."); *see also* Pet. ¶¶ 66-82. Chemical or biological testing of the DNA sample from a person who has been released from custody and is not charged with any crime and then putting the resulting profile into a criminal database to compare it against other profiles is therefore a significant intrusion into the privacy protected by article I § 1. *See Carmen M.*, 141 Cal. App. 4th at 492 ("context in which the allegedly invasive conduct occurs" is "central" to analysis); *see also*

Buza, 4 Cal. 5th at 712 (Cuellar, J., dissenting) ("The DNA Act's processes thus seem to fall close to the heart of article I, section 1's scope.").

2. Defendants cannot show that this intrusion substantially furthers any countervailing interests

Because defendants must raise any justification as an affirmative defense, it may be premature to resolve this issue on demurrer. *See Sheehan*, 45 Cal. 4th at 1000. But assuming the issue is before the court, the same factors that make searching DNA unreasonable under § 13, make it unreasonable under § 1: the state cannot show that its interest in analyzing DNA samples in the absence of pending charges justifies this intrusion into individual privacy. Moreover, creating a DNA profile for inclusion in CODIS is just the type of "collecting and stockpiling unnecessary information" about people that the provision forbids. *See Hill*, 7 Cal. 4th at 21, 35. Taking a DNA sample collected as part of the booking process for purposes of jail security and monitoring, and repurposing it for use in a general criminal fishing expedition to connect arrestees with unrelated, unknown crimes is a prototypical example of "misusing information gathered for one purpose in order to serve other purposes." *See Hill*, 7 Cal.4th at 35-36.

3. Defendants have less intrusive ways to satisfy any legitimate countervailing interests.

Defendants do not need to analyze these DNA samples. The state can retain the sample for as long as the arrestee is facing charges and can test it if the state has a valid justification to do so. *See Mario W.*, 230 Ariz. at 129. If the state later decides to prosecute the former arrestee, it can test the sample at that point. If it develops probable cause to believe that the sample has evidentiary value in the crime of arrest or in some other crime, it can get a warrant to test it. And, of course, the state also has the arrestee's fingerprints, which can be used to identify people but otherwise contain no other information about a person and are therefore a less-intrusive alternative to analyzing, uploading, and indefinitely retaining an arrestee's genetic profile.

D. The right to privacy requires Defendants to expunge samples and profiles taken from people who have no qualifying past or present offenses or pending charges

California's right to privacy is broader than the constitutional right against unlawful searches and seizures. Unlike article I § 13, the privacy provision prohibits not just unreasonable searches and seizures but also any action that leads to "stockpiling unnecessary information" about us. *See Hill,* 7

Cal.4th at 35. Thus, for example, police surveillance of university classrooms may violate the privacy provision, although it involves neither searches nor seizures. *White v. Davis*, 13 Cal. 3d 757, 776 (1975). So does the state's dissemination of incomplete criminal history information. *Cent. Valley Chap. 7th Step Found. v. Younger*, 95 Cal. App. 3d 212, 238 (1979). Defendants' claim that § 1 provides no broader protection than § 13 is therefore wrong and relies on their omission of a critical qualifier from the quotation of *York*, which said only that § 1 may not be more protective than § 13 in "the search and seizure context." *York*, 9 Cal. 4th at 1149. Moreover, *York* dealt with the rights of people released before trial, not people who had been released without charges and are therefore not under criminal justice supervision.[9]

1. The retention of a person's DNA is a significant intrusion into privacy

The state's retention of DNA samples and profiles implicates the right to privacy for the same reasons that its initial collection and analysis of these samples do. *See* section C (1), above. The weekly comparison of arrestee profiles with offender and crime-scene profiles throughout the nation is a further intrusion; one that can have concrete effects, including erroneous incrimination leading to unjustified arrest, prosecution, and even incarceration. Pet. ¶¶ 67-70; *see White*, 13 Cal. 3d at 774 (privacy initiative intended to protect against "stockpiling information" and creation and maintenance of "cradle-to-grave profiles" made possible by "[c]omputerization of records").

2. Defendants cannot show that this intrusion substantially furthers any countervailing interests that cannot be satisfied by less-intrusive means

Although the state may have an interest in retaining profiles and samples taken from people who are ultimately convicted, it has no legitimate interests in retaining the DNA sample and profile or in continuing to search the profile of people who were not convicted of anything and are eligible to have their samples expunged. This case is distinguishable from the authority Defendants cite because Plaintiffs ask only that the state expunge samples that are statutorily eligible for expungement under § 299. In contrast, in *Loder* a former criminal defendant asked the court to order the government to destroy "all records of his arrest," even though that was specifically prohibited by statute. *Loder v. Mun. Court for San Diego Judicial Dist.*, 17 Cal. 3d 859, 862 (1976). The court

[9] The other case Defendants cite addressed the rights of people in jail; it has nothing to do with the rights of people who are not in custody. *People v. Owens*, 112 Cal. App. 3d 441, 448-49 (1980).

rejected this claim because it would mean that if the defendant were arrested and prosecuted in the future, the government would not have any access to these prior records, deferring to the legislative determination that the State had a compelling interest in the retention of these records for that purpose. *Id.* at 876. Here, where the law allows expungement, there is no such legislative determination. Nor is there any need to maintain the DNA for use in case of a future prosecution, because if the person is arrested again in the future, the state can take a new sample. Fingerprints are sufficient to satisfy the state's need to determine whether an arrestee has a prior criminal record, a step it currently takes before deciding whether to collect a DNA sample. *See* ¶ 18.

The DNA cases cited by Defendants are even farther afield because they involve people who were convicted of a qualifying felony. *See Alfaro v. Terhune*, 98 Cal. App. 4th 492, 499 (2002) (murder); *People v. Harris*, 15 Cal. App. 5th 47, 51 (2018) (felony grand theft). An arrest is not a conviction, and cases involving the rights of people convicted of felonies do not control the rights of people never prosecuted or convicted of anything.

Finally, that automatic expungement may require the Department to develop new protocols is not a sufficient justification for the infringement. *See 7th Step Found.*, 95 Cal. App. 3d at 238 ("avoidance of administrative burden" not a sufficient justification under article I § 1). The state cannot construct a system that, unlike those used in other states, analyzes and stores profiles taken from arrestees who are not charged or convicted and then claim it is too burdensome to bring it into compliance with the California Constitution.

III. CONCLUSION

Because the allegations in the First Amended Complaint show that Defendants are violating article I § 1 and § 13 of the California Constitution, the Court should deny the demurrer.

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