This case is not yet scheduled for argument

No. 05-5156

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAMAR JOHNSON,
Plaintiff – Appellant

v.

PAUL A. QUANDER, et al.,
Defendants – Appellees

Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT

LAMAR JOHNSON

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*TIMOTHY P. O'TOOLE
TODD A. COX
RICHARD SCHMECHEL

Public Defender Service for D.C.
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

*Counsel for Oral Argument

District Court
04-448(RBW)

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As Mr. Johnson demonstrated in his opening brief, this case involves a complex, fact-intensive dispute about the privacy implications that arise when a plaintiff like Mr. Johnson is forcibly compelled to provide a DNA sample which the government then analyzes, disseminates for repeated database searches, and retains indefinitely for further analysis as technology improves. Dismissal at the pleadings stage was, as Mr. Johnson has shown, completely inappropriate because fact development would have shown that such a regime violates a host of statutory and constitutional provisions including, most importantly, the Fourth Amendment.

In response, the appellees provide no meaningful counter and fail to suggest how the complicated questions raised by Mr. Johnson's case could fairly be resolved in a summary fashion. Appellees' silence on this point speaks volumes, because there is simply no credible way to defend summary resolution of these complex, fact-intensive issues, particularly on a record where Mr. Johnson supports his allegations with supporting evidence from experts.

But even if it were proper to reach the merits on this sparse a record, appellees' attempts to defend the district court's ruling also fails, particularly with respect to the Fourth Amendment claim. As Mr. Johnson demonstrated

in his opening brief, the Supreme Court has never upheld a suspicionless search like this one, where the primary purpose of the search was indisputably to provide law enforcement officials with information about the person being searched for use in a criminal proceeding. Moreover, while many lower courts have in fact upheld suspicionless DNA Act searches, those decisions are jeopardized by the Supreme Court's recent grant of certiorari in *Samson v. California*, and are also distinguishable from Mr. Johnson's case on two grounds. First, only two other lower court cases involve the factual circumstances that exist here, where the supervisory period has expired and the person searched is seeking to prevent future privacy intrusions. Although the government seeks to obscure the point, both courts held that the government cannot retain and analyze forcibly collected DNA samples beyond the probationary or supervisory period because such continued privacy intrusions *do* violate the Fourth Amendment. Second, none of the other cases to address this issue have arisen in this procedural posture, where the privacy interests at stake are vigorously disputed and the case is nonetheless resolved summarily without even permitting the plaintiff to conduct factual development of his allegations. Each or either of these distinctions is dispositive here on the Fourth Amendment claim.

In short, the appellees' brief does nothing to change the picture of this case as one that presents novel and complicated issues that Mr. Johnson should have been permitted to pursue beyond the pleadings stage. While this is especially true for the Fourth Amendment claim, it also holds for all of the fact-intensive civil rights allegations pleaded below. The Court should reverse the judgment below in its entirety and remand for further proceedings.

ARGUMENT

I. The Trial Court Erred in Dismissing Mr. Johnson's Claims Where A Number Of Factual Issues Remained Unresolved and the Trial Court did not Accept Mr. Johnson's Alleged Facts as True and Did Not Give Mr. Johnson The Benefit of all Inferences to be Derived from Such Facts

In his opening brief, Mr. Johnson's primary argument was that the trial court erred in dismissing this case at the pleading stage because it involves a complex, fact-intensive dispute about the privacy interests at stake when the government forcibly extracts a blood sample from a probationer for DNA analysis, shares information about the analysis with others for repeated database searches, and permanently retains the sample for the purpose of acquiring additional private information in the future. Appellant's Brief 11-15. In response, the government correctly cites to the standard of review – acknowledging that dismissal is proper only if "the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Appellees' Brief 8 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). However, the government then ignores all of Mr. Johnson's well-pleaded factual allegations when attempting to defend the district court's order. In short, the appellees make virtually the identical error the trial court did, by assuming away Mr. Johnson's factual allegations and

instead resolving factual disputes in favor of the government defendants' position.

The principal question in this appeal is whether the trial court erred in summarily dismissing despite the existence of a host of material disputed facts. Rather than address this question, the government simply points to the many cases that have rejected facial challenges (most brought by pro se litigants) to the DNA Act. But none of those cases involved a summary dismissal in the face of disputed allegations about the privacy interests implicated by the DNA Act. Thus, for whatever reason, the complicated Fourth Amendment consequences of the DNA Act have never been explored by any court. Appellees' cases are accordingly easily distinguishable from the present one in that they were limited to facial challenges to the DNA Act that claimed general violations of privacy and were resolved on what all parties agreed was a complete record. Plaintiffs' claims, by contrast, included numerous, detailed, factual assertions that the government disputed below and continues to dispute here – and that the trial court discounted when reaching its summary decision of plaintiff's vigorous objection. Appellant's Brief 11-15.

Simply put, the claims pleaded below could not be fairly decided in the absence of further factual development, and the government provides no

principled rationale to justify the lower court's decision otherwise. Making the blanket assertion that the privacy intrusion is minimal or that those whose DNA is seized must wait for misuses to occur to bring suit reflects an outcome determinative analysis and is not a sufficient basis for a motion to dismiss. Appellees' Brief 11; Mem. Op. at 11 (J.A. 12).

While not allowing Mr. Johnson to develop further facts and disregarding his well-pleaded and supported factual allegations, the lower court and appellees go one step further and seem to suggest that this Court can properly resolve disputed facts in the *defendants' favor* rather than through the plaintiff-friendly lens required during preliminary proceedings. Most tellingly, appellees dispute Mr. Johnson's allegations about the severe privacy implications of the DNA Act and label Mr. Johnson's expert affidavits supporting these allegations as "questionable." Appellee's Brief 30. Indeed, appellees (like the district court) seem to assume away the privacy implications of the DNA Act entirely by repeatedly comparing that law to the sex offender legislation at issue in *Connecticut v. Doe*, 538 U.S. 1 (2003). Appellees' Brief 7; Mem. Op. at 38-39 (J.A. 39-40). The statute in *Doe* was upheld by the Supreme Court, however, precisely because it had no privacy implications and merely consisted of the compilation of already-

public information by government authorities.[1] Appellees thus ask this Court to view Mr. Johnson's factual allegations and those of his experts by viewing the DNA Act as raising no privacy implications at all, or at most "minimal" privacy concerns. But appellees have offered no opposing evidence into the record and, more importantly, have not explained how it would be proper for a trial court or for a defendant to not take into consideration Mr. Johnson's detailed factual allegations about the severe privacy implications of the DNA Act or to assume that those implications are "minimal" when the complaint alleged otherwise.

Additional examples of factual disputes abound. The trial court seemed to assume that the 13 loci used in the CODIS database are "junk DNA," a mere identifier that will not disclose more than fingerprints do about their owner. Mem. Op. at 11, 19, 38 n. 17 (J.A. 12, 20, 39). By contrast, Mr. Johnson has asserted (and appellees have failed to dispute) that the 13 CODIS loci give additional information about race and family members' DNA, and that examination of other locations than the 13 CODIS

[1] *Connecticut v. Doe*, 538 U.S. 1, 21 (2003) (identities of "sex offenders" and various other conviction-related information are public information); *see also, Smith v. Doe*, 538 U.S. 84, 99 (2003) (holding that the names and convictions of sex offenders posted on a public internet website "is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality").

loci is possible and already done under the DNA Act. Appellant's Brief 13. The trial court and appellees also have asserted multiple purposes for the DNA Act, including that it has a rehabilitative and supervisory purpose, and that it somehow prevents recidivism. Mem. Op. at 40 (J.A. 41); Appellees' Brief 15. Mr. Johnson, on the other hand, has alleged that the Act has a damaging effect on rehabilitation by chilling the free exercise of his civil rights, permanently branding as individuals as criminals, and that it could have served no supervisory purpose in his case. Pl. Mem. of Law in Opp. to Motion to Dismiss at 17 (J.A. 241). Similarly, the trial court and appellees have claimed that law enforcement interests in DNA are monumental by stating that fewer crimes are committed and more criminals detected because of DNA. Mem. Op. at 12 (J.A. 13); Appellees' Brief 9, 15. However, no studies have been adduced that show the efficacy of DNA databases, either as compared to DNA comparisons obtained via a blood-draw warrant in particular cases, or as compared to less expensive and intrusive technologies like fingerprints. Appellant's Brief 24.

These factual disputes, as well as the many others identified by Mr. Johnson in his opening brief, Appellant's Brief 11-15, required further development in the trial court. The district court, therefore, erred by cutting short Mr. Johnson's factual inquiries into the implementation of the DNA

Act and the privacy invasions that occur through this regime of forcibly collecting, analyzing, disseminating and indefinitely retaining DNA samples for further scientific analysis.

II. The Trial Court Erred in Holding That A Suspicionless Search, Conducted For Law Enforcement Purposes And Designed To Obtain Evidence To Be Used Against The Subject, Does Not Violate The Fourth Amendment

A. The Trial Court Erred Both By Unreasonably Narrowing the Scope of The Searches and Privacy Interests It Considered, And By Only Viewing Mr. Johnson As Probationer, When Evaluating Mr. Johnson's Fourth Amendment Claims

Mr. Johnson also demonstrated in his opening brief how the district court erred in resolving his Fourth Amendment claims. The posture of Mr. Johnson's Fourth Amendment claim is somewhat unique in that it included allegations based on his status as an ex-probationer seeking to keep the government from retaining his sample, analyzing it, and disseminating the results now that his probationary period has ended. In response, the appellees repeat several critical errors made by the district court, ignoring the continued privacy invasions occurring to Mr. Johnson as a result of the DNA Act, and ignoring that those privacy invasions must now be viewed in light of Mr. Johnson's status as a free citizen and former probationer. The appellees' analysis thus cannot withstand scrutiny.

As noted in his opening brief, and as the government does not dispute, Mr. Johnson's claims are a matter of first impression in this jurisdiction and, nationally, only two other courts have considered challenges of free citizens who were previously under court supervision to DNA database legislation. *A.A. v. Attorney General of New Jersey*, C.A. No. MER-L-0346-04, (N.J. Super. Ct. Law Div. December 22, 2004); *Doe v. Tandeske*, 2005 WL 1220936 (D. Alaska May 18, 2005). Both courts found the government's attempt to conduct a suspicionless search of plaintiffs' DNA as free citizens was unconstitutional. Appellees have cited no case law contrary to *A.A.* and *Doe* and have not discussed (let alone distinguished) either case in its brief except to say in a footnote that the New Jersey decision is now on appeal. Appellees' Brief 11. Although neither decision is binding on this Court, these decisions highlight the important factual differences in this case compared to the many cases cited by appellees that upheld the DNA Act against narrower facial challenges raised by persons incarcerated or under court supervision.

The government also does not dispute that, except for the initial blood sample seized from Mr. Johnson, all government actions pursuant to the DNA Act at issue in this case – the DNA analysis, the dissemination of the results and the retention of his sample for future analysis – will take place

while Mr. Johnson is a free citizen.[2] The restoration of Mr. Johnson's full Fourth Amendment privacy rights prior to governmental analysis of his DNA or sharing of that information undermines virtually all of appellees' rationales purporting to justify the search and seizure. In particular, since Mr. Johnson is no longer on probation, any further harm cannot fairly be justified by some supposed need for supervision. Nonetheless, contrary to the government's assertion that the district court analyzed *all* of Mr. Johnson's claims both as they related to his status as a probationer and as a person who had been discharged from probation, Appellees' Brief 5, the trial judge in fact *never* considered how the impending search of Mr. Johnson's DNA impacted his Fourth Amendment rights as a free citizen. Instead, the district court's Fourth Amendment analysis focused either on Mr. Johnson's status as a probationer, Mem. Op. 10 (J.A. 11), or on his right to have the sample discarded "and the analysis expunged from the CODIS database" if Mr. Johnson's sample was placed in the database in error or if he is exonerated. Mem. Op 34 (J.A. 35). While Mr. Johnson disputes the entirety of the court's analysis, perhaps the most critical flaw in that analysis was the lower court's failure to address squarely Mr. Johnson's predominant

[2] Mr. Johnson explicitly preserved his objections to the blood draw as part of the joint agreement by which he submitted to the seizure. Jt. Mot. to Resolve Certain Prel. Matters at 2 (J.A. 182); Def. Notice of Filing Re: Chain of Custody (J.A. 187).

constitutional concerns about the impending searches of his DNA while a free citizen. One of the chief harms to Mr. Johnson caused by the DNA Act is the *impending* invasion of his privacy from DNA analyses and the sharing of that information. By limiting its attention to statutory rights of expungement the court appears to have assumed that all the government's searches had already been performed when it ruled, and therefore any Fourth Amendment claims either derive from the time during which Mr. Johnson was a probationer or else concern the expungement of a permanently fixed and static record.

As a matter of law, the district court was required to consider any impending, continued invasions as part of the privacy interests implicated by the Fourth Amendment in this case. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (addressing each additional analysis of already-collected urine a "search" for Fourth Amendment purposes, explaining that "the ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests"). In his opening brief to this court and other pleadings, Mr. Johnson has discussed at great length how the statutory scheme of the DNA Act gives the government unlimited discretion to test and retest DNA for any kind of genetic information. *See* Appellant's Brief 28-30. Should a

profile be extracted from his DNA for use in the CODIS database, new parties, including third party researchers and government agencies at all levels (how many is unknown without discovery), will be searching through his genetic information even twenty or thirty years from now. The DNA Act's open-ended authorization of new DNA searches that will reveal any kind of identifying information and the sharing of that resulting information, therefore, must be appraised as occurring to Mr. Johnson as a free citizen.

Not only do the trial court and government brief not address the fact that new, impending searches will occur if Mr. Johnson's case is dismissed, but both the lower court and appellees dismiss off-hand the range of potential uses and misuses of forensic technology on Mr. Johnson's DNA sample. Specifically, appellees claim that any chance of accidental database matches implicating Mr. Johnson due to inclusion of his DNA profile in the CODIS database is irrelevant because that harm has not happened yet. Appellees' Brief 30. The district court also rejected any consideration of potential misuses of DNA analysis (and unconventional uses of DNA within the scope of the statute) on ripeness grounds in a footnote of its opinion. Mem. Op. 30 n. 6 (J.A. 31). While the trial court recognized Mr. Johnson had raised "legitimate concerns," the court said it was deciding the constitutionality of the challenged statutes based solely on the "purpose for

which they were designed and have been utilized." *Id.* The court thus assumed, without question, that the very law whose validity was under review would be properly enforced and applied. By ignoring Mr. Johnson's claims about potential uses and misuses, not only do the court and appellees assume facts not in evidence about the purpose and the efficacy of past and current uses of the DNA Act, they are applying an improperly narrow view of the interests that must be considered in assessing the scope of a privacy invasion for Fourth Amendment purposes.

The Supreme Court has made clear that, in a Fourth Amendment case questioning the privacy invasion of a new technology like this, courts must look to the *potential* privacy infringements resulting from the technology when assessing injury and harm to plaintiffs. *Kyllo v. United States*, 533 U.S. 27, 36 (2001); *Skinner*, 489 U.S. at 617 (assessing Fourth Amendment implications of urinalysis by considering that "chemical analysis of urine, like that of blood, can reveal a host of medical facts about an employee, including whether he or she is an epileptic, pregnant or diabetic"). Indeed, the government's argument in *Kyllo* defending its use of thermal imaging technology is nearly identical to its position here. The government in *Kyllo* urged the Court to uphold *its self- limited use* of thermal imaging technology because such technology supposedly "did not detect private activities in

private areas" but was instead limited to assessing only the amount of heat that was coming out of the inside of the home. *Id.* at 37-38. The Supreme Court squarely rejected this argument, however, noting that "the Fourth Amendment's protection of the home has never been tied to the quantity or quality of information measured." *Id.* Rather, the Court explained, the privacy interests at stake are more properly gauged by all of the intimate details that *can* be revealed whenever police enter the home. Thus, the court considered in its assessment of the Fourth Amendment implications of the technology the fact that it currently could reveal what "hour the lady of the house generally takes her bath," *id.* at 38, and if police were permitted to learn such details through current technology, then before long they could learn all of the intimate details of the home using more advanced technology already in development. In short, the Court held that the real question in cases like this one is "what limits there are upon this power of technology to shrink the realm of guaranteed privacy," *id.* at 34, and in addressing that question, the Court conducted a realistic analysis of those privacy interests jeopardized by the search, both now and through a reasonable estimation of how that technology could be used in the future if upheld.[3]

[3] Appellees' reliance on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), is misplaced. Appellees' Brief 30. Per *Kyllo,* the assessment of a Fourth Amendment claim requires a broad scope of inquiry into what constitutes an

The analysis of *Kyllo* applies with equal, if not greater, force here, for the Fourth Amendment's protection of a "person" – like that of a home – also has never been tied solely to the "quantity or quality of information measured." In other words, the government has never been permitted to conduct a highly invasive personal invasion and then discount the nature of the privacy interests at stake by claiming to have averted its eyes to the most personal information available to it. Rather, any valid assessment of the privacy interests at stake in DNA testing must turn on a complete assessment of the privacy interests affected by a scheme of forcible collection, analysis, dissemination and indefinite retention of DNA samples. *See also Skinner*, 489 U.S. at 617. Such an analysis should have considered, at the very least, all of the privacy implications set forth in Mr. Johnson's expert affidavits, including the use of forensic DNA technologies to deduce such highly personal and otherwise private information such as family members' DNA profiles, racial and ethnic heritage, and parentage from profiles entered into the CODIS system. Because of the DNA Act's provision allowing permanent retention of DNA samples and broad authorization of uses that aid "identification," an evaluation of the privacy implications for Mr.

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injury-in-fact. Mr. Johnson has more than sufficiently alleged an injury for Article III purposes and there is simply no precedent for dismissing a Fourth Amendment challenge to the DNA Act on grounds of ripeness or standing.

Johnson must take into account those adverse risks and technological advances that are reasonably foreseeable. The trial court did not consider those important interests in its analysis, however, and that is yet another reason why its ruling below cannot stand. This Court should remand this case for the development and consideration of the myriad facts alleged by Mr. Johnson.

B. A Simple Totality of Circumstances Balancing of Interests Test May Not Be Applied To A Law Enforcement Search Because The Fourth Amendment Requires That All Law Enforcement Searches Be Premised On Some Measure Of Individualized Suspicion

Mr. Johnson argued at length in his opening brief that because the search at issue in his case took place in the absence of individualized suspicion, consistent Supreme Court precedent in the *Edmund-Ferguson-Lidster* trilogy forecloses use of a totality of circumstances balancing test to evaluate the search. Appellant Opening Br. 19-22, 25-28. Supreme Court cases in a variety of contexts strongly suggest that no suspicionless search for law enforcement purposes can be reasonable under the Fourth Amendment, and that such searches in the absence of individualized suspicion will be upheld only when conducted to serve a "special need"

beyond general law enforcement interests.[4] On this point, Mr. Johnson has emphasized that *United States v. Knights*, 534 U.S. 112 (2001), the sole precedent that contains any ambiguous language about the propriety of suspicionless searches absent a special needs analysis, certainly does not permit such searches since the case itself involved a search of a parolee reasonably suspected of a crime. Appellant's Brief 27.[5] It is telling, moreover, that "the Court emphasized, from the very first paragraph of its opinion, that the search of Knights's apartment was 'supported by reasonable suspicion.'" *Nicholas v. Goord*, __ F.3d __, 2005 WL 3150611 at * 8-9 (2d Cir. November 28, 2005).

Appellees have not responded in their brief with any Supreme Court decision upholding a suspicionless search for law enforcement purposes, nor have the appellees identified how the Supreme Court's decision in *Knights* could fairly be construed to allow suspicionless searches of parolees, probationers or even ex-probationers like Mr. Johnson. Instead, the

[4] Mr. Johnson has also argued that even if a totality of circumstances balancing of interests test is applied in this case, his privacy interests outweigh the government's. Appellant's Brief 36-40.

[5] The Second Circuit has recently adopted precisely this view of *Knights*, albeit in the context of upholding a facial challenge to the DNA Act under the special needs doctrine. *Nicholas v. Goord*, __ F.3d __, 2005 WL 3150611 at * 8-9 (2d Cir. November 28, 2005).

government simply argues that its actions are sustainable under either a totality of circumstances or a special needs analysis. Appellees' Brief 11.

The Supreme Court will soon make clear whether suspicionless searches of parolees for law enforcement purposes – like the ones authorized by the DNA Act – can nonetheless properly be upheld under the sort of balancing test relied on by the district court and urged by appellees here. As Mr. Johnson noted in his opening brief and as the appellees do not dispute (or even acknowledge) the Supreme Court has recently agreed to hear the case of *Samson v. California*, No. SC052426, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004), *cert. granted*, 2005 WL 916785 (U.S. Sep 27, 2005) (No. 04-9728), which presents the question of whether the Fourth Amendment prohibits suspicionless searches of parolees.[6] Oral arguments in the case are scheduled for February 22, 2006.

If the *Samson* court continues with 210 years of Supreme Court precedent by refusing to uphold a suspicionless law enforcement search conducted for general law enforcement purposes, such a ruling will completely undermine the lower court decision here. The trial court in this case based its opinion on a balancing test applied to Mr. Johnson as a

[6] The exact question presented: "Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?"

probationer, Mem. Op. at 9 (J.A. 10), and thus a Supreme Court decision in favor of Mr. Samson's Fourth Amendment rights would vitiate the portion of the district court's decision that applied a balancing test in the absence of individualized suspicion. Indeed, such a ruling would almost certainly compel a finding that the suspicionless searches at issue here are unconstitutional, since it is hard to imagine that, if the suspicionless search of the parolee in *Samson* is invalidated, the Supreme Court would nonetheless allow a virtually identical suspicionless search to take place through application of a special needs analysis. The impending Supreme Court ruling in *Samson* thus will likely provide yet another reason for reversal of the judgment below.

C. The Suspicionless Searches In The Present Case Are For Ordinary Law Enforcement Purposes, Do Not Meet or Survive A Special Needs Test, And Are Therefore Unconstitutional

Apart from seeking to have this Court uphold the regime of suspicionless searches imposed by the DNA Act under a balancing test analysis, the government also seeks to have the suspicionless searches and seizure in this case upheld under the "special needs" analysis used by the Supreme Court to review suspicionless searches in carefully guarded areas that serve something other than a general law enforcement purpose. But as Mr. Johnson demonstrated in his opening brief, and as the appellees fail to

meaningfully refute, the suspicionless searches in this case cannot properly be subjected to the "special needs" analysis because a primary purpose of the searches here is to implicate Mr. Johnson in past and future criminal acts. The government's actions pursuant to the DNA Act, therefore, are presumptively unconstitutional per *Indianapolis v. Edmonds*, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

Neither of the two rationales proposed by appellees justifying a special needs analysis, parolee status and purposes beyond ordinary law enforcement, bears scrutiny. Appellees' Brief 19.

First, parolee status (and *a fortiori* former-parolee status) alone cannot distinguish the holdings of *Ferguson* or *Edmond* that suspicionless searches for law enforcement purposes are presumptively unconstitutional. Appellees' reliance on *Griffin*, which predates *Ferguson* and *Edmond*, to support the proposition that Mr. Johnson's parolee status renders DNA collection and analysis in this case subject to a special needs analysis, Appellees' Brief 18, is misplaced.[7] The *Griffin* court did find that its plaintiff's status as a probationer was relevant to the legality of the search insofar as parole supervision was a "'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if

[7] The district court also mistakenly relied on the reasoning in *Griffin* to support its totality of circumstances analysis. Mem. Op. at 11 (J.A. 12).

applied to the public at large." *Griffin* 483 U.S. at 875. But, the *Griffin* court immediately added that, "[t]hat permissible degree is not unlimited, however, so we next turn to whether it has been exceeded here," and then proceeded to find there was reasonable suspicion for the search in that case. *Id.* Like the facts in *Knights*, the facts and decision in *Griffin* relied upon the fact that there was reasonable suspicion for a search. Thus, while indicating that probationer status is a relevant factor in a special needs analysis, the *Griffin* holding does not establish that suspicionless searches of parolees is a constitutionally sound "special need." As noted above, moreover, the pending Supreme Court case of *Samson v. California*, No. SC052426, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004), *cert. granted*, 2005 WL 916785 (U.S. Sep 27, 2005) (No. 04-9728), will settle any doubts about this issue by resolving whether the Fourth Amendment authorizes suspicionless law enforcement searches of persons under some form of court or parole supervision.

Second, there can be no doubt that the primary purpose of the DNA Act is to aid ordinary law enforcement activities as prohibited by the *Ferguson-Edmond-Lidster* trilogy of cases. Nonetheless, appellees claim that the primary purpose of the DNA Act is not to detect evidence of ordinary criminal wrongdoing and refer to various alternative purposes

throughout their brief. Appellees' Brief 19. Mr. Johnson has cited numerous references in the statute and statutory history that clearly demonstrate the primary purpose of the law is to aid past and future criminal investigations by linking DNA taken for the database to DNA left at crime scenes. Appellant Opening Br. 23-25. Indeed, appellees' own brief contains numerous admissions that the criminal investigative aspect of the DNA database is paramount. *See, e.g.*, Appellees' Brief 19, 22. The secondary rationales offered by appellees for creating DNA databases at best restate in abstract terms the purposes motivating every prosecution and will be applicable to any law enforcement act. *See* Appellees' Brief 21 ("combat recidivism"); Appellees' Brief 15-16 ("deterrent value"); Appellees' Brief 15 ("promotes increased accuracy in the investigation and prosecution of criminal cases"). Sometimes, however, defendants' alternative rationales merely beg the question. *See* Appellees' Brief 17 ("to fill and maintain a DNA database"). At worst, such rationales pretend to benefit those searched. *See* Appellees' Brief 15 ("contributes positively to the convicted offender's rehabilitation in that it prevents his commission of more crimes"); Appellees' Brief 22 (decreases "risks of convicting an innocent person"). Appellees identify no single primary purpose amid this bevy of proposed

purposes[8] and, since no discovery has been allowed by the trial court, no factual support for appellees' many alternative purposes has been adduced. Further, appellees' reliance on the argument that DNA evidence samples "in fact prove nothing 'by themselves regarding whether a donor has committed a crime and therefore, do not detect ordinary criminal wrongdoing,'" blatantly ignores (or reads a great deal into) its own citation of the Supreme Court's broad prohibition against searches to generate evidence.[9] Appellees' Brief 19 (citing *Ferguson,* 532 U.S. at 83-84).

A common theme of both arguments is their reliance on *Illinois v. Lidster*, 540 U.S. 419 (2004), where the Supreme Court most recently upheld a roadblock created by local police solely for the purpose of locating witnesses to a recent crime that had taken place in the area. But, contrary to the government's claims, *Lidster* simply did not approve of a government program authorizing suspicionless law enforcement searches carried out with an intent to implicate the person searched in criminal activity.

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[8] In its lower court pleadings, however, appellees seemed to claim just two primary purposes for the DNA Act: "The dual purposes of CODIS are to match evidence from crime scene with genetic information for known offenders to connect unsolved crimes through a common perpetrator and to monitor the criminal activity of known offenders." Def. Reply in Support of Mot. to Dismiss at 4, (J.A. 307).

[9] This rationale also overlooks the increasingly common practice of solely using DNA database "cold hits" to indict, and in some cases convict, persons.

Appellant Opening Br. 20-25; *see also* Pl. Mem. of Law in Opp. to Mot. to Dismiss 10-15 (J.A. 234-39). In fact, the Court in *Lidster* took special care there both to emphasize the limited privacy invasion imposed by a brief motorist stop, and to distinguish the pursuit of *witnesses* to a crime from the situation where individual being searched is the one the government ultimately will charge depending on the outcome of the search. Specifically, the Court in *Lidster* found several facts critical to reaching its conclusion that the search there was conducted for purposes other than general law enforcement: a) the search or seizure was not directed at apprehension of the person stopped; b) the search or seizure was not in or of a location traditionally considered private; c) the stop at issue in the case was not likely to provoke anxiety or prove intrusive to the person stopped; d) the practice there could be likened to a search by consent; and e) the allowance of case-by-case reviews of the practice would not result in the unreasonable proliferation of that practice. *Lidster*, 540 U.S. at 889-90. This situation contains none of those facts, in that it is a highly invasive privacy invasion in the absence of individualized suspicion, directed entirely at determining whether subject of the search has committed a crime.

It is also imperative that the decision in *Lidster* be understood in the unique circumstances of that case, as the Court itself emphasized by

beginning its analysis by acknowledging the general prohibition on suspicionless searches for law enforcement purposes. Carefully limiting application of the special needs test to minimally-invasive stops of persons who are not being investigated prevents an end-run around the core Fourth Amendment requirement of particularized suspicion. The critical questions asked by the *Lidster* court all focus on the Fourth Amendment rights of individuals most at risk in law enforcement investigations. It is important to note, moreover, that the importance of the government interests in criminal investigations is irrelevant to this calculus, as it always is in determining whether a special needs test is applicable. Rather, the sole question is whether the search furthers some legitimate *non-law enforcement interest,* which is why the vast majority of special needs cases involve school children, drug testing, border crossings, and similar state action where individual probable cause determinations really are impractical[10] and there is no hint that the government search or seizure is done to investigate the person stopped. *Lidster* is the only special needs case to allow suspicionless searches and seizures related at all to a general criminal investigation. It did so only because of the unique fact that the investigation was not intended to

[10] As defendants themselves note, the special needs doctrine is only to be used in situations where "governmental interests 'beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" Appellees' Brief 16, citing *Skinner,* 489 U.S. at 619.

implicate the person stopped, and any privacy implication of the search was brief and minimal. To expand *Lidster* beyond those facts, however, would eviscerate the Fourth Amendment's primary purpose of preventing suspicionless searches conducted for law enforcement purposes. *See Payton v New York*, 445 U.S. 573, 583-84 (1980) ("it is familiar history that indiscriminate searches and seizures conducted under the authority of general warrants were the immediate evils that motivated the framing and adopting of the Fourth Amendment").[11]

Appellees also attempt to support their "special needs" argument with the claim that Mr. Johnson "fails to cite a single opinion rejecting 'special needs'" analysis. Appellees' Brief 17. In fact, Mr. Johnson cites two cases that have invalidated search provisions under precisely the circumstances presented here, where the government seeks to justify continuing privacy invasions of persons no longer subject to parole or probation supervision. Both cases have ruled that a special needs analysis is not applicable once the supervisory period has ended. *A.A. v. Attorney General of New Jersey*, C.A.

[11] "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

No. MER-L-0346-04 at 41 (N.J. Super. Ct. Law Div. December 22, 2004); *Doe v. Tandeske*, 2005 WL 1220936 at 3 (D. Alaska May 18, 2005). In addition, many other jurisdictions have rejected a special needs analysis in the course of upholding DNA statutes under a totality of circumstances analysis and in doing so, those courts have acknowledged the obvious by conceding that these are in fact suspicionless searches conducted for law enforcement purposes which can be justified only if the balancing test authorized by *Knights* can be applied in the absence of individualized suspicion. *A.A.* slip op. at 38. Indeed, nearly all the decisions upholding the DNA Act under a special needs analysis apply very similar reasoning, relying exclusively upon the plaintiffs' status as probationers and the special needs of running a probation system as announced in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). Thus, those cases upholding the DNA Act are clearly distinguishable from Mr. Johnson's claims against imminent searches of his DNA while he is a free citizen outside the probation system.

In sum, appellees ask this Circuit to go beyond the limited holding of *Lidster* by adopting a special needs analysis that threatens to undermine the Supreme Court's otherwise strict prohibition of suspicionless searches for law enforcement purposes. For example, appellees' analysis, if applied to the *Ferguson* case (where the Court prohibited suspicionless searches of

pregnant women's bodily fluids for illegal drugs because such information would be reported to police) would mean that South Carolina could reinstitute such a program solely by aiming it at pregnant women with criminal histories, or by carefully describing the same program in legislative hearings as focused on preventing illegal drug use during pregnancy, with law enforcement involvement only an incidental benefit. This is fundamentally inconsistent with the Supreme Court's analysis of the question in *Ferguson*, which is presumably why that Court did not even inquire whether searchees might have had diminished Fourth Amendment rights and instead found dispositive the fact that the searches produced information that was provided to law enforcement officials and systematically used against the persons being searched. Second, such analysis is dangerous given the scope of the special needs doctrine itself. If such searches are allowed against all persons who have lesser privacy status under the Fourth Amendment, there is no good reason why a regime of compulsory DNA extraction, analysis, dissemination and retention cannot be imposed against airplane pilots, school children, and others.[12]

The law currently does not allow such an application of a special needs test, but if this Court has any doubt, Mr. Johnson asks that appellees'

[12] *U.S. v. Kincade* 379 F.3d 813, 844 (9th Cir. 2004) (*dissenting opinion*).

arguments be scrutinized in the light of the Supreme Court's upcoming decision in *Samson.* If *Samson* holds suspicionless searches of parollees to be unconstitutional, then neither of appellees' arguments for a special needs test survive. For it cannot be that such a holding in *Samson* would change if the parolee search statute at issue in that case were examined under a special needs analysis using the government's proffered justifications of "supervision" or "deterrence." The special needs test cannot be used as a back door to such a clear ruling on Fourth Amendment rights of parolees (let alone former parolees) against suspicionless searches, and discerning the primary purpose of a statute cannot be so tenuous a process.

III. Viewing The Facts In The Light Most Favorable To Appellant, Appellant Has Stated Cognizable Claims That The DNA Act Also Violates The Fifth Amendment, The Ex Post Facto Clause, The Health Insurance Portability And Accountability Act Of 1996 And The International Convention Of The Elimination Of All Forms Of Racial Discrimination

Mr. Johnson, without conceding any point raised in his earlier pleadings, relies chiefly on his opening brief with regard to his Fifth Amendment, Ex Post Facto, HIPAA, and CERD claims. Appellees' brief merely recites the government's lower court pleadings and the trial court decision on these points to which Mr. Johnson responded sufficiently in his opening brief. Nonetheless, appellees' repeated misapprehension of a

couple key issues common to several of Mr. Johnson's claims deserve special note.

The government raises sovereign immunity defenses against several of Mr. Johnson's claims that are grossly in error. Appellees most recently raise this defense in their HIPAA and due process claims on appeal. Appellees' Brief 27-28. However, Mr. Johnson is not seeking money damages in this case and therefore "the United States and its officers…are [not] insulated from suit for injunctive relief by the doctrine of sovereign immunity." *See also, Dronenburg v. Zech*, 741 F.2d 1388, 1390 (D.C. Cir. 1984) (quoting *Schnapper v. Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981)).

Furthermore, the government and trial court have erred by completely ignoring the equal protection and due process claims Mr. Johnson has directed against defendants' *implementation* of the DNA Act.

Insofar as defendants have raised sovereign immunity as the sole basis for their arguments against due process and HIPAA claims on appeal, Appellees' Brief 27-28, or failed to use the proper standard of review and do an as-applied analysis of Mr. Johnson's due process and equal protection claims, Appellees' Brief 25-28, the government has effectively waived alternative arguments and Mr. Johnson's claims should be granted.

CONCLUSION

For the foregoing reasons, this Court must reverse the trial court's order and remand this case for further proceedings.

Respectfully submitted,

*TIMOTHY P. O'TOOLE
TODD A. COX
RICHARD SCHMECHEL

Public Defender Service for D.C.
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

*Counsel for Oral Argument

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

This brief complies with type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6975 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B) and D.C. Circuit Rule 32(a)(2). This brief complies with the type-face requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced type-face program, using Microsoft Word, in Times New Roman 14 point font.

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Timothy P. O'Toole

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief was served by first-class U.S. mail, postage prepaid on the following:

Jane M. Lyons, Assistant United States Attorney
United States Attorney's Office for the District of Columbia
Civil Division
555 4th Street, NW
Washington, D.C. 20530

on this 6th day of December 2005.

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Timothy P. O'Toole