

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF ABSAROKA

JOHAN VANDERMER, )  
 )  
 Plaintiff, )  
 )  
 v. ) Case No. Civ. 09-296-1-MJ  
 )  
 RISA PATEL, State Attorney )  
 General; STEFAN MacARTHUR, )  
 Superintendent of State Police; and )  
 ANNABELLE LEE, Public Safety )  
 Director of the City of Arcadia, )  
 )  
 Defendants. )

**MEMORANDUM OPINION AND ORDER  
DENYING MOTION FOR PRELIMINARY INJUNCTION**

This matter is before the Court on Plaintiff’s Motion for Preliminary Injunction. The Plaintiff challenges the Absaroka DNA Database Enhancement Act (hereinafter, “the DNA Act”),<sup>1</sup> which authorizes law enforcement officers to collect and maintain DNA samples from all arrestees. Plaintiff argues that this Act, and Defendants’ actions under it, violate his Fourth Amendment rights and that he is entitled to both a preliminary and permanent injunction. For the reasons set forth below, the Court denies Plaintiff’s Motion for Preliminary Injunction because the taking of DNA from individuals upon arrest under the DNA Act does not violate the Fourth Amendment, and thus Plaintiff cannot demonstrate a probability of success on the merits of his claim.

Plaintiff Vandermer filed his complaint for declaratory relief under 28 U.S.C. § 2201 (2000) and for injunctive relief under 42 U.S.C. §1983 (2000) against Defendants Patel,

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<sup>1</sup> A DNA database expansion of similar scope is currently under consideration before the Washington State House of Representatives. *See* H.B. 1382, 61st Leg., 2009 Reg. Sess. (Wa. 2009).

MacArthur, and Lee. Plaintiff alleges that the DNA Act, both on its face and as applied to him by Defendants, violates his Fourth Amendment right to be free from unreasonable search and seizure. The Complaint asks the Court to (a) enjoin Defendants from collecting DNA samples from Vandermer if he is arrested in the future; (b) order Defendants to delete permanently any records of Vandermer's DNA information from existing databases; and (c) declare the DNA Act unconstitutional.

Shortly after the Answer was filed, Plaintiff moved for a preliminary injunction. The Court held a hearing on Plaintiff's Motion for Preliminary Injunction on September 1, 2009. Defendants were provided advance notice of the hearing in accordance with Fed. R. Civ. P. 65(a)(1) and Fed. R. Civ. P. 6(c)(1). The facts below are taken from the testimony, exhibits, and other evidence introduced at the hearing and are not in dispute.

## **I. BACKGROUND**

### **A. Statutory Background**

Modern DNA identification techniques were developed in the mid-1980s and quickly became an important part of criminal investigations. In 1994, Congress passed the DNA Identification Act, Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.), to allow states and the federal government to easily share DNA information. The DNA Identification Act created the Combined DNA Index System ("CODIS").<sup>2</sup> In response, all fifty states enacted legislation to collect biological specimens for the purpose of creating a DNA profile of persons convicted of certain crimes. *See United States v. Kincade*, 379 F.3d 813, 848 (9th Cir. 2004) (en banc) (Reinhardt, J., dissenting). DNA used for CODIS and similar database

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<sup>2</sup>The following materials, which describe how DNA profiles are received, processed, stored, and expunged in CODIS were introduced at the hearing: CODIS, <http://www.fbi.gov/hq/lab/html/codis1.htm>.

searches is non-coding, or so-called “junk DNA,” which reveals no information other than an individual’s identity.<sup>3</sup>

On January 25, 2006, the President signed into law the DNA Fingerprint Act of 2005, which, together with section 155 of the Adam Walsh Child Protection and Safety Act of 2006, made amendments to section 3 of the DNA Analysis Backlog Elimination Act of 2000, now found at 42 USC § 14135a(a)(1)(A). This federal law, which has since been implemented through regulations set forth at 73 Fed. Reg. 74,932 (Dec. 10, 2008), directs federal agencies to obtain warrantless, compulsory DNA samples from all persons arrested for federal crimes or detained on immigration matters.

The State of Absaroka, like many other states, created a state analogue to this federal statute.<sup>4</sup> In June 2007, Absaroka Governor A. R. Swickard signed the DNA Act into law. The DNA Act, codified at 17 Absaroka Stat. Ann. § 378, provides for warrantless, compulsory DNA samples to be taken from all arrested persons for specified crimes. The Act calls for these

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<sup>3</sup>The following excerpt from H.R. Rep. No. 106-900(I) , at 27 (2000), was introduced into evidence: “The genetic markers used for forensic DNA testing were purposely selected because they are not associated with any known physical or medical characteristics, providing further assurance against the use of convicted offender DNA profiles for purposes other than law enforcement identification. In common parlance, they show only the configuration of DNA at selected “junk sites” which do not control or influence the expression of any trait. DNA records in the national database contain the following information only: an agency identifier for the agencies submitting the DNA profile; the specimen identification number; the DNA profile; and the name of the DNA personnel associated with the DNA analysis. As noted, DNA profiles generated in conformity with the national standards do not reveal information relating to any medical condition or other trait. By design, the effect of the system is to provide a kind of genetic fingerprint, which uniquely identifies an individual, but does not provide a basis for determining or inferring anything else about the person.”

<sup>4</sup> At least fifteen states, including Alaska, California, Florida, Kansas, and South Dakota, have passed similar laws. See Nat’l Conference of State Legislatures, *State Laws on DNA Database, Qualifying Offenses, Others Who Must Provide Sample*, <http://www.ncsl.org/IssuesResearch/CivilandCriminalJustice/StateLawsonDNADatabases/tabid/12737/Default.aspx>; see also D.H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J. L. Med. & Ethics 188 (2006).

samples to be sent to and maintained in a State DNA Index System (“SODIS”) that, it was established at the hearing, operates exactly like the federal CODIS.<sup>5</sup> The relevant text of the DNA Act at the time Plaintiff filed suit and the portions of the DNA Act’s legislative history that were cited at the hearing are reproduced in Appendices A and B.

Although the DNA Act, like the federal act,<sup>6</sup> provides that an arrestee may seek expungement of his DNA information from the database when no charges are filed, when charges are dismissed, or when the arrestee is acquitted, the process is not an automatic one. Testimony at the hearing established that since the Act’s passage, no individual has asked to purge a profile from SODIS under the expungement provision, an experience that apparently closely parallels the history of expungements under the federal statute.<sup>7</sup>

### **B. Plaintiff’s Background**

Johan Vandermer was born in 1980 in Belgium. His father was a Protestant minister, and in 1991, Vandermer and his family moved to Somalia to conduct missionary work. In April, 1992, however, their mission was cut short by widespread violence in the Horn of Africa. Vandermer’s father was among several thousand killed during fighting among warring clans. A year later, Vandermer and his mother Margriet legally immigrated to the United States, where they both became legal permanent residents. They settled in Arcadia City, in the State of Absaroka.

Vandermer was an outstanding student: he graduated with honors from Arcadia South

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<sup>5</sup> Plaintiff entered into evidence, without objection, the materials on how DNA profiles are received, processed, stored, and expunged in CODIS. *See* <http://www.fbi.gov/hq/lab/html/codis1.htm>.

<sup>6</sup> The parties stipulated at trial that the following provides accurate information on expungement proceedings for CODIS: <http://www.fbi.gov/hq/lab/html/expungement.htm>.

<sup>7</sup> Solomon Moore, *F.B.I. and States Vastly Expand DNA Databases*, N.Y. Times, Apr. 18, 2009, available at [http://www.nytimes.com/2009/04/19/us/19DNA.html?\\_r=2&hp](http://www.nytimes.com/2009/04/19/us/19DNA.html?_r=2&hp).

High School in 1998 and from Absaroka University (“AU”) in May 2002 with a bachelor’s degree in accounting and finance. During college, Vandermer founded “BAM” (“By All Means”), an AU student group promoting activism on human rights and development issues affecting African countries, including the genocide in Darfur, HIV/AIDS, odious debt, and famine relief. After graduation, Vandermer obtained a position in Arcadia City as an auditor for the United States Department of Agriculture. In March 2005, Vandermer moved to Malawi, in Eastern Africa, to work on development issues with a non-governmental organization, Action Aid-Malawi, for two years. Upon returning to the U.S., Vandermer applied and was accepted to the Absaroka University School of Law class of 2011. While in law school, Vandermer continued his participation in BAM.

Vandermer is one of approximately three million residents of the sprawling metropolis of Arcadia City. Arcadia City is also home to the headquarters of the Global Trade Organization (“GTO”).<sup>8</sup> Arcadia City is also the center of controversy in global commerce, particularly when the GTO holds its biennial December conferences, which draw finance ministers, international development officials, and other participants from around the world. The conferences inevitably draw large crowds of protestors that have led to noisy and sometimes destructive demonstrations and clashes with police. At times, these protests have come close to escalating into full-fledged riots. Estimates of the costs to Arcadia City of the protests associated with the 2005 and 2007 GTO conferences, for example, including security preparations; overtime for law enforcement and other public-safety personnel; special 24-hour courts to process the high volume of misdemeanor arrests; and outright destruction of parks and other public property, ranged from

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<sup>8</sup> The GTO is a quasi-governmental, not-for-profit consortium comprised of one hundred and fifty-three member nations. Its main purposes are to provide a forum for these member nations to negotiate trade agreements and facilitate international trade reforms.

\$2.3 – \$4.7 million.

Most of the protestors at the GTO conferences appear to be young people who are genuinely concerned about a range of issues that they associate with globalization and free trade, including environmental impact, international debt, and the failure of the pharmaceutical industry to make therapeutic drugs available to the poor populations of nations hit especially hard by the AIDS crisis. Absaroka officials have also increasingly worried, however, that the chaos and militant protest spawned by these demonstrations would attract more sinister elements.

In 2003, those fears appeared to be borne out when a bomb left in a messenger bag on the seat of public bus exploded, killing two bystanders and injuring seventeen. While a number of different groups, domestic and foreign, came under suspicion of having plotted the attack (including radical environmental, animal rights, and right-wing militia groups), to date no one has been charged in the attack.

At the preliminary injunction hearing, Vandermer testified that he has participated in each GTO protest since 1999, with the exception of 2005 when he was in Africa. He was arrested during the protests in 2001, 2003, and in 2007.

The 2007 GTO conference was held between December 3rd and December 5th. Vandermer mobilized the members of BAM to join the nearly 100,000 demonstrators that filled the streets on December 4th. Vandermer and other members of BAM blame African nations' debt problems on the trade practices endorsed by the GTO. The majority of the demonstrators passed peacefully, but once the initial march had finished the demonstrations turned violent. Bricks were thrown through windows, and car tires were slashed. Fires were started, and rocks were thrown at police officers.

In the midst of these disruptions, Governor Swickard came to Arcadia City to greet the GTO participants and to hold a series of “town hall” meetings in hopes of defusing some of the tension surrounding the events. Leaving the demonstrations, Vandermer noticed a crowd surrounding the downtown sandwich restaurant, Reuben’s Reubens. His curiosity piqued, Vandermer discovered that the Governor was ordering one of the restaurant’s “world famous” Reubens. Pushing his way to the front of the crowd, Vandermer positioned himself near the Governor and, leaning forward, cried out, “Why are you even here? We argue about taxes and spending while people *die* of AIDS and other preventable diseases in Africa. In America, one of the largest problems affecting the poor is obesity—but children in Africa die every day for lack of food.”

His statements created a small commotion, and Arcadia City police officer Frank Horrigan, who had been assigned to the Governor’s security detail for that day, quickly grabbed Vandermer. As they escorted Vandermer from the restaurant’s main dining outside, Vandermer continued to yell: “Why don’t you go back to Capitol City and focus on issues that really matter in this world?” Officer Horrigan told Vandermer he had just “assaulted the Governor” and that he was under arrest.<sup>9</sup> Rather than immediately being taken to the police station, however, Vandermer was handcuffed and escorted to a nearby police tent being used as a detention area for the many of others who had been arrested in the course of that morning for various offenses related to the GTO demonstrations. After the demonstrations had subsided, most of the eventual 250 arrestees were released with a citation for disorderly conduct. However, the police singled

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<sup>9</sup> Similar instances have happened in the past. See Kirk Johnson, *Man Sues Secret Service Agent Over Arrest After Approaching Cheney and Denouncing War*, N.Y. Times, Oct. 4, 2006, available at <http://www.nytimes.com/2006/10/04/washington/04cheney.html>; *Activist Sheehan Arrested in House Gallery*, CNN.com, <http://www.cnn.com/2006/POLITICS/01/31/sheehan.arrest/index.html>. Plaintiff does not contest the legality of this 2007 arrest.

out some of those who they believe were the “most violent” protestors to bring to the local station for booking. Despite Vandermer’s insistence that he only protested peacefully, the police brought him to the station.

At the station, Arcadia City Police Sergeant Jorge Ramos scanned Vandermer’s fingerprints and then informed Vandermer that he needed to draw Vandermer’s blood for DNA collection. At the preliminary hearing Ramos testified that, in accordance with standard operating procedure, he received his Emergency Medical Technician certification when he joined the Arcadia City police force in 2001 and has continuously maintained his certification through the present day. At the station, Ramos drew 10 mL of blood (a full blood tube) from Vandermer’s left arm with a syringe. In accordance with protocol, Sergeant Ramos submitted Vandermer’s blood sample to the crime lab in Arcadia City where it was subjected to DNA testing. The resulting DNA information was entered in SODIS on December 12, 2007, and was searched against all outstanding cases. There were no matches.

For reasons unknown, Vandermer was ultimately released on December 4th without any charges being filed. Vandermer testified at the preliminary injunction hearing that he was not informed by anyone of the DNA Act’s expungement procedures at the time of his release or afterwards. Vandermer also acknowledged that the blood draw conducted by Ramos led to no medical complications and was “relatively painless.”

### **C. DNA at the Crime Scene**

On April 8, 2009, Arcadia police responded to a report of suspicious activity in an abandoned tavern near the AU campus. An elderly gentleman who lived down the street, and knew the building was supposed to be vacant, reported seeing lights at odd hours on several occasions. Entering the building, police found what appeared to be the makings of a bomb on a

small table in the bar's office. The bomb consisted of several pounds of homemade explosives and a remote detonation device. Eventual lab testing revealed that some elements of the partially assembled bomb were similar to the materials used in the bombing of 2003.

Police also discovered propaganda and literature advocating attacks in the United States, as well as blueprints to the Arcadia City Federal Building. Investigators were able to link the propaganda to Al-Shabab, a terrorist group headquartered in Somalia.<sup>10</sup> In fact, according to testimony at the preliminary injunction hearing from Arcadia Police Intelligence, the Al-Shabab group was one of the organizations that had previously been a suspect in the 2003 bombing. Underneath the Al-Shabab materials in the abandoned tavern, the police also found a few educational brochures on HIV in Africa bearing the name and logo of BAM.

Crime-scene investigators discovered a blood spot on the table near the bomb's detonation device. They gathered the blood sample and sent it to the State Police headquarters for an analysis against DNA samples kept in SODIS. Laboratory technicians tested the blood sample, but they were only able to obtain a "partial profile" from the degraded DNA sample.<sup>11</sup> This partial profile was immediately compared to existing samples in SODIS. The search resulted in a "probable"<sup>12</sup> match to the DNA previously collected from Vandermer.

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<sup>10</sup> Defendants entered the following article regarding Al-Shabab into evidence, without objection. See <http://terrorism.about.com/od/groupsleader1/p/Al-Shabab.htm>.

<sup>11</sup> The parties stipulated that the following article accurately describes the match probabilities of DNA evidence and the impact of the sample's quality on the match probabilities. William Thompson et al., *How Probability of a False Positive Affects the Value of DNA Evidence*, 48 J. Forensic Sci. 1 (2003), available at <http://www.bioforensics.com/conference/Examiner%20Bias/JFS%20False%20Pos.pdf>.

<sup>12</sup> Plaintiff entered into evidence, without objection, the following book excerpt that contains information on partial profile: Andrei Semikhodskii, *Dealing with DNA Evidence: A Legal Guide* 36-37 (2007), available at [http://www.law.indiana.edu/students/competitions/mootcourt/2009/dealing\\_with\\_dna\\_evidence\\_a\\_legal\\_guide\\_36-37.pdf](http://www.law.indiana.edu/students/competitions/mootcourt/2009/dealing_with_dna_evidence_a_legal_guide_36-37.pdf).

Police executed a search of Vandermer's apartment and brought Vandermer to their office in Arcadia City for questioning. Vandermer denied having any connection to the explosive device or the terroristic literature found in the building. At one point, however, after several hours of questioning, he apparently admitted that BAM used to hold meetings in the tavern before it closed. Vandermer mentioned that if his blood indeed had been found on a table at the restaurant, it conceivably could have resulted from an incident that he vaguely recalled in which he had pricked his finger while playing darts one evening. Vandermer eventually refused to answer any further police questions.

Vandermer was never formally charged in connection with the materials found in the restaurant or in the 2003 bombing, but at some point during the approximately two weeks in which he was questioned by both state and federal authorities, his name and the fact of the partial DNA match were apparently leaked to the press. Seizing on the strong public emotions still surrounding the unsolved 2003 bombing, and the continuing public concern about the disruptions surrounding the GTO conferences, local and national mass media ran articles speculating about Vandermer. Some commentators even proclaimed the long-awaited capture of the 2003 bomber. Newspapers, television reporters and web sites noted Vandermer's longstanding ties to Africa, his involvement in BAM, and a one-time post on his Facebook page, stating "The United States shares the blame for the death of my father, as well as several thousand Somalians. We were abandoned when we needed help."

Within weeks, however, with only a probable DNA match and no other direct evidence of Vandermer's complicity in terrorist activities, the government ceased actively investigating him. Nonetheless, to this day some commentators and bloggers continue to hypothesize Vandermer's guilt, attacking both Vandermer and the government's failure to prosecute. Indeed, Vandermer

testified that he continues to receive threats by mail, was fired from his campus job, and ultimately dropped out of law school in order to lessen the public scrutiny.

Vandermer has asked both Absaroka state and Arcadia City officials to issue a statement exonerating him, but they have thus far declined to do so, stating that the investigations into both the 2003 bombing and the more recent incident “remain open.” Vandermer has also requested informally, through his attorney, that officials agree to remove his DNA information from SODIS, on the grounds that he has never been charged with any crime; this request also has been declined. (He has not thus far sought relief through the formal expungement process provided for in the DNA Act.)

## II. PRELIMINARY INJUNCTION

### A. Legal Standard

A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *See Winter v. Natural Res. Defense Council, Inc.*, 129 S. Ct. 365, 375-76 (2008). To be entitled to a preliminary injunction “[a] plaintiff . . . must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 374. “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

Vandermer argues that he is likely to succeed on the merits of his claim: that the DNA Act, and Defendants’ actions in extracting and maintaining his DNA sample under that Act, violate his Fourth Amendment rights. He also argues that the Court should enjoin Defendants’ future use of the DNA Act as unconstitutional because he remains at risk for law enforcement

officials spuriously linking him through his DNA sample to other unsolved crimes through “probable matches” (especially as he is now such a high-profile figure), and for future DNA extractions if he should again be arrested while exercising his constitutional rights of free speech and free assembly at future GTO protests.

At the preliminary injunction hearing, the Defendants disputed Plaintiff’s showing, arguing that he had suffered no real harm; that the asserted harm in any event was not irreparable; and that the balance of equities and public interest both favored the government. The Defendants devoted most of their argument, however, to contesting Vandermer’s probability of success on the merits. Because this Court finds that the present motion may be resolved on the latter ground, as discussed below, it need not reach these other arguments of the Defendants.

#### **B. Fourth Amendment**

The Fourth Amendment provides that

[t]he right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The threshold question of any Fourth Amendment analysis is whether a search has occurred. A search occurs when the government (1) violates a person’s “actual (subjective) expectation of privacy” and (2) “the expectation [is] one that society is prepared to recognize as ‘reasonable.’” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

The Court concludes, and the parties agree, that a search occurred in this case. Plaintiff was subjected to a compulsory blood draw and “this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.”

*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); *see also Schmerber v. California*, 384 U.S. 757, 767 (1966) (concluding that “[i]t could not be reasonably argued . . . that the administration of [a] blood test . . . [is] free of the constraints of the Fourth Amendment”).

Once it has been determined that a search has occurred, the second inquiry in a Fourth Amendment analysis is whether the search was “reasonable.” *See Kyllo v. United States*, 533 U.S. 27, 31 (2001). Indeed, the Fourth Amendment only proscribes unreasonable searches. *See Skinner*, 489 U.S. at 618-19. Ideally, reasonableness is satisfied by a warrant issued on probable cause, *United States v. United States Dist. Ct. for the E. Dist. of Mich.*, 407 U.S. 297, 315-16 (1972), but the Supreme Court has utilized certain tests to identify exceptions to the warrant requirement. Warrantless searches have been justified under the special needs and the reasonableness test.

### **C. The Appropriate Fourth Amendment Test**

The parties disagree over which Fourth Amendment test should apply in determining the constitutionality of DNA extraction upon arrest. Defendants argue that the Court should apply the “totality of the circumstances” or “reasonableness” test and uphold the DNA Act. *See, e.g., Bell v. Wolfish*, 441 U.S. 520 (1979). In the alternative, Defendants argue that even if the Court should apply the special needs test, the DNA Act satisfies the special needs test. *See New Jersey v. T. L. O.*, 469 U.S. 325 (1985). In contrast, Plaintiff argues that the DNA Act can only be justified through the so-called “special needs” test, *see id.*, and that the DNA Act fails this test.

The question of what Fourth Amendment test to apply to compulsory DNA collection is a matter of first impression in the Fourteenth Circuit. Indeed, the circuits are split as to which test applies to DNA collection statutes. Certain circuits —such as the Tenth—apply the special

needs test. *See, e.g., United States v. Kilmer*, 335 F.3d 1132, 1146 (10th Cir. 2003). Others, however—such as the Fourth and Eleventh—employ the reasonableness test. *See, e.g., Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005); *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992).

After considering Supreme Court precedent and the weight of authority in other Circuits, the Court adopts the majority view and concludes that the general Fourth Amendment reasonableness test applies in this case.

### *1. The Special Needs Test*

The Supreme Court first articulated the special needs test in the context of a school search. *T.L.O.*, 469 U.S. at 333. Although the unique balancing of public and private interests in “the school environment” arguably cautioned against applying the special needs test in other factual contexts, Justice Blackmun in his concurrence did not constrain the special needs test in such a manner and applied it to those searches where “special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.” *Id.* at 351 (Blackmun, J., concurring). Blackmun’s articulation of the special needs test has subsequently been adopted by the Supreme Court in a variety of other contexts and now is the accepted articulation of the special needs test. *See e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 77-84 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-47 (2000).

Plaintiff argues that only the special needs test could apply in this case because the extraction of his DNA constituted a suspicionless search and that the reasonableness test only applies in searches based on individualized suspicion. Plaintiff largely relies on two cases to support of his proposition that his search was suspicionless: *Ferguson* and *Edmond*. In *Ferguson*, the Supreme Court struck down warrantless and suspicionless searches, via urine

sample, of maternity patients in a public hospital who exhibited one of several possible, albeit inconclusive, indicators of cocaine use. *See Ferguson*, 532 U.S. at 76. Because these searches were unsupported by any individualized suspicion of wrongdoing, the Court evaluated the searches under the special needs test and ultimately concluded that they failed. *See id.* at 84-86. Similarly, in *Edmond*, the Court concluded that the Indianapolis police department's practice of conducting random vehicle checkpoints to detect illegal drugs violated the Fourth Amendment under the special needs test. 531 U.S. at 47.

Defendants, in turn, contend there was a measure of individualized suspicion in this case as a result of Plaintiff's arrest. *See United States v. Robinson*, 414 U.S. 218 (1973) (upholding a search incident to lawful arrest). An arrest surely constitutes at least a quantum of individualized suspicion. *See Murray*, 962 F.2d at 306. Additionally, unlike the random checkpoint screening of motorists in *Edmond* or the use of admittedly inconclusive indicators of drug use in *Ferguson*, there was nothing random about Plaintiff's arrest. Plaintiff was not arbitrarily detained as a part of some dragnet search protocol; rather he was arrested because he confronted Governor Swickard. Plaintiff's disruptive behavior gave rise to the individualized suspicion required for police to arrest him and, consequently, for the ensuing search via a blood draw. Plaintiff's fortuitous release does not affect this original suspicion.

In sum, the Court concludes that the extraction of Plaintiff's DNA upon arrest should be evaluated under the reasonableness test because individualized suspicion existed in this case. Nonetheless, the parties argued at the hearing, for the purposes of the special needs test, whether the DNA Act has a purpose "beyond the normal need for law enforcement." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring), and those arguments are worth noting here. Defendants argued that the statement from Senator Ramirez, as well as §§ 2.6(e)(i)-(ii), (iv)-(vi), of the DNA Act

indicate that the DNA Act also serves purposes separate from law enforcement. Defendant also argued that the substantial financial costs caused by widespread demonstrations at GTO conferences, and the threat of foreign and domestic terrorism, constitute additional special needs. Plaintiff argued in response that the DNA Act's application to him, as well as the statements from Senators Friedman, Sims, and Nussbaum, *see* Appendix B, indicate that the DNA Act was passed for a purely law enforcement purpose. The Court need not evaluate these arguments, however, because the "special needs" test does not apply in this case. The Court now turns to whether the search of Plaintiff was constitutional under the reasonableness test.

## 2. *The Reasonableness Test*

"Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which the search intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Samson v. California*, 547 U.S. 843, 848 (2006) (*quoting United States v. Knights*, 534 U.S. 112, 118-19 (2001)).

Defendants contend that this intrusion was minimal and reasonable in light of the government's justifications for conducting the search. Plaintiff, on the other hand, contends that the government's justifications do not outweigh the DNA Act's substantial infringement of an individual's privacy when there is no criminal conviction or even a probable cause determination by a magistrate. The Court concludes that the extraction of an arrestee's DNA under the DNA Act does not violate the Fourth Amendment's prohibition on unreasonable searches.

First, the Supreme Court has on several occasions held that "the intrusion occasioned by a blood test is not significant, since such 'tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.'"

*Skinner*, 489 U.S. at 625 (quoting *Schmerber*, 384 U.S. at 771); see also *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957). Accordingly, the Court concludes that the extraction of Plaintiff's blood was a minimally invasive search.

Plaintiff also argues that strong privacy interests are implicated because the scope of the intrusion extended beyond the physical act of drawing blood to the coding for DNA. Plaintiff argues that previous cases discussing the intrusiveness of blood samples, which Defendants cite in support of their position, were in the context of medical tests and drug screening; they “did not confront a regime in which the samples were turned into profiles capable of being searched time and time again throughout the course of an individual’s life.” *Kincade*, 379 F.3d 813 at 867. At trial, Plaintiff’s counsel argued that DNA extraction upon arrest leads to increased governmental intrusion in other arenas as well. These examples ranged from the legitimate—that DNA could one day be decoded to reveal one’s predisposition to disease and possibly other traits like sexual preference or criminal tendencies—to the absurd—the creation of “nightmarish worlds depicted in films such as *Minority Report* and *Gattaca* . . . [where] government seeks rapidly to expand its law enforcement powers.” *Id.* at 851.

Although Defendants admit that DNA, in general, can reveal personal genetic information, the part of the DNA strand extracted from Plaintiff cannot. Junk DNA “differs from one individual to the next and thus can be used for purposes of identification but [is] purposely selected because [it is] not associated with any known physical or medical characteristics and do[es] not control or influence the expression of any trait.” *United States v. Weikert*, 504 F.3d 1, 3-4 (1st Cir. 2007) (internal citations omitted). Accordingly, the Court concludes that Plaintiff’s fears are speculative, at best. There was no evidence that the government used, or planned to use, Plaintiff’s genetic information to determine any information

other than Plaintiff's identity.<sup>13</sup> Further, the Court remains unconvinced that the government could discover sensitive information in a suspect's non-coded DNA. Thus, based on this second argument, the Court agrees with Defendants and concludes that coding Plaintiff's blood sample for DNA was a minimally invasive search.

Defendants also argue that the justifications for initiating DNA extraction at arrest outweigh Plaintiff's expectation of privacy. Not only does DNA identify wrongdoers, it also protects the innocent. 17 Absaroka Stat. Ann. § 378.2.6(e)(iv). Additionally, the government points out that the DNA database is a crucial tool in quickly identifying potential terrorists in the chaos that always surrounds GTO conferences. *See* Senator Friedman's statement at Appendix B. Defendants contend that DNA databases have proven useful in solving past crimes and that DNA databases may even deter, or help solve, future crimes. *See* Committee Report at Appendix B.

Finally, Defendants emphasize that every court has upheld compulsory DNA extraction. *See Maryland v. Raines*, 857 A.2d 19, 26-28 (Md. 2004) (citing cases). Plaintiff counters that these previous cases upholding DNA extraction dealt exclusively with probationers, parolees, and others convicted of offenses. Plaintiff claims he is entitled to a higher expectation of privacy as an arrestee in part because whether he is arrested at a GTO protest is completely within the police's discretion. Moreover, unlike probationers, parolees, and other convicted offenders, Plaintiff was not found guilty beyond a reasonable doubt. Nor was his DNA subject to a

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<sup>13</sup> It is based on this argument that Defendants argue that the collection of DNA upon arrest pursuant to statute amounted to standard booking procedures, such as photographing and fingerprinting. *See Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007). The Court, however, does not address this argument because the Court concludes that under the reasonableness test, the search of Plaintiff did not violate the Fourth Amendment.

probable cause determination by a magistrate before Defendant Ramos extracted Plaintiff's blood.

While arrestees do retain some expectations of privacy, that expectation is limited. *See Chimel v. California*, 395 U.S. 752 (1969). By committing an act that gave police probable cause to arrest, Plaintiff surrendered, to a degree, the expectation of privacy reserved for innocent persons. *See Murray*, 962 F.2d at 306. On balance, the government's interest in extracting DNA from arrested individuals is high, the nature of the search at issue here is minimally invasive, and Plaintiff's expectation of privacy is reduced due to his arrest.

For these reasons, the Court concludes that DNA extraction from an arrestee, and specifically from Plaintiff, satisfies the Fourth Amendment's reasonableness test for warrantless searches. Therefore, Plaintiff cannot show the requisite likelihood of success on the merits.

#### **CONCLUSION**

For the reasons stated above, the Court DENIES Plaintiff's Motion for a Preliminary Injunction.

Dated this 3<sup>rd</sup> day of September, 2009.

*/s/ Karen Al-Hamsa*  
Karen Al-Hamsa  
United States District Judge

## APPENDIX A

### The DNA Database Expansion Act, 17 Absaroka Stat. Ann. § 378:

#### **Introduction**

AN ACT relating to criminal procedure; requiring that a biological specimen be obtained from all person arrested for all State criminal offenses, felony and misdemeanor; providing a penalty; and providing other matters properly relating thereto.

#### **Section 1.**

1. If a person is arrested for a most serious offense, the law enforcement agency making the arrest shall:

- (a) Submit the name, social security number, date of birth and any other information identifying the person to the Central Repository for Absaroka Records of Criminal History; and
- (b) Before the person is released from custody, obtain a biological specimen from the person pursuant to the provisions of this section so that the specimen can be used for an analysis to determine the genetic markers of the specimen.
- (c) “Most serious offense” means any of the following felonies or a felony attempt to commit any of the following felonies:
  - i. Any felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony;
  - ii. Assault in the second degree;
  - iii. Assault of a child in the second degree;
  - iv. Assault of a police officer in the second degree;
  - v. Child molestation in the second degree;

- vi. Controlled substance homicide;
- vii. Extortion in the first degree;
- viii. Incest when committed against a child under age fourteen;
- ix. Indecent liberties;
- x. Kidnapping in the second degree;
- xi. Leading organized crime;
- xii. Manslaughter in the first degree;
- xiii. Manslaughter in the second degree;
- xiv. Promoting prostitution in the first degree;
- xv. Rape in the third degree;
- xvi. Robbery in the second degree;
- xvii. Sexual exploitation;
- xviii. Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;
- xix. Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug, or by the operation of any vehicle in a reckless manner;
- xx. Any other class B felony offense with a finding of sexual motivation;

xxi. Any other felony with a deadly weapon.

2. The law enforcement agency obtaining the biological specimen shall provide the specimen to the forensic laboratory that has been designated by the county in which the person was arrested to conduct or oversee genetic marker testing for the county.

3. Any cost that is incurred to obtain a biological specimen from a person pursuant to this section is a charge against the county in which the person was arrested and must be paid by the county, or, in the event the person is subsequently convicted in a court of law for the charges for which he or she was arrested, by the person convicted, in an amount not to exceed \$370.

4. Except as otherwise provided, provisions of subsection 1(b) also apply to a person who is arrested for:

(a) An attempt or conspiracy to commit a most serious offense; or

(b) Acting as an accessory, as provided in § 397.030, to an offense listed in this subsection.

5. A law enforcement agency shall not obtain a biological specimen from a person who has previously submitted such a specimen for an arrest and conviction of a prior offense unless the law enforcement agency, court or magistrate determines that an additional specimen is necessary.

6. If the criminal charge against the person for which a biological specimen was obtained pursuant to this section is never prosecuted, dismissed, or the person is acquitted at trial, there shall be a one-year waiting period before action may be taken to remove the sample from the Central Repository for Absaroka Records of Criminal History. Upon completion of the waiting period, the person or their legal representative may begin the expungement procedure by:

(a) Submitting a written request to the following address:

Absaroka State Criminal Investigation Department  
Laboratory Division  
3612 Investigation Parkway  
Arcadia City, AB 55512  
Attention: Convicted Offender Program Manager

- (b) The request must include, for each charge for which the DNA record was or could have been included in the national DNA index, a certified copy of a final court order establishing that such charge has been dismissed or had resulted in an acquittal; or an affidavit from the clerk of courts that after one year after being arrested no charges were filed against the individual requesting expungement.
- (c) In the event the charges were dismissed or resulted in an acquittal, the copy of the court order must contain a certification that it is a true and accurate copy of the original court order and be signed and dated by an appropriate court official, such as a court clerk. The copy of the court order itself must be signed by a judge, be dated and include sufficient identifying information (at a minimum the person's full name, social security number, and/or date of birth) to determine the identity of the person and list the conviction offense that has been overturned, or the charge that has been dismissed or that the charge that resulted in an acquittal. If the written request does not include a copy of the final court order, the request will not be processed.
- (d) In the event that charges were not filed within a year after the individual was arrested, the request for expungement must include:
  - i. A copy of the report generated during the arrest, or similar documentation from the arresting law enforcement agency documenting the date of the arrest, a certification from the arresting law enforcement agency that such documentation is a true and accurate copy of the original, and the dated signature of an employee of the arresting law

enforcement agency who can verify the document's accuracy; and

- ii. An affidavit from the clerk of courts verifying that no charges were filed against the individual requesting expungement within one year from the date of the arrest contained in the law enforcement document required in § 1.6(d)(i) and the dated signature of the clerk of courts.

7. Neither the Court, nor any agency or agent of the State shall be obligated to inform the person of the right to expunge the specimen from the databank, nor shall the process be an automatic one.

8. The law enforcement agency, forensic laboratory and Central Repository for Absaroka Records of Criminal History shall keep the specimen or result of the genetic marker analysis and all records thereof for a period not to exceed thirty (30) years from the date of that person's death. If the person requests an expungement pursuant to §1.6 of this Act, and it is granted, the Central Repository for Absaroka Records of Criminal History shall destroy the sample after receiving notification from the court that the expungement has been granted.

9. Except as otherwise authorized by federal law or by specific statute, a biological specimen obtained pursuant to this section, the results of a genetic marker analysis and any information identifying or matching a biological specimen with a person must not be shared with or disclosed to any person other than the authorized personnel who have possession and control of the biological specimen, results of a genetic marker analysis or information identifying or matching a biological specimen with a person, except pursuant to:

(a) A court order; or

(b) A request from a law enforcement agency during the course of an investigation.

10. A person who violates any provision of subsection 9 is guilty of a misdemeanor.

[...]

## **Section 2.**

[...]

5. The Absaroka State Criminal Investigation Department: Laboratory Division may:

- (a) Disseminate any information which is contained in the Central Repository to any other agency of criminal justice;
- (b) Enter into cooperative agreements with federal and state repositories to facilitate exchanges of information that may be disseminated pursuant to paragraph (a); and
- (c) Request of and receive from the Federal Bureau of Investigation information on the background and personal history of any person whose records, fingerprints or genetic material the Central Repository submits to the Federal Bureau of Investigation.

6. The Central Repository shall:

- (a) Collect and maintain records, reports and compilations of statistical data.
- (b) Tabulate and analyze all records, reports and compilations of statistical data received pursuant to this section.
- (c) Disseminate to federal agencies engaged in the collection of statistical data relating to crime information which is contained in the Central Repository.
- (d) Assist in the production of materials and advertisements touting the efficacy of DNA for crime-solving purposes as part of an effort to prevent recidivism.
- (e) Use the genetic material within the depository to

- i. provide data relative to the causation, detection and prevention of disease or disability,
- ii. assist in educational or medical research,
- iii. identify persons not legally entered into the United States,
- iv. exculpate persons wrongfully convicted,
- v. assist in the identification of human remains, and
- vi. identify missing persons.

[...]

## APPENDIX B

### Excerpt from Report from the Absaroka General Assembly's Committee on Courts and Criminal Code Recommending Passage of the DNA Database Expansion Act:

DNA analysis is a powerful tool for human identification. Indeed, these DNA profiles amount to “genetic fingerprints.” The collection of DNA offers important information that is not captured by taking fingerprints alone. Positive biometric identification, whether by means of fingerprints or by means of DNA profiles, facilitates the solution of crimes through database searches that match crime scene evidence to the biometric information that has been collected from individuals. Solving crimes by this means furthers the fundamental objectives of the criminal justice system and law enforcement, helping to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused, through the prompt and certain identification of the actual perpetrators. DNA analysis offers a critical complement to fingerprint analysis in the many cases in which perpetrators of crimes leave no recoverable fingerprints but leave biological residues at the crime scene.

In addition, as with taking fingerprints, collecting DNA samples at the time of arrest can prevent and deter subsequent criminal conduct, a benefit that may be lost if law enforcement agencies wait until conviction to collect DNA. Moreover, in relation to aliens who are illegally present in the United States and detained pending removal, prompt DNA-sample collection could be essential to the detection and solution of crimes they may have committed or may commit in the United States. Since in most cases such aliens are not prosecuted for their immigration offenses, there is usually no later opportunity to collect a DNA sample premised on a criminal conviction. Hence, the individual's detention pending removal constitutes a unique opportunity to obtain this critical biometric information, and by that means to solve and hold the individual accountable for any crimes committed in the United States, before the individual's removal from the United States places him or her beyond the ready reach of the United States justice system.

### Comments on the Senate floor regarding the DNA Database Expansion Act:

Senator Friedman: “Obtaining identifying genetic information from all arrestees will be a crucial tool towards managing the influx of unknown persons and the chaos that surrounds every GTO conference. When I was a practicing doctor, scientific knowledge of DNA was still in its infancy. Even today, we have barely scratched the surface of DNA’s potential, and increased information will enable increased knowledge.”

Senator Sims: “The first step of combating terrorism is identifying the persons involved. We have learned from our mistakes in 1999 and in 2001. This bill increases our ability to identify people before it’s too late.”

Senator Fitzpatrick: “Once again fear mongering and xenophobia motivate the hasty passage of a statute granting the executive branch sweeping and unchecked license to invade our privacy. Proponents of this Act downplay this invasion by failing to acknowledge that DNA is nothing like fingerprints. Police cannot determine an arrestee’s genetic predisposition to disease, for example, from fingerprints; but they can from DNA. Furthermore, this Act applies to all forms of arrest, no matter how heinous or trivial the offense. Under this Act the jaywalker is treated the same as the serial killer as both can be swept into the government’s DNA extraction dragnet. What ever happened with innocent until proven guilty?”

Senator Nussbaum: “Our law enforcement personnel put their lives on the line each day. The least we can do is provide them with all the necessary tools. We can no longer ignore the appalling number of unsolved crimes in this state. On the other side of the coin, we cannot ignore DNA’s unique ability to exonerate wrongfully convicted individuals. This is a win win.”

Senator Ramirez: “I fear this debate as centered too much on the use of the DNA extracted under the Act for law enforcement. Section 2.6(e)(iv) will go a long way to limiting the number of wrongly convicted innocent people behind bars. Section 2.6(e)(v) will allow families who have struggled with not knowing what happened to a lost loved one to finally have closure. And sections 2.6(e)(i) and (ii) explicitly provide that DNA extracted under the Act will further our understanding of disease and will be used in medical research. In total, ladies and gentlemen, the Act being debated here today will not just help law enforcement, but will better the lives of the citizens of Absaroka in several other respects.”

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF ABSAROKA

JOHAN VANDERMER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. Civ. 09-296-1-MJ
	)	
RISA PATEL, State Attorney	)	
General; STEFAN MacARTHUR,	)	
Superintendent of State Police; and	)	
ANNABELLE LEE, Public Safety	)	
Director of the City of Arcadia,	)	
	)	
Defendants.	)	

**NOTICE OF APPEAL**

Plaintiff Johan Vandermer, by counsel, now respectfully submits his Notice of Appeal to the United States Court of Appeals for the Fourteenth Circuit, pursuant to Fed. R. App. P. 3, from the Memorandum Opinion and Order Denying Motion for Preliminary Injunction entered by this Court on September 3, 2009.

*Counsel for Plaintiff*

Dated: September 4, 2009

UNITED STATES COURT OF APPEALS  
FOR THE FOURTEENTH CIRCUIT

JOHAN VANDERMER,	)	
	)	
Appellant	)	Appeal from the
(Plaintiff below),	)	United States District Court
	)	for the Southern District of Absaroka
	)	
v.	)	
	)	Hon. Karen Al-Hamsa
RISA PATEL, State Attorney	)	United States District Judge
General; STEFAN MacARTHUR,	)	
Superintendent of State Police; and	)	Case No. Civ. 09-296-1-MJ
ANNABELLE LEE, Public Safety	)	
Director of the City of Arcadia,	)	
	)	
Appellees	)	
(Defendants below).	)	

**BRIEFING ORDER**

Appellant Johan Vandermer filed a Notice of Appeal on September 4, 2009, from the Order Denying Plaintiff’s Motion for Preliminary Injunction from the United States District Court for the Southern District of Absorka dated September 3, 2009. The appropriate Docketing Fee having been paid and the Docketing Statement having been filed, the Court now sets the following schedule and instructions for the admission of the parties’ principal briefs:

- (1) The Brief of Appellant shall be due on or before October 5, 2009.
- (2) The Brief of Appellees shall be due on or before October 5, 2009.

SO ORDERED.

Terrance Brown, Chief Judge

Dated: September 11, 2009