

No. 11-7603

IN THE
Supreme Court of the United States

REUBEN MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**BRIEF OF *AMICUS CURIAE* ELECTRONIC
FRONTIER FOUNDATION IN SUPPORT
OF PETITIONER**

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Amicus Curiae respectfully submit this Brief in support of the Petitioner pursuant to Supreme Court Rule 37.¹ Both Petitioner, Ruben Mitchell, and Respondent, the United States of America, have given express written consent to the filing of this brief.

STATEMENT OF INTEREST

The Electronic Frontier Foundation (“EFF”) is a nonprofit, member supported civil liberties organization working to protect rights in the information society. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy as emerging technologies become more prevalent in society. As part of its mission, EFF has often served as counsel or amicus in privacy cases, such as *National Aeronautics and Space Administration v. Nelson*, --- U.S. ---, 131 S.Ct. 746 (2011), and *City of Ontario v. Quon*, --- U.S. ---, 130 S. Ct. 2619 (2010). EFF has also served as amicus curiae in a case before the Ninth Circuit Court of Appeals, considering the constitutionality of DNA testing of pretrial arrestees. *See United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), *opinion vacated* 659 F.3d 761 (9th Cir. 2011).

INTRODUCTION

During oral argument before this Court in a case argued just two months ago, Justice Alito noted

the heart of the problem that’s presented by this case and will be presented by other cases

1. Amicus affirms that no counsel for a party authored this brief in whole or in part and no person or entity made a monetary contribution to this brief other than the amicus.

involving new technology is that in the pre-computer, pre-Internet age much of the privacy -- I would say most of the privacy -- that people enjoyed was not the result of legal protections or constitutional protections; it was the result simply of the difficulty of traveling around and gathering up information. But with computers, it's now so simple to amass an enormous amount of information about people . . .

United States v. Jones, Supreme Court No. 10-1259, Transcript of November 8, 2011 Oral Argument, p. 10:17-11:1.² The government's warrantless collection of DNA from individuals merely arrested for a crime requires this Court to yet again confront the "power of technology to shrink the realm of guaranteed privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

This Court has made clear that Courts encountering evolving technologies must reject "mechanical interpretations of the Fourth Amendment." *Id.* at 35-36. Yet the Third Circuit's closely divided opinion below, which analogized DNA profiles to traditional fingerprints by labeling both "identification," exemplifies the kind of "mechanical" Fourth Amendment interpretation that must be rejected: not only does it lose sight of the fact that DNA reveals far more about a person than a fingerprint, it views DNA profiling as mere "identification," although DNA profiling is used solely for the purpose of law enforcement "investigation." See *United States v.*

2. Available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf (last accessed December 14, 2011).

Mitchell, 652 F.3d 387, 409-10 (3d Cir. 2011). By adopting this erroneous interpretation of the DNA Act, the Third Circuit disregarded the substantial privacy interests at stake, and only highlighted the substantial rift developing among Courts struggling with this issue.

The time is ripe for this Court to grant Mr. Mitchell's *writ of certiorari* and resolve this complicated, and controversial issue.

SUMMARY OF ARGUMENT

Whether warrantless collection of DNA from individuals merely arrested for a crime satisfies the Fourth Amendment's prohibition against unreasonable search and seizure is an issue on which federal and state courts throughout the country disagree. This judicial disagreement dates back to when the DNA Act only mandated warrantless DNA collection from convicted felons. Equally troubling, courts do not even agree on the correct constitutional standard to apply when analyzing the warrantless DNA collection scheme in 42 U.S.C. § 14135a. The much broader version of the statute at issue here will only further deepen these divisions, because it extends warrantless DNA collection to individuals not yet convicted of a crime.

The Fourth Amendment was a response to "general warrants," which allowed the government "to search and seize whatever and whomever they pleased" without judicial review or individualized suspicion. *Ashcroft v. al-Kidd*, --- U.S. ---, 131 S.Ct. 2074, 2084 (2011). The DNA Act's authorization of blanket DNA collection of individuals not yet convicted of a crime presages a future

in which every person's DNA is sampled and profiled without any individualized suspicion whatsoever, and in direct contradiction of this Court's long standing Fourth Amendment precedent.

This Court must acknowledge the current and future backdrop of the warrantless search practices at issue here:

- The government must collect DNA samples to create DNA profiles, so any claim that the search and seizure does not implicate an individual's most private bodily information is false.
- The government retains both DNA profiles and samples almost indefinitely.
- The government repeatedly uses once-collected DNA profiles and samples for purposes unrelated to any one defendant's identity.
- The government has expanded, and will continue to expand, the scope of DNA sample and profile collection, both within and outside of the law enforcement context.
- DNA collection and analysis technology is rapidly advancing, making DNA searches less expensive and more efficient at determining information from an individual sample or profile.

As one judge has noted, "the advance of science promises to make stored DNA only more revealing in time." *United States v. Kincade*, 379 F.3d 813, 842 n.3 (9th Cir. 2004) (en banc) (Gould, J., concurring)). Because this difficult, divisive issue affects millions of Americans, this Court should grant *certiorari*.

ARGUMENT

I. *Certiorari* Is Appropriate Because Courts Are Divided on the Analytical Framework for Deciding the Issue

The degree to which courts confronting the issue of DNA collection fundamentally disagree is highlighted by the fact that they have adopted two different tests for analyzing the Fourth Amendment issue. The Third Circuit opinion below adopted a “totality of the circumstances” test based on this Court’s decisions in *United States v. Knights*, 534 U.S. 112 (2001) and *Samson v. California*, 547 U.S. 843 (2006). *See Mitchell*, 652 F.3d at 402-03. This totality of the circumstances test has also been adopted in the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits. *See United States v. Weikert*, 504 F.3d 1, 9-11 (1st Cir. 2007); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005), *Jones v. Murray*, 962 F.2d 302, 306-08 (4th Cir. 1992), *Groceman v. United States*, 354 F.3d 411, 413 (5th Cir. 2004) (per curiam), *Wilson v. Collins*, 517 F.3d 421, 427 (6th Cir. 2008), *United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006), *United States v. Kriesel*, 508 F.3d 941, 946 (9th Cir. 2007), *Padgett v. Donald*, 401 F.3d 1273, 1278 n. 4 (11th Cir. 2005), *Johnson v. Quander*, 440 F.3d 489, 494 n.1, 496 (D.C. Cir. 2006).

Meanwhile, the Second and Seventh Circuits have applied the “special needs” exception to the Fourth Amendment, taken from *Griffin v. Wisconsin*, 483 U.S. 868 (1987) and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). *See United States v. Amerson*, 483 F.3d 73, 78 (2d Cir. 2007), *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006), *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004); *see*

also *Nicholas v. Goord*, 430 F.3d 652, 659 (2d Cir. 2005) (adopting special needs test in analyzing constitutionality of New York state DNA collection statute). And the Tenth Circuit’s “own precedents are divided” between the special needs and totality of the circumstances test. *Banks v. United States*, 490 F.3d 1178, 83-84 (10th Cir. 2007); compare *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1997) (analyzing under totality of the circumstances standard) with *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003) (analyzing under special needs test).

Even amongst the Courts that have decided which test to apply to mandatory DNA collection, there is disagreement amongst judges. See e.g., *Kincade*, 379 F.3d at 840 (Gould, J., concurring) (believing special needs test, not totality of the circumstances analysis applies); *Kincade*, 379 F.3d at 861 (Reinhardt, J., dissenting) (disagreeing with majority’s conclusion that totality of the circumstances test is correct test to apply); *Weikert*, 504 F.3d at 18 (Stahl, J., dissenting) (believing special needs, rather than totality of the circumstances test applies); *Goord*, 430 F.3d at 672 (Leval, J., concurring) (rejecting special needs test of *Griffin* and *Edmond* and instead believing issue is controlled by *Illinois v. Lidster*, 540 U.S. 419 (2004)).

With courts and judges disagreeing about the methodology for deciding this important issue, this Court should grant *certiorari*.

II. This Court Should Grant *Certiorari* Because Courts Are Divided on Whether Mandatory DNA Extraction from Individuals in the Criminal Justice System Violates the Fourth Amendment

Although the Third Circuit was quick to note that “[e]very federal circuit court to have considered these statutes as applied to an individual who has been convicted and is either incarcerated or on probation, parole, or supervised release has upheld the constitutionality of the challenged statute,” there is considerable debate and disagreement within the circuit courts on this issue. *Mitchell*, 652 F.3d at 402.

The *Mitchell* opinion highlights the rift, with the *en banc* court itself split: eight judges found the DNA Act’s mandatory collection of DNA from pretrial arrestees to be constitutional, while six judges found it unconstitutional. *See Mitchell*, 652 F.3d at 416 (Rendell, J., dissenting). Nor are *Mitchell*’s six dissenters alone.

Many federal judges have voiced their opinion that the mandatory collection of DNA from individuals not yet convicted of a crime violates the Fourth Amendment. *See Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009) (finding forceful collection of DNA from pretrial arrestee unconstitutional); *United States v. Frank*, No. 09-CR-2075 (E.D.Wa. Mar. 10, 2010) (unpublished) (finding 42 U.S.C. § 14135a unconstitutional as applied to felony arrestees and pretrial detainees); *United States v. Purdy*, 2005 WL 3465721 (D.Neb. Dec. 19, 2005) (unpublished) (finding DNA Act unconstitutional for mandating collection of

DNA from arrestees and detainees);³ *see also United States v. Scott*, 450 F.3d 863 (9th Cir. 2006) (warrantless searches, specifically drug testing, of pretrial arrestees unconstitutional).

Even some state courts have ruled that DNA collection from individuals simply arrested of a crime fails Fourth Amendment scrutiny. *See People v. Buza*, 129 Cal.Rptr.3d 753 (Cal. Ct. App. 2011) (finding California’s collection of DNA from felony arrestees unconstitutional), *review granted* 132 Cal.Rptr.3d 616 (Cal. Oct. 19, 2011); *In re Matter of C.T.L.*, 722 N.W.2d 484 (Minn. 2006) (holding pretrial DNA collection from juveniles unconstitutional); *see also* Tenn. Op. Atty. Gen. No. 07-45, 2007 WL 1451632 (April 9, 2007) (proposed Tennessee legislation requiring DNA collection from individuals arrested for violent felonies “constitutionally suspect”).

Similarly, prior versions of the DNA Act, which only mandated DNA collection from individuals convicted of a crime, sparked considerable dissent amongst judges. *See Kriesel*, 508 F.3d at 950 (B. Fletcher, J., dissenting)

3. The Ninth Circuit is the only other federal circuit court to analyze the issue in *Mitchell*, the constitutionality of the DNA Act’s requirement for DNA collection from pretrial arrestees. *See United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010). That three-judge panel issued three separate decisions, including a dissenting opinion by Judge Schroeder, who believed that DNA collection from pre-trial arrestees violates the Fourth Amendment. *See* 621 F.3d at 1234 (Schroeder, J., dissenting). After agreeing to rehear the case *en banc*, 646 F.3d 659 (2011), the defendant’s guilty plea shortly before *en banc* oral argument mooted the case, and the Ninth Circuit vacated the panel opinion. *See* 659 F.3d 761 (9th Cir. 2011).

(finding warrantless DNA collection from felon on supervised release unconstitutional); *Weikert*, 504 F.3d at 18 (Stahl, J., dissenting) (finding warrantless searches of convicted felons under DNA Act unconstitutional); *Sczubelek*, 402 F.3d at 189 (McKee, J., dissenting) (finding coerced collection of DNA of individual on supervised release under DNA Act unconstitutional); *Kincade*, 379 F.3d at 861 (Reinhardt, J., dissenting) (finding warrantless collection of DNA unconstitutional); *id.* at 875 (Hawkins, J., dissenting) (finding warrantless DNA collection unconstitutional); *Id.* at 871 (Kozinski, J., dissenting) (warrantless DNA collection from convicted felons unconstitutional); *Jones*, 962 F.2d at 311 (Murnaghan, J., dissenting in part) (finding DNA collection under Virginia state law from felons convicted of non-violent crimes unconstitutional).

With such disagreement about the constitutionality of a statute that applies to a vast number of Americans, this Court should grant *certiorari* to provide guidance on the issue.

III. The Privacy Interests at Stake Warrant this Court's Review

The dissenting judges below recognized that DNA analysis technology poses grave threats to personal privacy and expressed concerns about how the expansion of DNA collection portends a society in which every American's DNA will be sampled and profiled. *See Mitchell*, 652 F.3d at 424 (Rendell, J., dissenting) ("we believe we should not be blind to the potential for abuse when assessing the legitimacy of government action. These concerns are legitimate and real, and should be

taken into account in considering the totality of the circumstances in this case.”). They were not alone. *See Kincade*, 379 F.3d at 872 (Kozinski, J., dissenting). (“[i]f collecting DNA fingerprints can be justified [here], then it’s hard to see how we can keep the database from expanding to include everybody.”).

The Third Circuit, while not entirely ignoring these concerns, discounted their relevance partly by characterizing them as future concerns not immediately presented to this case. *See Mitchell*, 652 F.3d at 408. This Court’s opinion in *Kyllo*, however, stands for the proposition that courts cannot avoid confronting the known implications of a rapidly evolving technology that is being used forensically.

There are three crucial aspects of the increasing deployment of modern DNA technology that this Court must address. First, there is a clear trend toward cheaper DNA analysis. Second, government forensic practices have already greatly expanded their use of DNA technology. Third, non-forensic practices have also greatly expanded the scope of DNA collection. Taken together, these facts compel the conclusion that if courts do not insist that Fourth Amendment values be scrupulously observed, the continued evolution of DNA technology will usher in a future where dragnet surveillance by tracking our DNA may be unconstrained.

A. Cheaper DNA Analysis Will Lead to More DNA Analysis

Society has experienced how new technologies enable it to do things it could not do before and to do those things

more cheaply and efficiently. But where surveillance is concerned, cheapness and efficiency are not an unalloyed good; improved surveillance techniques may well aid law enforcement in criminal investigation, but they also pose risks to our privacy.

In the past, this Court could say that individuals have no reasonable expectation of privacy in public, secure in the fact that surveilling individuals was so costly that it occurred only when the government had a compelling reason to do so. *See e.g., United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements.”). Today, technology has made it so much easier to use GPS tracking, cellphone tracking, or audio and video surveillance in public places, that surveillance is now routine. *See e.g., Jones*, Supreme Court No. 10-1259, argued November 8, 2011 (considering whether warrantless GPS surveillance of car violates 4th Amendment).

Similarly, this Court has said that individuals have no reasonable expectation of privacy in records of their transactions held by business. *See United States v. Miller*, 425 U.S. 435 (1976). Today, our lives are thoroughly documented in myriad transactions and virtually everything we do electronically is recorded somewhere. Cost therefore matters to privacy and to Fourth Amendment values.

This is relevant because society faces the same set of issues for DNA technology. Even ten years ago, the cost of analyzing DNA was so great it did not pose a risk to ordinary Americans. Today, DNA analysis is much

cheaper; a recent report prepared for the U.S. Department of Defense predicts the cost to sequence an entire human genome could drop to \$100 by 2013. JASON (The MITRE Corporation), *The \$100 Genome: Implications for the DoD*, at 11 (Dec. 15, 2010) (hereinafter “JASON Report”).⁴

The JASON report explains that while the first draft sequences of the human genome cost about \$300 million, improvements in “second-generation” DNA sequencing platforms in the past five years have reduced costs such that “[a]n entire human genome can now be sequenced in a matter of days for a retail cost of \$20,000,” and “third-generation”⁵ DNA sequencing technology will mean that “DNA sequencing costs will no longer be a factor limiting personal human genomics technologies.” *Id.* at 2. Indeed, the cost “will likely fall to less than \$1000 by 2012, and to \$100 by 2013.” *Id.* at 12.

Courts did not need to think about the privacy expectation in our DNA when the cells we shed revealed

4. Available at www.fas.org/irp/agency/dod/jason/hundred.pdf (last visited December 19, 2011).

5. The JASON report explains “new technologies, called third-generation sequencing systems,” are expected to account for this cost reduction. JASON Report at 16. Technology being developed by Pacific Biosciences “should reduce reagent costs, increase read lengths, and dramatically reduce the time needed to sequence each nucleotide.” *Id.* Another company, Ion Torrent, has developed advanced DNA sequencing chips that reduce costs even though they are made with “chip fabrication facilities constructed in 1995;” “[d]ramatic” improvements “can be achieved simply by using more recent chip fabrication facilities . . . [and] [t]herefore, DNA sequencing chips that permit complete collection of a human genome for less than \$100 seems within easy reach.” *Id.* at 17-18.

nothing about us. That is no longer true. And just as we cannot hide our faces in public or enjoy many conveniences of everyday life without leaving electronic footprints, we cannot hide our DNA; we leave skin cells wherever we go. If, as some argue, we have no privacy interest in our “abandoned” DNA, *see* Jules Epstein, “*Genetic Surveillance*”—*The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech. & Pol’y 141, 151 (2009), then there will be no legal constraint on government collection of our DNA from public places. The only possible way to limit government DNA-based surveillance will be to legally constrain governmental use of our DNA.

B. The Government is Already Taking Steps to Expand Its Collection and Use of DNA and to Build a Bigger Biometric Database

One dissenting judge has warned of a “slippery slope toward ever-expanding warrantless DNA testing.” *Pool*, 621 F.3d at 1235 (Schroeder, J., dissenting) (citing *Kincade*, 379 F.3d at 842-71 (Reinhardt, J., dissenting) and 871-75 (Kozinski, J., dissenting)), *opinion vacated* 659 F.3d 761. Those dissents were prescient. The government’s collection, sharing and analysis of DNA profiles and other biometric identifiers has expanded significantly over the last few years.

As a result of the expansion of the DNA Act and state DNA collection statutes, DNA collection for law enforcement and law enforcement-related purposes has increased exponentially. In 2009 alone, nearly 1.7 million samples from convicted offenders and arrestees were processed through CODIS. *See* Marc Nelson, *Making*

Sense of DNA Backlogs, 2010—Myths vs. Reality, National Institute of Justice, 7–8 (Feb. 2011).⁶ As of 2011, the National DNA Index (“NDIS,” the federal level of CODIS) contains over 9,748,870 offender profiles, and states’ individual databases are each expanding as well. See FBI, “CODIS—NDIS Statistics,” (June 2011).⁷

Some have predicted even greater federal accumulation of DNA samples once the Department of Homeland Security (“DHS”) fully implements its program to collect samples from “non-United States persons who are detained under the authority of the United States” under 42 U.S.C. § 14135a(a)(1)(A).⁸ As DHS may detain “non-United States persons” for purely civil rather than law enforcement purposes, such as overstaying a visa, this

6. Available at <http://www.ncjrs.gov/pdffiles1/nij/232197.pdf> (last visited December 19, 2011).

7. Available at <http://www.fbi.gov/about-us/lab/codis/ndis-statistics> (last visited December 19, 2011). California added 56,969 profiles to its state-level database between October 1 and December 31, 2010. See California Department of Justice Proposition 69 DNA Data Bank Program Report for Fourth Quarter 2010, available at <http://ag.ca.gov/bfs/pdf/quarterlyrpt.pdf> (last visited December 19, 2011). California has 1,748,480 DNA profiles in its database. *Id.*

8. See e.g., Julia Preston, “Immigrants’ DNA to flood U.S. database,” *International Herald Tribune*, Feb. 5, 2007 (quoting Justice Department officials as saying “the goal . . . is to make DNA sampling as routine as fingerprinting for anyone detained by federal agents” and noting in 2006, “federal customs, Border Patrol and immigration agents detained more than 1.2 million immigrants.”). Available at <https://www.nytimes.com/2007/02/05/world/americas/05iht-dna.4481568.html> (last visited December 19, 2011).

could result in expanding CODIS to contain hundreds of thousands of profiles of people who have never interacted with the criminal system. *See Padilla v. Kentucky*, --- U.S. ---, 130 S.Ct. 1473, 1481 (2010) (“deportation is a particularly severe ‘penalty,’ . . . but it is not, in a strict sense, a criminal sanction . . . removal proceedings are civil in nature”) (citations omitted).

Current federal technology cannot meet the demands of these expanded collection programs. A Department of Justice (“DOJ”) sponsored report noted the “year-end backlog of offender samples has increased steadily, from 657,166 in 2007, to 793,852 in 2008, to 952,393 in 2009.” Nelson, *Making Sense of DNA Backlogs* at 8. Current federal DNA technology also cannot efficiently and accurately conduct the kinds of analyses, such as familial or partial searching, that the government wants conducted on DNA it has already collected. *See* Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 *Stan L. Rev.* 751, 764-65 (Apr. 2011) (noting the current version of CODIS “is poorly designed for identifying true leads where partial matches are uncovered”).

To meet these demands, the DOJ has spent the last five years attempting to “re-architect the CODIS software” to expand its capabilities. *See* FBI, “CODIS—The Future.”⁹ In 2006, the DOJ awarded a multi-year, multi-million dollar contract to Unisys to develop a “Next Generation CODIS,” which would expand the “scalability and flexibility” of CODIS and include a “highly sophisticated search engine technology that will greatly

9. Available at http://www.fbi.gov/about-us/lab/codis/codis_future (last visited December 19, 2011).

accelerate the DNA matching process.” See Unisys, “FBI Contracts with Unisys for Development and Deployment of Next-Generation Combined DNA Index System.”¹⁰ While the current status of Next Generation CODIS is unclear,¹¹ the DOJ has stated it plans to roll out a new version of CODIS sometime in 2011-2012. See Department of Justice, *Exhibit 300: Capital Asset Plan and Business Case Summary, FBI Combined DNA Index System*, 1 (2011).¹² This latest version will include improvements in search and analysis capabilities, including incremental

10. Available at https://www.unisys.com/products/news_all_events/all__news/10198717.htm (last visited December 19, 2011).

11. Contrast this with the FBI’s other “Next Generation” biometric database, called “Next Generation Identification” or “NGI,” which promises to “offer state-of-the-art biometric identification services,” including “advanced fingerprint identification technology” and “multimodal” identification that includes iris scans, palm prints, and voice and facial recognition technology. See FBI, “Next Generation Identification” available at http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi (last visited December 19, 2011). In fact, the FBI is already building out the NGI database with fingerprints from the DOJ’s Integrated Automated Fingerprint Identification System (“IAFIS”) as well as the Department of Homeland Security’s IDENT and the Department of State’s US-VISIT fingerprint collection programs. See Center for Constitutional Rights, *New Documents Reveal Behind-the-Scenes FBI Role in Controversial Secure Communities Deportation Program*, (July 6, 2011) at <http://ccrjustice.org/newsroom/press-releases/new-documents-reveal-behind-scenes-fbi-role-controversial-secure-communities-deportation-program> (last visited December 19, 2011).

12. Available at www.itdashboard.gov/?q=investment/exhibit300/pdf/011-10-01-03-01-2501-00 (last visited December 19, 2011).

searching, population statistical calculations, efficient processing of large databases up to 50 million specimens, and partial profile indicators, or familial searches. *Id.* It will also allow greater interoperability with state and international DNA databases. *Id.* This report and the FBI’s own website also state that the DOJ will introduce further improvements to CODIS in the near future, including “expanding CODIS capabilities in terms of DNA match technologies (*e.g.* electropherogram, base composition, full mtDNA sequence, mini-STRs, SNPs)” and kinship searches. *Id.*; *see also* FBI, “CODIS—The Future,”¹³ (noting the re-architecture of CODIS will allow it “to include additional DNA technologies.”)

As shown above, the “slippery slope toward ever-expanding warrantless DNA testing” dissenting judges have predicted, is already upon us. *See Kincade*, 379 F.3d at 842-71 (Reinhardt, J., dissenting).

C. DNA Collection is Already Expanding in Non-Forensic Contexts

The massive amount of DNA collection and analysis occurring in the law enforcement context may be matched

13. Available at http://www.fbi.gov/about-us/lab/codis/codis_future (last visited December 19, 2011).

by DNA collection in other areas of society, from military DNA collection,¹⁴ to personal DNA testing,¹⁵ to blood and tissue samples collected for public health purposes. While some rules have been set up to regulate collection and sharing of these DNA samples, the edges are hazy. And it has been shown in sensitive data collection contexts outside of DNA¹⁶ that there is a high risk these treasure

14. The JASON report recommended the Department of Defense collect and archive DNA samples from all military personnel now and “[p]lan for the eventual collection of complete human genome sequence data.” JASON Report at 50. This year, the Army issued a solicitation suggesting it may plan to follow JASON’s recommendations. See U.S. Army, *Archive of Samples for Long-term Preservation of RNA and Other Nucleic Acids*, Small Business Innovation Research Program, A11-107 (2011) available at http://www.dodsbir.net/sitis/archives_display_topic.asp?Bookmark=40675 (last visited December 19, 2011).

15. Last year, several drugstores planned to sell at-home personal genetic testing kits that required purchasers to send a saliva sample to the manufacturer, Pathway Genomics, who would analyze the sample and post results online. See Sandra Jones, “Genetic test kits to hit stores amid controversy,” *Chicago Tribune* May 11, 2010 available at http://articles.chicagotribune.com/2010-05-11/business/ct-biz-0512-genetic-tests-20100511_1_genetic-test-kits-walgreens (last visited July 23, 2011). While the program was shelved and led to an FDA investigation and congressional hearing, it is still possible to purchase genetic tests over the Internet. See <https://www.23andme.com/> (offering genetic tests for \$99) (last visited December 19, 2011).

16. For example, in 2006 the Department of Veterans Affairs lost the names, birth dates, and Social Security numbers of 17.5 million military veterans and personnel. See Mary Miller, “Data theft: Top 5 most expensive data breaches,” *Christian Science Monitor*, available at <http://www.csmonitor.com/Business/2011/0504/Data-theft-Top-5-most-expensive-data->

troves of data will be compromised or used for purposes beyond their original intention.

Newborn blood sample collection exemplifies these risks. In 2004, one federal circuit judge warned that if “the expansion of the DNA Act’s reach continues to follow its current trajectory, it will not be long before CODIS includes DNA profiles from . . . all newborns.” *Kincade*, 379 F.3d at 849 (Reinhardt, J., dissenting). That thought may soon bear fruit.

Newborn genetic screening is mandatory in 49 states, and almost all of the 4 million infants born in the United States each year are tested. See Michelle H. Lewis, *et al.*, *State Laws Regarding the Retention and Use of Residual Newborn Screening Blood Samples*, *Pediatrics* 2011; 127: 703-712, at 704 (March 28, 2011)¹⁷ (hereinafter “*Newborn Blood Screening Laws*”). Hospitals collect a small blood sample from each newborn within the first 24 hours of his or her life and send it to testing for rare genetic, congenital and functional disorders. After testing, state rules vary widely on what the state may or must do with the sample, *id.* at 706-707 (table of state laws), but 40% of states retain the sample for at least a year. *Id.* at 704

While newborn genetic screenings are important, have contributed to advances in research, prevented thousands of serious health consequences, and saved

breaches/5.-US-Veterans-Affairs-25-30-million (last visited December 19, 2011).

17. Also available at http://www.genomicslawreport.com/wp-content/uploads/2011/04/Pediatrics_newborn-screening.pdf (last visited December 19, 2011).

lives, *id.* at 707, the national collection program has not been without controversy. In 2009, after litigation and several public records requests, it was revealed that the Texas Department of State Health Services (“DSHS”) stored newborn blood spots indefinitely and used and shared them with others for research purposes without parental consent. *See Beleno, et al. v. Texas Department of State Health Services, et al.*, 5:09-cv-00188 (W.D. Tx. 2009). In one of the most controversial instances of sharing, Texas DSHS distributed hundreds of maternally unrelated bloodspots to the U.S. Armed Forces Pathology Laboratory for use in a forensic mitochondrial DNA (mtDNA) registry. *See* Emily Ramshaw, “DSHS Turned Over Hundreds of DNA Samples to Feds,” *Texas Tribune*, February 2, 2010.¹⁸ This database was built specifically to solve crimes, identify missing persons, and eventually, to allow mtDNA to be shared internationally for law enforcement and anti-terrorism purposes. *Id.* As a result of the controversy surrounding Texas’s blood spot collection program, the agency ultimately destroyed all samples it collected before May 2009—nearly 5 million samples in all. *Id.*; *see also* Texas DSHS, Statement: Newborn Screening Settlement News Release (Dec. 22, 2009).¹⁹

The situation in Texas highlights the potential for abuse inherent in DNA collection programs. As noted, many states retain residual blood spots collected from

18. *Available at* <http://www.texastribune.org/texas-state-agencies/department-of-state-health-services/dshs-turned-over-hundreds-of-dna-samples-to-feds/#> (last visited December 19, 2011).

19. *Available at* <http://www.dshs.state.tx.us/news/releases/20091222.shtm> (last visited December 19, 2011).

newborns for at least a year, and some states, including California, may retain the bloodspots for up to 21 years unless a parent specifically requests its destruction.²⁰ While some states have attempted to draft clear laws regarding who may access the samples and for what purposes, *see* Lewis, *et al. Newborn Blood Screening Laws* at 705-707, even the clearer laws allow room for interpretation. For example, after Texas's newborn blood sample sharing controversy and resulting statutory changes, a Texas DSHS spokeswoman stated the Armed Forces study fell "under the broader category of public health research."²¹ Equating sharing for forensics and law enforcement purposes with sharing for research to discover a cure for cystic fibrosis strains the definition of "public health" and opens the door for even broader sharing.

It remains to be seen whether other states will attempt to broaden their sharing of newborn blood samples or whether law enforcement may try to regularly

20. California's newborn screening statutes and regulations do not discuss how long the state may retain samples. *See* Cal. Health & Safety Code §§ 125000-125002; 124975-124996. However, the department of public health has indicated it may retain samples for up to 21 years. *See* California Department of Public Health, *Notice of Information and Privacy Practices, Genetic Disease Screening Program, Newborn Screening Branch*, available at <http://www.cdph.ca.gov/programs/GDSP/Documents/Privacy%20Policy.pdf> (last visited December 19, 2011).

21. *See* Mary Ann Roser, "Suit Possible Over Baby DNA Sent to Military Lab for National Database," *Austin American-Statesman* February 22, 2010, available at <http://www.statesman.com/news/texas-politics/suit-possible-over-baby-dna-sent-to-military-268714.html> (last visited December 19, 2011).

access this data in the future.²² However, given the massive DNA collection occurring in other contexts, including from arrestees under the DNA Act at issue in this case, these risks cannot be ignored.

CONCLUSION

The Third Circuit’s unprecedented acceptance of warrantless and suspicionless DNA collection from all arrestees is the unfortunate next step towards a future where “all Americans will be at risk . . . of having our DNA samples permanently placed on file in federal cyberspace, and perhaps even worse, of being subjected to various other governmental programs providing for suspicionless searches conducted for law enforcement purposes.” *Kincade*, 379 F.3d at 843 (Reinhardt, J., dissenting).

“The time to put the cork back in the brass bottle is now—before the genie escapes.” *Id.* at 875 (Kozinski, J., dissenting). This Court should grant Mr. Mitchell’s petition for *certiorari*, and resolve whether the warrantless collection of an arrestee’s DNA violates the Fourth Amendment.

22. It is easy to imagine a situation where, in a state that stores newborn blood samples for 21 years or indefinitely, law enforcement might want access to blood samples to connect a suspect whose DNA is not yet in CODIS with DNA collected at a crime scene.

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