

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAMAR JOHNSON)

Plaintiff,)

v.)

Case. No. 04-0448 (RBW)

ECF

PAUL A. QUANDER,)
Director, Court Services and Offender)
Supervision Agency, *et al.*)

Defendants.)
_____)

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

PRELIMINARY STATEMENT

Plaintiff Lamar Johnson, who has fully paid his debt to society and who is suspected of committing no crime, is attempting to prevent Defendants from forcing him to submit to an incredibly invasive search that would require Mr. Johnson to surrender to his most intimate medical and genetic secrets. As Mr. Johnson has successfully completed his term of probation, any legitimate governmental interest in supervising Mr. Johnson has evaporated and, with it, Defendants' best argument in support of this tremendous invasion of Mr. Johnson's privacy. Nonetheless, Defendants seek to use the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. §14135b ("DNA Act"), to extract and analyze Mr. Johnson's DNA, to place Mr. Johnson's DNA profile into a national law enforcement database and to retain a sample of Mr. Johnson's blood in perpetuity

In their motion to dismiss, Defendants ignore or dispute critical facts in this case, belittling both Mr. Johnson's privacy rights and the extent to which their conduct impinges upon those rights. In addition, Defendants ask this Court to ignore Mr. Johnson's current status as a free citizen and to make a number of dubious assumptions about the state – and the future – of forensic DNA analysis. Defendants also ask this Court to assume the existence of purported safeguards and to assume that the DNA analysis at issue in this case is not being conducted for either traditional law enforcement purposes or in violation of any of the laws and rights identified in Mr. Johnson's pleadings.

In short, Defendants ask this Court to view the facts as *Defendants* see them, rather than through the plaintiff-friendly lens that is required at this early stage of the proceedings. The Court should decline this invitation to turn a bedrock litigation standard on its head, and instead, as the law requires, accept as true the liberally construed allegations of Mr. Johnson's complaint. Thus conceived, it becomes clear that Mr. Johnson's pleadings have credibly established the existence of facts – sworn to by experts in the relevant fields – in ample support of his claims. Assuming, as the Court must at this stage, that Mr. Johnson can prove these allegations after discovery, Mr. Johnson has accordingly established a basis for relief under the relevant constitutional and statutory provisions. The Court must therefore deny Defendants' motion.

Mr. Johnson also respectfully requests a hearing at this time.

FACTUAL BACKGROUND

Defendants' attempt to collect, analyze, catalogue and retain Mr. Johnson's DNA stems entirely from Mr. Johnson's D.C Superior Court conviction for unarmed robbery. This conviction, in turn, is based entirely on conduct that was highly situational and clearly aberrant,

the product of previously untreated emotional and mental health problems from which Mr. Johnson has now recovered.

On March 27, 2001, shortly after Mr. Johnson's fiancée suffered an extremely painful miscarriage, Mr. Johnson abruptly resigned from his job with Affiliated Computer Services, Inc., where had worked since 1998 and where he earned an annual salary of \$43,834. On March 29, 2001, Mr. Johnson left home after dinner and did not return. Around 5:00 a.m. the following morning, Mr. Johnson abandoned his own, fully operational pick-up truck to take a car from an individual who was stopped at the same intersection, driving the car until it was out of gas and then abandoning it. Later that morning, around 7:30 a.m., Mr. Johnson jumped into the backseat of yet another car, exclaiming "take me home" several times to the driver. On March 30, 2001, Mr. Johnson was arrested at his home by officers of the D.C. Metropolitan Police Department, to whom Mr. Johnson made a series of bizarre statements. By the time Mr. Johnson was presented in court the following day, he was so incoherent that his attorney was unable to learn even Mr. Johnson's name or address. Some weeks later, Mr. Johnson was taken to St. Elizabeths Hospital after being found sitting in a puddle, eating dirt in front of his own residence. Staff at St. Elizabeths subsequently concluded that Mr. Johnson was suffering from a recently developed "psychotic disorder."

On December 20, 2001, Mr. Johnson pleaded guilty to two counts of unarmed robbery. On March 15, 2002, Mr. Johnson was sentenced to one year of incarceration and two years of supervised release in each case. Execution of both sentences was suspended and Mr. Johnson received two years of concurrent probation. Mr. Johnson's condition had stabilized significantly by that time; his mental health problems had not – and have not – recurred.

On February 18, 2004, however, approximately one month before Mr. Johnson's probation was scheduled to expire, Defendants requested that Mr. Johnson submit a blood sample for DNA analysis. On March 18, 2004, Mr. Johnson filed a civil complaint before this Court alleging that Defendants' attempt to secure his blood, to conduct a DNA analysis of that blood, to place the results into the FBI's Combined DNA Index System (CODIS), and to retain the sample of his blood in perpetuity violated rights secured to Mr. Johnson by the United States Constitution and under federal law. In his complaint, Mr. Johnson sought purely injunctive and declaratory relief, including a temporary restraining order.

On March 29, 2004, Defendants opposed Mr. Johnson's motion for a temporary restraining order, noting in their supporting papers the fact that Defendants were seeking to have Mr. Johnson's probation revoked based on Mr. Johnson's refusal to comply with their efforts to obtain his DNA. On April 9, 2004, the parties filed a joint motion proposing to resolve this dilemma without prejudicing Mr. Johnson's claims in the instant matter by arranging for Mr. Johnson to provide a blood sample that could be stored during the pendency of this case. On that same day, Mr. Johnson provided a blood sample to Defendants pursuant to the terms outlined in the motion.

On April 13, 2004, Mr. Johnson's probation terminated successfully. *See* Memorandum of Defendant Michael Johnson, attached hereto as Exhibit A. Mr. Johnson's case thus calls upon this Court to decide, among other things, the heretofore unresolved question of whether a DNA sample collected pursuant to the DNA Act "may properly be retained by the government after the felon has finished his or her term and has paid his or her debt to society." *United States v. Kincade*, 379 F.3d 813, 842 (9th Cir. 2004) (Gould, J., concurring).

ARGUMENT

I. Standard of Review

The standard by which this Court must review Defendants' motion is a familiar one: Mr. Johnson's complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "To that end, the complaint is construed liberally in the plaintiffs' favor and [the Court must] grant [the] plaintiff[] the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *Atchinson v. District of Columbia*, 73 F.3d 418, 422 (D.C. Cir. 1996); *Sachs v. Bose*, 201 F.2d 210, 210 (D.C. Cir. 1952). As the Supreme Court has held,

[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Indeed, at this stage, the trial court is not called upon to assess "the truth of what is asserted or [to] determin(e) whether a plaintiff has any evidence to back up what is in the complaint." *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 467 (D.C.Cir.1991). As the Supreme Court has stated, the Federal Rules of Civil Procedure requires only that a plaintiff in his or her complaint "simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests' ...[as the] simplified notice pleading standard relies on liberal

discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley*, 355 U.S. at 47). Moreover, federal courts have applied this already rigorous standard of review with “particular strictness when the plaintiff complains of a civil rights violation,” as is the case here. *See, e.g., Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998) (quoting *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991)).

Defendants’ motion cannot withstand scrutiny under these controlling standards. In fact, Mr. Johnson’s case is a particularly inappropriate candidate for dismissal on the pleadings because factual disputes in this case abound and because the law with respect to most of Mr. Johnson’s claims is in active flux.¹ In addition, particularly with respect to Mr. Johnson’s Fourth Amendment argument, the relevant law has become substantially more unsettled in just the last few weeks as two appellate courts have sharply divided on questions similar to those raised here. *See Kincade, supra; Maryland v. Raines*, ___ A.2d ___, 2004 WL 189485 (Md. 2004).

II. Sovereign Immunity

Defendants argue that sovereign immunity bars suits against them because “it is well settled that suits against officials in their official capacity are, in effect, suits against the Sovereign” and that “sovereign immunity bars all suits against the United States except in accordance with the explicit terms of the statutory waiver of such immunity.” Defendants’ Memorandum at 3-4.

“[T]he United States and its officers are not insulated,” however, “from suit for injunctive relief by the doctrine of sovereign immunity.” *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). Indeed, 5 U.S.C.

¹ Defendants acknowledge that no binding authority exists with respect to the bulk of Mr. Johnson’s claims. Defendants’ Memorandum in Support of Motion to Dismiss (hereinafter Defendants’ Memorandum) at 5.

§702 expressly waives the sovereign immunity defense in such cases, clearly providing that an “action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an employee thereof failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief thereon denied on the ground that it is against the United States.” *Dronenburg*, 741 F.2d at 1390; *Schnapper*, 667 F.2d at 108.

In addition, Mr. Johnson has sought relief pursuant to 42 U.S.C. § 1983² and it has been clear for almost a century that the concept of sovereign immunity has no place in §1983 actions seeking only prospective injunctive relief. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989); *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (“[A] suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of the [Eleventh] Amendment”).

III. Mr. Johnson’s Fourth Amendment Claim

In support of its efforts to see Mr. Johnson’s constitutional privacy claims summarily extinguished, Defendants advance no particular Fourth Amendment analytic.³ Instead, Defendants offer a scattershot conflation of various principles of law and, accordingly, utterly fail to meet their burden of proving “beyond doubt” that Mr. Johnson has failed to state a claim. *Conley*, 355 U.S. at 45-46.

² Nominally federal officials can be subjected to § 1983 liability when acting pursuant to statutes applicable uniquely to the District of Columbia. *Fletcher v. District of Columbia*, 370 F.3d 1223, 1227 (D.C. Cir. 2004).

³ Defendants concede that DNA sampling constitutes both a seizure and a search and is accordingly rightly subject to 4th Amendment scrutiny. Defendants’ Memorandum at 4.

Defendants appear to ask the Court to dismiss this case based on (1) a misleading reading of *United States v. Knights*, (2) a misapplication of the “special needs” doctrine and/or (3) an amorphous balancing test. None of these arguments, however – alone or in concert – supports Defendants’ claims or in any way authorizes the conduct at issue here: a suspicionless search, conducted on a free citizen, for the purpose of obtaining evidence to be used against that citizen in a subsequent criminal prosecution.⁴ Indeed, as the Supreme Court has repeatedly made clear, this sort of suspicionless law enforcement conduct lies at the heart of the Fourth Amendment’s most inviolate zone. *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001); *Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000); *Henry v. United States*, 361 U.S. 98, 100 (1959).

Moreover, Mr. Johnson’s Fourth Amendment argument, like all Fourth Amendment litigation, is highly fact-dependent. As such, dismissal at this stage of the proceedings – action akin to denying a colorable suppression motion without a hearing – is unwarranted and unsupportable, particularly given the expressly fact-limited nature of the relevant precedent. *See, e.g., Kincaid*, 379 F.3d at 841 (“What we do not have before us is a petitioner who has fully paid his or her debt to society, who has completely served his or her term, and who has left the penal system.”) (Gould, J., concurring); *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (“Courts that have dealt with constitutional challenges to DNA-collection statutes frequently have lumped together all persons subject to these laws. Yet there are at least four major categories, potentially subject to differing legal analysis.”) (Easterbrook, J., concurring); *United States v. Miles*, 228 F. Supp. 2d 1130, 1138 (E.D.Cal 2002) (holding that DNA Act violated Fourth Amendment

⁴ Defendants attempt to blunt the magnitude of the intrusion at stake here by arguing that “a DNA sample (like a fingerprint) is not, in and of itself, conclusive evidence of a crime.” Defendants’ Memorandum at 8. Mr. Johnson notes, however, that the vast majority of items and information produced as evidence in the criminal context are not inherently incriminating. Items of clothing, for example – seizures of which are rightly subjected to Fourth Amendment scrutiny in courts across the country every day – are meaningless from an evidentiary stand point absent their association with a particular perpetrator’s description.

primarily because individual in that case had “fully served his sentence for [the DNA collection eligible crime]”).

A. *United States v. Knights*

Far from, as Defendants would have it, foreclosing Mr. Johnson’s privacy claims at the outset, *United States v. Knights*, 534 U.S. 112 (2001), reaffirms the bedrock Fourth Amendment principle that every search undertaken for the purpose of collecting criminal evidence to be used against the target of the search must be accompanied by some measure of individualized suspicion. *See Kincade*, 379 F.3d at 843. (Reinhardt, J., Pregerson, J., Kozinski, J., Wardlaw, J., dissenting) (“Never has the [Supreme] Court approved of ... a programmatic search designed to produce and maintain evidence relating to ordinary criminal wrongdoing, yet conducted without any level of individualized suspicion.”).

True, *Knights* makes clear that searches of probationers need be supported only by reasonable suspicion, not probable cause, but it is for this very reason that *Knights* plainly does not stand for the proposition that such searches can be conducted in the absence of any suspicion at all. The *Knights* court in fact expressly declined to hold that an absolutely suspicionless search of a probationer would pass constitutional muster, *Knights*, 534 U.S. at 120 n.6, and discussed at great length the detailed facts that constituted the key element of reasonable suspicion in that case, *Id.* at 114-116.

Properly understood, then, *Knights* supports Mr. Johnson’s essential contention that even searches conducted on those to whom society affords only a reduced expectation of privacy must be supported by at least a modicum of cause. Given the fact that Mr. Johnson is now, in fact, no longer a probationer – and the fact that the analysis in *Knights* was heavily informed by the probation status of the searchee in that case – it would seem that *Knights*’ reliance on reasonable

suspicion to authorize probationer searches establishes a dispositive constitutional minimum in such cases and that a legitimate search of Mr. Johnson would have to be supported by something *more* than the reasonable suspicion deemed necessary for a search of Mr. Knights, not something less.

In addition, Defendants refer, misleadingly, to *Illinois v. Lidster*, 540 U.S. 419, 124 S.Ct. 885 (2004), in support of their assertion that “[t]he Supreme Court has also held that a suspicionless search with a law enforcement objective is not presumptively unconstitutional.” Defendants’ Memorandum at 4. What Defendants omit is the *Lidster* court’s clear holding that the suspicionless seizure at issue in that case – a highway check point set up to interview motorists who might have witnessed a hit-and-run accident – was constitutionally acceptable *only because those subjected to the seizure were not in fact targets of any criminal investigation.* *Id.* at 888-90. The *Lidster* court went, in fact, to great lengths to make clear that its holding was to be distinguished from cases where the seizure or search at issue was intended to collect criminal evidence to be used against the person being seized or searched and to make clear that a “presumptive rule of unconstitutionality” should continue to apply to such conduct. *Id.* Indeed, “[n]ever once in over two hundred years of history has the Supreme Court approved of a suspicionless search designed to produce ordinary evidence of criminal wrongdoing for use by the police.” *Kincade*, 379 F.3d at 854. (Reinhardt, J., Pregerson, J., Kozinski, J., Wardlaw, J., dissenting). *See also Roe v. Marcotte*, 193 F.3d 72, 77 (2d Cir. 1999), (“[T]he concept of probable cause is ‘peculiarly related to criminal investigations’ in which a specific individual is the target.”)(quoting *Colorado v. Bertine*, 479 U.S. 367, 371 (1987)).

B. The “Special Needs” Exception

Defendants effectively acknowledge that an utterly suspicionless law enforcement search, such as the one at issue here, can find no Constitutional quarter unless it falls within the narrow strictures of the Supreme Court's "special needs" exception.⁵ This exception, however, has no application here, particularly when the facts in this case are viewed in the light most favorable to Mr. Johnson.

Defendants' application of the "special needs" rubric is both structurally and substantively flawed. To begin, Defendants' "special needs" analysis fails to appreciate the two-step nature of a "special needs" inquiry. While the Supreme Court has made quite clear that "special needs" cases must begin with a determination that, indeed, the search at issue serves "special needs beyond the normal need for law enforcement" such that "the warrant and probable cause requirement [are rendered] impracticable," *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring), Defendants omit this threshold requirement entirely and appear to proceed directly to a general reasonableness assessment. Moreover, to the extent Defendants recognize the compound nature of the "special needs" inquiry at all, they seem to suggest a complete upending of the process by urging the Court to award them a "special needs" exemption on the *basis* of their general reasonableness arguments. The Supreme Court, however, has made very clear the nature and kind of rigorous proof required before a particular search can earn this extraordinary constitutional pass and the search at issue in this case falls far short of that standard.

⁵ An utterly suspicionless search can not simply be analyzed under a traditional balancing test. *Nicholas v. Goord*, 2003 WL 256774 *11 (S.D.N.Y. Feb 06, 2003) ("Apart from cases involving some level of individualized suspicion ... [there is] no room for a classic Fourth Amendment 'balancing' analysis except in those cases meeting the 'special needs' threshold."); *Miller v. United States Parole Commission*, 259 F. Supp. 2d 1166, 1175 (D. Kan. 2003) ("[It is] inappropriate [to]... direct[ly] appl[y] a Fourth Amendment balancing test in determining a DNA challenge where no individualized suspicion is present").

The search in this case – unlike the witness interviews in *Lidster* – is not in any sense distinct from ordinary law enforcement searches, or, in “special needs” parlance, “divorced from the State’s general law enforcement interest.” *Ferguson*, 532 U.S. at 68. On the contrary, forced forensic DNA sampling is classic criminal investigation, intended, as Defendants concede, to “solve crimes” and to “link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system.” Defendants’ Memorandum at 13 (quoting Council of the District of Columbia Report on Bill 14-63 (April 24, 2001)). As such, the search at issue falls squarely within heartland Fourth Amendment jurisprudence and the “special needs” exception, which applies only “outside the criminal investigatory context,” *Roe*, 193 F.3d at 78, accordingly does not apply.

In addition, even assuming, *arguendo*, that the Court could somehow find that the search in this case is something other than an impermissible suspicionless attempt “to uncover evidence of ordinary criminal wrongdoing,” *Edmond*, 531 U.S. at 42, Defendants cannot meet the second prong of the first part of the “special needs” test – a finding that the intentionally burdensome warrant/probable cause requirement is overridingly “impracticable.” To be sure, individualized suspicion is a chore, from the government’s perspective, in any criminal case. Without question, it is much easier for the government to search and seize without having to identify a basis for such conduct. But while securing a warrant or establishing some individualized cause would no doubt be an imposition on law enforcement authorities hoping to close cold cases via DNA comparison, that burden is no heavier – no more “impracticable” – than the constitutional strictures that apply to every other law enforcement endeavor. The hassle that is the Fourth

Amendment exists for a reason and its requirements are not to be shirked absent extraordinary circumstances.⁶

As for the second part of the “special needs” analysis – the general reasonableness inquiry – Defendants fare no better. “[T]he reasonableness of a search is determined by assessing, 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.” *Knights*, 534 U.S. at 112-113 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). This inquiry accordingly requires a searching and sensitive assessment of the privacy injury at stake in this case – a requirement that, in and of itself, should prevent dismissal of Mr. Johnson’s claims as the privacy invasion of which Mr. Johnson complains looms incredibly large at this stage of the proceedings, where the Court must accord Mr. Johnson “the benefit of all inferences that can be derived from the facts alleged.” *Kowal*, 16 F.3d at 1276; *Atchinson*, 73 F.3d at 422; *Sachs*, 201 F.2d at 210.

Viewed, as they must be, in the most plaintiff-favorable light, these facts encompass the incredible range of detailed personal information obtainable from a DNA sample, which includes, but is not limited to, data regarding such intimate and revealing information as genetic traits, susceptibility to disease, “biogeographic heritage” (i.e. race), medical conditions and paternity. *See* declaration of Dr. Greg Hampikian at 5-7, attached hereto as Exhibit B. As it stands today, even the thirteen DNA loci used to generate a forensic profile – a tiny fraction of the DNA genome – “may yield probabilistic information evidence of the contributor’s race or

⁶ Significantly, as discussed in Mr. Johnson’s Preliminary Statement, *supra*, the government has provided the Court with absolutely no factual declarations in support of this argument or, indeed, any argument in this case. This position is particularly troubling with respect to the government’s “special needs” arguments as “[t]he special needs doctrine is limited in its application to exceptional circumstances and ‘must be analyzed in the context of the specific factual circumstances involved in the case.’” *Vore v. U.S. Dept. of Justice*, 281 F. Supp. 2d 1129, 1133 (D. Ariz. 2003) (quoting *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1056-57 (9th Cir. 2002)).

sex.” *Kincade*, 379 F.3d at 818 n.4 (citing Nat’l Comm. for the Future of DNA Evidence, Nat’l Inst. of Justice, U.S. Dep’t of Justice, *The Future of Forensic DNA Testing* 35, Nov. 2000, available at [http:// www.ncjrs.org/ pdffiles1/nij/183697.pdf](http://www.ncjrs.org/pdffiles1/nij/183697.pdf)). In addition, as discussed in Mr. Johnson’s earlier pleadings, *see* Plaintiff’s Motion for Temporary Restraining Order at 13 –15, the scientific community has now determined that the “junk” or “non-coding” DNA regions from which forensic profiles are generated are not, in fact, “junk” at all and may someday, soon, be revealed to contain the same highly personal information found elsewhere on the DNA strand. Indeed, the term “junk DNA”

is a misnomer, since the more we learn about the architecture and regulation of the human genome, the more we appreciate formerly disregarded areas of our hereditary material. However, even sequences that do not have any direct role in heredity, can tell us something about the sequences around them. This is because junk DNA sequences are linked to other DNA sequences, and they are inherited together. If a disease gene is inherited along with a particular piece of non-coding DNA, the non-coding DNA can serve as a marker or indicator of the disease. As medical genetics evolves so does the information that can be gleaned from old DNA samples, and even old data. Therefore, an area considered junk DNA today may someday be correlated with a disease or trait located on the same chromosome.

Declaration of Dr. Greg Hampikian at 5. Add to this reality the potential for misuse or retrospective re-purposing of Mr. Johnson’s blood sample (concerns inescapably inherent in Defendants’ intention to retain that sample in perpetuity), and the privacy side of the reasonableness balance is weighted very heavily indeed. *Id.* at 5 –7.

In contrast, the government interests advanced by suspicionless DNA sampling of people like Mr. Johnson, while not insignificant, are hardly sufficient to justify or override the tremendous privacy invasion inevitably at stake. True, the government has a strong and abiding interest in the prosecution and prevention of crime. But this rationale applies to all law enforcement activity, of course, and therefore clearly cannot be relied upon to authorize

departure from the dictates of the Constitution. For this reason, proponents of forensic DNA sampling generally emphasize in the “special needs” context either “needs” associated with regulation and identification of prison inmates, *see, e.g., Roe*, 193 F.3d at 78; *Jones*, 962 F.2d at 306; *Green*, 354 F.3d at 678, or an alleged supervisory purpose, *see, e.g., Kincade*, 379 F.3d at 835; *Miller*, 259 F. Supp. 2d at 1176, in staking their “special needs” claim.

Thus, even leaving for another day the question of the applicability of the “special needs” exception to prisoners, parolees and probationers, it can surely be said that the traditional non-law enforcement bases advanced in support of suspicionless DNA sampling do not apply to Mr. Johnson. Indeed, many of the cases cited by Defendants expressly distinguish their analyses from that which must be applied to someone, like Mr. Johnson, whose term of supervision has now expired. *See, e.g., Kincade*, 379 F.3d at 841 (“What we do not have before us is a petitioner who has fully paid his or her debt to society, who has completely served his or her term, and who has left the penal system.”) (Gould, J., concurring); *Miller*, 259 F. Supp. 2d at 1177 (“This Court is not presented with whether someone in Miles’ position [i.e. someone who had completed his term of probation] is unconstitutionally searched by the DNA collection act.”); *Miles*, 228 F. Supp. 2d at 1138 (an individual who has “fully served his sentence for [the DNA collection eligible crime] ...ha[s] an objectively reasonable expectation that after three decades the government would not be able to use that offense as a justification for invading his bodily integrity and obtaining his identifying information without some individualized suspicion of criminal wrongdoing.”).

C. The “Totality of the Circumstances” Balancing Test

Leaving aside, for the moment, the question of whether a free-floating balancing test has any place at all in a Fourth Amendment assessment of an admittedly suspicionless law enforcement

search, *see Kincade*, 379 F.3d at 860, (Reinhardt, J., Pregerson, J., Kozinski, J. and Wardlaw, J., dissenting) (“totality of the circumstances” test inappropriately “dispenses with the structural guarantees that have guided Fourth Amendment jurisprudence since the Founding”), for the reasons detailed above and because, at this stage of the proceedings, Mr. Johnson is entitled to the benefit of all fact-related doubt, Defendants cannot possibly succeed in seeing Mr. Johnson’s claims dismissed based on nothing but Defendants’ own questionable accounting of the private and public needs at stake in this case.

Indeed, should the Court accept such a simplistic and amorphous Fourth Amendment standard, there is potentially no end to the list of people who may some day find themselves in Mr. Johnson’s place as such arguments amount to an endorsement of any search conducted upon any person with a reduced expectation of privacy. If, as Defendants argue, “plaintiffs [sic] severely reduced expectation of privacy renders his DNA testing constitutional,” Defendants’ Memorandum at 11, then so, too, could the government conduct suspicionless law enforcement searches of the many, many other citizens who have been found to possess compromised privacy rights – including “attendees of public high schools or universities, persons seeking to obtain drivers’ licenses, applicants for federal employment...persons requiring any form of federal identification, and those who desire to travel by airplane, to name just a few.” *Kincade*, 379 F.3d at 844 (Reinhardt, J., Pregerson, J., Kozinski, J., Wardlaw, J., dissenting).

Moreover, it bears noting that Defendants’ “wealth of persuasive authorities favoring the constitutionality of the [DNA] Act,” Defendants’ Memorandum at 5, provides rather less impressive or robust a foundation than it may at first appear. Many of the cases relied on by Defendants deal only fleetingly with the Fourth Amendment issues raised by Mr. Johnson, dispatching their “persuasive” endorsements in as few as two or three sentences. *See, e.g.*,

United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003); *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998). Many more involved *pro se* plaintiffs, *see, e.g., Groceman v. United States Dep't of Justice*, 354 F.3d 411 (5th Cir. 2004); *Velasquez*, 329 F.3d at 420; *Shaffer* 148 F.3d at 1180; *Vore*, 281 F. Supp. 2d at 1129, or merely echolalic regurgitation of non-binding analyses conducted by other courts, *see, e.g., United States v. Plotts*, 347 F.3d 873, 877 (10th Cir. 2003) (summarily rejecting Fourth Amendment argument “for the reasons stated in *Kimler*” where *Kimler*’s Fourth Amendment analysis is no more than three sentences long); *Velasquez*, 329 F.3d at 421.

Finally, recent additions to the field have made clear that the Fourth Amendment issues raised by Mr. Johnson in this case are actively dividing courts across the county and that what may appear at first blush to be nationwide consensus is, in fact, an ever more complicated mosaic of conflicting, highly fact-dependent opinions. In the last two months alone, DNA collection cases utterly fractured two appellate courts, generating no less than eight separate written opinions. *Kincade*, 379 F.3d 813 (plurality, concurrence and two dissents); *Maryland v. Raines*, 2004 WL 1898485 (Md. August 26, 2004) (majority, two concurrences and one dissent). Of the eighteen appellate judges who considered these two cases, eight, in sum, found suspicionless DNA sampling unconstitutional, nine upheld the practice on various bases and with various limitations and one reluctantly gave an endorsement expressly contingent on the fact that the petitioner before him – unlike Mr. Johnson – was not someone “who has fully paid his or her debt to society, who has completely served his or her term, and who has left the penal system.” *Kincade*, 379 F.3d at 841 (Gould, J., concurring).⁷

⁷ This issue also echo concerns regarding the “re-entry” problems created by including an individual’s DNA sample in CODIS forever, permanently branding that individual a “usual suspect” notwithstanding his successful completion of a sentences or even their complete rehabilitation. Exacerbating the already severe collateral consequences associated with a criminal conviction, such as limited employment opportunities and political

IV. Mr. Johnson's Substantive Due Process Claim.

Mr. Johnson, a free citizen who has entirely paid his debt to society, objects to a tremendously invasive and utterly suspicionless search with the potential to reveal his most intimate genetic and medical information. Mr. Johnson's substantive Due Process rights have accordingly been violated. Defendants' narrowly focused precedent notwithstanding, the Supreme Court has long recognized the distinction between the privacy invasion represented by the physical act of taking a biological sample and the invasion occasioned by disclosure of information gleaned from the government's subsequent use of that sample. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995). It is therefore important to understand that the DNA Act not only mandates physical extraction of blood but also: a) authorizes analysis of the blood for identification information by either government or private entities; b) requires entry of that information into a permanent national database accessible to thousands; and c) allows for subsequent re-testing for other desired identification information by permitting permanent retention of the physical sample.

A. The Privacy Rights at Stake

The DNA Act authorizes the analysis, publication, and permanent retention of DNA information in violation of two distinct, constitutionally protected privacy rights. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in

disfranchisement, the burden of forever being considered a suspect will prevent individuals like Mr. Johnson from truly fully integrating back into our civil society. These concerns are not hypothetical and are grounded in social science. *See, e.g.,* Marc Mauer, *Invisible Punishment: Block Housing, Education, Voting*, FOCUS (publication of the Joint Center for Political and Economic Studies), May/June 2003. Subjecting someone to stigmatizing, ongoing punishment long after one has completed his or her sentence is not consistent with this country's defining principles and provides yet another rationale for rendering the DNA Act unlawful.

independence in making certain kinds of important decisions.” *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

Federal courts have repeatedly recognized the existence of a fundamental constitutional right of privacy with respect to the nondisclosure of personal data or information. *See, e.g., Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000); *Denius v. Dunlap*, 209 F.3d 944, 955 (7th Cir. 2000); *Statharos v. New York City Taxi & Limousine Commission*, 198 F.3d 317, 322-23 (2d Cir. 1999); *In re Crawford*, 194 F.3d 954, 958-59 (9th Cir. 1999), *cert. denied sub nom. Ferm v. United States Trustee*, 528 U.S. 1189 (2000); *Kallstrom v. Columbus*, 136 F.3d 1055, 1061-62 (6th Cir. 1998); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996); *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir. 1996); *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir.), *cert. denied*, 516 U.S. 817 (1995); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988).⁸ Most federal Circuit Courts have similarly concluded that the constitutional protection of personal information extends to medical information or records. *See, e.g., Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000), *cert. denied*, 122 S. Ct. 96 (2001); *Doe v. Southeastern Pennsylvania Transportation Authority*, 72 F.3d 1133, 1137 (3d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995); *Doe v. New York*, *supra*, 15 F.3d 267 (2d Cir. 1994); *Doe v. Attorney General of the United States*, 941 F.2d 780, 795-96 (9th Cir. 1991), *vacated on*

⁸ The D.C. Circuit, which, to date, has declined to expressly rule on the issue, *see, e.g., AFGE, AFL-CIO v. HUD*, 118 F.3d 786, 793 (1997), has likewise suggested that a constitutional right of privacy extends to personal information. *United States v. Hubbard*, 650 F.2d 293, 304-06 (D.C. Cir. 1980) (citing *Whalen* for the proposition that there are constitutionally protected spheres of personal privacy); *Doe v. Webster*, 606 F.2d 1226, 1238 n.49 (D.C. Cir. 1979) (suggesting that a right to privacy could be violated by the government’s collection and dissemination of criminal information); *Utz v. Cullinane*, 520 F.2d 467, 482 n.41 (D.C. Cir. 1975) (“It would appear that there is another constitutional right which might be impaired by the dissemination of pre-conviction or post-exoneration arrest data for other than law enforcement purposes--the right of privacy.”).

other grounds sub nom. Reno v. Doe, 518 U.S. 1014 (1996); *see also Harris v. Thigpen*, 941 F.2d 1495, 1513 (11th Cir. 1991).

B. The Appropriate Standard of Review

The Due Process Clause “forbids the government to infringe . . . ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292 (1993)). As the right to protect genetic information from disclosure implicates a number of liberties traditionally deemed “fundamental” by the Supreme Court, including “marriage, procreation...family relationships, and child rearing,” *Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992) (quoting *Carey v. Population Services International*, 431 U.S. 678, 684-685 (1977)), strict scrutiny must apply in this case.⁹ Indeed, the privacy interests here at stake arguably dwarf even those contemplated in the traditional “fundamental privacy” cases. *Whalen*, for example, involved a database with names and addresses of persons who had obtained prescriptions for certain drugs. In contrast, DNA samples, unlike fingerprints, include a vast quantity of medical information about an individual, as well as information regarding a person’s race, ethnicity, susceptibility to disease, lineage and fertility. *See* declaration of Dr. Greg Hampikian at 4-5.

The history of eugenics and forced sterilization in this country and throughout the world provide chilling reminders of the troubling possibilities for government misuse of private medical information, *c.f. Skinner v. Oklahoma*, 316 U.S. 535 (1942) (law sterilizing repeat

⁹ Although it is Mr. Johnson’s position that only a “strict scrutiny” analysis should apply in this case, it should be noted that the DNA Act is also not “rationally related” to the government interests it purports to serve, based on essentially the same discrepancies between the Act and its alleged goals that are articulated below. In addition, Mr. Johnson notes that the Act fails for similar reasons under the substantive due process “balancing” test of *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). *See* section III.C., *supra*.

criminal offenders violates the Equal Protection Clause), particularly with respect to minority populations, *see* section VI., *infra*. The relatively recent suggestion by a Massachusetts state senator that DNA databases from prisoners be used to develop a “criminal” genetic profile provides yet another example.¹⁰

Not surprisingly, then, the Supreme Court has emphasized the importance of robust security precautions when contemplating government access to private information. *See AFGE, AFL-CIO* 118 F.3d at 793. The DNA collection statutes and procedures for D.C., however, have no such protections. In fact, under the FBI’s current authority to administer CODIS, it could change the kind of “identifying” genetic information included in the database tomorrow. *See* declaration of Dr. Daniel Krane at 11-12, attached hereto as Exhibit C. Moreover, the DNA Act does not proscribe or define or limit analyses to non-coding DNA or require that blood samples be destroyed after the identification analysis has been performed and the stated compelling governmental interest has been satisfied.

In addition, the DNA Act is not narrowly tailored because crimes that have been included in the statute appear to be arbitrary. In this very case, for example, the DNA Act applies to Mr. Johnson even though he was convicted of an unarmed robbery for which there was no DNA evidence. Similarly, the list of qualifying offenses is not limited to crimes for which high levels of recidivism have been empirically demonstrated. *Compare Smith*, 538 U.S. at 103 (finding sex offender registration not excessive to its regulatory purpose based on social science regarding unusually high rate of recidivism in the relevant offender population).

Finally, the DNA Act is not narrowly tailored because it fails to provide any mechanism for removal or expungement of a DNA record and return of a blood sample in the event a

¹⁰ This suggestion was made by Massachusetts state senator James Jajuga in an August 1998 interview with the journal *Nature*.

conviction is reversed on appeal or in the case of someone like Mr. Johnson whose aberrant and highly-situational criminal behavior bears all the hallmarks of a singular event.

V. Mr. Johnson's Procedural Due Process Claim

The taking of Mr. Johnson's DNA without cause, without any legitimate governmental purpose and entirely without any mechanism or opportunity for Mr. Johnson to object violates Mr. Johnson's right to procedural due process. Defendants argue that Mr. Johnson's claims in this regard must be dismissed because nothing beyond a conviction for a predicate offense is required to trigger DNA collection under the DNA Act. Defendants' Memorandum at 17. This "defense" – that a DNA collection is essentially automatic under the DNA Act – is, of course, no defense at all; it is exactly the problem.

Defendants cite essentially one single case, *Boling v. Romer*, 101 F.3d 1336, 1341 (10th Cir. 1996), in support of their procedural due process arguments.¹¹ *Boling*, however, is entirely distinguishable from Mr. Johnson's claims¹² and its rationale has not been adopted by any other Circuit court. Defendants' cursory treatment of Mr. Johnson's procedural due process argument thus fails to fully address the lack of adequate procedure alleged in (1) the enactment of a law that fails to require a determination if the target is likely to recidivate via a crime with biological

¹¹ Defendants also cite to *Miller v. United States Parole Commission*, 259 F. Supp. 2d 1166 (D. Kan. 2003), but *Miller* relies exclusively on the rationales and citations in *Boling*.

¹² The question in *Boling* was whether the plaintiff there had been deprived of a property interest in his blood, *Boling*, 101 F.3d at 1340 and the *Boling* court explicitly noted that a liberty interest was not part of their due process analysis in that case. *Id.* at 1341. Furthermore, although the *Boling* court held that the state legislature's limitation of the law at issue in that case to sex offenders was sufficient procedural due process, it did so by improperly relying on three cases with very distinct facts. *Id.* (citing *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995)(stating that since the only criterion for extracting blood was a conviction for a predicate offense there would be little of substance to contest at any hearing, but noticing the misapplication of the collection statute on a second due process claim); *Vanderlinden v. Kansas*, 874 F. Supp. 1210, 1216 (D. Kan. 1995) (holding there is no due process right to a hearing prior to a mere threatened threat of segregation); *Dunn v. White*, 880 F.2d 1188, 1198 (10th Cir. 1989)(same). As the *Vanderlinden* court itself recognized, "[b]ecause due process is a flexible concept, its requirements vary according to the context of its application." *Vanderlinden*, 874 F. Supp. at 1216.

evidence and (2) the implementation of the law that has no internal guidelines for determining if a particular individual has actually been convicted of qualifying offense.

A two-part analysis should be applied to appropriately address these claims. First, the court must determine whether the individual interests at stake are encompassed by the “life, liberty, and property” protected by the Fifth Amendment. Second, if protected interests are at stake, the court must assess whether the procedures in place are adequate. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). When conducting the second part of this analysis, the Supreme Court requires a three-factor balancing test, encompassing (1) the private interest affected; (2) risk of an erroneous deprivation of such interest and the value of additional procedural safeguards; and (3) the government’s interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

A. The Private Interest Affected

This case involves two “liberty” interests protected by the Fifth Amendment. First, collection of DNA implicates serious privacy interests because of the vast amount of private genetic and medical information contained in DNA samples. Permitting the government access to a host of information relevant to one’s race, lineage and medical condition impermissibly chills exercise of fundamental liberties. Second, individuals risk being wrongfully compelled to submit a DNA sample or having their information wrongfully entered into the CODIS database because of the statute, as

[i]nclusion in a DNA profile database that is used as an investigative tool places an individual at risk of false-inclusion due to a number of factors including: the possibility of examiner bias . . . , ambiguities related to recognized technical artifacts . . . , complications associated with the interpretation of mixed samples . . . , allele sharing between related individuals . . . , and contamination/inadvertent transfer Any of these factors individually and especially in combination could result in a false match between an evidence sample and a DNA profile in a database. Further, there is still significant debate regarding the appropriate way to describe the statistical significance of a DNA profile match discovered during the course of such an investigation

Declaration of Dr. Daniel Krane at 3. *See also* declaration of Dr. Greg Hampikian at 5 (“The DNA database has a known inherent risk of accidental matches, and that risk rises as more profiles are entered into the database. That is each time a new profile is added to the database, the odds of a coincidental database-match go up in a predictable manner.”).

B. The Risk of an Erroneous Deprivation of Such Interest, the Value of Additional Procedural Safeguards and the Government’s Interest

The DNA Act does not require a factual determination of whether a targeted individual is likely to commit a crime involving biological evidence in the future before demanding that individual’s DNA. In addition, current implementation of the DNA Act provides insufficient procedures for determining whether an individual has actually been convicted of a qualifying offense and CSOSA regulations do not set forth any official procedures for correctly identifying such individuals. Instead, the DNA collection appears to be proceeding largely in a capricious manner, as Defendants’ request to sample Mr. Johnson’s DNA just moments before termination of his two-year term of probation appears to demonstrate. Furthermore, there is no procedure for individuals to challenge erroneous classifications.

Finally, Defendants have not established processes to limit the use of DNA samples in any meaningful way. For example, there is no procedure for an individual to petition to ensure that his sample is destroyed or returned and his genetic information removed from CODIS after his probation has ended, even though maintaining the sample and keeping the individual in CODIS after that point would serve no supervisory purpose. In fact, there is no procedure in place to petition or challenge the government’s use or testing of the sample at all once it is given. This is all the more serious given that the DNA Act does not limit the government’s use of the

sample. Each one of these missing safeguards could be easily arranged for without compromising the government's stated interest.

VI. Mr. Johnson's Equal Protection Claim

The DNA Act violates Mr. Johnson's right to equal protection of the law by discriminating against Mr. Johnson on the basis of race. The proper standard for evaluating Mr. Johnson's equal protection claim is, therefore, strict scrutiny, not rational basis review, *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 441 (1985); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17-39 (1973), and the DNA Act can be sustained only if it is narrowly tailored to advance a compelling state interest.¹³ Because the DNA is not so constructed, it violates the Equal Protection Clause.

A. Discriminatory Purpose

Evidence that the DNA Act has been created and implemented with discriminatory intent may be found in the statute's disproportionate impact, the historical mistreatment of minorities in the criminal justice system – particularly with regard to their privacy rights – and the statements of legislators enacting the DNA Act. Proof of discriminatory purpose may be either direct or circumstantial and in many circumstances may be “inferred from the totality of relevant facts.” *Washington v. Davis*, 426 U.S. 229, 242 (1976). *See also Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). To establish sufficient evidence of purposeful discrimination requiring strict judicial scrutiny, it need not be shown that race was the sole motivation, or even the primary reason behind the challenged action, but only

¹³ As Mr. Johnson notes with respect to his Due Process Clause arguments, n.10, *supra*, it is Mr. Johnson's position that only a “strict scrutiny” analysis should apply in this case. Mr. Johnson notes, however, that the DNA Act is also not “rationally related” to the government interests it purports to serve, based on the same discrepancies between the Act and its alleged goals already articulated in this pleading.

that it was a motivating factor. See *Arlington Heights*, 429 U.S. at 265-266. “[O]nce racial discrimination is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.” *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (citing *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977)).

The assessment of whether purposeful discrimination was a motivating consideration “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,” *Arlington Heights*, 429 U.S. at 266, and an assessment of whether “the law bears more heavily on one race than another,” provides “an important starting point” to this inquiry. *Id.* (quoting *Washington v. Davis*, 426 U.S. at 242). Accordingly, the Supreme Court has identified several factors which may provide evidence of invidious purpose in the context of official action taken by governing officials, including whether the impact of an action bears more heavily on one race than another, the historical background of the decision, and the legislative history, including contemporaneous statements by the members of governing body. *Arlington Heights*, 429 U.S. at 266-268.

1. Disproportionate Impact

The DNA Act disproportionately burdens racial minorities, especially African Americans, a population disparately impacted by the criminal justice system¹⁴ and, accordingly, disparately impacted by the requirements of the DNA Act. The racial disparity of the DNA

¹⁴ In 2001, the Bureau of Justice Statistics determined that approximately seventeen percent of adult African American males and eight percent of adult Hispanic males were current or former State or Federal prisoners; by comparison, less than three percent of white males were current or former prisoners. Furthermore, according to the Bureau, 32 percent of African American males and seventeen percent of Hispanic males born in 2001 were expected to go to prison at some point in their lives; in contrast, less than six percent of white males were expected to go to prison in their lifetime. Thomas P. Bonczar, *Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 5-8 (2003). See also Paige M. Harrison and Jennifer C. Karberg, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2003*, at 11 (2004) (reporting 4,834 African American males per 100,000 African American males in population in State or Federal prisons and local jails, compared to 681 white males per 100,000 white males in population).

Act's burden is even more striking in the District of Columbia. Fifty percent of the District's eighteen to 35 year old African American males are either incarcerated or under some form of criminal justice supervision and African Americans in the District are incarcerated at 36 times the rate of whites.¹⁵ Statistics from the District of Columbia Department of Corrections further show that, as of August 2003, nearly 97 percent of the D.C. inmate population was African American or Hispanic.

2. History of Discriminatory Treatment

The United States' history of discriminatory criminal investigation and disregard for the privacy rights of minorities is also evidence of discriminatory intent. Race-based dragnets have been a mainstay of police investigations throughout this century;¹⁶ DNA is just the latest tool.¹⁷ As noted by the dissenters in *Kincade*, DNA dragnets may become more commonplace if databases are allowed to continue in their current form. *Kincade*, 379 F.3d at 854 ((Reinhardt, J., Pregerson, J., Kozinski, J., Wardlaw, J., dissenting). In addition, investigators apparently can now analyze crime scene DNA for racial characteristics and use that information for a race-based search for suspects.¹⁸

¹⁵ Eric Lotke, National Center on Institutions and Alternatives, Hobbling a Generation (Five Years Later) (1997).

¹⁶ See Deborah A. Ramirez, Jennifer Hoopes, and Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 Am. Crim. L. Rev. 1195 (2003) (comparing the history of racial profiling before 9/11 with instances of "ethnic profiling after 9/11).

¹⁷ See, e.g., Lauren Todd Pappa, *Longo Discusses DNA Sampling in Rapist Search*, The Cavalier Daily (April 13, 2004) available at: <http://www.cavalierdaily.com/CVArticle.asp?ID=19733&pid=1150> (discussing attempts to capture a serial rapist at the University of Virginia by DNA dragnets of African American students); Jeffrey S. Grand, Note, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 Cardozo L. Rev. 2277 (2002) (reviewing DNA dragnets in cities as diverse as San Diego, Miami, Lawrence (Massachusetts), Ann Arbor, Cheverly (Maryland), and Chicago).

¹⁸ *DNA Test Pointed to Black Man*, Lafayette Daily Advertiser (Lafayette LA) June 5, 2003, available at <http://www.theadvertiser.com/news/html/4CEBD31C-1DDA-4BBC-8028-9B69CCD9DDA4.shtml>

The United States government also has an appalling history of failing to protect – and of actively misusing – the sensitive medical information of minorities. As recently as 1970, of course, the United States Public Health Service used hundreds of African American men as an experimental control group for untreated syphilis as part of the Tuskegee Syphilis Experiment.¹⁹ Medical information has also been misused to discriminate against minorities in the employment arena. Until recently, the United States Air Force Academy excluded African Americans with the “sickle-cell gene” based on unverified speculation that this would cause high-altitude illness.²⁰ Similarly, more than a dozen states passed legislation requiring sickle-cell screening for marriage licenses when the gene was first identified.²¹ Thus, even when used with supposedly beneficial intent, the government’s use of genetic information “can reflect institutional racism and encourage new forms of discrimination.”²²

3. Legislative History

The legislative record of the passage of the DNA Act reflects that the D.C. Council was aware of the potential discriminatory impact of the Act. For example, Councilmember Ambrose repeatedly raised concerns about the Government’s ability to conduct racial profiling based on the DNA samples. Council’s Report on Bill 14-63 at 6. Also, D.C. Council members considering which crimes to designate for purposes of the DNA Act expressed skepticism over

¹⁹ See generally, A.W. Fournier, C.R. Fournier and C.F. Herreid, *Bad Blood: A Case Study of the Tuskegee Syphilis Project*, University at Buffalo, State University of New York, available at: <http://ublib.buffalo.edu/libraries/projects/cases/blood.htm>.

²⁰ Janet L. Dolgin, *Personhood, Discrimination, and the New Genetics*, 66 Brooklyn L. Rev. 755 (2001).

²¹ *Id.* at 788.

²² *Id.* at 818.

whether the statutory safeguards would sufficiently protect individual privacy. The Counsel's Report states squarely that

the Committee must be mindful of the important privacy interests that are implicated by this legislation. DNA testing requires blood tests that subject an individual's genetic information to government review. This type of invasive procedure can not be undertaken lightly *or without a compelling government interest*.

Id. (emphasis added).²³ But while an FBI official attempted to address whether a CODIS DNA profiled could reveal physical characteristics or medical conditions, *id.*, it is evident that the government and the Council made no real effort to ensure that the Act would contain sufficient safeguards against the future ability of CODIS to include such identification data.

While there is little additional discussion of the racial impact of the DNA Act in Congress and in the D.C. Council, this is not dispositive of the issue. In fact, knowledge of the disparate impact of the DNA Act need not be contemporaneous with its passage. Given the almost axiomatic and voluminous amount of data popularly available concerning the disparate impact various pieces of criminal legislation have had on racial and ethnic minorities, notice of disparate racial impact of the DNA Act should be inferred. This principle has been consistently applied in other civil rights cases involving whether a particular legislative enactment violates the Equal Protection Clause. For example, in evaluating the constitutionality of affirmative action programs, federal courts have not required that the evidence and rationale supporting the constitutionality of the programs be made contemporaneously with their creation. Rather, “[t]he law is plain that the constitutional sufficiency of a state’s proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the program’s enactment.” *Harrison & Burrows Bridge Constructors v. Cuomo*,

²³ Defendants apparently misread the D.C. Council’s Report when citing to it as evidence that a rational-basis standard applies in this case.

981 F.2d 50, 60 (2d Cir. 1992) (citing *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992)); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 945 F.2d 1260, 1267 (3d Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir.), *cert. denied*, 498 U.S. 983 (1990); *see also*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289-291 (1986) (O'Connor, J., concurring); *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1566 (11th Cir. 1994). As Justice O'Connor reasoned, in the context of evaluating whether a particular hiring plan is unconstitutional,

a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite” to a state actor making a decision, as “[a] violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed. Contemporaneous findings serve solely as a means by which it can be made absolutely certain that the governmental actor

is acting lawfully. *Wygant* at 289 (O'Connor, J., concurring).

Given the totality of the circumstances surrounding the adoption of the DNA Act, including the government's awareness of the potential discriminatory impact of the Act, as well as the historic impact of other aspects of the criminal justice system on racial and ethnic minorities, Mr. Johnson has alleged facts sufficient to raise an inference that the DNA Act was enacted with an impermissible intent to discriminate.²⁴

B. Strict Scrutiny Review

Because the DNA Act was motivated by a racially discriminatory purpose, it must be subjected to strict scrutiny and the statute must be “narrowly tailored” to serve a “compelling governmental interest” in order to withstand such review. *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995). Thus, even if Defendants' proffered purpose of promoting public safety is

²⁴ In cases where discriminatory intent is alleged, often there is no direct evidence of the subjective motivation of decision makers. Rather, the court must draw reasonable inferences regarding the rationale underlying certain decisions from a range of objective and circumstantial evidence. *See Arlington Heights*, 429 U.S. at 266-268.

deemed to be a compelling interest, the DNA Act still violates equal protection because is not narrowly tailored to this interest.

As discussed above, *see* section IV., *supra*, on its face, the DNA Act fails to provide many simple protections for genetic privacy rights. Due to these insufficient safeguards, the DNA Act is not narrowly tailored to the purpose of promoting public safety. Moreover, as also discussed above, the scope of the DNA Act is also not narrowly tailored. Indeed, four federal appellate judges have just recently stated that “[t]he current list of qualifying crimes is so broad and eclectic that it is difficult to name...any discernible categories of criminal activities that remain beyond the reach of the DNA Act.” *Kincade*, 379 3d. at 846 ((Reinhardt, J., Pregerson, J., Kozinski, J., Wardlaw, J., dissenting).

VIII. Mr. Johnson’s Ex Post Facto Claim

Mr. Johnson was convicted of two counts of unarmed robbery based on an incident that took place on March 30, 2001. The D.C. Code provision implementing the DNA Act was signed by the Mayor on June 15, 2001 and became effective on November 10, 2001. Thus, as Defendants agree, “there is no dispute that the [DNA] laws operate retroactively with regard to the plaintiff.” Defendants’ Memorandum at 12. The issue here is therefore merely whether the DNA Act “makes more burdensome the punishment for a crime.” *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925)). Mr. Johnson submits that it does.

The Supreme Court has established a clear framework for determining whether a statute constitutes “punishment” forbidden by the Ex Post Facto Clause.²⁵ First, a court must determine

²⁵ Defendants’ suggested application of a “clearest proof” standard is inapt. In *Hudson v. United States*, 522 U.S. 93 (1997), the Supreme Court stated that “only the clearest proof will be sufficient to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Id.* at 99. In this case, the legislature

if the legislature intended the statute to impose a criminal punishment. *Smith v. Doe*, 538 U.S. 84, 92 (2003). If the intention of the legislature was to impose punishment, the Ex Post Facto Clause applies. *Id.* If, instead, the legislature intended to create a civil and non-punitive scheme, the court must then determine whether the statute is “so punitive either in purpose or effect as to negate [the legislature’s] intention to deem it ‘civil.’” *Id.*

A. Legislative Intent

Several factors affirmatively indicate a punitive legislative intent with respect to the DNA Act. First, the D.C. statute is codified in Title 22, “Criminal Offenses and Penalties.” D.C. Code § 22-4151. Second, the statute is enforced by the Bureau of Prisons and the Court Services and Offender Supervision Agency, 42 U.S.C. § 14135b(a), entities with clear criminal justice mandates. Third, the DNA collection requirement is directly inserted into conditions of probation, supervised release or parole for qualifying offenders, 18 U.S.C. §§ 3563(a), 3583(d), 4209, thus becoming, quite literally part of the offender’s sentence.

In addition, the theme of punishment appears several times in the D.C. Council Report discussing the scope of the DNA Act. In fact, the Act was justified in the Council on the express grounds that it targeted individuals who had committed a crime and accordingly deserved to suffer a loss of their privacy rights. Council of the District of Columbia Report on Bill 14-63 at 14-15. In addition, the D.C. Council Report also reveals a clearly retributive legislative rationale in the Council’s discussion of the appropriate extent of the Act. *Id.* at 6 (“It is the Committee’s

has not “denominated” the DNA Act as civil, however, and any intent to do so is far from clear. As described below, numerous factors suggest that, on the contrary, the legislature intended a criminal punishment. Under these circumstances, the “clearest proof” test is inappropriate. *See Smith*, 538 U.S. at 107 (Souter, J., concurring) (“this heightened burden [‘only the clearest proof’] makes sense only when the evidence of legislative intent clearly points in the civil direction”). Historically, the “clearest proof” test has generally been applied to statutes that fit within well-established traditions of civil legislation. *See Kansas v. Hendricks*, 521 U.S. 346, 358-62 (1997) (“civil commitment procedure” falls within the civil tradition of confining the mentally ill and dangerous for treatment); *United States v. Ursery*, 518 U.S. 267, 274 (1996) (in rem civil forfeiture falls within civil tradition dating to “the earliest years of this Nation”). The DNA Act does not fit within such a tradition.

view that the mere possibility that someone convicted of a property crime or low level felony may commit a more serious crime in the future is insufficient to justify the significant invasion of privacy at issue here.”)

B. Punitive Purpose and Effect

Furthermore, even if the legislative intent behind the DNA Act were not so clearly criminal, the statute is sufficiently punitive in purpose and effect as to implicate the Ex Post Facto Clause. Courts look to seven factors when determining whether a statute has been rendered criminal by virtue of its purpose and effect:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned,

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

Because Defendants fail to recognize the privacy interests implicated by the DNA Act, they also fail to appreciate the extent to which the statute’s effects activate the *Mendoza-Martinez* considerations. First, subjecting individuals to an invasion of privacy – particularly an invasion of the magnitude seen here – constitutes a significant affirmative disability.²⁶ Second, the statute clearly promotes the traditional criminal purposes of retribution and deterrence. *See* Defendants’ Memorandum at 15 (discussing deterrence). Finally, the DNA Act’s invasion of privacy is excessive to any purported “civil” purpose of promoting public safety.

²⁶ The second *Mendoza-Martinez* factor, history, is not applicable to this case as DNA’s ability to allow the government to seize such vast amounts of intimate information is unprecedented.

VIII. Mr. Johnson's HIPPA Claim

Mr. Johnson's claim under the Health Insurance Portability, Availability and Renewability Act of 1996 (HIPPA) has merit and this Court should find a private right of action under the HIPPA statute. Defendants cite only one federal district court opinion in support of their contrary position and err by treating this statutory claim as if it were controlled by constitutional rulings on privacy interests.

A private right of action may be implied in a federal statute where lack of such a right would "severely hamper" achievement of the legislation's purpose. *Morse v. Republican Party of Virginia*, 517 U.S. 186, 231 (1996) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969)). Courts also find such a right if, upon examination, it appears that Congress intended to create a private remedy. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The starting point for such an examination should be the "structure and text of the statute," *id.* at 288, and should be informed by whether the plaintiff is "one of the class for whose especial benefit the statute was enacted," *Cort v. Ash*, 422 U.S. 66, 78 (1975) (quoting *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

The structure and text of HIPAA show that Congress intended the statute to protect the private genetic information of citizens like Mr. Johnson. Section 264 of HIPAA, 42 U.S.C. §1320d-2, directs the Secretary of Health and Human Services ("HHS") to promulgate regulations to protect the privacy of medical records. Section 160.512(f)(2) of 45 C.F.R. accordingly allows disclosure of certain information to law enforcement officials for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person, but does not authorize disclosure of "any protected health information related to the individual's DNA or DNA analysis." Thus, despite Defendants' efforts to characterize DNA information as

“something far less revealing than traditional medical records,” Defendants’ Memorandum at 11, the medical experts charged with implementing HIPPA clearly disagree.²⁷

In addition, only a handful of federal courts have even considered the question of a private right of action under the law and in each of those cases the question was evaluated in the context of efforts to use HIPPA as a means of invoking federal jurisdiction. *See O’Donnell v. Blue Cross Blue Shield of Wyo.*, 173 F. Supp. 2d 1176 (D.Wyo. 2001); *Means v. Independent Life and Acc. Ins. Co.*, 963 F. Supp. 1131, 1135 (M.D.Ala. 1997); *Brock v. Provident America Ins. Co.*, 144 F. Supp. 2d 652, 657 (N.D.Tex. 2001); *Wright v. Combined Insurance Co. of America*, 959 F. Supp. 356, 362-63 (N.D. Miss. 1997).

In sum, at the very least, the existence of a private right of action under HIPAA and the statute’s application with respect to genetic privacy are unsettled areas of law worthy of a full hearing before this Court.

IX. Mr. Johnson’s CERD Claim

Mr. Johnson has a private right of action under the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) 1966 U.S.T. LEXIS 521 to redress the DNA Act’s discriminatory effects. By signing and ratifying CERD, the United States has joined more than 135 nations in the international community in promising not to engage in racial discrimination, defined as practices with the “purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental

²⁷ In addition, it bears noting that the medical privacy goals of HIPAA would be seriously undermined if citizens were forced to rely completely on litigation at the discretion of state Attorneys General or the Department of Justice. This difficulty is particularly pronounced in this case, where Mr. Johnson would have to rely on the very government who is requiring him to submit his DNA – and who is the target of his lawsuit – to vindicate his privacy interests.

freedoms in the political, economic, social, cultural or any other field of public life.” 1966 U.S.T. LEXIS 521 at *54 (emphasis added). Further, Article 6 of the treaty states that signatories “shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate...human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” 1966 U.S.T. LEXIS 521 at *60.

More than one federal appellate judge has found a disproportionate impact of the DNA Act on African American and other minorities. *See Kincade*, 379 F.3d at 848 (Reinhardt, J., Pregerson, J., Kozinski, J., Wardlaw, J., dissenting). Thus, Mr. Johnson should be afforded a private right of action under CERD in order to vindicate his rights under international law.

No Circuit Court has addressed whether the language of CERD and its Senate adoption manifests an intent to create a private right of action²⁸ and the doctrinal distinction between self-executing and non-self-executing treaty provisions is ambiguous when applied to CERD. By definition, a treaty is self-executing when it prescribes “rules by which private rights may be determined,” *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003) (*quoting Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976)), and Article 6 of CERD and the Senate’s understanding in its adoption do prescribe such “rules,” yet the Senate has made a statement that the treaty is not self-executing. Given this contradiction and the lack of binding precedent, this Court must allow further exploration of this claim, particularly as claims regarding international treaties – like

²⁸ The only two district courts to address the existence of a private right of action under CERD found the treaty’s lack of a “self-executing” provision dispositive, without discussion. *Hayden v. Pataki*, No. 00 Civ. 8586, 2004 U.S. Dist. LEXIS 10863 (S.D.N.Y. June 14, 2004); *United States v. Perez*, No. 3 : 02cr7(JBA), 2004 U.S. Dist. LEXIS 7500 (D.Conn. April 29, 2004).

claims regarding the Fourth Amendment – are highly fact-dependent. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc) (“Whether or not treaty violations can provide the basis for particular claims and defenses . . . appears to depend upon the particular treaty and claim involved.”)

Alternatively, the Court may view Mr. Johnson’s CERD claim as tantamount to a charge that principles of customary international law are being violated by the DNA Act. “Customary international law is comprised of those practices and customs that states view as obligatory and that are engaged in or otherwise acceded to by a preponderance of States in a uniform and consistent fashion.” *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003). This Court properly exercises jurisdiction over customary international law claims under 28 U.S.C. § 1331 as it is well-settled that § 1331 provides federal courts with jurisdiction over claims founded on federal common law, *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957), and that federal common law incorporates international law, *see, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (citing decisions by the European Court of Human Rights as support for the proposition that the right of homosexual adults to engage in intimate, consensual conduct is “an integral part of human freedom”); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing *amicus* brief of the European Union for the proposition that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved”).

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

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Respectfully submitted,

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