No. 12-207

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,
v.
ALONZO J. KING, JR.
Respondent.

On Writ of Certiorari to the Maryland Court of Appeals

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND THE NATIONAL SHERIFFS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LISA E. SORONEN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

RICHARD WEINTRAUB
NATIONAL SHERIFFS' ASSOCIATION
1450 Duke Street
Alexandria, VA 22314
(800) 424-7827
rmwein1948@gmail.com

PRASHANT K. KHETAN*
MILIND PAREKH
TYLER S. MERTES
WILLIAM P. PIPAL
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2950
prashant.khetan@troutmansanders.com

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICI CURIAE* [1]

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 States, three Territories, and two Commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

3,068 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National Sheriffs' Association is a § 501(c)(4) non-profit formed in 1940, which promotes the fair and efficient administration of criminal justice throughout the United States; and, in particular, in advancing and protecting the Office of Sheriffs throughout the United States. The Association has over 21,000 members and is the advocate for over 3,000 sheriffs located throughout the United States. The National Sheriffs' Association promotes the public interest goals and policies of law enforcement in the nation, and it participates in judicial processes where the vital interests of law enforcement and its members are being affected. The

National Sheriffs' Association supports the continued use of DNA testing by local, state, and federal law enforcement authorities as a routine law enforcement practice in the twenty-first century. Today, DNA samples are commonly used as reliable evidence throughout our Nation's criminal justice systems to solve a full range of major crimes.

Amici represent state and local governments and governmental officials in urging this Court to reverse the decision of the Maryland Court of Appeals. These groups have a strong interest in this Court upholding statutes enacted by state legislatures. This is especially true for criminal law statutes since this area of the law is generally within the purview of state and local governments. *Amici* concur with the arguments made by Petitioner and the other *amici* supporting it. *Amici* will not repeat those arguments here. Rather, *amici* submit this brief to highlight that affirming the Maryland Court of Appeals' decision amounts to rejecting the policy interests of state legislatures and taking away from state and local officials the discretion they need to enact statutes that protect their citizens and provide for the efficient enforcement of criminal law within their jurisdiction.

SUMMARY OF THE ARGUMENT

A foundational principle of our democratic government is that legislatures are tasked with the duty of creating laws. Accordingly, statutes enacted by state legislatures are accorded deference by this Court and are presumed constitutional. This is especially true when the statute in question pertains to criminal law. Criminal law is almost exclusively within the province of state and local governments and, therefore, their policy decisions in this area should be accorded significant deference. State legislatures

that have enacted DNA arrest laws have recognized the efficacy and importance of these laws in aiding both crime prevention and crime detection. Accordingly, their policy decisions should not be second-guessed by the courts.

Moreover, states that have enacted DNA arrest laws have narrowly tailored these laws to balance the privacy interests of arrestees with the substantial benefit to state and local law enforcement that comes from collecting arrestee DNA. The statutes limit DNA sampling to arrests for felonies or other violent crimes. They also contain expungement provisions in instances where the arrestee is not subsequently convicted of an offense. Finally, they contain additional safeguards that are aimed at protecting the privacy of arrestees.

For all of these reasons, and those set forth in the briefs submitted by Petitioner and the other *amici* supporting it, this Court should reverse the judgment of the Maryland Court of Appeals.

ARGUMENT

I. STATE DNA ARREST LAWS, AND STATE STATUTES MORE GENERALLY, ARE PRESUMED CONSTITUTIONAL.

A. State Legislatures Are Responsible for Enacting Laws.

The authority to enact laws and, by necessity, make policy decisions, rests with state legislatures. For more than 200 years, the legislative branch of government has been recognized as having the authority to make policy decisions regarding the development of the law. Indeed, Alexander Hamilton, in considering the role of legislatures, once wrote that

"[t]he legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated." THE FEDERALIST NO. 78 (Alexander Hamilton). The judiciary has the more limited role of applying the law in each case and reviewing legislative enactments to determine whether they are in accord with the Constitution. *See Trop v. Dulles*, 365 U.S. 86, 119-20 (1958) ("When the power of Congress to pass a statute is challenged, the function of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power . . . ."). This separation between the power to make law and policy and the power to judge and interpret laws is a fundamental tenet of our democratic society. U.S. CONST. art. II-V; *Evans v. Gore*, 253 U.S. 245, 249 (1920) (discussing separation of powers).

These doctrines are applicable to the instant case as this Court is asked to review the constitutionality of Maryland's DNA Collection Act, MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis 2012), which was duly enacted by Maryland's legislature (Maryland's DNA Collection Act).[2] Maryland's DNA Collection Act, and other statutes like it (collectively, DNA arrest laws) reflect a policy decision of the legislature and are entitled to deference by this Court based on longstanding precedent.

While the Fourth Amendment protection against unreasonable searches is an important right contained in the U.S. Constitution, its scope is not unlimited. *See*, *e.g.*, *Samson v. California*, 547 U.S. 843 (2006); *United States v. Knights*, 534 U.S. 112 (2001) (state statutes allowing searches without sus-

[2] This law is very similar to a significant number of other state statutes. *See* discussion *infra* Part II.C.

picion of criminal activity upheld as constitutional). States have a significant role in defining criminal law, and DNA arrest laws are an appropriate exercise of that role.

B. This Court Should Defer to Maryland Legislature's Law because the Legislature is Tasked to Make Policy Decisions through Criminal Statutes that are Presumed Constitutional.

It is a well-settled principle of law that legislatures, not the judiciary, are tasked with the power to enact policy; this principle has been recognized by the federal judiciary since the seminal case of *Marbury v. Madison*. In that case, this Court recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law is[,]" not what the law should be. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Accordingly, this Court has consistently acknowledged that the judiciary should refrain from judging "the wisdom, fairness, or logic of legislative choices." *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also Gregg v. Georgia*, 428 U.S. 153, 174 (1976) (noting that the Court has a "limited role" in judging requirements of certain portions of the Bill of Rights). Of course, this Court is not merely a bystander, but as Justice Stewart eloquently noted while analyzing the parameters of the Eighth Amendment, "while [the Court] has an obligation to insure that constitutional bounds are not overreached, [the Court] may not act as judges as we might as legislators." *Gregg*, 428 U.S. at 174-75.

Instead, this Court has opined that "'[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judi-

cial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" *Beach Commc'ns*, 508 U.S. at 314 (quoting *Vance v. Bradley*, 440 U.S. 93 (1979)). This Court has further emphasized the importance of leaving policy decisions to legislatures "where the legislature must necessarily engage in a process of line-drawing[,]" as the state of Maryland has done here. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Accordingly, in reviewing statutes enacted by state legislatures, the judiciary must refrain from over-reaching and making decisions regarding public policy that are more appropriately left to the purview of state and local governments. In this case, Maryland, like 27 other states, has properly decided that enacting a DNA arrest law is in the best interests of public policy because of the effect the law can have on crime prevention and citizen safety.

Due to the deference accorded to state legislatures, this Court has frequently noted that state statutes are presumed constitutional. *See, e.g.*, *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969); *see also Galloway v. State*, 781 A.2d 851, 857-58 (Md. 2001) ("In determining the constitutionality of statutes, the basic rule is that there is a presumption that the statute is valid.") (internal citations omitted). Additionally, this Court has provided that if it is possible, it will refrain from declaring a law unconstitutional. *See*, *e.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). As such, a heavy burden rests on those who would attack the judgment of representatives of the people, as Respondent seeks to do here. *Gregg*, 428 U.S. at 176.

As legislative enactments by various state legislatures, DNA arrest laws should be presumed constitu-

tional. As this Court is aware, nearly 30 state legislatures have authorized the collection of DNA samples from those arrested for certain felony offenses.[3] Each state that has enacted these statutes has carefully considered their constitutionality and scope to tailor each statute in accordance with the requirements of the federal Constitution.[4] By necessity, the decision of where to draw the line with respect to DNA database laws is chosen by state legislatures. These types of policy decisions are properly left to those entrusted and chosen by the people to be their voice and conscience with respect to the creation of new laws.

Finally, because state and local governments play such a vital role in defining and enforcing criminal law, their decisions in this area in particular should be given significant deference. This Court has astutely noted that under our "federal system, the States possess primary authority for defining and enforcing the criminal law." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotations and citations omitted); *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Presumably, this principle is based on the fact that individual state and local governments shoulder most of the nation's burden in handling criminal cases.

This reality is evidenced by the sheer number of cases handled by the individual states in comparison to the federal government. In 2010, the federal government disposed of approximately 98,000 criminal cases. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE

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[3] *See infra* Part II.C.1.

[4] *See infra* Part II.C.

STATISTICS ONLINE: CRIMINAL DEFENDANTS DISPOSED OF IN U.S. DISTRICT COURTS, BY OFFENSE AND TYPE OF DISPOSITION tbl. 5.24.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t5222010.pdf. By comparison, in 2010, Maryland alone disposed of approximately 250,000 criminal cases. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: BY OFFENSE CHARGED, AGE GRP., AND STATE, 2010 tbl. 4.5.2010 (2010), *available at* http://www.albany.edu/sourcebook/pdf/t452010.pdf. More populous states like Florida and California each disposed of in excess of one million cases. *See id*. In fact, only 13 states disposed of less criminal cases than the federal government, and nearly all of these states have populations below one million. *See id.*

These statistics are indicative of state and local governments' important responsibility with respect to enforcing criminal law within their jurisdictions. Moreover, the large number of criminal cases handled each year by state and local governments necessitates that state legislatures enact criminal laws that promote resource efficiency. Thus, the decisions of state legislatures regarding how best to effectuate an efficient and orderly criminal justice system should be given considerable weight.

II. STATES HAVE ADOPTED DNA ARREST LAWS BASED ON SOUND POLICY CONSIDERATIONS.

A. DNA Arrest Laws Protect Citizens and Help Aid in Crime Prevention.

State legislatures, who have the responsibility for making policy judgments about how to best improve public safety, have concluded that taking the DNA

of arrestees can protect the innocent by catching suspects faster, pursuing prosecutions more expeditiously, and convicting criminals early in their criminal "careers." This conclusion is based not on conjecture, but data and studies conducted in both the states and at the local level.

As a number of reports and studies have shown, it is rare that an individual commits a violent felony like rape or murder as his or her first offense. Instead, the typical "career path" of a criminal evolves from smaller petty crimes to more serious crimes. *See* JAY SIEGEL & SUSAN D. NARVESON, WHY ARRESTEE DNA LEGISLATION CAN SAVE INDIANA TAXPAYERS OVER $50 MILLION PER YEAR (Jan. 2009), *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Indiana%20Arrestee%20Legislation%20-%20Jan%2013%202009.pdf, and sources cited therein. Moreover, a study conducted in the 75 largest counties in the United States found that 64 percent of defendants had one or more felony arrests. BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf.

Maryland's DNA Collection Act is important not only to Maryland's law enforcement efforts, but to law enforcements efforts across the country as well. Currently, Maryland's DNA Collection Act permits the DNA that is taken from Maryland arrestees to be provided to any agency that participates in the Combined DNA Index System (CODIS), a federal database of all DNA profiles from participating states. MD. CODE ANN., PUB. SAFETY § 2-509(c)(2). This allows other states to access Maryland's DNA database information and determine if DNA collected

from crime scenes within their own borders matches any DNA from Maryland arrestees. Thus, obtaining DNA from arrestees in Maryland expands the national database, and enhances its ability to help solve and prevent crimes across the United States.

Any decision striking down the Maryland law as unconstitutional would potentially hamper law enforcement efforts nationwide and render the federal database less effective for other states and the federal government.

Several state and local government-sponsored studies focusing specifically on the public safety impact of DNA arrest laws have determined that if DNA testing of arrestees had been conducted earlier, it could have prevented later crimes. While most of these studies have looked at the impact of DNA collection at arrest as it relates to a few people—or even one person—it is striking how many violent crimes could have been prevented by DNA collection of a small number of people.

These studies illustrate that state legislatures did not pass DNA arrest laws in a vacuum. Instead, they relied on research that indicated adopting these laws would accomplish the sound public policy goals of deterring and solving crime.

1. The Maryland Study

A study conducted prior to the passage of Maryland's DNA Collection Act demonstrates the critical need for DNA arrest laws. The Maryland study was performed in support of the two bills that would eventually become Maryland Public Safety Code § 2-501. *See* MD. CRIMINAL JUSTICE INFO. SYS., MARYLAND STUDY ON PREVENTABLE CRIMES, *available at* http://www.dnaresource.com/documents/Maryland

DNAarresteestudy.pdf (last visited Dec. 11, 2012). The study examined the potential benefits of expanding DNA collection in Maryland to those arrested for violent crimes and burglaries. *Id.* The study analyzed the criminal histories of three offenders and concluded that if DNA samples had been taken upon their arrest, 20 crimes could have been prevented: eight rapes/sexual assaults, seven batteries/assaults, three robberies, two burglaries, and one murder. *Id.*

2. The Chicago Study

In 2005, the City of Chicago conducted a study of eight criminal recidivists over a 12 year period of time. CITY OF CHICAGO, CHICAGO'S STUDY ON PREVENTABLE CRIMES (2005), *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Chicago%20Preventable%20Crimes-Final.pdf. The eight individuals were identified as being responsible for 60 violent crimes, including 53 murders and rapes. *Id.* at 1. The study noted that these 60 violent crimes "could have been prevented if DNA had been treated as the 'fingerprint of the 21st century.'" *Id.* In each case, the offender had committed unsolved violent crimes that could have been solved *immediately* through a DNA match. *Id.* One particular felon was responsible for *11* different murders that might have been prevented had his DNA been taken upon his initial arrest. *Id.*

3. The Washington State Study

The State of Washington published a study discussing the actions of a serial rapist, Anthony Casper Dias, who was able to go on a major crime spree before he was identified and arrested. WASH. STATE, WASHINGTON STATE PREVENTABLE CRIME,

available at http://www.denverda.org/DNA_Documents/Arrestee_Database/WA%20Preventable%20Crime.pdf (last visited Dec. 20, 2012). On July 31, 2005, Dias was arrested for felony hit-and-run. *Id.* At the time of his arrest, no DNA arrest law existed and no DNA was taken. *Id.* Subsequently, Dias posted bond and was released from custody pending trial. *Id.* One month later, Dias raped a 19 year-old woman in her bedroom. *Id.* DNA was collected from this rape, but the perpetrator could not be identified because there was no matching DNA in the DNA database. *Id.* at 1-2. Dias continued his crime spree that summer and raped a total of eight women and girls. *Id.* It was not until November 8, 2005, one day after raping two young girls, that Dias was finally arrested. *Id.* Had law enforcement been able to take Dias' DNA after the hit-and-run in July of 2005, it is very likely that nearly all of the subsequent rapes could have been prevented. *See id.*

4. The Denver Study

The Denver District Attorney's office conducted a study that closely analyzed five individuals' criminal history. DENVER DISTRICT ATTORNEY'S OFFICE, CITY OF DENVER, DENVER'S STUDY ON PREVENTABLE CRIMES, *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Denver%20Preventable%20Crime%20Study1.pdf (last visited Dec. 20, 2012). The study concluded that had DNA been collected at arrest, 47 violent crimes could have been prevented, including three murders and 18 sexual assaults. *Id.*

B. State DNA Arrest Laws Have Enjoyed Considerable Success.

The numbers do not lie. While many DNA arrest laws are relatively new, state legislatures have not

been wrong in concluding that they would help solve and prevent crime. Across the country, state and local governments are experiencing the value of DNA arrest laws.

1. Success in Virginia

Virginia, which began arrestee DNA testing in 2003, shows how arrestee profiles can assist in solving and preventing crime. As of October 31, 2012, there were 356,112 DNA samples in Virginia's general DNA database, resulting in 8,344 hits. *See DNA Database Statistics*, DEP'T OF FORENSIC SCIENCE, STATE OF VA., http://www.dfs.virginia.gov/statistics/index.cfm (last updated Oct. 31, 2012). These hits have aided law enforcement efforts in 8,900 criminal investigations, including 1,126 sex crimes and 607 murders. *Id.* As of October 31, 2012, a total of 785 hits to the arrestee database had been obtained with 117 of those hits associated with sexual assault cases. *Id.*

2. Success in Colorado and Denver

The State of Colorado has had a DNA arrest law in place since October 1, 2010. DENVER DISTRICT ATTORNEY'S OFFICE, CITY OF DENVER, UPDATE ON KATIE'S LAW, *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Update%20on%20Colorado%27s%20Katie%27s%20law1%2011-19-12.pdf (last visited Dec. 20, 2012). In total, 86,731 samples have been received, which has resulted in 398 hits to the CODIS database. *Id.* Of the 398 statewide hits, 131 hits were tied to Denver cases. *Id.*

3. Success in North Carolina

In the year after beginning to collect DNA from arrestees, North Carolina's crime lab obtained hits to

24 arrestee DNA profiles. *Over 400 DNA Hits Helped Solve Cases in 2011*, FORENSIC MAGAZINE (Apr. 23, 2012), http://www.forensicmag.com/news/over-400-dna-hits-helped-solve-cases-2011. As of April 2012, nine arrestee DNA hits had occurred during the calendar year. *Id.*

C. State DNA Arrest Laws are Carefully Written to Weigh the Interests of the State Versus Arrestees of Serious Crimes.

State legislatures have balanced competing policy interests of the state in solving and preventing crime with the privacy interests of arrestees when crafting DNA arrest laws. A review of state DNA arrest laws demonstrates that state legislatures have written them carefully to grant privacy protection to arrestees of serious crimes, while still providing law enforcement agencies with information that can assist them in solving crimes and maintaining public safety.

1. States Sample Arrestee DNA for Felony Offenses

Maryland's DNA Collection Act provides for the collection of DNA samples after charges are presented for burglary or a "crime of violence," which includes, among others, murder, rape, and sexual offense in the first degree. MD. CODE ANN., CRIM. LAW § 14-101 (LexisNexis 2012). All states' DNA arrest laws contain similar limitations on collection and provide for DNA sampling only where persons are arrested for felony offenses or worse. Thus, the statutes narrowly restrict collection of DNA samples to a limited class of arrestees accused of felonies or other violent crimes. ALA. CODE § 36-18-24 (2012);

ALASKA STAT. § 44.41.035 (2012); ARIZ. REV. STAT. ANN. § 13-610 (2012); ARK. CODE ANN. §§ 12-12-1006, 1105 (2012); CAL. PENAL CODE § 296 (West 2012); COLO. REV. STAT. § 16-23-103 (2012); CONN. GEN. STAT. § 54-102l (2012); FLA. STAT. § 943.325 (2012); 730 ILL. COMP. STAT. 5/5-4-3 (2012); KAN. STAT. ANN. § 21-2511 (2012); LA. REV. STAT. ANN. § 15:609 (2012); MD. CODE ANN., PUB. SAFETY § 2-501 (LexisNexis 2012); MICH. COMP. LAWS § 750.520m (2012); MINN. STAT. § 299C.105 (2012); MO. REV. STAT. § 650.055 (2012); N.J. STAT. ANN. § 53:1-20.18 (West 2012); N.M. STAT. ANN. § 29-3-10 (2012); N.C. GEN. STAT. § 15A-266.3A (2012); N.D. CENT. CODE § 31-13-03 (2012); OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012); S.C. CODE ANN. § 23-3-620 (2012); S.D. CODIFIED LAWS § 23-5A-5.2 (2012); TENN. CODE ANN. § 40-35-321 (2012); TEX. GOV'T CODE ANN. § 411.1471 (West 2012); UTAH CODE ANN. § 53-10-403 (LexisNexis 2012); VT. STAT. ANN. tit. 20, § 1932 (2012); VA. CODE ANN. § 19.2-310.2:1 (2012).

In addition to the probable cause requirement to arrest a person in the first instance, some DNA arrest laws contain an additional probable cause requirement. For example, Maryland's statute only allows for the sampling of arrestee DNA after an individual has been charged with a crime. MD. CODE ANN., PUB. SAFETY § 2-501(i)(2) (LexisNexis 2012). Similarly, Illinois' statute requires a grand jury indictment or a judicial finding of probable cause before sampling of arrestee DNA. 730 ILL. COMP. STAT. 5/5-4-3(a-3.2) (2012). The following code provisions contain similar probable cause requirements: MINN. STAT. § 299C.105(1)(a)(1) (2012); TENN. CODE ANN. § 40-35-321(e)(1) (2012); VT. STAT. ANN. tit. 20,

§ 1933(a)(2) (2012); VA. CODE ANN. § 19.2-310.2:1 (2012).

2. State DNA Arrest Laws have Expungement Requirements

Further restricting the use of DNA information collected from arrestees, many states' laws require automatic expungement of DNA samples collected where the arrestees are not later convicted of an offense. For example, under Texas's DNA arrest law, on acquittal of a defendant or dismissal of the case against a defendant, "the court shall order the law enforcement agency taking the specimen to immediately destroy the record of the collection of the specimen and require the department to destroy the specimen and the record of its receipt." TEX. GOV'T CODE ANN. § 411.1471(e) (West 2012). The following state laws contain automatic expungement requirements: ALASKA STAT. § 44.41.035(i) (2012); CONN. GEN. STAT. § 54-102l(a) (2012); 730 ILL. COMP. STAT. 5/5-4-3(f-1) (2012); MD. CODE ANN., PUB. SAFETY § 2-511(a)(1) (LexisNexis 2012) ("Except as provided in paragraph (2) of this subsection, any DNA samples and records generated as part of a criminal investigation or prosecution shall be destroyed or expunged automatically from the State DNA data base if: (i) a criminal action begun against the individual relating to the crime does not result in a conviction of the individual; (ii) the conviction is finally reversed or vacated and no new trial is permitted; or (iii) the individual is granted an unconditional pardon."); MINN. STAT. § 299C.105(3) (2012); N.C. GEN. STAT. § 15A-266.3A(h)(1) (2012); S.C. CODE ANN. § 23-3-660(A) (2012); TENN. CODE ANN. § 40-35-321(e)(2) (2012); TEX. GOV'T CODE ANN. § 411.1471(e) (West 2012); UTAH CODE ANN. § 53-10-406(1)(i) (LexisNexis

2012); VT. STAT. ANN. tit. 20, § 1940(a) (2012); VA. CODE ANN. § 19.2-310.2:1 (2012).

States where the DNA arrest laws do not provide for automatic expungement still permit for expungement upon request where the arrestee is never convicted of an offense.[5] For example, the Arizona DNA arrest law provides, in part, that an arrestee

> may petition the superior court in the county in which the arrest occurred or the criminal charge was filed to order that the person's deoxyribonucleic acid profile and sample be expunged from the Arizona deoxyribonucleic acid identification system . . . if . . . [t]he criminal charges are not filed within the applicable period . . . [or] [t]he criminal charges are dismissed.

ARIZ. REV. STAT. ANN. § 13-610(m) (2012); *see also* ALA. CODE § 36-18-26 (2012); ARK. CODE ANN. § 12-12-1113 (2012); CAL. PENAL CODE § 299 (West 2012); COLO. REV. STAT. § 16-23-103(b) (2012); FLA. STAT. § 943.325(16)(b) (2012); KAN. STAT. ANN. § 21-2511(e)(4) (2012); LA. REV. STAT. ANN. § 15:614 (2012); MICH. COMP. LAWS § 28.176(11)(b) (2012); MO. REV. STAT. § 650.055(9) (2012); N.J. STAT. ANN. § 53:1-20.25 (West 2012); N.M. STAT. ANN. § 29-16-10(A)(2) (2012); N.D. CENT. CODE § 31-13-07 (2012); S.D. CODIFIED LAWS § 23-5A-28 (2012).

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[5] Ohio's DNA arrest law does not contain a provision for expungement; but, the state's general criminal laws do not contain any relevant restrictions on an individual's right to expungement. *See* OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

3. Many DNA Arrest Laws Contain Penalties for Misuse of DNA Information

In addition to the privacy protections flowing from limited sampling and expungement requirements, the DNA arrest laws also include significant penalties for misusing DNA information. Misuse of DNA information can include unauthorized disclosure, obtaining DNA information without proper authorization, or unauthorized testing of DNA samples. Under California's statute, misuse of DNA information can result in imprisonment of up to one year and a criminal fine, as well as civil damages up to $50,000 in certain instances. CAL. PENAL CODE § 299.5(i)(1)(A)-(B), § 299.5(i)(2)(A) (West 2012). The following state laws contain similar penalties regarding misuse of DNA information: ALA. CODE § 36-18-28 (2012); ARK. CODE ANN. § 12-12-1115 (2012); CAL. PENAL CODE § 299.5(i) (West 2012); CONN. GEN. STAT. § 54-102k (2012); FLA. STAT. § 943.325(15) (2012); 730 ILL. COMP. STAT. 5/5-4-3(f-5) (2012); LA. REV. STAT. ANN. § 15:618 (2012); MD. CODE ANN., PUB. SAFETY § 2-512 (LexisNexis 2012) ("A person who violates subsection (a) [disclosure to unauthorized persons], (b) [obtaining information without authorization], or (c) [unauthorized testing] of this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both."); MO. REV. STAT. § 650.055(5) (2012); N.J. STAT. ANN. § 53:1-20.26 (West 2012); N.D. CENT. CODE § 31-13-09 (2012); S.C. CODE ANN. § 23-3-650 (2012); S.D. CODIFIED LAWS § 23-5A-26 (2012); TEX. GOV'T CODE ANN. § 411.153 (West 2012); UTAH CODE ANN. § 53-

10-406(12) (LexisNexis 2012); VT. STAT. ANN. tit. 20, § 1941 (2012); VA. CODE ANN. § 19.2-310.6 (2012).

4. State Labs That Process Arrestee DNA Samples Must Conform to Uniform Quality Control Standards Promulgated by the FBI

From state and local governments' perspective, one important advantage of states collecting DNA identification data is the ability to participate in and to use the national index systems. The DNA Fingerprint Act of 2005 enabled states to upload arrestee DNA profiles to CODIS and NDIS. *See* 42 U.S.C.S. § 14135a. CODIS is a computer software program that operates state, local, and national databases of DNA profiles from convicted offenders, arrestees, and others. CODIS software enables state, local, and national law enforcement crime laboratories to compare DNA profiles electronically, thereby linking serial crimes to each other and identifying suspects by matching DNA profiles from crime scenes with profiles from convicted offenders. NDIS is considered a part of CODIS and allows for states to upload DNA profiles into it.

The states' participation in providing DNA arrestee profiles to NDIS broadens considerably the scope of NDIS and allows state and local law enforcement access to data that would otherwise be unavailable to them, such as out of state data. As of October 2012, NDIS contained 1,279,400 arrestee profiles. CODIS's primary metric, the "Investigations Aided," tracks the number of criminal investigations where CODIS has added value to the investigative process. As of that same time, CODIS had produced over 193,100 hits assisting in more than 185,300 investigations. *CODIS – NDIS Statistics*, FEDERAL BUREAU OF

INVESTIGATION, http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last visited Dec. 12, 2012).

Viewed from an arrestee's perspective, another federal law, the DNA Identification Act of 1994 (the DNA Act), protects an arrestee's privacy by requiring that the FBI Laboratory ensure that all DNA laboratories participating in NDIS demonstrate compliance with the standards issued by the FBI. *See* 42 U.S.C.S. § 14132; *see also CODIS – NDIS Statistics*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/lab/codis/codis_quality (last visited Dec. 12, 2012). Thus, states wishing to make use of NDIS must comport with standards ensuring that the DNA samples they collect are properly analyzed prior to uploading the information taken from those samples into NDIS.

Additionally, states participating in NDIS must sign a Memorandum of Understanding with the FBI Laboratory documenting their agreement to abide by the DNA Act requirements as well as record-keeping and other operational procedures governing the uploading of DNA data, expungements, CODIS users, and audits. Thus, state laboratories participating in NDIS are subject to stringent standards and ongoing quality evaluations.

Finally, concerns about the use of arrestee DNA information through NDIS are mitigated by virtue of the fact that NDIS only stores a DNA profile of arrestees. It is does not store actual DNA samples, names, or other personal identifiers of arrestees. Only limited information can be stored and searched on the national level. *See Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FEDERAL BUREAU OF INVEST-

IGATION, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (last visited Dec. 12, 2012).

D. State DNA Arrest Laws Can Save State and Local Governments Money Which is a Boon to Those States and Local Governments Facing Law Enforcement Cutbacks.

State DNA arrest laws can provide significant financial benefits to state and local governments who must cut costs because of budgetary constraints. In short, a more efficient and effective judicial system is an additional benefit of DNA arrest laws.

A study conducted in the State of Indiana concluded that implementing a DNA arrest law could save Indiana $50 million per year. In this study, the authors noted that for each reported crime in Indiana, taxpayers paid $1,836. JAY SIEGEL & SUSAN D. NARVESON, WHY ARRESTEE DNA LEGISLATION CAN SAVE INDIANA TAXPAYERS OVER $50 MILLION PER YEAR (JAN. 2009), *available at* http://www.denverda.org/DNA_Documents/Arrestee_Database/Indiana%20Arrestee%20Legislation%20-%20Jan%2013%202009.pdf. This figure took into account factors such as officer response, investigation, prosecution, and adjudication. *Id.* The authors concluded that the collection of DNA from arrestees produces cost savings because it reduces the number of crimes that must be processed by removing criminal recidivists from the streets. *Id.* at 5. Notably, the authors of the study described this estimate as "conservative" because it did not take into account potential savings that might be realized due to the more "efficient nature of DNA cases." *Id.* at 9. Likewise, a cost effectiveness study by the Urban Institute found that the average added cost for processing a

single case with DNA evidence was about $1,397. JOHN K. ROMAN ET AL., URBAN INSTITUTE, COST-EFFECTIVENESS ANALYSIS OF THE USE OF DNA IN THE INVESTIGATION OF HIGH-VOLUME CRIMES 5 (Mar. 2008), http://www.urban.org/publications/411697.html. According to that study, each additional arrest—an arrest that would not have occurred without DNA processing—cost $14,169. *See id.*

The fact that DNA arrest laws can save state and local governments considerable money is important because of recent budgetary cutbacks affecting law enforcement. Across the country, state and local governments are being forced to institute deep cuts to their police forces in the wake of budgetary concerns. *See*, *e.g.*, CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES (2011); Erica Goode, *Crime Increases in Sacramento After Deep Cuts to Police Force*, N.Y. TIMES, Nov. 4, 2012, at A26; James Staley, *Budget Cuts Mean Fewer Officers, Less Visibility for State Police*, LAS CRUCES SUN-NEWS (Nov. 28, 2012, 5:22 PM), http://www.lcsun-news.com/ci_22084586/budget-cuts-mean-fewer-officers-less-visibility-state (New Mexico). As a result, laws that can both save state and local governments money *and* increase efficiency are imperative to the continued success of law enforcement efforts across the country.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Maryland Court of Appeals.

Respectfully submitted,

LISA E. SORONEN
STATE AND LOCAL
LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

RICHARD WEINTRAUB
NATIONAL SHERIFFS'
ASSOCIATION
1450 Duke Street
Alexandria, VA 22314
(800) 424-7827
rmwein1948@gmail.com

PRASHANT K. KHETAN*
MILIND PAREKH
TYLER S. MERTES
WILLIAM P. PIPAL
TROUTMAN SANDERS LLP
401 9th Street, N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2950
prashant.khetan@
troutmansanders.com

* Counsel of Record