No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

STATEMENT OF INTEREST [1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates.

Most significantly for purposes of this case, NACDL has a strong interest in ensuring that the Fourth Amendment remains a robust protection against unreasonable encroachments on individual privacy. NACDL thus has a substantial interest in ensuring that a state's collection of DNA from an arrestee's body is not taken without a warrant, without probable cause to believe that the DNA is related to the crime leading to arrest, and without any suspicion that the DNA sample will produce evidence relevant to any particular crime an arrestee may or may not have committed.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment guards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Respondent was arrested and charged

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[1] The parties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

with first-degree assault, though he was never convicted of that offense. As an individual charged with a "serious" crime, respondent, like thousands of others, was compelled to have a sample of his DNA taken from his person. The state conducted a Fourth Amendment search when it extracted cells containing DNA from the inside of respondent's mouth. The state used the sample to create a DNA profile; uploaded the profile into CODIS, an electronic system that allows law enforcement personnel to search DNA-based crime scene evidence; discovered that respondent's DNA profile matched evidence left behind in an unsolved crime; and convicted him of that offense.

The state executed this search without a warrant, and with no belief that respondent's DNA had any bearing upon the assault charges for which he was arrested. The state did not suspect respondent of having committed any crime other than assault, let alone believe that his DNA might connect him to the crime with which it was ultimately connected. And the state's avowed purpose in collecting DNA samples from arrestees like respondent is to advance the quintessential law enforcement purpose of solving cold cases.

Petitioner and the United States argue that the Fourth Amendment allows this warrantless, suspicionless search so long as the search advances important governmental interests more than it encroaches upon respondent's privacy interests. Pet. Br. 11-12; U.S. Br. 11-12. Relying principally on *Samson v. California*, 547 U.S. 843 (2006), they propose that because reasonableness is the "touchstone of the Fourth Amendment," the constitutionality of a warrantless, suspicionless search—or any other type

of search—is determined solely by balancing the respective interests in a particular search. Pet. Br. 11; U.S. Br. 11. Here, they say, the government has a strong need to collect arrestees' DNA, respondent's privacy interests are minimal, and that is the end of the inquiry. Pet. Br. 8-10; U.S. Br. 31-32.

This balancing-only approach transforms what is ordinarily the endpoint of Fourth Amendment analysis—determining the reasonableness of a particular search in light of the specific interests presented—into the only inquiry. That approach runs roughshod over the foundational premise of this Court's Fourth Amendment jurisprudence, the presumption that searches—and especially searches that intrude into the body, as this one did—are reasonable only if executed on the basis of a warrant and with probable cause to believe that the search will produce evidence relevant to a crime of which the person being searched is suspected. There was no warrant or probable cause for this search. Departures from the warrant requirement require some strong indication of necessity, like exigent circumstances, but no exigent circumstances justified the collection of respondent's DNA.

Even for searches this Court considers relatively unintrusive, the analysis still begins from the premise that a warrant and probable cause are required. Departure from those requirements mandates some indication that they are demonstrably unworkable—not that it was merely inconvenient or time-consuming for the police to develop sufficient suspicion to obtain a warrant. Yet petitioner and the United States have articulated no reason why a warrant and probable cause would be infeasible preconditions to obtaining an arrestee's DNA. Even

so, the default presumption remains that the state cannot subject an individual to a search unless the individual's actions have given rise to some suspicion of wrongdoing.

Petitioner and the United States nonetheless attempt to shoehorn this search into the exceptionally limited categories of warrantless, suspicionless searches this Court has approved, *i.e.*, searches that raise "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable," *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment), and searches of parolees related to conditions of parole. But those searches, too, are types in which a warrant and probable cause are unworkable. And they depart from the core requirement of individualized suspicion only because that requirement is demonstrably incompatible with the government's objectives in conducting a particular search—for instance, because an imminent public danger requires immediate preventive investigation.

Here, however, the only reason for dispensing with individualized suspicion as a prerequisite to obtaining an arrestee's DNA appears to be convenience; it is easier for the state to search all arrestees than to devote investigative resources to pinpointing undetected recidivists or to await a conviction before taking DNA. Collecting arrestees' DNA thus presents no "special need beyond the normal need for law enforcement," *id*., because the overriding purpose of doing so is to crack cold cases. Arrestees are also fundamentally different from parolees, whose rights are categorically lessened by the fact of conviction and who consent to suspicionless searches as a condition of their release from prison. To deem the search

here reasonable would open the floodgates to the very type of searches the Framers considered most oppressive.

ARGUMENT

I. A STATE'S SEARCH FOR DNA SAMPLES FROM AN ARRESTEE'S BODY WITHOUT A WARRANT OR ANY BASIS FOR SUSPECTING THE DNA IS CONNECTED TO A CRIME IS UNREASONABLE, REGARDLESS OF THE BALANCE OF INTERESTS

A. Physically Intrusive Searches like the Collection of DNA from Inside an Arrestee's Body Require a Warrant and Probable Cause

Rather than simply balancing the relative interests involved in a given search, this Court's Fourth Amendment "analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). The warrant and probable cause requirements apply with greatest force to the types of searches considered unlawful at the time the Fourth Amendment was framed. *Cf. Wyoming v. Houghton*, 526 U.S. 295, 299 (1999).

Extracting a DNA sample from the inside of an arrestee's body, no less than an intrusion into the home, falls within the core category of searches

historically considered unlawful absent a warrant and probable cause. And the search here does not involve exigency or any other limited exception to the warrant requirement.

1. The Fourth Amendment Imposes Especially Strong Protections Against Searches Involving Bodily Intrusions

"[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *United States v. Jones*, 132 S. Ct. 945, 950 (2012). And because the "overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic," *Payton v. New York*, 445 U.S. 573, 601 (1980), "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

That rule extends with equal, if not greater, force to searches violating the sanctity of one's body. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). This Court long has considered the security of one's person against intrusive searches "at the core of the Fourth Amendment." *Berger v. New York*, 388 U.S. 41, 53 (1967); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Rehnquist, J., dissenting). Because "warrants are ordinarily required for searches of dwellings . . . no less could be required where intrusions into the human body are concerned." *Schmerber v. California*, 384 U.S. 757,

770 (1966); *see also Winston v. Lee*, 470 U.S. 753, 760-61 (1985).[2]

Petitioner would throw out these longstanding Fourth Amendment principles on the basis that searches like the one here are "de minimis invasion[s] of personal integrity." Pet. Br. 13. But when it comes to invasions of the body, the question is not the *degree* of physical invasion. The dispositive question—for searches involving the home and body alike—is the *existence* of any intrusion into a constitutionally protected area at all. *See Silverman v. United States*, 365 U.S. 505, 512 (1961). After all, a warrant and probable cause are mandatory for "any physical invasion of the structure of the home, 'by even a fraction of an inch.'" *Kyllo*, 533 U.S. at 37 (citation omitted). There is no principled reason for a different rule for a search of a person's body. Indeed, "intrusions beyond the body's surface" ordinarily are considered unreasonable absent a warrant and probable cause. *Schmerber*, 384 U.S. at 769. Even painlessly drawing blood, *see id.* at 771, or scraping detritus from beneath a suspect's fingernails are "severe, though brief, intrusion[s] upon cherished personal security." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)

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[2] Even physically unintrusive searches of the person may implicate substantial Fourth Amendment concerns if they encroach upon expectations of privacy society recognizes as reasonable. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). But the "*Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Jones*, 132 S. Ct. at 952. In other words, "core" Fourth Amendment searches include, but are not limited to, searches that implicate common-law notions of trespass—and face the heavy presumption that a warrant and probable cause are required.

(citation and quotation marks omitted). Far from "barely register[ing]" under the Fourth Amendment, U.S. Br. 18, extracting a sample of respondent's DNA from the inside of his mouth is a search entitled to the Fourth Amendment's strongest protections.[3]

The United States fares even worse with its theory that collecting a buccal sample of respondent's DNA is less of a search because the collection is from inside of one's cheek, which is "visible to others when an individual speaks, yawns, or eats, and accustomed to touching with a toothbrush." U.S. Br. 17. As this Court's jurisprudence concerning the searches of structures established, physical intrusion is no less of an encroachment because the intrusion involves an area occasionally exposed to public view. *See Jones*, 132 S. Ct. at 950, 952. Police cannot enter a home without a warrant merely because incriminating items inside the house are visible from outside. *See Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011); *Chapman v. United States*, 365 U.S. 610, 613-14 (1961). What is more, a brief glimpse of someone's inner cheek at best exposes dentistry, not the potentially incriminating information derived from microscopic DNA. And DNA is a far cry from fingerprints or other "'physical characteristics constantly exposed to the public'" that receive no Fourth Amendment

[3] This Court in *Skinner*, 489 U.S. 602, permitted a blood draw and other testing on less than a warrant and probable cause, but in far different circumstances. There, the search was of railroad employees engaged in safety-sensitive tasks who effectively consented to these intrusions by participating in a pervasively regulated industry and were on notice of the "circumstances justifying toxicological testing and the permissible limits of such intrusions." *Id.* at 622, 627; *see also Ferguson v. City of Charleston*, 532 U.S. 67, 90-91 (2001) (Kennedy, J., concurring in judgment).

protection. *Cupp*, 412 U.S. at 295 (quoting *United States v. Dionisio*, 410 U.S. 1, 14 (1973)); *see also Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

2. No Exigency Excuses the State from Failing to Obtain a Warrant to Collect Arrestee DNA Samples

Nor does collecting DNA from a person's body fall within any relevant exception to the warrant requirement. If a search involves "exigent circumstances," this Court has been willing on occasion to dispense with the warrant requirement and engage in balancing the interests "rather than employing a *per se* rule of unreasonableness." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). Those circumstances are absent here.

This Court has found that drawing blood from a driver suspected of driving under the influence, for example, is permissible without a warrant only when the time spent obtaining a warrant, transporting the suspect to the hospital, and investigating the accident scene would have allowed evidence of blood-alcohol content to dissipate. *Schmerber*, 384 U.S. at 770-71. This Court likewise has held that police officers could scrape beneath a suspect's fingerprints for visible blood residue without a warrant where the suspect was attempting to destroy this incriminating and "highly evanescent evidence." *Cupp*, 412 U.S. at 296. Even then, such searches are ordinarily reasonable only if they are predicated upon probable cause. Any lesser standard is categorically foreclosed, since "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber*, 384 U.S. at 769-70; *see also Winston*, 470 U.S. at 760-61.

Unlike those cases, the collection of respondent's DNA involves no exigency. Indeed, DNA is useful to law enforcement precisely because it cannot be hidden, destroyed, or altered. Far from needing to take a spur-of-the-moment DNA sample lest the opportunity be lost, the state has ample opportunity to take DNA samples from arrestees like respondent who are often in pretrial detention for months between arraignment and trial. And even if exigency were involved, there was no probable cause—or even any reason at all—to believe that respondent's DNA might have any connection to a crime, let alone a past, unsolved crime.

B. The Balance of Interests Alone Does Not Determine Reasonableness Even for Less Intrusive Bodily Searches

Some less-than-"full-blown" searches—most obviously, a "stop and frisk" by a police officer who observes suspicious behavior while on patrol—may be reasonable even without a warrant or probable cause. *Terry v. Ohio*, 392 U.S. 1, 19-21 (1968); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975).

The state's extraction of DNA from inside a person's mouth is hardly the equivalent of a pat-down in the field. But even if DNA collection were considered a minimal intrusion, it would not be reasonable merely if the state's interests in obtaining the DNA outweighed respondent's privacy interests, as petitioner and the United States contend. Departures from the norms of a warrant and probable cause have never been justified merely because the balance of interests favors the government. At minimum, some obvious indication that a warrant and probable cause would be impracticable has always been necessary. Even then, the requirement that the police have some

degree of individualized suspicion remains a strong default rule, and cannot be bypassed merely because the balance of interests purportedly favors the government.

1. Even Less Intrusive Searches Can Dispense with a Warrant and Probable Cause Only by Showing Those Requirements Are Impracticable

Because "the Fourth Amendment governs all intrusions by agents of the public upon personal security," less than "full-blown search[es]" are nonetheless subject to the Fourth Amendment's baseline presumptions of a warrant and probable cause. *Terry*, 392 U.S. at 17 n.15, 19, 20; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). Thus, "[i]n assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but . . . whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967).

Accordingly, while the circumstances of these less-than-full searches vary, one constant runs through them: the nature of each search is incompatible with the full requirements of a warrant and probable cause. A warrant and probable cause are impracticable when police conduct a brief "stop and frisk" because such procedures involve "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat." *Terry*, 392 U.S. at 20. A warrant and probable cause would thwart the element of surprise essential to effective searches of probationers' houses, because "probationers have

even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal." *United States v. Knights*, 534 U.S. 112, 120 (2001). All "special needs" cases by definition involve "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable." *City of Ontario v. Quon*, 130 S. Ct. 2619, 2628 (2011) (citation and quotation marks omitted).[4] In all of these cases, in sum, this Court has required something more than the ever-present challenge law enforcement personnel face in identifying and investigating suspects who might have committed crimes.

This case involves no valid justification for dispensing with a warrant and probable cause, and is thus unreasonable regardless of the balance of interests involved. *See Camara*, 387 U.S. at 533. Unlike petitioner, the United States at least acknowledges that the impracticability of a warrant and probable cause is a "feature[]" beyond the "relative strength of . . . interests" that often defines the reasonableness of a search. U.S. Br. 32. But the United States' extra-

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[4] Thus, for example, in the school context, a warrant and probable cause would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *T.L.O.*, 469 at 340, 341; *see also Bd. of Educ. v. Earls*, 536 U.S. 822, 828-29 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). For drug testing in certain occupations, a warrant and probable cause would frustrate the need to discover "latent or hidden" usage of contraband and "prevent their development." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667-68 (1989); *see also Skinner*, 489 U.S. at 622-24, 631. And for government employees, they would "seriously disrupt the routine conduct of business." *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987) (plurality).

ordinary contention that obtaining a warrant to collect respondent's DNA would have been impracticable because it would "jeopardize the benefits" of DNA collection, U.S. Br. 32-33, confuses convenience with necessity. The only conceivable obstacle a warrant presents here is the requirement of probable cause—the very difficulty that the Framers intended to impose.

2. Individualized Suspicion Is the Default Required for Less Intrusive Searches

Balancing alone could not render the collection of respondent's DNA a reasonable search even if a warrant and probable cause were impracticable. That is because balancing the interests in these cases begins from the "main rule" that the Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 308, 313 (1997). In other words, the strong presumption is that there must be "a suspicion that the particular individual being stopped is engaged in wrongdoing," and, in the context of a search, that the search of a particular person will yield evidence of wrongdoing. *United States v. Cortez*, 449 U.S. 411, 418 (1981).

Petitioner and the United States rightly decline to argue that there was any individualized suspicion here: the state concededly had no reason to suspect respondent of any offense other than the one for which he was arrested, let alone believe that his DNA would connect him to any crime. They instead reason that because individualized suspicion is not an "indispensable component of reasonableness in every circumstance," *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989), it is no

requirement at all. Under their position, individualized suspicion is the Fourth Amendment equivalent of extra credit: encouraged but unnecessary if the government's interests already tipped the scales. Pet. Br. 12; U.S. Br. 11-12. All that the Fourth Amendment means by reasonableness, they suggest, is that the government's interest in the search prevails. *See id.*

That position discards "the central teaching of this Court's Fourth Amendment jurisprudence," the "demand for specificity in the information upon which police action is predicated." *Terry*, 392 U.S. at 21 n.18; *see also Vernonia School District 47J v. Acton*, 515 U.S. 644, 678 (1995) (O'Connor, J., dissenting). Though individualized suspicion is not required *per se*, it does not follow that individualized suspicion has *no* relevance to whether a search is reasonable, nor that the balance of interests alone is the only determinant of whether any warrantless search is reasonable. Were that so, the warrantless, suspicionless search in *Ferguson*, in which the state had a compelling need to prevent cocaine abuse during pregnancy by testing expectant mothers, would have easily been upheld. *Ferguson v. City of Charleston*, 532 U.S. 67, 70-72, 81 (2001). So, too, would the state's paramount interest in stopping and searching all cars at a roadblock for illegal drugs have justified the search and seizure in *Edmond*. 531 U.S. at 40-41.

By downgrading individualized suspicion from a presumptive constraint on official action to an afterthought, the approach petitioner and the United States advance would also vitiate the concerns that spurred the Fourth Amendment's creation. "Nothing is more clear," this Court has said, "than that the Fourth Amendment was meant to prevent wholesale

intrusions upon the personal security of our citizenry." *Davis*, 394 U.S. at 726. Among the most oppressive measures the British crown employed against American colonists were "promiscuous" and "dragnet searches" of houses. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, *602-1791*, at 518-21, 696-99 (1990) (Ph.D dissertation, Claremont Graduate School). The founding generation objected strenuously to subjecting the doors of the "impenetrable Castles of freemen" to "perpetual invasion" through the indiscriminate use of blanket searches, with or without warrants. *Id.* at 1375-82; 1402; 1499-1501. Indeed, they opposed general warrants precisely because "no offenders names are specified in the warrant." *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (C.B. 1763); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 576-89 (1999). With the revolution won and the republic in its infancy, the Framers viewed the requirement that the government have some basis for singling out an individual before instigating an intrusion as perhaps the greatest protection against the abuses they had suffered. *See* Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. Mem. L. Rev. 483, 526-30 (1995); *Henry v. United States*, 361 U.S. 98, 100-01 (1959). That understanding not only underpinned the Fourth Amendment's requirements of particularity and probable cause to obtain a warrant, but the entire notion of what constituted a "reasonable" search. Clancy, at 526-30.

Individualized suspicion remains a bulwark against arbitrary intrusion under this Court's precedents. Requiring some modicum of suspicion as a precondition of police action guards against "intru-

sions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Terry*, 392 U.S. at 22. It is the last, best safeguard against "arbitrary invasions solely at the unfettered discretion of officers in the field," and provides an objective metric against which an officer's actions can be judged. *Brown v. Texas*, 443 U.S. 47, 51 (1979). Individualized suspicion limits the scope of the government's potential intrusions; the state's potentially immense investigatory powers single out an individual only when the state has reason to suspect that a particular person has committed a particular crime. *Ybarra v. Illinois*, 444 U.S. 85, 90-91 (1979). The requirement of individualized suspicion likewise cedes some control to individuals to dictate their relationship to the state: by avoiding wrongful behavior, they may minimize the possibility of the intrusion in the first place. *See Vernonia*, 515 U.S. at 667 (O'Connor, J., dissenting). A blanket warrantless, suspicionless search instead indiscriminately intrudes upon the many who have done nothing to bring themselves within the ambit of the state. *See, e.g.*, *Brignoni-Ponce*, 422 U.S. at 882; *Carroll v. United States*, 267 U.S. 132, 153-54 (1925). It is little surprise, then, that this Court has considered searches that depart from the individualized-suspicion standard reasonable only if there are strong justifications—absent here—for departing from this standard.

C. The State's Collection of DNA from Arrestees Falls Outside the Limited Circumstances Permitting Warrantless, Suspicionless Searches

Warrantless, suspicionless searches are "forbid[den] . . . in the absence of special circumstances." *Illinois*

v. Lidster, 540 U.S. 419, 423 (2004). These special circumstances must be "particularized," *Chandler*, 520 U.S. at 313, and are "limited," *Edmond*, 531 U.S. at 37. They are present only if it is necessary—not just preferable or convenient—for the government to subject every member of an identified group to a search. Even then, this Court has recognized only two types of permissible suspicionless searches: searches that present a "special need" and searches of parolees. The collection of DNA from arrestees fits neither category. Nor can it be justified as a new exception.

1. Suspicionless Searches Are Reasonable Only If There Is Some Justification Why Individualized Suspicion Would Be Impracticable

There is no basis for resorting to balancing to gauge the reasonableness of collecting respondent's DNA, or even considering whether this case falls into one of the two narrow exceptions allowing suspicionless searches. That is because the search here lacks a key criterion always required of suspicionless searches: justification for why individualized suspicion would be impracticable. Only if "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion," might "a search . . . be reasonable despite the absence of such suspicion." *Skinner*, 489 U.S. at 624. This criterion is not just a "feature[]" common among cases upholding suspicionless searches, U.S. Br. 32, but the heart of the reasonableness inquiry.

This Court has upheld warrantless, suspicionless searches only after confirming that individualized suspicion would be incompatible with the objectives of the search. For example, requiring individualized suspicion would be impracticable for most administrative searches because "the Government seeks to *prevent* the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." *Von Raab*, 489 U.S. at 668; *see also Camara*, 387 U.S. at 537. The need to avert a potentially imminent public danger demands immediate action; by the time suspicion crystallizes, the harm may have already come to pass.

Similarly, random, suspicionless drug tests of high school athletes in a school plagued by a drug epidemic were essential because "[d]rug testing on suspicion of drug use" would pose "substantial difficulties—if it is indeed practicable at all" given that drug-impaired individuals seldom display signs detectable by lay persons. *Vernonia*, 515 U.S. at 663-64. And individualized suspicion was impracticable when police urgently sought witnesses to a recent hit-and-run accident by setting up a roadblock near the accident site. "Like . . . crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual." *Lidster*, 540 U.S. at 424-25. Police had no recourse but to stop all cars because no discernible behavior—beyond perhaps the possibility that witnesses might travel the same road again—

would ever distinguish witnesses from ordinary citizens. *Id.* at 423.[5]

The state's asserted need to collect DNA samples from all arrestees fundamentally differs from those searches. The state seeks to search all arrestees because it does not know which arrestees may have left behind DNA at crime scenes in cold cases. Pet. Br. 23. In this case, individualized suspicion has no role to play only in the sense that the state wishes to save time and money by searching all arrestees as a class, rather than expending investigative resources to support each search with individualized suspicion. *Id.*; U.S. Br. 32. Requiring individualized suspicion is hardly incompatible with solving crimes; it is instead the constitutional norm.

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[5] *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (individualized suspicion impracticable "because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"); *Skinner*, 489 U.S. at 628, 631 ("Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident."); *Camara*, 387 U.S. at 535 (requiring individualized suspicion would undermine "the only effective way to seek universal compliance" with municipal safety codes); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1520-22 (2012) (requiring officers to decide which detainees to strip search for contraband based on seriousness of offense as predictor would be unworkable); *Bell v. Wolfish*, 441 U.S. 520, 559-60 & n.40 (1979) (individualized suspicion impracticable because in order for suspicion to crystallize, officers would have to closely observe prisoners during contact visits at the price of "the confidentiality and intimacy that these visits are intended to afford").

2. DNA Collection from Arrestees Does Not Fall Within the "Special Needs" or Parolee Exceptions

Only if a suspicionless search falls into one of two narrowly defined categories has this Court ever determined that the balance of interests renders the search reasonable. Those two categories are searches in which "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment), and searches involving parolees who have consented to random searching as a condition of parole, *Samson*, 547 U.S. at 847. Some members of this Court have suggested that even these exceptions may be over-broad in light of the "doubt" that "the Framers . . . would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing." *Edmond*, 531 U.S. at 56 (Thomas, J., dissenting). In any event, neither the "special needs" exception nor the parolee exception encompasses the collection of DNA samples from arrestees.

a. Traditionally, searches that raised "special needs" were the only category of suspicionless searches this Court recognized as constitutionally permissible.[6] *Cf.*

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[6] Searches incident to lawful arrest are not suspicionless *per se*, because probable cause for the underlying arrest singles out the individual being arrested. And the authority to search incident to arrest does not extend to evidence of other crimes for which officials have no individualized suspicion. *Arizona v. Gant*, 556 U.S. 332, 339, 343-44 (2009). In any event, neither petitioner nor the United States seriously contends that the search here could be justified based on search-incident-to-arrest doctrine. And as respondent argues, the doctrine is inapplicable to the facts in this case. Resp. Br. 33-34.

Samson, 547 U.S. at 855 n.4. And like virtually every other Fourth Amendment doctrine, "special needs" cases do not balance interests first and consider other constraints on reasonableness later. To the contrary, the "special needs" doctrine insulates otherwise unlawful suspicionless searches only if, after a rigorous inquiry into the search's underlying purpose, the Court is satisfied that the asserted "special need" is for "prophylactic and distinctly *non*punitive purposes." *Vernonia*, 515 U.S. at 658 n.12; *see also Ferguson*, 532 U.S. at 79-80; *Edmond*, 531 U.S. at 41-42. If the "primary purpose" of the search is instead to ease the way for a criminal investigation, the search is impermissible irrespective of the government's asserted purpose, and regardless of how the respective interests might have balanced. *Edmond*, 531 U.S. at 42-43.

Given this threshold constraint, the kinds of searches permitted under this doctrine fall into predictable patterns, namely random drug tests of groups whose use of illegal drugs would create particular safety hazards or other risks, *e.g.*, *Von Raab*, 489 U.S. at 666; *Vernonia*, 515 U.S. at 661-62; *Skinner*, 489 U.S. at 620-21, random searches of prisoners whose access to contraband and makeshift weapons must be vigorously monitored to protect the safe administration of the prison system, *e.g.*, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1517 (2012); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), and random administrative searches of buildings or businesses for safety violations, *e.g.*, *Michigan v. Tyler*, 436 U.S. 499, 507-09, 511-12 (1978); *Camara*, 387 U.S. at 534-39.

In every instance when this Court has considered such searches reasonable, it has placed great weight

on the fact that any evidence discovered was either kept private and never disclosed to the police as a matter of policy, *e.g. Von Raab*, 489 U.S. at 666; *Skinner*, 489 U.S. at 621 n.5, or was part of a safety inspection regime executed outside the law enforcement process, *e.g.*, *Camara*, 387 U.S. at 535.

Tellingly, petitioner does not argue that the state's collection of respondent's DNA presents a similar "special need." Indeed, petitioner mentioned the "special needs" doctrine so fleetingly below, *see King v. Maryland*, 42 A.3d 549, 557 (Md. 2012), that the argument should be considered forfeited. *Jones*, 132 S. Ct. at 954. And the United States half-heartedly argues in a footnote that the collection of respondent's DNA served a number of non-law enforcement purposes, in addition to the goal of solving cold cases. U.S. Br. 32 n.12.

The United States' belated portrayal of the collection of respondent's DNA as a search driven by anything other than solving crimes is futile. This Court has never taken the government's invocation of a "special need" at face value. *Ferguson*, 532 U.S. at 81; *Edmond*, 531 U.S. at 41-42. And for all the reasons respondent has catalogued, there can be no question that Maryland mandated the collection of arrestees' DNA primarily because it sought to solve more cold cases. Resp. Br. 28-29.

Nor is there any dispute that the collection of DNA samples from arrestees like respondent is performed by law enforcement officers and intimately tied to the criminal justice system at every stage. Respondent's DNA was entered into CODIS—a system accessible to, and used by, law enforcement officials and criminal justice agencies. And when respondent's DNA produced a match to a cold case, the match served as

probable cause for a warrant to obtain another sample, which in turn led directly to petitioner's indictment for the unsolved sexual assault.

b. Because this case plainly does not implicate a "special need," petitioner and the United States hang their justification for this search on the proposition that the parolee exception articulated in *Samson v. California*, 547 U.S. 843 (2006), extends to arrestees. *See* Pet. Br. 12-13; U.S. Br. 13-14. In *Samson*, this Court approved a police officer's warrantless, suspicionless stop and search of a parolee, who was found carrying methamphetamine; his parole was revoked, and he was prosecuted for drug possession. 547 U.S. at 846-47. *Samson* deemed that search permissible after reiterating that balancing the interests is the "general Fourth Amendment approach" used to determine reasonableness, *id.* at 848—a statement the petitioner and the United States read broadly to cast aside decades of this Court's jurisprudence and endorse their balancing-only approach. Pet. Br. 12-13; U.S. Br. 13.

Samson approved the suspicionless search there by stressing the "severely diminished expectations of privacy by virtue of [parolees'] status alone." 547 U.S. at 852. To petitioner and the United States, *Samson* thus extends to the search here: arrestees, they say, have nearly as reduced privacy expectations as parolees because arrest prompts extensive governmental intrusions and supervision. Arrestees thus have virtually no expectation of privacy in their DNA, or in anything else, they conclude, and the state's interests in using that DNA appear vast in comparison. Pet. Br. 8-10, 16-18; U.S. Br. 14-16, 31-32.

Samson, however, did not elevate the balance of interests above all other indicia of reasonableness,

and its holding should not be extended beyond parolees. To the contrary, *Samson* involved long-standing bases for departing from the warrant and individualized-suspicion requirements. The search in *Samson* involved a brief, chance encounter in which a police officer stopped and searched Samson during a routine patrol. 547 U.S. at 846. That, of course, is precisely the type of search for which the warrant and probable cause requirements have long been relaxed even as to ordinary citizens. *See, e.g.*, *Terry*, 392 U.S. at 20.

Samson's status as a parolee also implicated more than just his privacy interests. As the Court emphasized, parolees' rapid and deft ability and heightened incentive to conceal or destroy evidence of criminality make an individualized-suspicion requirement incompatible with the supervisory needs of the parole system. 547 U.S. at 854-55. And the state's purpose in closely supervising parolees goes well beyond ordinary crime prevention, and extends to reintegrating parolees into civil society at a vulnerable moment. *Id.* at 853. In sum, *Samson*'s reasoning relied on the same criteria this Court has always looked to before resorting to balancing—namely, the impracticability of a warrant and individualized suspicion. Irrespective of whether *Samson* considered these criteria within a more expansive "balancing" inquiry or instead as threshold considerations, they remain independent and indispensable elements of reasonableness—and, as noted above, they are entirely absent from the search here.

Nor is it plausible to read *Samson* as a sea change in this Court's Fourth Amendment jurisprudence in which this Court endorsed *sub silentio* the reasonableness of any type of suspicionless search so long as

the balance of interests favors the government. The narrowness of *Samson*'s holding is evident from the question presented: "whether a suspicionless search, conducted under the authority" of a statute providing that "every prisoner eligible for release on state parole 'shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time . . . with or without a search warrant and with or without cause,'" is consistent with the Fourth Amendment. 547 U.S. at 846.

The proper reading of *Samson* is that parole presents unique circumstances that make suspicionless searches of parolees reasonable regardless of whether the search also presents "special needs." The two fundamental characteristics of parole, *Samson* stated, are that it is "an established variation on imprisonment of convicted criminals," *id.* at 850 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972)), and that it is a "release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence," *id.* Taken together, the Court held that these two characteristics deprived Samson of *any* legitimate expectation of privacy—and accordingly any grounds for objecting to a suspicionless search of his outer pockets. *Id.* at 852.

Samson thus cannot be extended to authorize suspicionless searches of arrestees in the first instance; to do so would ignore the dispositive role conviction plays in circumscribing constitutional rights. Prior to conviction, arrestees' expectations of privacy can indeed be encroached upon in numerous ways—for instance through searches incident to arrest and the exhaustive visual searches of one's body and cell that occur during pretrial detention.

See Pet. Br. 17; U.S. Br. 15-16. The extent of those intrusions, however, is always carefully tailored to the needs justifying those searches. The authority to search incident to arrest extends only far enough to protect officer safety and preserve evidence of the offense of arrest; only an arrestee's person and immediate surroundings can be searched. *Gant*, 556 U.S. at 339. And the extent of a search that a pretrial detainee can be subjected to while in custody extends only as far as the specific needs of prison administration demand—*e.g.*, to protecting guards and other prisoners against the hazards of contraband and smuggled weapons. *Florence*, 132 S. Ct. 1510. It does not follow that because arrestees' expectations of privacy are diminished in these carefully defined ways, their entire "store of privacy," including in their DNA, is virtually empty, and that any intrusion is presumably permissible. Pet. Br. 16-17; U.S. Br. 16.

Conviction is "transformative." *United States v. Kincade*, 379 F.3d 813, 834 (9th Cir. 2004). This Court has indicated that conviction not only subjects convicts to a "continuum of state-imposed punishments," *Samson*, 547 U.S. at 850 (citation and quotation marks omitted); it also categorically reduces convicts' expectation of privacy—and entitlement to a number of other rights—as a consequence of their breach of the social contract. Convicts may be prohibited from exercising Second Amendment rights, irrespective of whether the crime for which they were convicted involved a handgun or was even violent. *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008); *see also United States v. Vongxay*, 594 F.3d 1111, 1113-18 (9th Cir. 2010). Convicts may be deprived of the right to vote. *Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974). They may be subject to

licensing and employment restrictions, and may lose access to benefits such as health care, food stamps, housing assistance, and educational loans. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 705-06 (2002). So, too, has this Court held that their Fourth Amendment rights are diminished even beyond what the administration of the prison system demands, because "under our system of justice, deterrence and retribution are factors in addition to correction." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). When convicts—including parolees and probationers—are subject to any search, this Court has described their expectations of privacy as diminished *per se* because their unlawful conduct has deprived them of a full entitlement to the Fourth Amendment's protections. That is why collecting convicts' DNA, as opposed to obtaining samples from arrestees like respondent, may not violate the Fourth Amendment.

Parolees differ from arrestees in one other way that *Samson* considered critical: parolees, unlike arrestees, chose their status, and were at least aware of the Fourth Amendment protections they might be losing as a result of their choice. The "essence of parole" is that the remainder of a parolee's sentence is served outside prison, "on the condition that the prisoner abide by certain rules during the balance of the sentence." *Samson*, 547 U.S. at 850 (quoting *Morrissey*, 408 U.S. at 477). A parolee may avoid the restrictions of prison—strip-searches, total constraints upon one's movement, and constant surveillance—by agreeing to rules as far-reaching as abstaining from alcohol, never traveling more than fifty miles without permission, and, critically, being subject to suspicionless searches at any

time. *Id.* at 851-52. Not only are these conditions generally permissible elements of parole; Samson "signed an order" accepting that he could be searched for no reason at any time, and was thus "'unambiguously' aware" of the condition. *Id.* at 852 (citation omitted). He thereby diminished his already-low expectation of privacy to a point where he "did not have an expectation of privacy that society would recognize as legitimate." *Id.* Arrestees, by contrast, have no such control over when they will be arrested, nor any opportunity to choose among the relative constraints they may face. Respondent certainly faced no choice as to whether to abandon any expectation of privacy in his DNA—and *Samson* accordingly cannot be extended to justify this search.

3. This Court Should Not Create a New Category of Permissible Suspicionless Searches to Fit This Case

To date, the bright-line principle that has kept mass suspicionless searches to a minimum has been that such searches cannot be undertaken for a law enforcement purpose. This Court has long expressed "particular[] reluctan[ce] to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends." *Edmond*, 531 U.S. at 43; *see also Ferguson*, 532 U.S at 88 (Kennedy, J., concurring in judgment). That reluctance is well-founded, because warrantless, suspicionless searches offer fewer opportunities for abuse, and have less grave consequences, only when the fruits of such searches are not used to deprive anyone of their liberty through prosecution. Non-law enforcement searches accordingly represent a "less hostile intrusion" than the "great bulk of Fourth Amendment

cases," which involve "the typical policeman's search for the fruits and instrumentalities of crime." *Camara*, 387 U.S. at 530. *Samson* did not weaken the validity of this rule. Even aside from Samson's acknowledgement that he would be subject at any time to suspicionless searches, this Court has long recognized that the administration of the parole system—including the detection and prevention of recidivism during a particularly fragile period—serves purposes distinguishable from ordinary law enforcement functions. *See Samson*, 547 U.S. at 853; *Morrissey*, 408 U.S. at 478; *cf. Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987).

Petitioner and the United States would substitute that rule with a balancing-only inquiry that places no limit on the scope or type of suspicionless searches that might be considered reasonable. There is certainly no obvious limit to the logic of petitioner's and the United States' argument that "the results of the balancing test may permit the government to dispense" with the "conditions" of a warrant and individualized suspicion when "the governmental need is especially great." U.S. Br. 8, 12. Many intrusions could be characterized as "de minimis," at least in comparison to a far-reaching social evil the government hopes to solve.

Indeed, arrestees stand in no different position from law-abiding individuals in society who pass through an airport, or travel in a car. Until the moment of conviction, arrest is a "transient status." *Kincade*, 379 F.3d at 836. Many arrestees are never charged, others have charges dismissed when a magistrate determines that there was insufficient cause for the arrest, others have charges dismissed for insufficiency at later phases, and still others are

exonerated. Beyond the limited intrusions on privacy during their period of arrest, which are permitted to ensure the safety of those who have taken them into custody, arrestees' expectation of privacy is not diminished whatsoever. The only difference is that arrestees have come into incidental contact with law enforcement. And it is no exaggeration to say that literally hundreds of thousands are arrested annually in this country. In other words, if the Fourth Amendment does not preclude law enforcement from subjecting arrestees to generalized, exploratory searches merely because of their temporary status as arrestees, then it would not prohibit law enforcement from taking swabs from every person.

In light of these concerns, this Court has long held that "'the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.'" *Ferguson*, 532 U.S. at 86 (quoting *Edmond*, 531 U.S. at 42-43). Approving the search in this case would thus mark a dramatic departure from this Court's prior cases, and a dangerous one as well. If the balance of interests alone dictated when a suspicionless search is reasonable, mass searches could well become "a routine part of American life." *Edmond*, 531 U.S. at 42. There would no longer be any absolute bar on "random area searches which are no more than 'fishing expeditions' for evidence to support prosecutions." *Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973) (Powell, J., concurring). There would no longer be any principle limiting the types of permissible suspicionless searches. This Court has consistently rejected proposed exceptions to the warrant and individualized-suspicion requirements that would swallow the rule. *See, e.g.*, *Dunaway v. New York*, 442 U.S. 200, 213 (1979);

Mincey v. Arizona, 437 U.S. 385, 393 (1978); *Chimel v. California*, 395 U.S. 752, 765 (1969). It should do so here as well.

* * * * *

Petitioner and the United States have advanced a view of the Fourth Amendment that would deprive searches of all safeguards save the malleable requirement that the government's interests prove superior to the individual's. This Court has always rejected that view, and should do so again. "[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases," this Court has explained. *Dunaway*, 442 U.S. at 213. As this Court recently reiterated, the "core protection" of any "enumerated constitutional right" cannot be wholly contingent upon "a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. That is because "the very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* Petitioner and the United States' radical departure from that principle should be rejected.

CONCLUSION

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

Respectfully submitted,

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