NO. 12-207

In the
Supreme Court of the United States

STATE OF MARYLAND,
PETITIONER,

v.

ALONZO JAY KING, JR.,
RESPONDENT.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF SUSANA MARTINEZ, GOVERNOR OF THE STATE OF NEW MEXICO, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Governor Susana Martinez served as a prosecutor in New Mexico for more than 20 years before being elected Governor. Fourteen of those years were as the elected District Attorney for Doña Ana County in southern New Mexico. As a result of that experience, she is intimately familiar with the need for better law enforcement technologies, especially in cases where justice may otherwise be long denied for victims of sexual abuse, rape, or murder.

In 2006, Governor Martinez prosecuted Gabriel Adrian Avila, who raped and murdered a graduate student named Katie Sepich in 2003. That crime remained unsolved for three years despite intensive investigative efforts. Investigators were able to obtain the perpetrator's DNA from under Sepich's fingernails because she had fought back and scratched him, but no match was found in the DNA database. Avila was identified three years later as Sepich's rapist and murderer only because he was convicted of an unrelated felony and had his DNA collected pursuant to a New Mexico statute allowing DNA collection from convicted felony offenders. But had DNA collection of arrestees been permitted when Avila was arrested for the unrelated felony in 2003, the Sepich family would not have had to wait over

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and her counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and respondent have each filed blanket consent letters with the Clerk.

three years to see their daughter's killer brought to justice.

This powerful experience prompted Governor Martinez to fight for reforms in New Mexico's DNA collection statute. In 2006, as District Attorney she pressed the Legislature to pass "Katie's Law," which amended the State's DNA collection statute to permit collecting DNA from individuals arrested for certain violent felonies—as does the Maryland law at issue in this case. 2006 N.M. Laws, ch. 104. As part of that effort, she provided information about the Katie Sepich case and what a difference early DNA collection could have made. As Governor, she made it a priority to expand the statute so that the State could obtain DNA samples pursuant to all felony arrests. New Mexico's Legislature enacted such an amendment in 2011, and Governor Martinez signed it into law. This expansion of the New Mexico statute bore immediate fruit: in the year and a half since the amendment, the State has identified and brought to justice numerous violent criminals who otherwise might have escaped identification and victimized more innocent citizens.

Governor Martinez is participating as an *amicus* to urge the Court to reverse the Maryland Court of Appeals and allow the people, through their elected representatives, to better protect themselves against crime by authorizing the collection of DNA from felony arrestees. The people have a strong interest in enabling the State to identify felony arrestees and solve crimes; the DNA collection is entirely non-intrusive; and statutory protections ensure that the State will not misuse the collected DNA to invade

citizens' privacy. Maryland's DNA collection regime, like New Mexico's, is therefore not at all "unreasonable," U.S. Const. amend. IV.

SUMMARY OF ARGUMENT

Collecting and analyzing DNA from individuals arrested for felonies is reasonable under this Court's balancing framework for evaluating the reasonableness of a search. On one side of the scale, the Court weighs the extent to which the search promotes valid state interests; on the other, the Court considers the extent to which the search impinges on citizens' privacy. *See, e.g.*, *Samson v. California*, 547 U.S. 843, 848 (2006). That balance tips heavily here in favor of the State.

On the State's side of the scale, DNA collection is an important tool to identify arrestees and solve crimes. DNA analysis is the most accurate means known to modern science to identify arrestees. States have an obvious interest in using the best technology available, and where the legislature has opted to do so, it is inappropriate for a court to decide that technologies that are undeniably inferior are nonetheless good enough. The court below compounded this error by drawing a sharp distinction between the State's interest in identifying arrestees and its interest in solving crimes. Those interests are closely related, and in any event the validity of DNA analysis as a means of identifying arrestees is not undermined by the fact that DNA analysis is *also* a valuable means of solving crimes. To the contrary, that fact simply underscores that

the interests on the State's side of the scale are extremely weighty.

Given the weight of the State's interests, Maryland's DNA statute can be "unreasonable" only if it substantially impinges on meaningful privacy interests in a manner not justified by its benefits. It does not.

As an initial matter, given that arrestees can be jailed and strip-searched without individualized suspicion, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012), it is significant that the act of collecting DNA itself is entirely non-intrusive. To be sure, the court below was palpably concerned that the State might *use* collected DNA in ways that would be intrusive and unreasonable. But the Maryland legislature built robust protections into the statute to make the misuse feared by the court below a felony. Not surprisingly, such misuse is also a chimera: there is absolutely no evidence, nor even an allegation, that it has occurred a single time. An important statute enacted by the people's elected representatives to improve the State's ability to keep its citizens safe from crime should not be struck down based on the hypothetical concern that some state official somewhere might commit a felony and invade a citizen's privacy in violation of the statute's explicit restrictions.

The Court of Appeals' other reasons for striking down the statute do not withstand scrutiny. The court's concern with the "warrantless" nature of the DNA collection is misplaced, because the statute specifies exactly when and how to collect and analyze DNA and leaves no discretion to law enforcement

officers. As a result, requiring a warrant would add no meaningful protection. Moreover, the court's concern over warrants is difficult to square with its recognition that law enforcement officers can obtain arrestees' DNA on an ad hoc and warrantless basis through trickery, such as offering an arrestee a drink and then surreptitiously obtaining his DNA from the rim of the cup. The State's carefully crafted statute, replete with protections against misuse and guarantees of regularity, is surely far preferable to such a regime. Finally, the court erred in its belief that collecting DNA from arrestees contravenes the presumption of innocence. That presumption is a trial right and has nothing to do with the Fourth Amendment reasonableness of DNA collection. Arrestees who are prosecuted based on a DNA match retain the full panoply of trial rights, including the right to confront the State's DNA analyst to ensure that the match is valid and persuasive.

ARGUMENT

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The Amendment's requirement of reasonableness is "flexible" and "should not be read to mandate . . . rigid rule[s]." *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995). "In determining whether a particular governmental action violates this provision," this Court "assess[es], on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999). "[W]hat is reasonable depends on the context within

which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires balancing the need to search against the invasion which the search entails." *New Jersey v. TLO*, 469 U.S. 325, 337 (1985) (internal quotation marks omitted). When this well-established framework is applied to the Maryland DNA collection statute at issue here, the balance tips sharply in favor of the State. Collecting DNA from individuals arrested for felonies significantly advances important government interests, and does so with a minimum of intrusion into citizens' reasonable privacy interests.

I. The State Has a Strong Interest in Obtaining DNA from Felony Arrestees.

Collecting DNA at arrest helps the State do its most critical job: protecting its citizens. DNA collection from felony arrestees solves more crimes, by leading to the identification of dangerous criminals sooner, more efficiently, and more reliably. It enables law enforcement to solve the toughest crimes—cold cases that have languished for years. And equally important, DNA collection exonerates the innocent. That DNA collection provides such valuable benefits to the State's ability to identify and convict the guilty and to identify and exonerate the innocent is a strong point in favor of the constitutionality—the "reasonableness"—of the Maryland statute.

The court below, however, appeared to believe that the existence of these law enforcement benefits somehow undermines the State's interest in identifying the individuals who are in its custody.

That makes no sense. The State's interest in identifying those in its custody is valid and important, and using the best technology available furthers that interest. That DNA collection *also* helps solve crimes, as well as helping identify individuals in custody, makes DNA collection more important—not less "reasonable."

A. Collecting DNA From Felony Arrestees Helps States Solve Serious Crimes.

The story behind New Mexico's law, and similar laws around the country, is a compelling illustration of the power of DNA evidence. Katie Sepich was a 22-year-old student from Carlsbad, New Mexico working on a master's degree in business at New Mexico State University in Las Cruces in 2003. She was walking home when someone attacked her. The attacker raped her as she fought back, scratching him repeatedly and coming away with his DNA under her fingernails. The rapist then strangled her, took her half-naked body in his truck to an old city dump in the desert, doused her body with alcohol, and set it on fire in an attempt to destroy the physical evidence of his crime. The police investigated everyone connected to Sepich but had no leads.

Less than three months later, Gabriel Adrian Avila was arrested for entering the home of two other young women, who locked themselves in a bedroom and called the police. He was charged with aggravated burglary with intent to commit aggravated assault. At that time, New Mexico law provided for DNA collection only upon conviction, so Avila's DNA could not be collected upon his arrest.

See 1997 N.M. Laws, ch. 105. If the State could have collected and analyzed Avila's DNA at that point, the Sepich family would not have had to wait over three years to bring their daughter's rapist and murderer to justice. Nor, presumably, would Avila have been released on bail. As it happens, without the benefit of that information, Avila was granted bail and jumped it, eluding rearrest for over a year. It is not known whether Avila victimized other young women during that time. He eventually was convicted of the burglary charge and sentenced to nine years' imprisonment, and only then was his DNA collected pursuant to the New Mexico statute. Renée Ruelas-Venegas, *More Evidence Comes Out in Sepich Murder*, Alamogordo Daily News, Dec. 23, 2006.

When the DNA sample that Avila provided upon conviction was analyzed, it matched the DNA found under Katie Sepich's fingernails. As District Attorney of Doña Ana County, Governor Martinez confronted Avila with the DNA match, and he confessed to raping and murdering Sepich. Avila pled guilty to first-degree murder and was sentenced to 69 years in prison in 2007.

Meanwhile, in March 2006, New Mexico had passed an amendment to its DNA Collection Law to allow for the collection of DNA samples from persons arrested for violent felonies. 2006 N.M. Laws, ch. 104. This amendment was known as "Katie's Law" in memory of Katie Sepich. As District Attorney, Governor Martinez fought for the 2006 amendment, and it was an important advance. But the statute still did not permit collecting DNA from persons arrested for crimes that are non-violent but

nonetheless are serious enough to be felonies. Many individuals who are arrested for non-violent felonies also have committed or will commit violent felonies, so this gap in protection was significant.

Accordingly, when she took office in 2011, Governor Martinez made it her priority, starting on her very first day, to expand Katie's Law to cover all adults arrested for a felony. This amendment passed by a vote of 55-13 in the House and 35-3 in the Senate. Governor Martinez signed the amendment into law and it took effect July 1, 2011. 2011 N.M. Laws, ch. 84.

Under current New Mexico law, anyone 18 years of age or older who is arrested for the commission of a felony must provide a DNA sample. N.M. Stat. Ann. § 29-16-6(B). The sample is sent to a lab, but the lab may not analyze it until there has been a judicial determination that probable cause existed for the arrest. *Id.* § 29-3-10(B). If at arraignment the court determines that probable cause is lacking, the sample must be destroyed without ever being tested. *Id.* (If the defendant fails to appear, the lab may retain and analyze the sample. *Id.*)

New Mexico has seen a significant rise in DNA matches due to Katie's Law and the reform of Katie's Law that Governor Martinez spearheaded. As of December 2012, 958 DNA samples had been matched to arrestee profiles in the five years since Katie's Law took effect in 2007. This represents a dramatic increase in the State's ability to solve serious crimes; the nine years between the initial 1997 enactment (which allowed for DNA collection upon conviction) and Katie's Law yielded only 358 matches. Of the

958 post-Katie's Law matches, 139 were made after the 2011 amendment took effect, including 62 that resulted from arrests for felonies that had not been classified as violent felonies under the 2007 version of the law. In other words, 62 unsolved crimes—including 11 homicide and rape cases—were solved just in the past year and a half, and just in New Mexico, thanks to the 2011 expansion of Katie's Law.

Behind these DNA-match statistics are dangerous criminals who are in prison where they belong when they might otherwise be at large, and crime victims who have gained the security of seeing their attackers brought to justice.

For example, a woman was at home with her four-year-old daughter when a stranger who claimed to be friends with her father asked to be let in to use the bathroom. She allowed him in, and he repaid her by sexually assaulting her at gunpoint. Investigators were able to find the assailant, Jesus Oscar Dominguez, because his DNA was in the system due to prior arrests for illegal reentry. *See Katie's Law Helps Win Rape Conviction*, Las Cruces Sun-News, Sept. 17, 2011. Thanks to DNA testing, Dominguez is serving a 27-year sentence instead of potentially remaining at large and attacking other innocent citizens. *Man Sentenced for Kidnapping & Rape of Clovis Woman*, NewsChannel 10, Jan. 6, 2012, http://www.newschannel10.com/story/16465817/man-sentenced-for-kidnapping-rape-of-clovis-woman. In a similar situation, the 2002 rape of a 41-year-old woman who had pulled over to change a flat tire was solved in 2006 when DNA was collected from a convicted felon, Noel Manuel Sanchez, but the crime

could have been solved four years earlier if Katie's Law had been in force. *Man Charged with Brutal 2002 Rape*, Las Cruces Sun-News, Apr. 14, 2006.

Equally importantly, DNA collection has helped exonerate the innocent, such as in the case of a mentally challenged man who had confessed, falsely, to the rape and murder of an 11-year-old girl in Albuquerque. The true killer was found when his DNA was collected upon arrest for an unrelated burglary. Deanna Sauceda, *Child Killer Convicted*, Oct. 28, 2011, http://www.krqe.com/dpp/news/crime/child-killer-convicted-ds. Indeed, in Katie Sepich's case itself, numerous individuals were publicly identified as potential suspects before DNA testing led the State to the real killer. *See No Arrests a Year After NMSU Student's Death*, Assoc. Press State & Local Wire, Aug. 29, 2004.

B. DNA Collection Also Helps States Identify Arrestees.

While the foregoing makes it clear that New Mexico's DNA collection statute, like Maryland's, is a powerful tool to help the State protect its citizens by solving crimes, DNA collection also furthers the State's interest in identifying persons who are in its custody. The court below drew a sharp distinction between a State's interest in identifying arrestees and its interest in solving other crimes, JA 146–48, but this dichotomy between identification and investigation is a false one.

1. The State's Interest in Solving Crimes Does Not Undermine Its Collection of DNA for Identification Purposes.

As an initial matter, identification and investigation are related because the State needs to know more about an arrestee than just his name before it can responsibly determine how to proceed—for example, what charge or charges to pursue, whether to support or oppose bail, and what other jurisdictions to consult. The court below thus erred by assuming that determining whether an arrestee has committed other crimes can be sharply distinguished from ascertaining his identity. JA 147.

More fundamentally, however, the court below erred by treating the existence of broader or additional investigative benefits as defeating the State's interest in identifying arrestees. The Fourth Amendment requires that a search be reasonable. If it is, the State may use the fruits of that search for any lawful purpose; the Fourth Amendment does not limit the State to using only the fruits that are somehow connected to the original justifications for the search.

For example, a search of an arrestee's person incident to arrest is reasonable because the arresting officers need to know whether he is concealing a weapon, and also need to prevent him from destroying evidence that could easily be destroyed. *See, e.g.*, *Maryland v. Buie*, 494 U.S. 325, 332 (1990); *Chimel v. California*, 395 U.S. 752, 762–63 (1969). But if the officers find other kinds of evidence, the Fourth Amendment does not require them to ignore it. In *United States v. Robinson*, for example, the

arrestee was suspected of driving after his license had been revoked. 414 U.S. 218, 220 (1973). The arresting officer did not have an individualized suspicion that either weapons or evidence pertaining to that crime would be found on the arrestee, but the Court had no trouble concluding that the search incident to arrest was reasonable under the Fourth Amendment and that the heroin found during that search was admissible in a subsequent prosecution. *Id.* at 223, 235–37 & n.7. Similarly, searches of airline passengers that are far more intrusive than the DNA collection at issue here are justified by the "goal of searching for possible safety threats related to explosives," *United States v. McCarty*, 648 F.3d 820, 831 (9th Cir. 2011), but if such a search uncovers evidence of an unrelated offense—child pornography, for example—the government is free to use that evidence, *id.* at 831 n.14.

2. DNA Collection Is a Valuable Means of Identifying Arrestees.

That a State has a legitimate interest in identifying people who are in its custody is undeniable. *See* Pet. Br. 18–19 (citing *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004)); *cf. Illinois v. Lafayette*, 462 U.S. 640, 646 (1983) (plurality opinion) (warrantless inventory search of arrestee's property justified in part because the "inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity"). The court below was wrong to hold that the State must be relegated to less effective means of identification such as fingerprinting and ID cards. JA 148.

Under the Court of Appeals' logic, a State could never harness new or updated technology so long as the existing technology is, in the court's estimation, good enough. But history belies that proposition. Before fingerprinting, arrestees were still required to provide information enabling the State to identify them as accurately as possible using the tools available at the time; fingerprinting simply gave the government a more efficient and more reliable way of verifying the arrestee's identity than relying on photographs or identification documents. *See* Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 Nw. U. L. Rev. 857, 869 & n.66 (2006) . DNA, in this sense, is just the latest step in the evolution of identification technology: it serves the same identification purpose as fingerprinting, but it is more accurate. Pet. Br. 8, 19 n.6 (explaining that the justifications for pre-fingerprinting methods of ascertaining identity apply equally to fingerprinting and DNA collection).

To be clear, fingerprint analysis is scientifically valid and an important law enforcement tool. But there is no denying that DNA is more accurate. Defendants regularly challenge fingerprint evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and similar state-law standards, and the government has been known to make critical errors in matching fingerprints. For example, the FBI mistakenly matched a latent print linked with the 2004 Madrid train bombings to an innocent Oregon attorney. *See* Fed. Bureau of Investigation, *Statement on Brandon Mayfield Case* (May 24, 2004), http://www.fbi.gov/news/pressrel/press-releases/statement-on-brandon-mayfield-case.

Even though such errors are infrequent and challenges to fingerprint evidence rarely succeed,[2] the point is that States need more, and more effective, tools to be able to protect their citizens. When superior technology like DNA analysis is available, there is no justification for a court to relegate the State to lesser technology. *Samson v. California*, 547 U.S. 843, 854 (2006) ("[T]he Fourth Amendment does not render the States powerless to address [their] concerns *effectively*.").

The court below appears to have believed that fingerprints and photographs are good enough, or at least were good enough in the case of Mr. King. JA 85 (stating that Maryland "identified King accurately and confidently through photographs and fingerprints" and "had no legitimate need for a DNA sample in order to be confident who it arrested"). But it is a legislative judgment for the people to make through their elected representatives whether the State should be content with "good enough" technology or should strive for better. The legislatures of New Mexico, Maryland, and many other States have decided that the State should use state-of-the-art technology to identify arrestees, and absent any serious harm to constitutional values, *see*

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[2] Only one court appears to have found that fingerprint evidence does not meet the *Daubert* standard—only to reverse itself on reconsideration. *United States v. Llera-Plaza*, No. 98-362-10, 2002 WL 27305 (E.D. Pa. Jan. 7, 2002), *rev'd on reconsideration*, 188 F. Supp. 2d 549 (E.D. Pa. 2002).

infra Part II, the Court should defer to that presumptively valid legislative judgment.[3]

Crucially, moreover, the court below had no basis to require the State to prove that DNA was necessary to identify the arrestee in *this particular case*. *See* JA 85. DNA collection furthers the State's interest in identification as a general matter, which makes collection reasonable given its non-intrusiveness. By analogy, a search incident to arrest is *always* reasonable if it is limited to areas that the arrestee can reach to obtain a weapon or destroy evidence; a court does not ask whether in that particular instance the police could have used other methods to ascertain that the arrestee was not armed or whether there was really enough of a risk that a particular arrestee would destroy evidence. *Robinson*, 414 U.S. at 235 ("[O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.").

There are also good reasons why such categorical legislative judgments are preferable to the alternative of case-by-case judgments made by law enforcement personnel. Where a legislature has prescribed uniform use of DNA testing in a given

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[3] On December 28, 2012, Congress passed the Katie Sepich DNA Enhanced Collection Act, which makes federal funds available to help States collect DNA from felony arrestees. H.R. 6104, 112th Cong. (2012). The Act awaits President Obama's signature.

category of cases, it has ensured consistency by constraining the discretion of law enforcement. Such legislative requirements protect against the discrimination and arbitrariness, real or alleged, that can result from allowing law enforcement to decide on a case-by-case basis whether DNA testing is "really" needed for a particular arrestee.

This case is thus easier than *Samson*, where the State had broadly authorized parole officers to search parolees without individualized suspicion or a warrant, but left it to individual parole officers to decide when and how to exercise that broad discretion. 547 U.S. at 846. The Court upheld the State's categorical authorization for such searches despite the dissent's concern that this system subjected parolees "to capricious searches conducted at the unchecked 'whim' of law enforcement officers," because the State's prohibition on "arbitrary, capricious or harassing" searches provided sufficient assurance that this broad authority would be exercised appropriately. *Id.* at 856. Here, the State's detailed legislative scheme takes this concern off the table entirely by mandating DNA collection and analysis for felony arrestees and leaving little or no discretion in the hands of individual law enforcement officers. *See also infra* at 22–23.

II. The Cost to Constitutional Values Is Minimal.

The court below did not question the public safety and law enforcement benefits of collecting and analyzing DNA from felony arrestees. Instead, the court struck down Maryland's DNA collection statute because it viewed the cost to constitutional values as too high. To be sure, the mere fact that a technique

benefits law enforcement does not make it constitutional. *Delaware v. Prouse*, 440 U.S. 648, 658–59 (1979). But where a technique benefits law enforcement—meaning that it benefits innocent citizens by helping the State identify and convict the guilty while also identifying and exonerating the innocent—it should pass muster as "reasonable" unless it impinges substantially on citizens' rights. *Cf. Houghton*, 526 U.S. at 299–300. Put differently, arrestees can have no valid interest in depriving the State of the benefits of a new technology and relegating the State to a less effective means of identification if the new technology is no more intrusive than the old.

That is the case here. The collection of the DNA is entirely non-intrusive, involving only a cheek swab that causes no pain and little or no invasion of privacy. *Cf. Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (upholding routine strip searches of arrestees detained in general prison population despite the substantial invasion of privacy entailed by such searches). The court below evidently believed that the State could not be trusted with the "vast genetic treasure map" contained in arrestees' DNA. JA 143. But the court's mistrust is unwarranted, and its analysis cannot withstand scrutiny. In truth, Maryland's statute, like New Mexico's, contains myriad strong protections against the kind of misuse of collected DNA that so worried the court below.

A. The Statute Protects Arrestees' Privacy Because It Contains Myriad Safeguards.

The procedural safeguards in DNA collection laws ensure that the nightmare conjured by the lower court will remain far from the realm of reality. First, the laws limit the analysis of DNA to strands that serve *only* to identify an arrestee. As required to participate in CODIS (the federal DNA database), New Mexico and Maryland restrict DNA analysis to the "core loci," which are 13 strands chosen precisely because they are statistically unique to each individual but do not reveal sensitive genetic information. N.M. Code R. §§ 10.14.200.7(G), 10.14.200.10(F), 10.14.200.11(G)(2); *see also* Pet. Br. 16. Analysts searching for a DNA match thus do not, and cannot, rummage around in an arrestee's genes and discover sensitive information about him any more than fingerprint analysts searching for a print match can do so. Just like a fingerprint, DNA from the core loci can identify an individual, but does not reveal sensitive personal information about the individual.

Expungement is an additional protection built into the statute. An arrestee's DNA sample will be expunged from federal and state databases at his request if the arrest does not lead to a conviction either for the offense of the arrest or another offense as a result of a DNA match. N.M. Stat. Ann. § 29-16-10(A).[4] Expungement also occurs if no felony charge

[4] "[E]xpungement means the complete destruction of all samples, records, personal identification and information concerning that person, such that the person could not be re-

has been filed within a year of the arrest. *Id.* § 29-16-10(B)(3)(b).[5] Because of this robust expungement mechanism, the Maryland court's belief that DNA collection is improper because arrestees are presumed innocent (JA 141, 144–45) is misplaced; if an arrestee is not ultimately convicted, his sample is expunged.

Furthermore, procedural safeguards exist against the misuse of DNA in every state, including New Mexico. The DNA Identification Act strictly limits the uses of those samples to three authorized purposes: identifying persons in connection with criminal investigations, establishing a missing persons database, and identifying unknown human remains. N.M. Stat. Ann. §§ 29-3-10(C), 29-16-2, 29-16-8. Violation of these restrictions is a felony. *Id.* § 29-16-12(A), (B). Despite the court's suggestion that it was all that stood between citizens and the State's "plundering [of] the vast genetic treasure map" of their DNA, *see* JA 161 (Barbera, J., dissenting), there is absolutely no claim that such misuse occurs in practice or indeed has *ever* occurred. The fears of the court below thus are entirely hypothetical.

The Court of Appeals believed that the theoretical possibility of misuse of DNA information was sufficient to render the entire statutory scheme

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associated with the expunged materials." N.M. Code R. § 10.14.200.12(N).

[5] Maryland's statute provides for automatic expungement, while New Mexico's requires the arrestee to initiate the process. N.M. Stat. Ann. § 29-16-10(A); Pet. Br. at 18 n.5.

unconstitutional. But courts are supposed to presume that government officials behave lawfully—not hypothesize rampant felonious "plundering" contrary to explicit statutory mandates. *NARA v. Favish*, 541 U.S. 157, 174 (2004); *see also Samson*, 547 U.S. at 855–57 (procedural safeguards against capricious or harassing searches are sufficient to allay concerns about how parole officers might exercise broad authority to conduct suspicionless searches of parolees).

By analogy, consider the vast store of sensitive and personal information that federal agencies such as the Internal Revenue Service and the Social Security Administration have collected about citizens pursuant to statutory mandates. If federal agencies were to share all that information with the FBI so that it was linked to the FBI's fingerprint database, perhaps one could argue that the FBI's collection of fingerprints could threaten the kind of invasion of privacy that the court below feared. But federal law, including the Privacy Act of 1974, bars such sharing of sensitive personal information. 5 U.S.C. § 552a(b); *see also* I.R.C. § 6103(a) (protecting the confidentiality of tax returns). As a result, the possibility that federal officials could hypothetically violate federal law and share and use citizens' personal information in prohibited ways is not a serious objection to the government's collection of that information. The Court of Appeals' approach—ignore the law and assume the worst—is fundamentally inappropriate.

It is almost as if the court below believed that the need for the statutory protections against misuse

of DNA information proves the unreasonableness of the statute, but that is backwards: these protections may well be necessary to ensure that DNA collection and analysis comports with the Fourth Amendment, but the point is that they are present and so that need has been satisfied. The Court should consider the reasonableness of collecting DNA from arrestees given the existence of these protections—in other words, consider the statute as an integrated whole as it actually exists and not, like the court below, hypothesize away the limits and protections that the legislature carefully and responsibly built into the statute.

B. The Court Below's Concerns Are Unfounded.

The court below expressed other concerns with allowing the State to collect DNA from arrestees, but none of them is persuasive.

1. The "Warrantless" Nature of the Search Is Irrelevant Because the Statute Fulfills the Same Purpose Served by Requiring a Warrant.

The Court of Appeals repeatedly criticized the "warrantless" nature of the DNA collection. JA 140, 141, 142, 147, 149. But this is a red herring. The legislature has enacted a generally applicable statute that mandates DNA collection and testing in certain categories of cases. A principal purpose of the warrant requirement is to limit individual officers' discretion concerning what searches to conduct, *see Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978), but the statute here avoids the problem entirely by

telling state officials exactly when and how to collect and analyze DNA. By supplying objective rules, the statute ensures that DNA collection and analysis occurs in a consistent manner that is the polar opposite of the "unbridled discretion of law enforcement officials" that raises serious Fourth Amendment concerns. *Prouse*, 440 U.S. at 661; *cf. Camara v. Municipal Court*, 387 U.S. 523, 532–33 (1967) (striking down an ordinance whose "practical effect" was "to leave the occupant subject to the discretion of the official in the field" because "[t]his is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search"). Because state officials' discretion is "directly curtailed by the [statutory] scheme," "it is difficult to see what additional protection a warrant requirement would provide." *Donovan v. Dewey*, 452 U.S. 594, 605 (1981).

Puzzlingly, even as the Court of Appeals emphasized its concern that DNA collection under the statute is "warrantless," the court seemingly approved of law enforcement gathering DNA from arrestees through trickery (and without a warrant). The court discussed with apparent approval its prior decision in *Williamson v. State*, 993 A.2d 626 (Md. 2010), in which police suspected Williamson of unsolved rapes, gave him a McDonald's meal after arresting him on an unrelated charge, and then obtained his DNA surreptitiously from the drink cup he left behind in the interrogation room. *See id.* at 630; JA 108–10. Williamson's DNA matched the specimens obtained from the unsolved rapes, and he was indicted for them. The court below upheld the

DNA collection and analysis on the ground that Williamson had abandoned the cup. 993 A.2d at 635.

Without questioning that result, it is hard to understand why it is preferable, either as a constitutional matter or a policy matter, for a State to encourage its law enforcement officers to use trickery to obtain DNA samples from suspects in ad hoc ways rather than to allow state legislatures to implement orderly systems to collect DNA in a professional and consistent manner. For all its professed concern with suspects' privacy rights and the warrantless nature of the DNA collection in this case, the court essentially invited the police to reach the same place via a much more circuitous and underhanded route.

Indeed, the court treated the tactics used in *Williamson* as a matter of amusement, speculating that if Williamson was given "a McDonald's Extra Value Meal . . . it appears that the State received the 'extra value,' not Williamson." JA 109 n.18. Without suggesting that the tactics used in *Williamson* are improper, it is no laughing matter for a court to encourage law enforcement to rely on deceit and ad hoc tactics while throwing out the orderly scheme, complete with robust protections against misuse, crafted by the people's elected representatives. Nor, of course, is it a laughing matter to let a rapist back on the streets, which would be the practical result of the decision below.

2. Collecting DNA from Arrestees Does Not Prejudice Their Trial Rights.

The lower court also erred in suggesting that DNA collection undermines the "presumption of innocence" "enjoyed" by arrestees. JA 141, 144–45. As explained by petitioner, *see* Pet. Br. 20–21, the presumption of innocence is a trial right, not a Fourth Amendment right, and accordingly has no application to searches of arrestees. DNA collection at arrest does not in any way prejudice the arrestee's right to be acquitted unless his guilt is proven beyond a reasonable doubt in accordance with all the rules, constitutional and otherwise, that govern the trial process.

In particular, under this Court's recent precedents, *e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), DNA evidence is fully subject to challenge at trial. Collection of DNA at arrest does not undermine the defendant's ability to confront the relevant laboratory analyst at trial and to ensure, through cross-examination as well as proffering evidence of the defendant's own, that the prosecution's DNA evidence is scientifically valid and persuasive. To the extent that the court below meant to suggest that DNA evidence will often be compelling and that few defendants will succeed in discrediting DNA evidence against them, that is a testament to the value and importance of collecting DNA, not a valid objection to doing so.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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