

No. 12-207

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**In the Supreme Court of the United States**

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STATE OF MARYLAND, PETITIONER

*v.*

ALONZO JAY KING, JR.

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*ON WRIT OF CERTIORARI  
TO THE COURT OF APPEALS OF MARYLAND*

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**BRIEF FOR THE RESPONDENT**

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### **QUESTION PRESENTED**

Whether the Fourth Amendment permits the warrantless collection and analysis of DNA from a person who has been arrested for, but not convicted of, a criminal offense, solely for use in investigating other offenses for which there is no individualized suspicion.



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**BRIEF FOR THE RESPONDENT**

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**OPINIONS BELOW**

The opinion of the Maryland Court of Appeals (J.A. 83-166) is reported at 42 A.3d 549. The court's order denying reconsideration and a stay of the mandate (Pet. App. 87b) is unreported.

**JURISDICTION**

The judgment of the Maryland Court of Appeals was entered on April 24, 2012. A motion for reconsideration was denied on May 18, 2012 (Pet. App. 87b). The petition for a writ of certiorari was filed on August 14, 2012, and granted on November 9, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

**CONSTITUTIONAL PROVISION INVOLVED**

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**STATEMENT**

Respondent was arrested in Wicomico County, Maryland, and charged in state court with first- and second-degree assault. The state then collected a sample of respondent's DNA pursuant to the Maryland DNA Collection Act, which requires the collection and analysis of DNA from persons who have been charged with certain criminal offenses. It is undisputed that the state conducted the DNA testing not to link respondent to the alleged assault, but rather to determine whether he was implicated in any other offenses.

Respondent's DNA profile was matched to a profile from forensic evidence of a previous sexual assault. Based solely on that match, respondent was charged with various offenses arising from the sexual assault, including first-degree rape. Respondent moved to suppress evidence of the DNA match. The trial court denied respondent's motion and later found respondent guilty of first-degree rape. The Maryland Court of Appeals reversed, holding that the warrantless, suspicionless collection and analysis of respondent's DNA violated the Fourth Amendment.

### A. Background

1. DNA testing is a powerful law enforcement tool that raises profound privacy concerns. Deoxyribonucleic acid (DNA) is located in almost every cell of the human body; it contains all of the information that determines an individual's genetic makeup. As every schoolchild learns, a DNA molecule consists of two strands that are coiled together in a ladder-like double helix. Each strand consists of a series of four bases: A (adenine), C (cytosine), G (guanine), and T (thymine). The base on one strand forms a "rung" of the ladder with a corresponding base on the other strand: A always pairs with T, and C with G. The order in which the base pairs are arranged constitutes an individual's DNA sequence; variations in that sequence are what give rise to genetic differences. See John M. Butler, *Forensic DNA Typing: Biology, Technology, and Genetics of STR Markers* 17-19 (2d ed. 2005) (Butler).

In the 1980s, federal and state governments began to use DNA testing for law enforcement purposes. In particular, law enforcement agencies began to create DNA profiles for individuals suspected of committing crimes, which could be compared with profiles created from forensic evidence collected at crime scenes. In order to create a DNA profile, officers must first collect cells that contain DNA. Cells can be collected from an individual through a blood draw or a cheek swab; they can also be collected from bodily fluids, flakes of skin, or items such as a toothbrush, a coffee cup, or a cigarette butt. DNA is extracted from the cells to create a DNA sample; the sample is analyzed to gain information about the order of the base pairs, and that information is used to create a DNA profile. See Butler 7, 11, 34 & tables 3.1, 11.

Today, the most common method of creating a DNA profile is through short tandem repeat (STR) testing.

Much of an individual's DNA is found on chromosomes in the nuclei of cells; at certain positions on the chromosomes (known as "loci"), short sequences of base pairs repeat themselves. The number of times the sequence repeats at a particular locus, however, varies to some degree from person to person. In STR testing, the number of repeats is counted at several different loci; the resulting series of numbers constitutes the DNA profile. That profile can then be compared against other profiles in the hopes of producing a match. See Butler 7, 17, 20-27, 85-96.

2. In 1994, Congress authorized the Federal Bureau of Investigation (FBI) to establish a national database of DNA profiles taken from convicted individuals and from forensic evidence collected at crime scenes. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210304(a)(1)-(3), 108 Stat. 2069 (codified as amended at 42 U.S.C. 14132). Exercising that authority, the FBI created the Combined DNA Index System (CODIS), a coordinated system of federal, state, and local databases that allows participating law enforcement agencies to store DNA profiles and to search profiles stored by other agencies. See FBI, *CODIS Brochure* <[tinyurl.com/codisbrochure](http://tinyurl.com/codisbrochure)> (last visited Jan. 25, 2013) (*CODIS Brochure*).

In the course of creating CODIS, the FBI devised a standard DNA profile consisting of data from 13 different loci. Those loci are found on "non-coding" regions of an individual's chromosomes: that is, regions that do not store information that is used to make proteins. The loci were selected in the belief that they did not correspond to any particular traits or characteristics. See H.R. Rep.

No. 900, 106th Cong., 2d Sess., Pt. I, at 27 (2000); Butler 22, 94, 443-444.<sup>1</sup>

By 1999, all 50 States required DNA collection and analysis from at least some convicted individuals. See Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767, 775 (1999).<sup>2</sup> In 2000, Congress followed suit and required DNA collection and analysis from individuals convicted of a limited set of federal offenses; in 2004, Congress extended that requirement to all individuals convicted of federal felonies. See DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, § 3(a)(1)-(2), 114 Stat. 2728 (codified as amended at 42 U.S.C. 14135a(a)(1)-(2)); Debbie Smith Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2269-2271 (codified as amended at 42 U.S.C. 14135a(d)).

Then as now, courts consistently rejected claims by *convicted* individuals that the collection and analysis of their DNA violated the Fourth Amendment. See, e.g., *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc), cert. denied, 544 U.S. 924 (2005); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996). Accordingly, some States began to test the boundaries of their authority by requiring DNA collection and analysis from individuals who had been arrested for, but not yet con-

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<sup>1</sup> The FBI has announced plans to expand the number of loci included in the standard DNA profile, but has not yet done so. See FBI, *Planned Process and Timeline for Implementation of Additional CODIS Core Loci* <[tinyurl.com/newloci](http://tinyurl.com/newloci)> (last visited Jan. 25, 2013).

<sup>2</sup> All 50 States now require DNA collection and analysis from all individuals convicted of felonies. See DNAResource.com, *State DNA Database Laws—Qualifying Offenses* (Sept. 2011) <[tinyurl.com/statednalaws](http://tinyurl.com/statednalaws)>.

victed of, criminal offenses. In 2004, Congress expressly permitted the storage on CODIS of profiles of arrested individuals. See Pub. L. No. 108-405, § 203, 118 Stat. 2269-2271. In 2005 and 2006, Congress extended federal DNA testing to all arrestees. See DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1004, 119 Stat. 3085-3086; Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 155, 120 Stat. 611 (codified as amended at 42 U.S.C. 14135a(a)(1)(A)); 28 C.F.R. 28.12.

The federal government has provided substantial funding to the States for DNA testing, thus creating a powerful incentive for States to create and expand their own programs. In 2006, the federal government expressly made funds available to the States for the creation of DNA profiles of arrested individuals; earlier this month, the President signed a law that provides funding for up to the entire first-year cost of implementing an arrestee testing program. See Pub. L. No. 109-162, § 1003, 119 Stat. 3085; Katie Sepich Enhanced DNA Collection Act of 2012, § 3, Pub. L. No. 112-253, 126 Stat. 2408. Like the federal government, 28 States now require DNA collection and analysis from at least some arrestees. See Julie Samuels et al., *Collecting DNA from Arrestees: Implementation Lessons*, Nat'l Inst. Just. J., June 2012, at 18, 19 <[tinyurl.com/samuelsdna](http://tinyurl.com/samuelsdna)>.<sup>3</sup>

As federal and state DNA testing programs have expanded, the number of DNA profiles in CODIS has grown exponentially. In 2000, there were about 400,000

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<sup>3</sup> Of those 28 States, three have idiosyncratic statutes: Alabama requires consent before testing, Ala. Code § 36-18-25(c)(3); Oklahoma collects DNA only from illegal-alien arrestees, Okla. Stat. Ann. tit. 74, § 150.27a; and Connecticut collects DNA only from arrestees with prior convictions who have not previously been tested, see Conn. Gen. Stat. Ann. § 54-102g(a).

offender profiles; by 2006, there were about 4 million offender profiles and 50,000 arrestee profiles. According to the most recent available data, CODIS now contains about 10 million offender profiles and 1.1 million arrestee profiles. Every Monday morning, the CODIS system automatically checks individual profiles against profiles created from forensic evidence collected at crime scenes, looking for matches. See *CODIS Brochure*; Jeffrey Rosen, *Genetic Surveillance for All?*, Slate (Mar. 17, 2009) <[tinyurl.com/rosencodis](http://tinyurl.com/rosencodis)>.

3. This case involves a constitutional challenge to an application of the Maryland DNA Collection Act (Maryland Act or Act), Md. Code Ann., Pub. Safety §§ 2-501 to 2-514. The evolution of the Maryland Act largely tracks that of federal law. In 1994, the Maryland General Assembly established a state database of DNA profiles and required DNA collection and analysis from individuals convicted of rape and other sexual offenses. See 1994 Md. Laws 458. In 1999 and 2002, the General Assembly expanded the Act to cover individuals convicted of all felonies and some misdemeanors. See 1999 Md. Laws 490; 2002 Md. Laws 465.

In 2008, the General Assembly temporarily expanded the Act to cover individuals who had been charged with, but not yet convicted of, crimes of violence and burglaries—including, as is relevant here, first-degree assault. Md. Code Ann., Pub. Safety § 2-504(a)(3); 2008 Md. Laws 337.<sup>4</sup> Under the Act, the collection of DNA samples from covered individuals is mandatory; with regard to individuals who have been charged but not convicted, the Act

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<sup>4</sup> The expansion of the Act to arrestees is due to expire on December 31, 2013. A bill to extend the expansion is currently pending in the General Assembly, but has not yet passed.

provides that the state is to collect the sample at the time of the charge. Md. Code Ann., Pub. Safety § 2-504(b)(1).

The Act further provides that, “[t]o the extent fiscal resources are available,” DNA samples “shall be \* \* \* tested” for several purposes, including “as part of an official investigation into a crime”; “to analyze and type the genetic markers contained in or derived from the [sample]”; and “for research and administrative purposes,” such as “develop[ing] a population data base after personal identifying information is removed” and “support[ing] identification research and protocol development of forensic DNA analysis methods.” Md. Code Ann., Pub. Safety § 2-505(a). In aid of those purposes, the Act specifically authorizes the state to prepare and store “DNA records” (the Act’s term for DNA profiles), which can be compared with similar profiles in national and state databases. *Id.* §§ 2-502(d), 2-504(d)(1), 2-505(b), 2-506(a).

As to individuals who have been charged and arraigned but not yet convicted, the Act authorizes the state to store both DNA samples and DNA profiles while charges remain pending. Md. Code Ann., Pub. Safety §§ 2-506(b), 2-511. If a charge results in a conviction, the DNA sample and DNA profile are retained indefinitely; if the charge does not result in a conviction (or the conviction is later overturned), the state is required to destroy the DNA sample and expunge the DNA profile from its database. *Id.* § 2-511(a)(1), (c).<sup>5</sup>

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<sup>5</sup> Numerous groups, including the Maryland chapters of the NAACP and NOW, opposed the expansion of the Maryland Act to arrestees. The Maryland chapter of NOW testified that, while “it is important for women to be protected before an assault or a rape,” the expansion would violate the Fourth Amendment and state resources would be better devoted to crime-prevention programs. See

### B. Procedural History

1. On April 10, 2009, respondent was arrested in Wicomico County, Maryland, and charged in state court with first- and second-degree assault. Respondent was accused of pointing a shotgun at a group of individuals; after one of the individuals pointed out respondent to an officer, he was arrested. Respondent admitted his involvement in the incident and appears to have been immediately identified as Alonzo King. See App., 1a-6a, *infra* (officer's statement of probable cause from the night of the arrest).<sup>6</sup>

After respondent was arrested and charged, the state collected a sample of his DNA pursuant to the Act. The state did not contend below, and does not contend here, that it conducted the DNA analysis to link him to the alleged assault; instead, it did so to determine whether he was implicated in any other offenses. See J.A. 85-86, 149. State personnel collected the sample of respondent's DNA by means of a swab of the inside of his cheek. The Forensic Sciences Division of the Maryland State Police processed respondent's DNA sample; a private vendor then analyzed the sample and prepared a DNA profile, which was subsequently stored in the state database. On August 4, 2009—almost four months after respondent's

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*Hearing on S.B. 211 Before the S. Comm. on Judicial Proceedings, 2008 Leg., 425th Sess. (Md. Feb. 13, 2008) (statement of Maryland NOW).*

<sup>6</sup> The charge of first-degree assault was later dropped; after respondent entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), he was convicted of second-degree assault, a misdemeanor offense. J.A. 86 & n.3. An individual who is convicted of second-degree assault is not subject to DNA testing under the Act. See Md. Code Ann., Pub. Safety § 2-501(e).

initial arrest and charge—respondent’s DNA profile was matched to a profile from forensic evidence of a 2003 sexual assault in Wicomico County. J.A. 86-88.

2. Based solely on that match, the state sought, and a Wicomico County grand jury returned, an indictment charging respondent with various offenses arising from the sexual assault, including first-degree rape. Because the Act provides that a match “may be used only as probable cause and is not admissible at trial,” Md. Code Ann., Pub. Safety § 2-510, the state obtained a search warrant and collected a second DNA sample, which also produced a match. J.A. 89.

Respondent moved to suppress evidence of the DNA match, arguing, as is relevant here, that the initial collection and analysis of his DNA violated the Fourth Amendment. J.A. 89-90. The trial court denied the motion. J.A. 47-55, 82. The court later found respondent guilty of first-degree rape and sentenced him to life imprisonment without the possibility of parole. J.A. 92.

3. The Maryland Court of Appeals reversed. J.A. 83-166.

a. The Maryland Court of Appeals first reasoned that, under the Fourth Amendment, “[a] seizure or search will be upheld even if there is a reasonable expectation of privacy when the government has a ‘special need.’” J.A. 96. The court noted, however, that the state had “do[ne] little more than mention the special needs exception in the present case.” *Ibid.* That was “for good reason,” according to the court, because the “narrow confines” of that doctrine “do not embrace the case at bar.” *Ibid.*

The court proceeded to determine that respondent’s privacy interests outweighed the government’s interests in collecting and analyzing respondent’s DNA. J.A. 96-152. At the outset, the court stated that “[o]ur analysis is

influenced \* \* \* by the precept that the government must overcome a presumption that warrantless, suspicionless searches are per se unreasonable.” J.A. 140.

First addressing respondent’s privacy interests, the court noted that “[respondent], as an arrestee, had an expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material.” J.A. 142. The court observed that “DNA samples contain a massive amount of deeply personal information.” J.A. 141 (internal quotation marks and citation omitted). The court then concluded that, to the extent the Act imposed restrictions on the use of the DNA sample, that fact “does not change the nature of the search.” J.A. 142. The court explained that “upholding the statute simply because of restrictions on the use of the material would be analogous to allowing the government to seize private medical records without a warrant, but restrict their use only to the portion of the records that serve to identify the patient.” *Ibid.*

The court refused to “embrace wholly” the analogy between taking DNA samples and fingerprinting advanced by the state. J.A. 142. The court noted that the collection of respondent’s DNA involved a physical intrusion, albeit a “minimal” one. J.A. 143. Further, the court observed, “[t]he information derived from a fingerprint is related only to physical characteristics and can be used to identify a person, but no more.” *Ibid.*

In determining that respondent’s privacy interests were substantial, the court described the distinction between convicted and arrested individuals as “critical to our analysis.” J.A. 144. The court reasoned that, “[a]lthough arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of

innocence bestows on them greater protections than convicted felons, parolees, or probationers.” *Ibid.*

Turning to the state’s interests, the court reasoned that, because respondent had already been “accurately” identified by the time his DNA sample was analyzed several months after his arrest, “the only [s]tate interest served by the collection of his DNA” was “[s]olving cold cases.” J.A. 147, 148. Although the court recognized that interest as a legitimate one, it determined that “a warrantless, suspicionless search cannot be upheld by a ‘generalized interest’ in solving crimes.” J.A. 147.

In analyzing the state’s interests, the court emphasized that “DNA collection can wait until a person has been convicted, thus avoiding all of the threats to privacy discussed in this opinion.” J.A. 149. The court added that, in many cases in which DNA-related evidence is required for conviction, “there will be \* \* \* substantial other evidence to provide probable cause for a search warrant” for that evidence. *Ibid.*

b. Judge Barbera, joined by Judge Wilner, dissented. J.A. 154-166. She concluded that the majority had “overinflat[ed] an arrestee’s interest in privacy and underestimat[ed] the [s]tate’s interest in collecting arrestee DNA.” J.A. 154. As to respondent’s privacy interests, Judge Barbera asserted that “[respondent’s] privacy expectation at the time of the cheek swab was far more like a convicted felon, probationer, and parolee than an uncharged individual.” J.A. 157. As to the government’s interests, Judge Barbera contended that “law enforcement’s interest in identity extends to knowing whether a person has been involved in crime.” J.A. 165.

4. Citing a conflict among the lower courts on the constitutionality of DNA testing of arrestees, the Chief Justice granted a stay of the judgment. J.A. 168-171. This Court subsequently granted review.

**SUMMARY OF ARGUMENT**

This case presents the question whether the Court should develop an exception to established Fourth Amendment rules for a new technology. It should not. This Court has never upheld a blanket, warrantless search of the type at issue here, where the search is being conducted to investigate crimes for which there is no individualized suspicion. The mere fact that DNA testing represents a valuable additional tool for law enforcement provides no justification for distorting the Court's existing Fourth Amendment jurisprudence. The Maryland Court of Appeals correctly held that the warrantless, suspicionless collection and analysis of respondent's DNA was invalid.

A. The collection and analysis of respondent's DNA violated the Fourth Amendment for the simple reason that it was not authorized by a warrant or based on some level of individualized suspicion. It is undisputed that a search occurred when the state collected and analyzed respondent's DNA by means of a swab of his cheek. A search, in turn, triggers the default Fourth Amendment requirements of a warrant and probable cause. Here, the state failed to obtain a warrant. And it has also failed to establish probable cause, because it has offered no reason to believe that DNA analysis would have been useful in linking respondent to the assault for which he was arrested, nor has it contended that it possessed probable cause with regard to respondent's involvement in the sexual assault for which he was later charged (or any other offense). Although the Court has relaxed the warrant requirement and required only reasonable suspicion in certain specific contexts, the state has failed even to establish reasonable suspicion here, because it did not possess *any* level of individualized suspicion that would have justified the search of respondent.

B. This Court has only rarely created exceptions to the requirements of a warrant or individualized suspicion, and none of the existing exceptions is applicable here. The exception for searches of parolees does not apply because arrestees are not subject to the same across-the-board curtailment of their expectations of privacy. It is the fact of *conviction* that works such a curtailment for parolees. Although an arrest entails an obvious limitation on an individual’s liberty, it does not permit the government to dispense with the ordinary rules governing searches for investigative purposes. And where, as here, the government wishes to conduct an investigative search to link an arrestee to other offenses for which there is no individualized suspicion, an arrestee, like an ordinary citizen, retains the full protections of the Fourth Amendment.

The “special needs” doctrine is also inapposite here—as petitioner seemingly recognizes by failing explicitly to invoke it. As the name suggests, the “special needs” doctrine is triggered only upon a threshold showing of a “special need”: that is, a showing that the primary purpose of the program at issue goes beyond the normal need for law enforcement. It cannot seriously be disputed that the primary purpose of the Maryland Act—like other DNA-testing statutes—is to serve the ordinary law enforcement interest in solving and preventing crimes. Law enforcement, moreover, plays a pervasive role in the operation of the Maryland DNA-testing program. Although petitioner and the United States contend that the DNA testing of arrestees also serves governmental interests in identifying individuals in custody and supervising arrestees before trial, there is no evidence that those interests were actual purposes behind the Maryland Act—or that the Act plays a meaningful role in serving those interests.

The search-incident-to-arrest doctrine likewise cannot justify the search in this case. Even assuming that the search was contemporaneous to the arrest (and that the search-incident-to-arrest doctrine permits physical intrusions into the body), the rationales for that doctrine are inapposite here. In particular, assuming that such a rationale applies outside the vehicle context, the collection of respondent’s DNA could not be said to constitute the gathering of evidence relevant to the offense of arrest, because it is undisputed that the state did not conduct the search to link respondent to the alleged assault.

C. Petitioner and the United States contend that the warrantless, suspicionless collection and analysis of DNA from arrestees is analogous to fingerprinting. Neither of the two potential justifications for fingerprinting arrestees upon booking, however, applies to the collection and analysis of DNA. There is good reason to believe that fingerprinting does not give rise to a “search”; it does not involve an intrusion into the body, and it arguably does not violate any legitimate expectation of privacy. But even assuming that fingerprinting does give rise to a “search,” it can be justified under the “special needs” doctrine, because the primary purpose of fingerprinting upon booking is to identify an individual who is being taken into the criminal-justice system, not to investigate unsolved offenses. Remarkably, the United States itself recently advanced both of those justifications for fingerprinting before this Court—and, in the process, distinguished DNA testing. The United States was just as right then as it is wrong now, and the analogy between fingerprinting and DNA testing should therefore be rejected.

D. There is no valid justification for creating a new exception to the presumptive warrant and individualized-suspicion requirements for DNA testing. Petitioner and

the United States contend that this Court can dispense with those requirements, and resort to balancing, where a search involves modest intrusions on an individual's privacy interests or where the government's interests are particularly strong. But the Court does not start by balancing an individual's privacy interests and the government's interests, and then apply the warrant and individualized-suspicion requirements only where those interests are roughly in equipoise. Quite the opposite. The Court starts with the warrant and individualized-suspicion requirements, and dispenses with them only where the government provides an articulable justification for doing so.

The mere fact that DNA testing represents an advance on preexisting technologies does not supply that justification. Nor does the fact that the statute at issue here requires DNA testing on a blanket basis. And while the United States complains that applying a warrant requirement in this context would thwart the government's interests, that is the whole point of the Fourth Amendment. Because the government cannot point to any justification for discarding the warrant requirement here, this Court should enforce that requirement and hold that the warrantless, suspicionless search of respondent was unconstitutional.

E. In the event this Court does resort to balancing, it should conclude, as the lower court did, that respondent's privacy interests outweigh the government's interests. As to respondent's privacy interests, the search at issue here involved a physical intrusion into the body. And even beyond that intrusion, the collection of an individual's DNA raises profound privacy concerns. The search at issue here allows the state to come into possession of the entirety of an individual's DNA. Nothing in the Maryland Act limits the state to using only the in-

formation contained in the standard CODIS profile; the Act permits the state to retain an individual's DNA sample even after a DNA profile has been prepared, and to conduct further tests on that sample for any one of a number of broad statutory purposes. And absent a special need, this Court has never blessed a search that would otherwise violate the Fourth Amendment simply because law enforcement has promised not to review the information it obtains from the search in a particular manner.

As to the government's interests, the government undoubtedly has a substantial interest in solving and preventing crimes. But petitioner has utterly failed to demonstrate that the expansion of the Maryland Act to arrestees is essential to serve that interest. In fact, the available statistics show that the collection and analysis of DNA from arrestees has resulted only in a modest number of charges and convictions—and those statistics do not even account for cases in which DNA collection and analysis would otherwise be permissible (either because the arrestee was later convicted, or because the arrestee's DNA was relevant to the crime of arrest).

The balancing analysis offered by petitioner and the United States would have no meaningful limiting principle. It would permit the DNA testing of all arrestees—which would result in a monumental expansion of DNA databases, in light of the fact that there are over 12 million arrests in the United States every year. But even worse, virtually all of the arguments advanced by petitioner and the United States would justify the blanket collection and retention of DNA from ordinary citizens. In the face of the profound privacy concerns raised by DNA testing, this Court should reject that open-ended approach, and hold that the collection and analysis of respondent's DNA was unconstitutional.

**ARGUMENT****THE WARRANTLESS, SUSPICIONLESS COLLECTION AND ANALYSIS OF RESPONDENT'S DNA VIOLATED THE FOURTH AMENDMENT**

The Fourth Amendment of the Constitution guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,” and further provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The Maryland Court of Appeals correctly held that the warrantless, suspicionless collection and analysis of respondent’s DNA constituted an unreasonable search in violation of the Fourth Amendment.

**A. The Collection And Analysis Of Respondent’s DNA Violated The Fourth Amendment Because It Involved A Search That Was Not Authorized By A Warrant Or Based On Some Level Of Individualized Suspicion**

***1. The Collection And Analysis Of Respondent’s DNA By Means Of A Cheek Swab Constituted A Fourth Amendment ‘Search’***

To begin with, there is no dispute that a search occurred when the state collected and analyzed respondent’s DNA. See Pet. Br. 13 (noting that “[t]he search at issue in this case involves rubbing a small swab against the inside of an arrestee’s cheek during booking”); U.S. Br. 14 (stating that “Maryland unquestionably searched respondent when it obtained his DNA sample and generated a DNA fingerprint”).

That proposition is not only undisputed, but indisputable. At a minimum, the swab of respondent’s cheek constitutes an intrusion into his person and thus gives

rise to a Fourth Amendment search. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); *Schmerber v. California*, 384 U.S. 757, 767 (1966). Whatever the outer bounds on the concept of a search, therefore, this case falls within the heartland.<sup>7</sup> And the existence of a search triggers the protections of the Fourth Amendment.<sup>8</sup>

**2. *The Fourth Amendment Requires A Warrant And Probable Cause Or, At A Minimum, Some Level Of Individualized Suspicion***

a. As petitioner and the United States note, the ultimate touchstone of Fourth Amendment analysis is the reasonableness of the government's conduct. Pet. Br. 11; U.S. Br. 11. It does not follow, however, that a court should analyze reasonableness by undertaking a case-by-

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<sup>7</sup> Because there was unquestionably a search here by virtue of the swab of respondent's cheek, the Court need not reach the question whether the analysis of a DNA sample taken from cells collected in a non-intrusive manner, standing alone, would constitute a search—for example, where the state collects cells from a chair in which the suspect had been sitting. Under this Court's cases, however, the better view is that it would. As the Court has explained in discussing blood-alcohol testing, not only does the “physical intrusion [of collecting blood] \* \* \* infringe[] an expectation of privacy that society is prepared to recognize as reasonable,” but “[t]he ensuing chemical analysis of the sample to obtain physiological data is a *further invasion* of the tested employee's privacy interests.” *Skinner*, 489 U.S. at 616 (emphasis added).

<sup>8</sup> To the extent that the collection of respondent's DNA “may be viewed as a meaningful interference with [respondent's] possessory interest in his [tissue],” it would also constitute a seizure for Fourth Amendment purposes. *Skinner*, 489 U.S. at 617 n.4. Ultimately, however, it is immaterial to the Fourth Amendment analysis whether the DNA collection and analysis here gave rise to both a search and a seizure. *Ibid.*

case balancing of the government's interests and an individual's privacy interests. To the contrary, the Court has articulated a number of familiar principles that flesh out the "reasonableness" standard.

Perhaps most familiar of all, when a search has occurred, "[the] analysis begins \* \* \* with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). That principle ensures that a neutral and detached magistrate will ordinarily pass on the existence of probable cause—a "time-tested means of effectuating Fourth Amendment rights" that "accords with our basic constitutional doctrine that individual freedoms will best be preserved through [the] separation of powers." *United States v. United States District Court*, 407 U.S. 297, 317, 318 (1972).

The default Fourth Amendment requirements of a warrant and probable cause apply with full force to searches, like the search here, that involve physical intrusions into the human body. Absent exigent circumstances, "[s]earch warrants are ordinarily required for searches of dwellings, and \* \* \* no less could be required where intrusions into the human body are concerned." *Schmerber*, 384 U.S. at 770.

Petitioner fails even to acknowledge the principle that a search ordinarily requires a warrant and probable cause. But that principle disposes of this case. The state failed to obtain a warrant here, which was required because the search involved a physical intrusion into respondent's body. Even if some exception to the warrant requirement were applicable, the state has also failed to

establish the existence of probable cause: it has not offered any reason to believe that DNA analysis would have been useful in linking respondent to the assault for which he was arrested,<sup>9</sup> nor has it contended that it possessed probable cause with regard to respondent's involvement in the sexual assault for which he was later charged (or any other offense). And the state could not colorably claim that the collection and analysis of respondent's DNA was justified by exigent circumstances. For those reasons, the search in this case was unreasonable and thus violated the Fourth Amendment.

b. To be sure, the Court has relaxed the warrant requirement and required a lower level of individualized suspicion—reasonable suspicion—in certain specific contexts. Most notably, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court permitted a warrantless protective frisk of an individual based on reasonable suspicion that criminal activity was afoot. Similarly, in *United States v. Knights*, 534 U.S. 112 (2001), the Court permitted a warrantless search of a probationer's home based on reasonable suspicion, where the search was also authorized by a condition of probation.

Although petitioner and the United States cite this Court's reasonable-suspicion cases, they do not argue that the Court should require reasonable suspicion for the search at issue here. And for good reason: just as the state has failed to establish probable cause, so too has it failed to establish any level of individualized suspicion that would have justified the search of respondent.

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<sup>9</sup> For a search, the requisite "probable cause" is not simply probable cause to believe that a crime has been committed, but probable cause to believe that the search would uncover evidence relevant to the crime. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Where, as here, the state collects an arrestee’s DNA not to link him to the offense of arrest, but rather to determine his involvement in other offenses for which there is no individualized suspicion, the search is invalid. As we will explain in the remainder of this brief, there is no valid justification for dispensing with the presumptive warrant and individualized-suspicion requirements in the context of DNA testing.

**B. None Of The Established Exceptions Permitting Warrantless, Suspicionless Searches Applies Here**

It follows from the fact that exceptions to the default warrant requirement are rare, that exceptions to the requirement of at least some level of individualized suspicion are even rarer. Time and again, this Court has reiterated that the Fourth Amendment’s “restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion”—a “rule” that is subject only to certain “limited,” “particularized,” and “closely guarded” exceptions. *Chandler v. Miller*, 520 U.S. 305, 308, 309, 313 (1997); see, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 85-86 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

The general prohibition of suspicionless searches has deep historical roots. The adoption of the Fourth Amendment was in large part motivated by a disdain for British use of general searches—whether in the form of searches authorized by general warrants lacking in particularity, see, e.g., *Chimel v. California*, 395 U.S. 752, 761 (1969); *Henry v. United States*, 361 U.S. 98, 100-101 (1959), or blanket searches lacking in individualized suspicion, see, e.g., *Vernonia School District 47J v. Acton*, 515 U.S. 646, 670 (1995) (O’Connor, J., dissenting); *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); Wil-

liam J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, at 286 (2009). As this Court has noted, suspicionless searches “implicate[] the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.” *Gant*, 556 U.S. at 345.

None of the existing exceptions permitting warrantless, suspicionless searches is applicable here. To varying extents, petitioner and the United States invoke three such exceptions: (1) the exception for searches of parolees, based on their diminished expectations of privacy; (2) the exception for searches based on “special needs” beyond the ordinary need for law enforcement; and (3) the exception for searches incident to arrest. Those exceptions cannot justify the warrantless collection and analysis of DNA from arrestees for the purpose of determining their involvement in offenses other than the offense of arrest—offenses for which there is no individualized suspicion.

***1. The Exception For Searches Of Parolees Is Inapplicable Because Arrestees Maintain Reasonable Expectations Of Privacy Until Conviction***

Of all this Court’s decisions, petitioner and the United States rely most heavily on *Samson v. California*, 547 U.S. 843 (2006). See Pet. Br. 12, 13, 16, 17, 20; U.S. Br. 8, 11, 13, 14, 27. In *Samson*, the Court addressed the question whether “a condition of release can so diminish or eliminate a released prisoner’s reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment.” 547 U.S. at 847. The Court concluded that, as a result of his “status as a parolee,” the individual challenging the search “did not have an expectation of privacy that society would recognize as legitimate.” *Id.* at 852.

a. The exception recognized in *Samson* for parolees does not apply to mere arrestees such as respondent. This Court did not suggest in *Samson*, and has never suggested since, that the exception to the individualized-suspicion requirement for parolees would extend beyond individuals who have already been convicted of crimes to individuals who have merely been arrested. And that is unsurprising, because it is the fact of conviction—not mere arrest—that serves as the “transformative change[.]” resulting in an across-the-board curtailment of an individual’s expectations of privacy (and, indeed, of other constitutional rights). *United States v. Kincade*, 379 F.3d 813, 834 (9th Cir. 2004) (en banc), cert. denied, 544 U.S. 924 (2005); see, e.g., *McKune v. Lile*, 536 U.S. 24, 36 (2002) (plurality opinion); *Boyd v. United States*, 116 U.S. 616, 630 (1886). The resulting reduction in expectations of privacy applies not only to individuals who are imprisoned, see, e.g., *Hudson v. Palmer*, 468 U.S. 517, 530 (1984), but also to individuals who have been released but remain under the supervision of the state (such as individuals on parole or supervised release), see, e.g., *Samson*, 547 U.S. at 850; *Ferguson*, 532 U.S. at 79 n.15; *Griffin v. Wisconsin*, 483 U.S. 868, 874-875 (1987).<sup>10</sup> Largely for that reason, lower courts have consistently held that the collection and analysis of DNA from *convicted* individuals is constitutional. See p. 5, *supra*.

Arrestees, however, are differently situated. And perhaps the best evidence that arrestees do not suffer an across-the-board reduction in their expectations of privacy comes from this Court’s cases concerning the

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<sup>10</sup> This Court has left open the question whether suspicionless searches of probationers would also be valid under the Fourth Amendment. See *Knights*, 534 U.S. at 120 n.6.

search-incident-to-arrest doctrine. If it were true that an arrest had such a transformative effect on an individual's privacy interests, those cases would have been easy ones, because a valid arrest would provide essentially unfettered authority to conduct an accompanying search—even for evidence of criminal activity unrelated to the crime of arrest. Indeed, that was seemingly the view expressed by Justice Powell, in language on which petitioner relies. See Pet. Br. 17 n.4 (quoting *United States v. Robinson*, 414 U.S. 218, 237-238 (1973) (concurring opinion)).

But that view did not command a majority of the Court at the time, and it has not since. See *Gant*, 556 U.S. at 335. To the contrary, this Court has carefully delineated the bounds of police authority to conduct searches incident to arrest, holding that the authority is limited by the rationales of ensuring officer safety and preventing the destruction of evidence, see *Chimel*, 395 U.S. at 763, and (at least in the vehicle context) gathering evidence relevant to the offense of arrest, see *Gant*, 556 U.S. at 335. Although the Court has framed its search-incident-to-arrest rules in objective terms to provide guidance to courts and officers in the field, see, e.g., *Chimel*, 395 U.S. at 763, it has never suggested that the mere fact of arrest could justify a suspicionless search for evidence of criminal activity unrelated to the offense of arrest. And the Court's approach is consistent with the approach at common law—which did not afford officers unlimited authority to conduct searches incident to arrest, but at most permitted searches pursuant to the twin rationales the Court has adopted. See *Thornton v. United States*, 541 U.S. 615, 629-631 (2004) (Scalia, J., concurring).

b. Admittedly, the liberty of an arrested individual is restricted in one obvious way: the individual has been

seized and may be detained until trial for the offense of arrest. The seizure of an arrestee, in turn, may entail other permissible intrusions. An arrestee who is being detained may be searched to serve special needs associated with admission into, and continued presence in, the general jail population. See *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 1515-1518 (2012); *Bell v. Wolfish*, 441 U.S. 520, 558-560 (1979). Conversely, an arrestee who is being released may be subject to reasonable conditions of release. See, e.g., *United States v. Scott*, 450 F.3d 863, 868-874 (9th Cir. 2006).

When it comes to the government's authority to conduct searches for investigative purposes, however, an arrestee is presumed to be innocent, and stands in the same position as an ordinary citizen in every respect but one: the government assertedly has probable cause to believe that the arrestee has committed the offense of arrest.<sup>11</sup> As a result, if the government wishes to conduct a search of an arrestee's home or person to link the arrestee to the offense of arrest, it will naturally be easier for the government to make the requisite showing that there is reason to believe the search would uncover evidence relevant to the crime. Cf. *Missouri v. McNeely*, No. 11-1425 (argued Jan. 9, 2013). In all other respects, however, an arrestee—unlike a convicted individual, but like an ordinary citizen—retains the full protections of the Fourth Amendment. Where, as here, the government wishes to conduct an investigative search of an ar-

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<sup>11</sup> Indeed, the Maryland Act recognizes as much, because it provides for destruction of an arrestee's DNA sample (and expungement of his DNA profile) if the arrestee is not convicted—at which point the arrestee indisputably stands in the same position as an ordinary citizen. See Md. Code Ann., Pub. Safety § 2-511(a)(1), (c).

restee not to link him to the offense of arrest, but to other offenses for which there is no individualized suspicion, this Court's decision in *Samson* provides no justification for dispensing with the warrant and individualized-suspicion requirements.<sup>12</sup>

**2. *The 'Special Needs' Exception Is Inapplicable Because The Primary Purpose Of The Maryland Act Is To Serve The Ordinary Law Enforcement Interest In Crime Control***

Perhaps the most significant exception to the requirement of individualized suspicion is the "special needs" doctrine.<sup>13</sup> Although petitioner and the United States liberally rely on cases applying the "special needs" doctrine, petitioner does not specifically invoke that doctrine before this Court, and the United States invokes it only in passing. See U.S. Br. 32 n.12. That is understandable, because the "special needs" doctrine plainly does not apply here.

a. Under the "special needs" doctrine, a court does indeed balance the government's interests and an individual's privacy interests to determine whether a partic-

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<sup>12</sup> *Samson* is distinguishable for an additional reason. In that case, the Court emphasized the presence of a parole condition that "clearly expressed" to the parolee the requirement that he submit to suspicionless searches. 547 U.S. at 852 (citation omitted). Here, by contrast, respondent did not submit to DNA testing as a voluntary condition of release; he was subject to mandatory testing simply because of his status as a qualifying arrestee. See Md. Code Ann., Pub. Safety § 2-504(a)(3).

<sup>13</sup> The following discussion assumes the validity of the "special needs" doctrine. But cf. *Edmond*, 531 U.S. at 56 (Thomas, J., dissenting) (expressing "doubt" that "the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing").

ular government practice is reasonable. As the name suggests, however, the “special needs” doctrine is triggered only upon a threshold showing of a “special need”: that is, a showing that the “primary purpose” of the program in question goes “beyond the normal need for law enforcement.” *Ferguson*, 532 U.S. at 81; *Griffin*, 483 U.S. at 873; see *Edmond*, 531 U.S. at 44-47. This Court has made clear that it will not “simply accept the State’s invocation of a ‘special need,’” but will “carr[y] out a close review of the scheme at issue” to determine whether a “substantial” and “concrete” special need exists. *Ferguson*, 532 U.S. at 81 (internal quotation marks and citation omitted); *Chandler*, 520 U.S. at 313, 318-319, 321.

It cannot seriously be disputed that the “primary purpose” of the Maryland Act—like other DNA-testing statutes—is to serve the “general interest in crime control,” *Edmond*, 531 U.S. at 44 (citation omitted), by helping both to solve unsolved crimes and to prevent future ones. One need not look far to find that purpose: it is right there on the face of the statute. See Md. Code Ann., Pub. Safety § 2-505(a) (stating that “DNA samples shall be collected and tested \* \* \* as part of an official investigation into a crime”). In his statement supporting the expansion of the Act to arrestees, moreover, Governor O’Malley testified that the expansion would allow law enforcement “to more efficiently resolve open criminal investigations, pursue repeat offenders, and save valuable time pursuing false leads by effectively eliminating suspects from ongoing investigations.” *Hearing on S.B. 211 Before the S. Comm. on Judicial Proceedings*, 2008 Leg., 425th Sess. (Md. Feb. 13, 2008) (statement of Governor Martin O’Malley). Even after certiorari was granted in this case, Governor O’Malley reiterated that the expansion “is absolutely critical to our efforts to continue driving down crime in Maryland and bolsters our

efforts to resolve open investigations and bring them to a resolution.” Governor Martin O’Malley, Statement on the Supreme Court’s Decision to Hear State’s DNA Case (Nov. 9, 2012) <[tinyurl.com/omalleydna](http://tinyurl.com/omalleydna)>. <sup>14</sup>

What is more, this Court has indicated that the “special needs” doctrine is applicable only where law enforcement plays a limited role in the actual implementation of the program at issue. See, e.g., *Ferguson*, 532 U.S. at 79 & n.15, 82; *id.* at 88 (Kennedy, J., concurring); *Vernonia*, 515 U.S. at 658; *New Jersey v. T.L.O.*, 469 U.S. 325, 341 n.7 (1985). Here, the role of law enforcement in collecting and analyzing an arrestee’s DNA is “central and indispensable.” *Ferguson*, 532 U.S. at 80. Take respondent’s case. After the Maryland police arrested respondent, personnel at the Wicomico County central booking facility collected his DNA sample. J.A. 86. The Forensic Sciences Division of the Maryland State Police processed the sample; stored the resulting profile; determined that the profile produced a match; and notified the Salisbury Police Department, which proceeded to obtain an indictment. J.A. 87-89. The role of law enforcement in Maryland’s DNA-testing program is therefore pervasive—and that is no coincidence, because that program serves the paradigmatic law enforcement interest in solving crimes.

b. Although petitioner and the United States do not specifically invoke the “special needs” doctrine, they cite three governmental interests in support of the collection and analysis of DNA from arrestees. None of those in-

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<sup>14</sup> Unsurprisingly, Congress’s purpose in enacting and expanding the federal DNA statute was the same. See, e.g., H.R. Rep. No. 711, 108th Cong., 2d Sess. 2, 3 (2004); H.R. Rep. No. 900, 106th Cong., 2d Sess., Pt. I, at 8-11, 23-27, 32-36 (2000).

terests could support the application of the “special needs” doctrine.

i. Petitioner and the United States cite the government’s interest in solving crimes. Pet. Br. 23-24; U.S. Br. 29-31. Tellingly, they both cite that interest last—even though it was plainly the predominant purpose behind the Maryland Act (and other DNA-testing statutes). As discussed above, that interest cannot possibly justify application of the “special needs” doctrine, because it is simply the “general interest in crime control” by another name. *Edmond*, 531 U.S. at 44 (citation omitted).<sup>15</sup>

ii. Petitioner and the United States primarily cite the government’s interest in “identifying” individuals who are in custody. Pet. Br. 21-23; U.S. Br. 25-26. As a preliminary matter, if, by “identification,” they mean investigating crimes and determining the perpetrators, then any interest in “identification” simply collapses into the interest in solving crimes.

The more natural understanding of “identification,” however, is simply “ascertain[ing] or establish[ing] \* \* \* who a given person is”: for example, determining or confirming that the person in custody here was Alonzo King. 7 *Oxford English Dictionary* 619 (2d ed. 1989) (definition 2(a) of “identify”). So understood, the purpose of identifying an individual in the government’s

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<sup>15</sup> As part of its discussion of the government’s interest in solving crimes, the United States notes that “[i]dentifying the true perpetrator of a crime also can exonerate the innocent.” Br. 29. That specific interest, however, would be more directly served by permitting an individual who has been convicted of a crime to have access to forensic evidence collected at the crime scene so that he can test it against his *own* DNA. See *District Attorney’s Office for Third Judicial District v. Osborne*, 557 U.S. 52, 62 (2009).

custody is arguably discrete enough to constitute a special need. But there is no reason to believe that identifying individuals in custody was an actual purpose behind the Maryland Act. Unlike the Maryland statute governing the intake of prisoners, which provides that the state may fingerprint and photograph inmates (and conduct other booking procedures) for the express purpose of “identify[ing]” them, see Md. Code Ann., Corr. Servs. § 3-601(e), the Act broadly authorizes the testing of an arrestee’s DNA “as part of an official investigation into a crime.” Md. Code Ann., Pub. Safety § 2-505(b)(2).<sup>16</sup>

Just as importantly, as it is now conducted, DNA testing does not play a meaningful role in identifying individuals in custody. When law enforcement agencies obtain a DNA profile from an arrestee, they compare the profile against CODIS’s index of DNA profiles created from forensic evidence collected at crime scenes—and not, as a matter of course, against the separate indices of DNA profiles of convicted offenders and other arrestees. And even if they did compare the profile against the latter indices, CODIS stores only the DNA profiles themselves and does not store any identifying information, such as an individual’s name, fingerprint, photograph, or criminal history. In order to obtain that information upon securing a match with an individual profile, a law enforcement agency must contact the agency that initially stored the matching profile. See U.S. Br. 19.

In addition, given the substantial time lag that typically occurs between the collection of a DNA sample and the preparation and analysis of a DNA profile, it is hard to see how DNA testing *could* play a meaningful role in

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<sup>16</sup> In fact, Maryland uses an individual’s fingerprints as a means of identifying his DNA sample. See Md. Code Regs. 29.05.01.07(C).

identification in the mine run of cases. This case illustrates the point: respondent's DNA was collected on the day of his arrest, but a match was not returned until almost four months later—and only a few weeks before the proceedings on the assault charge were terminated. See J.A. 86 & n.3, 88. The government's interest in identification therefore cannot supply a "special need" to justify warrantless, suspicionless DNA testing.

iii. Petitioner and the United States also cite the government's interest in supervising arrestees before trial. Pet. Br. 22-23; U.S. Br. 26-29. To begin with, to the extent they argue that it would be useful to know whether an arrestee has committed *other*, previously unsolved offenses before the arrestee's trial on the offense of arrest (so that the arrestee not only can be detained for the initial offense but can be charged with additional offenses), that interest, too, simply collapses into the general interest in solving crimes.

But in any event, the proffered interest in supervising arrestees before trial fails for materially the same reasons as the interest in identification. Petitioner cites no evidence suggesting that an interest in supervising arrestees was an "actual[]" purpose behind the Maryland Act—or, for that matter, any other DNA-testing statute. See *Ferguson*, 532 U.S. at 81. Supervising arrestees is not one of the enumerated purposes for DNA testing listed in the Maryland Act. See Md. Code Ann., Pub. Safety § 2-505(a).

In addition, petitioner cites no evidence that DNA testing in fact serves an interest in supervising arrestees. As with the interest in identification, the substantial time lag that typically occurs between the collection of a DNA sample and the preparation and analysis of a DNA profile would suggest that DNA testing does not meaningfully serve an interest in supervision—even

if it is theoretically possible that delayed DNA testing could still lead to a revocation of release, see U.S. Br. 27 n.10. And petitioner fails to cite a single case in which DNA testing has actually affected a decision on supervision in Maryland,<sup>17</sup> much less to show that there is a “substantial” and “concrete” problem with supervising arrestees in Maryland that could validly trigger the “special needs” doctrine. *Chandler*, 520 U.S. at 313, 318-319.

In short, it is clear that the only real purpose behind the Maryland Act is the one that common sense would suggest: *viz.*, that the Act was intended to help solve and prevent crimes. The “special needs” doctrine is therefore inapplicable here. This Court should refuse to permit petitioner and the United States to invoke the balancing permitted by that doctrine without satisfying the threshold requirement of a “special need.”

**3. *The Search-Incident-To-Arrest Exception Is Inapplicable For Multiple Reasons***

To the extent that petitioner and the United States seek to invoke the search-incident-to-arrest doctrine, it too is inapplicable here. See Pet. Br. 17; U.S. Br. 12, 15. As a preliminary matter, this Court has long understood that a search can be “incident” to arrest, and therefore proceed without a warrant and probable cause, “only if it is substantially contemporaneous with the arrest.” *Shipley v. California*, 395 U.S. 818, 819 (1969) (*per curiam*) (citation omitted). It is far from clear whether the search here was “substantially contemporaneous”: the

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<sup>17</sup> It bears noting that the Maryland Act applies only to individuals who have been charged with crimes of violence and burglaries, see Md. Code Ann., Pub. Safety § 2-504(a)(3)—and who are therefore among the least likely arrestees to be released before trial.

collection of respondent's DNA took place not at the point of arrest, but only after respondent had been charged with the assault. In addition, this Court has suggested that the search-incident-to-arrest doctrine, while permitting searches of the person, does not permit physical intrusions into the body like the search at issue. See *Schmerber*, 384 U.S. at 769-770; cf. *McNeely*, *supra*.

Even if the search-incident-to-arrest doctrine were otherwise applicable, moreover, the rationales for that doctrine, see p. 25, *supra*, would not justify the search here. In particular, assuming that such a rationale applies outside the vehicle context, the collection of respondent's DNA could not be said to constitute the gathering of evidence relevant to the offense of arrest, see *Gant*, 556 U.S. at 335, because it is undisputed that the state did not conduct the DNA testing to link respondent to the alleged assault. Where, as here, the state collects an arrestee's DNA to determine his involvement in other offenses for which there is no individualized suspicion, neither the search-incident-to-arrest doctrine nor any other existing exception to the warrant and individualized-suspicion requirements justifies the search.

**C. For Fourth Amendment Purposes, DNA Testing Is Not Analogous To Fingerprinting**

In a final effort to invoke existing law in support of their position, petitioner and the United States contend that the warrantless, suspicionless collection and analysis of DNA from arrestees is analogous to fingerprinting. See Pet. Br. 19; U.S. Br. 19-22. The United States goes so far as to describe what took place here as "DNA fingerprinting"—as if repeatedly using that facially inaccurate phrase would make the analogy ring true. See U.S. Br. 2, 4, 7, 8, 9, 10, 14, 19, 20, 21, 22, 24, 26, 28, 29, 30, 31, 32, 33.

Although both petitioner and the United States rely on the analogy with fingerprinting, they play coy about the doctrinal basis for the premise of that analogy: *viz.*, that the mandatory fingerprinting of arrestees is constitutional. This Court has never squarely addressed the issue. In light of the long history of fingerprinting arrestees upon booking, respondent does not dispute the constitutionality of that practice. But neither of the two potential justifications for that practice applies to the collection and analysis of DNA.

1. As a preliminary matter, there is good reason to believe that fingerprinting does not give rise to a “search” for Fourth Amendment purposes. To state the obvious, fingerprinting does not involve an intrusion into the person of the type that took place here. And as a result of the long history of fingerprinting, “we have come to accept that people—even totally innocent people—have no legitimate expectation of privacy in their fingerprints, and that’s that.” *Kincade*, 379 F.3d at 874 (Kozinski, J., dissenting). To the extent this Court has addressed the validity of fingerprinting, it has seemingly taken the same view, observing that “[f]ingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search.” *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

Notably, it appears to be the position of the United States that fingerprinting does not constitute a search. Just two Terms ago, this Court heard oral argument in *Tolentino v. New York*, 131 S. Ct. 1387 (2011), which presented the question whether an individual possessed a reasonable expectation of privacy in his identity that would justify the suppression of government records ac-

cessed once his identity was obtained.<sup>18</sup> At argument, the United States explained that, “[f]or \* \* \* things like a name or even a fingerprint, this Court has said [it] is not a separate Fourth Amendment event to acquire that.” Oral Arg. Tr. at 51, *Tolentino*, *supra*, No. 09-11556 (Mar. 21, 2011). “For example,” the United States continued, “once someone is detained, it’s not also a search to ask for their name or to take a fingerprint.” *Ibid.* Given those unequivocal statements, it is curious why the United States does not have the courage of its convictions to say the same in its brief here. Curious, but understandable: if fingerprinting does not constitute a search but the DNA collection and analysis at issue here concededly does, the analogy breaks down at the first hurdle.

2. Even assuming, *arguendo*, that fingerprinting does give rise to a “search,” the fingerprinting of arrestees can be justified under the “special needs” doctrine. As with other routine booking procedures such as photographing, the primary purpose of fingerprinting upon booking is to identify an individual who is being taken into the criminal-justice system, not to investigate unsolved offenses.<sup>19</sup> Upon collection of an arrestee’s fingerprints, law enforcement agencies run those fingerprints through the FBI’s Integrated Automated Fingerprint Identification System (IAFIS), a database that contains fingerprints, photographs, and criminal-history information. IAFIS contains over 73 million individual

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<sup>18</sup> The petition was later dismissed as improvidently granted. See *Tolentino*, 131 S. Ct. at 1387.

<sup>19</sup> In Maryland, the collection of DNA from an arrestee takes place only after the arrestee has been charged. See Md. Code Ann., Pub. Safety § 2-504(a)(3).

profiles in its criminal-offender index and another 36 million individual profiles in its civil index. Searches of the criminal-offender index for “ten-print” matches are completed in a matter of minutes, if not seconds. See FBI, *Integrated Automated Fingerprint Identification System* <[tinyurl.com/aboutiafis](http://tinyurl.com/aboutiafis)> (last visited Jan. 25, 2013); FBI, *Integrated Automated Fingerprint Identification System—Fact Sheet* <[tinyurl.com/iafisfacts](http://tinyurl.com/iafisfacts)> (last visited Jan. 25, 2013).

Critically, although IAFIS does contain a much smaller index of “latent” fingerprints (*i.e.*, individual fingerprints taken from forensic evidence collected at crime scenes), law enforcement agencies do not search that index as a matter of course upon collection of an arrestee’s fingerprints. Obtaining a match with a latent fingerprint takes longer and is a more complex enterprise, typically requiring specialized software and the use of a trained examiner. See FBI, *Integrated Automated Fingerprint Identification System—Five Key Services* <[tinyurl.com/iafisservices](http://tinyurl.com/iafisservices)> (last visited Jan. 25, 2013); Department of Justice, Office of the Inspector General, *Follow-Up Review of the Status of IDENT/IAFIS Integration 4* (Dec. 2004) <[tinyurl.com/iafisreview](http://tinyurl.com/iafisreview)>. And fingerprinting cannot serve other investigative purposes for which DNA testing is increasingly being used—such as “familial searching,” whereby partial matches trigger the investigation of family members of the individual from whom the DNA sample was taken. See, *e.g.*, Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 297-300 (2010).

Again, the United States has recognized this very distinction. In its brief, the United States acknowledges that fingerprinting is “designed to reveal [an arrestee’s] identity” and that law enforcement agencies use an arrestee’s fingerprints (and other information obtained at

booking) “to call up an arrestee’s criminal record and to determine whether he is wanted for a crime.” U.S. Br. 16. And at oral argument in *Tolentino*, in arguing that “the Court doesn’t need to \* \* \* say [that] all sorts of biometric information should be treated the same,” the government noted that an individual’s name or fingerprints were types of “information traditionally used to identify a defendant,” whereas “DNA evidence \* \* \* might provide competing considerations.” Oral Arg. Tr. at 52, *Tolentino, supra*. Indeed it does. Because fingerprinting of arrestees serves the primary purpose of identification, whereas DNA testing serves the primary purpose of helping to solve and prevent crimes, the two practices are readily distinguishable.

**D. There Is No Valid Justification For Creating A New Exception Permitting The Warrantless, Suspicionless Search At Issue Here**

Unable to invoke any justification under existing law in support of their position, petitioner and the United States effectively ask this Court to create a new exception to the presumptive warrant and individualized-suspicion requirements for DNA testing. All of their arguments in support of that new exception lack merit.

1. a. Petitioner and the United States contend that this Court can dispense with the presumptive warrant and individualized-suspicion requirements, and resort to balancing, where “[a search] involves modest intrusions on the individual’s privacy” or where “the governmental need is especially great.” U.S. Br. 12; see *id.* at 8; Pet. Br. 13-16, 23-25.

That contention gets it exactly backwards. In analyzing a claim that the government’s conduct violates the Fourth Amendment, this Court does not start by balancing an individual’s privacy interests and the government’s interests, and then apply the warrant and indi-

vidualized-suspicion requirements only where those interests are roughly in equipoise. Instead, the Court starts from the propositions that “[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights,” *United States District Court*, 407 U.S. at 318, and that the Fourth Amendment’s “restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion,” *Chandler*, 520 U.S. at 308. As discussed above, see pp. 22-34, the Court dispenses with those presumptive requirements only where the government provides an articulable justification for doing so—for instance, because the individual challenging the conduct is entitled only to a diminished expectation of privacy, see *Samson*, 547 U.S. at 852, or because the government’s conduct serves “‘special needs’ other than the normal need for law enforcement,” *Ferguson*, 532 U.S. at 74 n.7.

A balancing-first approach would have pernicious consequences. It would greatly diminish the role that neutral and detached magistrates play in “protect[ing] personal privacy and dignity against unwarranted intrusion by the State,” *Schmerber*, 384 U.S. at 767, and thus reduce the Fourth Amendment to an after-the-fact protection for individual liberties. And it would require courts to engage in the difficult enterprise of balancing law enforcement and privacy interests, whether on a programmatic or a case-by-case basis—an enterprise that is “more like judging whether a particular line is longer than a particular rock is heavy,” *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment), and one that undoubtedly favors the government, given the understandable temptation to defer to the government’s own assessment of its law enforcement interests. All this

is not to say that balancing should play no role in Fourth Amendment analysis; instead, balancing should be the method of analysis of last, not first, resort, and only upon the identification of a discrete justification for dispensing with the presumptive warrant and individualized-suspicion requirements.

b. In addition, this Court has already rejected the specific contention that it can dispense with the warrant and individualized-suspicion requirements where a search involves only a modest intrusion—even assuming, *arguendo*, that the intrusion at issue here was a modest one. But see pp. 45-48, *infra*. In *Arizona v. Hicks*, 480 U.S. 321 (1987), officers lawfully entered an apartment without a warrant, based on exigent circumstances. *Id.* at 323. Once in the apartment, one of the officers saw some stereo components, which he suspected to be stolen. *Ibid.* Accordingly, the officer read and recorded the components’ serial numbers, which required him to move some of the components. *Ibid.*

The Court held that, even though the movement of the stereo components was minimally intrusive, it nevertheless constituted an unreasonable search under the Fourth Amendment. See *Hicks*, 480 U.S. at 324-325. The Court reasoned that the movement of the components was a “new invasion of [the defendant’s] privacy unjustified by the exigent circumstance that validated the entry.” *Id.* at 325. And critically for present purposes, the Court rejected the argument that a *de minimis* search did not require a warrant, reasoning that “[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable.” *Ibid.* So too here. Even if the collection of DNA by means of a cheek swab is thought to be “relatively noninvasive,” *Chandler*, 520 U.S. at 318, it is concededly a “search” that triggers the

protections—and ordinary rules—of the Fourth Amendment.

c. Similarly, this Court has never accepted the proposition that it can dispense with the warrant and individualized-suspicion requirements simply because “the governmental need is especially great.” U.S. Br. 12. To begin with, as discussed above, the primary governmental interest served by DNA testing is the ordinary law enforcement interest in solving and preventing crimes. See pp. 28-29, *supra*. Respondent does not dispute that the problem of unsolved crimes is a grave one, particularly in certain jurisdictions. See California Br. 5-6. But this Court has repeatedly emphasized that “the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.” *Edmond*, 531 U.S. at 42. To accept that contention would be to hold that “in the administration of the criminal law the end justifies the means.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Facing that difficulty, petitioner resorts to the argument that DNA Is Different: namely, that DNA testing should be treated differently because it is an exceptionally effective tool—the “gold standard”—for solving and preventing crimes. See Pet. Br. 21-23. That mode of argument is a familiar one; this Court sees it to some extent in virtually every case involving the application of the Fourth Amendment to new technologies.

To be sure, DNA testing is unquestionably a valuable law enforcement tool and “has the potential to significantly improve both the criminal justice system and police investigative practices.” *District Attorney’s Office for Third Judicial District v. Osborne*, 557 U.S. 52, 55 (2009). But like any technology, DNA testing is imperfect: there are cases in which DNA testing involves sub-

jective analysis and identifies the perpetrator only with a low degree of certainty (such as cases in which the forensic DNA sample is degraded or contains a mixture of the perpetrator’s and victim’s DNA);<sup>20</sup> other cases in which contamination or laboratory errors lead to the identification of the wrong perpetrator;<sup>21</sup> and still other cases in which DNA testing alone “does not \* \* \* resolve a case,” because “there is \* \* \* an explanation for the DNA result.” *Id.* at 62; see *McDaniel v. Brown*, 130 S. Ct. 665, 670-671 (2010) (per curiam). While DNA testing undoubtedly represents a technological advance, that fact alone does not justify a departure from generally applicable Fourth Amendment rules.

2. The United States suggests that this Court can dispense with the presumptive warrant and individualized-suspicion requirements where “protections are in place that limit the discretion of officers in the field.” U.S. Br. 12; see *id.* at 9, 10, 33.

First, it is hard to see why it is better, rather than worse, for Fourth Amendment purposes that the Maryland Act requires DNA testing on a blanket basis—thus leading to more, rather than fewer, searches in the absence of a warrant or individualized suspicion. Cf. *Vernonia*, 515 U.S. at 671 (O’Connor, J., dissenting) (noting that “[t]he view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains

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<sup>20</sup> See, e.g., Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 *Sci. & Justice* 204, 204-208 (2011).

<sup>21</sup> See, e.g., William C. Thompson, *Forensic DNA Evidence: The Myth of Infallibility*, in *Genetic Explanations: Sense and Nonsense* 227, 230-231, 233, 237 (Sheldon Krinsky & Jeremy Gruber, eds., 2012).

inviolable in the criminal law enforcement context”). Although it is true that many of the programs this Court has upheld under the special-needs doctrine involved blanket searches, those cases are distinguishable because there was a discrete justification for the search. This Court has never suggested that the absence of discretion can itself serve as a justification for dispensing with the ordinary mode of Fourth Amendment analysis and resorting to balancing.

To the extent that this Court has expressed affirmative concern in Fourth Amendment cases about *excessive* law enforcement discretion, see, e.g., *Gant*, 556 U.S. at 345, statutes requiring the DNA testing of arrestees do not actually eliminate discretion. Far from it. Even in a State such as Maryland, which requires the DNA testing only of arrestees charged with crimes of violence and burglaries, prosecutors and police will often have considerable latitude to charge defendants with offenses that qualify for DNA collection. Once again, this case illustrates the point: respondent was initially charged with both first-degree assault and second-degree assault, but the first-degree assault charge was subsequently dropped. If respondent had been charged only with second-degree assault in the first place, he would not have been subject to DNA testing under the Act. See Md. Code Ann., Pub. Safety § 2-501(e).

If anything, the problem with discretion is even more acute with statutes such as the federal DNA statute, which require the DNA testing of *all* arrestees. As a practical matter, such statutes leave the availability of DNA collection up to the arresting officer, who has broad discretion to decide whether to conduct an arrest—particularly when it comes to minor offenses. See, e.g., Jim Dwyer, *Whites Smoke Pot, But Blacks Are Arrested*, N.Y. Times, Dec. 23, 2009, at A24 (citing statistics

showing that, in New York City, blacks were seven times more likely, and Hispanics four times more likely, than whites to be arrested for marijuana possession). If this Court permits the government to collect and analyze the DNA of arrestees without a warrant or individualized suspicion, it will therefore effectively cede to law enforcement considerable power to choose whom to search for involvement in unrelated crimes.

3. Perhaps most remarkably, the United States suggests that this Court should dispense with the warrant requirement where “the governmental need is \* \* \* especially likely to be frustrated by [that] requirement.” U.S. Br. 12; see *id.* at 8-9, 10, 32-33.

That suggestion should be dismissed out of hand. It is certainly true that prohibiting law enforcement from collecting and analyzing an arrestee’s DNA for the purpose of determining his involvement in unrelated crimes will hinder its ability to solve those crimes—just as it would to prohibit law enforcement from stopping every individual in a particular neighborhood, or searching every home in that neighborhood, without a warrant. As one member of this Court recently put it, “[a]ll law enforcement would be a lot easier if we didn’t have the doggone Fourth Amendment.” Oral Arg. Tr. at 57, *Bailey v. United States*, No. 11-770 (Nov. 1, 2012). But the Fourth Amendment exists for the “overriding” purpose of “protect[ing] personal privacy and dignity against unwarranted intrusion by the State.” *Schmerber*, 384 U.S. at 767. The mere fact that the warrant requirement may serve as an impediment to law enforcement is no justification for discarding it. And as we will now explain, even if this Court were to resort to balancing here, the substantial privacy interests implicated by the Maryland Act outweigh the incremental benefits to law enforcement of the expansion to arrestees.

**E. Should This Court Evaluate The Warrantless, Suspicionless Search At Issue Here By Balancing Interests, Respondent's Privacy Interests Outweigh The Government's Interests**

Under their preferred balancing approach, petitioner and the United States contend that the government's interests in collecting and analyzing the DNA of arrestees outweigh the countervailing privacy interests. Pet. Br. 13-25; U.S. Br. 31-33. They are mistaken. And in so contending, they mischaracterize both the interests at issue and the extent to which those interests are implicated by the expansion of the Maryland Act to arrestees.

1. a. On respondent's side of the ledger, the privacy interests are substantial. To begin with, the search at issue here involved a physical intrusion into respondent's body—a type of intrusion that is at least as substantial as other types of Fourth Amendment intrusion, such as intrusions into the home. See *Schmerber*, 384 U.S. at 770.

Even beyond that intrusion, moreover, the collection of an individual's DNA raises profound privacy concerns. Our DNA is our blueprint: an individual's DNA contains not only deeply personal information about the subject's medical history and genetic conditions, but also information that can be used to make predictions about a host of physical and behavioral characteristics, ranging from the subject's age, ethnicity, and intelligence to the subject's propensity for violence and addiction. See, e.g., Center for Genetics Education, *The Human Genetic Code—The Human Genome Project and Beyond* (2007) <[tinyurl.com/cgegegenome](http://tinyurl.com/cgegegenome)>; Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law*

*Enforcement: What Role for Privacy?*, 34 J.L. Med. & Ethics 153, 158 (2006).<sup>22</sup>

Petitioner and the United States contend that the privacy concerns here are overblown because the Maryland Act permits law enforcement only to use the information contained in the standard CODIS profile, which consists of data from 13 different loci—information, they assert, that serves no value other than for identification. See Pet. Br. 15-16; U.S. Br. 22-24. As a preliminary matter, while it is true that the loci at issue were initially selected because it was believed that they did not correspond to any particular traits or characteristics, the scientific understanding is rapidly evolving: it is now well understood that “non-coding” loci play important roles in the process of gene expression, see, *e.g.*, Brendan Maher, *The Human Encyclopedia*, 489 *Nature* 46, 46-47 (2012), and scientific advances may allow additional personal information to be gleaned from the data from the loci contained in the standard CODIS profile (or the new loci that the FBI intends to add), see, *e.g.*, Sara H. Katsanis & Jennifer K. Wagner, *Characterization of the Standard and Recommended CODIS Markers*, 58 *J. Forensic Sci.* S169, S171 (2013).

Perhaps more importantly, the Maryland Act does not limit the state to using only the information contained in the standard CODIS profile. The Act permits the state to include additional genetic information in an arrestee’s “DNA record” as long as that information “di-

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<sup>22</sup> See also Oral Arg. Tr. at 52, *Tolentino, supra* (statement by the United States noting that, “unlike a name or fingerprint, DNA evidence \* \* \* could lead to other types of information \* \* \* that may not be relevant to the criminal justice system, medical records, genetic information”).

rectly relate[s] to the identification of individuals.” Md. Code Ann., Pub. Safety § 2-505(b)(1).<sup>23</sup> The Act also permits the state to retain an individual’s DNA sample even after a DNA profile has been prepared, see *id.* §§ 2-506(b), 2-511, and to conduct further tests on that sample for any one of a number of broad statutory purposes, including “as part of an official investigation into a crime” and “for research and administrative purposes,” *id.* § 2-505(a).<sup>24</sup> As one commentator has noted, “[b]ecause they contain an individual’s entire genome, tissue samples retained by the government threaten privacy interests the most.” Elizabeth E. Joh, *Reclaiming ‘Abandoned’ DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 871 (2006).<sup>25</sup>

Petitioner and the United States correctly note that, under the Maryland Act, there are limits on the permissible use, and penalties for the misuse, of DNA samples taken from arrestees. See Pet. Br. 16; U.S. Br. 22. But at least outside the context of the “special needs” doctrine—where law enforcement plays a limited role, see

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<sup>23</sup> It is our understanding that, as it did in this case, the Forensic Sciences Division of the Maryland Police Department routinely analyzes not only the 13 loci currently included in the standard CODIS profile, but also two additional loci and the gene for amelogenin (which discloses an individual’s sex).

<sup>24</sup> Notably, if an arrestee’s DNA profile results in a match, the Act requires the state to conduct “additional testing” if it wishes to use the match in any subsequent trial. Md. Code Ann., Pub. Safety § 2-510. That is why, after respondent was charged with the sexual assault, the state obtained a search warrant and collected a second DNA sample. J.A. 89.

<sup>25</sup> Like the Maryland Act, the federal DNA statute permits the government to retain an individual’s DNA sample even after a DNA profile has been prepared.

p. 29, *supra*—this Court has never blessed a search that would otherwise violate the Fourth Amendment simply because law enforcement has promised (or, at least for the time being, bound itself) to review the information it obtains in a particular manner.<sup>26</sup> Like the First Amendment, the Fourth Amendment “protects against the Government; it does not leave us at the mercy of *no-lesse oblige*.” *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010). Because the search at issue here allows the state to come into possession of an individual’s entire DNA, it raises substantial privacy concerns—in addition to the physical intrusion that the collection of respondent’s DNA entailed.

b. On petitioner’s side of the ledger, the government undoubtedly has a substantial interest in solving and preventing crimes. See p. 41, *supra*. It is not enough, however, for petitioner simply to recite that interest; petitioner bears the burden of demonstrating that the expansion of the Maryland Act to arrestees is “essential” to serve it. See *Chandler*, 520 U.S. at 315.

At the outset, two points bear repeating. First, it is undisputed that the government may collect and analyze the DNA of arrestees *once they are convicted*. See p. 24, *supra*. Second, it is also undisputed that the government may collect the DNA of arrestees where it can show that DNA analysis would be useful in linking an arrestee to the crime of arrest. See pp. 20-21, *supra*. The critical question, therefore, is whether petitioner can demon-

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<sup>26</sup> To the extent petitioner and the United States rely on *Whalen v. Roe*, 429 U.S. 589 (1977), and *NASA v. Nelson*, 131 S. Ct. 746 (2011), those cases involved not the Fourth Amendment, but a claimed “constitutional right to informational privacy”—a right this Court has never actually recognized. Compare *id.* at 756 with *id.* at 765-766 (Scalia, J., concurring in the judgment).

strate that the collection and analysis of DNA from arrestees who do not fall within one of those two broad categories is essential to serve the government's interest in solving and preventing crimes.

Petitioner has completely failed to make such a showing. In fact, it does not even try. In its briefs at the certiorari and merits stages, petitioner has pointed to no evidence demonstrating the efficacy of the expansion of the Maryland Act to arrestees.<sup>27</sup> In its application for a stay of the judgment below (at 16-17), petitioner did cite a report indicating that the collection and analysis of DNA from arrestees has resulted in an average of 19 matches resulting in charges, and 10 matches resulting in convictions, for each year that the expansion to arrestees has been in effect. See Maryland State Police, Forensic Sciences Division, *2011 Annual Report: State-wide DNA Database Report* 8 (Apr. 2012) <[tinyurl.com/marylandreport](http://tinyurl.com/marylandreport)>. Those statistics, however, seemingly include arrestees who were subsequently convicted of the crimes of arrest (and whose DNA indisputably could have been collected at that point) and arrestees whose DNA could have been collected because it was relevant to the crime of arrest—as well as arrestees who had previously been convicted of other crimes (but whose DNA had not previously been collected). See J.A. 171 (Roberts, C.J., granting application) (noting that respondent had made “sound points” about the limited impact of the decision below). If anything, the statistics bear out what common sense would suggest: *viz.*, that there are diminishing returns to the expansion of DNA testing from in-

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<sup>27</sup> For its part, the United States simply cites generic statistics about the efficacy of DNA testing, without distinguishing between convicts and arrestees. See U.S. Br. 30.

dividuals who have been convicted to individuals who have merely been arrested.

Petitioner’s amici vividly recount individual cases in which the collection of DNA upon arrest either helped to solve previously unsolved crimes or might have helped to prevent the commission of subsequent ones. See, *e.g.*, California Br. 10-13. Only the most hard-hearted person could fail to be moved by those examples. But there are undoubtedly also individual cases in which the same could be said about the collection of DNA from ordinary citizens. Without more, anecdotal evidence about the efficacy of conducting DNA testing on arrestees cannot justify the substantial intrusions that resulted from the collection and analysis of respondent’s DNA.

2. In concluding that the government’s interests here outweigh the countervailing privacy interests, petitioner and the United States offer no meaningful limiting principle to their analysis. Although the Maryland Act requires the DNA testing only of arrestees charged with crimes of violence and burglaries, petitioner offers no basis for analyzing the validity of DNA testing differently depending on the crime of arrest. Nor does the United States—perhaps not surprisingly, because federal law mandates DNA testing of all arrestees. See 28 C.F.R. 28.12. And this Court has traditionally not drawn distinctions based on the crime of arrest in determining the validity of a search of an arrestee; instead, the Court has “treat[ed] all custodial arrests alike for purposes of search justification.” *Robinson*, 414 U.S. at 253.

By its terms, therefore, the reasoning of petitioner and the United States is far-reaching. This Court has held that the Constitution permits law enforcement to conduct arrests even for minor traffic offenses. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001). And the number of arrests in the United States is eye-

popping: there were more than *12 million* arrests in 2011 alone. See FBI, *Crime in the United States 2011—Persons Arrested* <[tinyurl.com/2011arrests](http://tinyurl.com/2011arrests)> (last visited Jan. 25, 2013). Indeed, one recent study concluded that, by age 23, nearly one-third of all Americans have been arrested for an offense other than a minor traffic violation. See Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. Times, Dec. 19, 2011, at A16. The Court should therefore be under no illusion as to the stakes here. If the Court adopts the approach advanced by petitioner and the United States, it will be sanctioning a monumental expansion of DNA databases—an expansion that has not been shown to have substantial benefits for crime control.

Nor does the reasoning of petitioner and the United States stop there. Aside from the erroneous contention that arrestees' expectations of privacy are diminished across the board, the only limiting principle petitioner offers is that, "[a]s a class, arrestees are far more likely than the general public" to have committed other crimes. Pet. Br. 24. Of course, where an arrestee has previously been convicted of another crime, his DNA may validly be collected and analyzed; the relevant question is therefore whether arrestees *who have not previously been convicted of another crime* are more likely as a class to have committed unsolved crimes (or to commit future ones). But more importantly, under petitioner's reasoning, it would seemingly be permissible to collect and analyze DNA from subsets of the general population—such as young men, residents of particular neighborhoods, or individuals from particular socioeconomic or educational backgrounds—as long as it could be shown that those groups have a higher incidence of criminal activity.

If anything, the United States takes an even more aggressive position: virtually all of its arguments—con-

cerning the allegedly minimal intrusion of the search, the significance of the government's interest in solving and preventing crimes, and the constraints on officer discretion—would justify the blanket collection and analysis of DNA from ordinary citizens. As the history of fingerprinting shows, moreover, that concern is far from theoretical. In California alone, the government requires fingerprinting as a condition of obtaining a driver's license, see Cal. Veh. Code § 12517.3(a)(1); receiving certain welfare benefits, see Cal. Welf. & Inst. Code § 10830(b)(1), and even becoming a member of the Bar, see Cal. Bus. & Prof. Code § 6054. If this Court upholds the practice at issue here, one can readily imagine that similar requirements for "DNA fingerprinting" will not be far behind. In New York City, the police have already developed a pilot project allowing officers to collect DNA by means of a cheek swab from individuals stopped, but not arrested, for traffic and other minor violations. See Wayne A. Logan, *Policing Identity*, 92 B.U. L. Rev. 1561, 1588 n.164 (2012).

Far from resisting the implication that the blanket collection and analysis of DNA from ordinary citizens would be permissible, the proponents of the Maryland Act affirmatively embraced it. As Attorney General Gansler put it at the time, "ultimately, someday, everybody's DNA is going to be in some sort of [a database], like with our Social Security numbers; \* \* \* that's the way it's going to be one day down the road." *Hearing on H.B. 370 Before the H. Comm. on the Judiciary*, 2008 Leg., 425th Sess. (Md. Feb. 13, 2008) (testimony of Attorney General Douglas Gansler). Some Fourth Amendment incursions may come dressed in sheep's clothing. This wolf comes as a wolf.

\* \* \* \* \*

In many ways, this case is a prime example of the potential value of DNA testing to law enforcement. The collection and analysis of respondent’s DNA helped to solve a brutal crime. Under those circumstances, the temptation to bend existing constitutional principles—in interpreting a provision that, after all, speaks only of “reasonableness”—may seem irresistible. The Court should nevertheless resist it. The history of our Nation is replete with examples of creeping intrusions into individual privacy, often involving new technologies. The expansion of DNA testing is no different, save perhaps for the speed with which it has occurred.

This Court’s Fourth Amendment decisions “[n]ot only \* \* \* reflect today’s values by giving effect to people’s reasonable expectations of privacy,” but “also shape future values by changing our experience and altering what we come to expect from our government.” *Kincaide*, 379 F.3d at 873 (Kozinski, J., dissenting). Should the Court uphold the blanket warrantless, suspicionless collection and analysis of DNA from arrestees, it would establish a new baseline. And it would take but modest incremental steps from that baseline to permit the preparation of more invasive profiles, such as full-genome profiles; the use of more intrusive investigative techniques, such as familial searching; and, ultimately, the collection and retention of DNA from ordinary citizens.

For the reasons stated in this brief, a ruling in petitioner’s favor would be contrary to existing law. But it would also make it difficult, if not impossible, to resist further expansions of the use of DNA testing. Those expansions are assuredly coming; some of them have already arrived. This Court should draw the line here, and hold that the collection and analysis of respondent’s DNA without a warrant or individualized suspicion was

unconstitutional. To hold otherwise would raise the prospect that, in the not-too-distant future, we will wake up to an America that the Framers could not have imagined—and that none of us will recognize.

**CONCLUSION**

The judgment of the Maryland Court of Appeals should be affirmed.

Respectfully submitted.

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JANUARY 2013

## APPENDIX

### STATEMENT OF PROBABLE CAUSE (Apr. 10, 2009)

Local Incident #0912080

Date: 04/10/2009
Time: 21:06
Related case(s):

#### DISTRICT COURT OF MARYLAND FOR WICOMICO COUNTY

LOCATED AT (COURT ADDRESS)  201 BAPTIST ST. SALISBURY, MD 21801	DISTRICT COURT CASE NUMBER
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COMPLAINANT				DEFENDANT					
NAME (LAST, FIRST, M.I.)		TITLE		NAME (LAST, FIRST, M.I.)		TITLE			
BURT, T		OFFR		KING, ALONZO					
AGENCY	SUB AGENCY	I.D. NO. (POLICE)		MAFIS NAME (LAST, FIRST, M.I.)					
DE		8270 3115		I.D.NO.	RACE	SEX	HT	WT.	D.O.B
				B	B	M	5/8	190	10/19/82
WORK TELEPHONE		HOME TELEPHONE		HAIR	EYES	OTHER DESCRIPTION			
(410)5483165		( )		BLK	BRO				
ADDRESS			APT. NO.	WORK TELEPHONE			HOME TELEPHONE		
P O BOX 4118				(410)8608888			(410)8601326		
699 WEST SALISBURY PARKWAY									
CITY	STATE	ZIP CODE		ADDRESS			APT. NO.		
SALISBURY	MD	21801		507 OVERBROOK DR.					
CITY			STATE	ZIP CODE					
SALISBURY			MD	21804					

DOMESTIC VIOLENCE                       HATE CRIME                      PAGE 1 OF 3

STATEMENT OF PROBABLE CAUSE

ARREST ON TRAFFIC/NATURAL RESOURCES CITATIONS/CRIMINAL CHARGES/MUNICIPAL ORDINANCES/PUBLIC LOCAL LAWS

THE DEFENDANT HAS BEEN ARRESTED UPON THE FOLLOWING INFORMATION OR OBSERVATION: (MAKE A PLAIN, CONCISE AND DEFINITIVE STATEMENT OF ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED)

ON APRIL 10, 2009 AT 1722 HOURS I OFC T BURT 3115, RESPONDED TO 1108 MIDDLENECK DR, IN REFERENCE TO SPEAKING WITH VIC-

(1a)

TIMS OF AN ASSAULT WITH A FIREARM AT 821 PRISCILLA ST (COUNTRY FOOD STORE). UPON ARRIVAL TO THE RESIDENCE I SPOKE WITH THREE WITNESSES IDENTIFIED AS CALVA DESHIELDS, LARON WOOLFORD, AND DANIELLE PATRICK THE SUBJECTS ADVISED THE FOLLOWING.

PATRICK ADVISED THAT ON APRIL 10, 2009 AT APPROX 1710 HOURS THE ABOVE MENTIONED SUBJECTS AND ANOTHER SUBJECT IDENTIFIED AS DEVON DESHEILDS, DEVON BEING DRIVER OF THE VEHICLE, DROVE TO 821 PRISCILLA ST TO PURCHASE GROCERY TYPE PRODUCTS AND FUEL. PATTRICK ADVISED THAT WHILE PARKED AT THE FUEL PUMPS A SUBJECT IDENTIFIED AS ALONZO KING APPROACHED THE VEHICLE, AND STATED "REMEMBER THAT NIGHT AT THE CLUB". PATTRICK ADVISED THAT KING THE FURNISHED A SHOTGUN AND POINTED AT THE VEHICLE. PATRICK ADVISED THAT DEVON, WOOLFORD AND, CALVA THEN EXITED THE VEHICLE AND FLED THE AREA ON FOOT. PATTRICK ADVISED THAT SHE THEN MOVED TO THE DRIVER SEAT OF THE VEHICLE AND FLED THE AREA IN HER VEHICLE. PATTRICK ADVISED THAT WHILE EN-ROUTE TO 1108 MIDDLENECK DR SHE NOTIFIED THE POLICE. PATTRICK DESCRIBED THE VEHICLE THAT KING FLED IN AS A GREY IN COLOR NISSAN ARMANDA.

CALVA ADVISED THAT SHE WAS A PASSENGER IN A VEHICLE OPERATED BY DEVON, AND

THE ABOVE MENTIONED SUBJECTS. CALVA ADVISED THAT SHE OBSERVED KING APPROACH THE VEHICLE AND FURNISH A SHOT-GUN, AT WHICH TIME SHE EXITED THE VEHICLE AND FLED THE AREA ON FOOT ARRIVING AT 1008 MIDDLENECK DR.

[2] WOOLFORD ADVISED THE SAME AS CALVA; HOWEVER WOOLFORD WAS VERY UNCOOPERATIVE WITH POLICE. WOOLFORD ADVISED THAT THE POLICE WILL DO NOTHING TO PROTECT HIM AND THAT; HE IS NOT DOING ANYTHING TO HELP. WOOLFORD DID REFUSE TO TAKE PART IN A LATER ONE ON ONE IDENTIFICATION.

WHILE AT 1108 MIDDLENECK DR, CPL KUCZENSKI 128, AND OFC BATSON 3191 WERE AT 638 DECATUR AV SPEAKING WITH THE FOURTH VICTIM DRIVER OF THE VEHICLE DEVON. WHILE OFFICERS WERE SPEAKING WITH DEVON HE ADVISED THAT KING WAS ENTERING A VEHICLE IN THE AREA. OFC BATSON AND CPL KUCZENSKI WERE ABLE TO PERFORM A TRAFFIC STOP ON THE VEHICLE THAT KING WAS A PASSENGER IN. THE TRAFFIC STOP WAS IN THE AREA OF S DIVISION ST/DECATUR AVE. THE VEHICLE WAS BEING OPERATED BY KING'S GIRLFRIEND CHRISTINE WASHINGTON, AND WAS A RED DURANGO GA TAG AEA8365. AT THIS TIME KING WAS DETAINED FOR THE INVESTIGATION. DEVON DID POSITIVELY IDENTIFY KING AS THE SUBJECT WHO ASSAULTED THEM WITH THE WEAPON. 638 DECATUR AVE WAS ONLY APPROX 200 FEET

FROM WHERE OFC BATSON AND CPL KUCZENSKI PERFORMED THE TRAFFIC STOP

AT THIS TIME A ONE ON ONE IDENTIFICATION WAS COMPLETED WITH PATTRICK, AND CALVA. BOTH SUBJECTS ADVISED THEY DID NOT WANT TO BE TRANSPORTED IN A POLICE CAR SO OFFICERS LET THE SUBJECTS BE DRIVEN IN SEPARATE PERSONAL VEHICLES TO THE AREA OF WHERE KING WAS BEING DETAINED. PATTRICK, AND CALVA DROVE BY THE AREA AND THEN MET OFC CALHOUN 1152, AT THE COUNTRY FOOD STORES. OFC CALHOUN ADVISED ME VIA RADIO THAT PATTRICK MADE A POSITIVE IDENTIFICATION ON KING, HOWEVER CALVA WAS NOT SURE.

CALVA, PATTRICK AND WOOLFORD DID COMPLETE WRITTEN STATEMENT FOR THE INCIDENT WHICH WILL BE PLACED IN THE CASE FILE FOR REVIEW.

OFC CALHOUN ADVISED THAT HE DID LOCATE A GRAY IN COLOR ARMADA IN THE AREA OF JOHNSON ST/DECATUR ST. OFC CALHOUN ADVISED THAT THIS VEHICLE HOOD WAS WARM TO THE TOUCH. A REGISTRATION CHECK OF THE VEHICLE REVELED IT WAS REGISTERED TO WASHINGTON. OFFICERS GAINED A CONSENT SEARCH OF THE VEHICLE FROM WASHINGTON. WHILE SEARCHING THE VEHICLE CPL KUCZENSKI LOCATED A 12 GAUGE SHOTGUN SHELL IN THE MIDDLE CONSOLE OF THE VEHICLE.

AT THIS TIME BASED ON THE EYEWITNESS ACCOUNTS AND THE LOCATION OF THE SHOT-GUN SHELL IN THE VEHICLE WHICH KING FLED THE AREA FROM KING WAS PLACED UNDER ARREST FOR FIRST DEGREE ASSAULT AND OTHER RELATED CHARGES.

KING WAS TRANSPORTED TO THE SALISBURY POLICE DEPARTMENT BY OFC BATSON. I THEN RESPONDED TO THE SALISBURY POLICE DEPT AND SPOKE WITH KING.

[3] CONFRONT THE VEHICLE WITH THE FOUR ABOVE MENTIONED SUBJECTS IN IT; HOWEVER HE DID NOT HAVE A SHOTGUN. KING ADVISED THAT HE HAD A LONG STEEL PIPE BUT DID NOT USE IT. KING ADVISED THAT THERE WAS A PHYSICAL ALTERCATION THROUGH THE WINDOW OF THE VEHICLE; HOWEVER NO SUBJECTS RECEIVED ANY INJURIES.

KING WAS THEN TRANSPORTED TO WCDC FOR PROCESSING.

OTHER OFFICERS FROM THE SALISBURY POLICE DEPT DID COMPLETE SUPPLEMENTS FOR THIS INCIDENT, IN THE SALISBURY CIS SYSTEM.

IT SHOULD BE NOTED THAT THIS WHOLE INCIDENT STEMS FROM A FIGHT THAT OCCURRED ALMOST FIVE MONTHS AGO BETWEEN THE PARTIES.

ALSO NO ITEMS WERE TAKEN FROM ANY OF THE VICTIMS OR REQUESTED BY KING AT ANY TIME.

ALL ABOVE EVENTS OCCURRED IN SALISBURY WICOMICO COUNTY MARYLAND.

COURT COPY

I SOLEMNLY AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE MATTERS AND FACTS SET FORTH IN THE FOREGOING DOCUMENT ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF		
DATE 04/10/2009	ARRESTING OFFICER /s/	
AGENCY DE	SUB-AGENCY 8270	ID NO. 3115

PROBABLE CAUSE CHARGES # 1-13

LACK OF PROBABLE CAUSE CHARGES #

I HAVE REVIEWED THE STATEMENT OF CHARGES AND HAVE DETERMINED THAT <input checked="" type="checkbox"/> THERE IS PROBABLE CAUSE TO DETAIN THE DEFENDANT <input type="checkbox"/> THERE IS NOT PROBABLE CAUSE TO DETAIN THE DEFENDANT AND I HAVE ACCORDINGLY RELEASED HIM ON HIS OWN RECOGNIZANCE		
DATE 04-10-09	JUDICIAL OFFICER /s/	COMMISSIONER ID NO 2094