No. G060988

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

WILLIAM THOMPSON AND SIMON COLE,
Plaintiffs-Appellants,
v.
TODD SPITZER AND COUNTY OF ORANGE,
Defendants-Respondents.

On Appeal from the Superior Court, County of Orange
The Honorable William D. Claster, Judge
Civil Case No. 30-2021-01184633-CU-MC-CXC

BRIEF FOR *AMICI CURIAE* ANDREA ROTH, BRANDON L. GARRETT, AND YVETTE GARCIA MISSRI IN SUPPORT OF PLAINTIFFS-APPELLANTS

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October 27, 2022

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL 4th **APPELLATE DISTRICT, DIVISION** 3	COURT OF APPEAL CASE NUMBER: G060988
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 292360 NAME: Christina E. Dashe FIRM NAME: Sterne Kessler Goldstein & Fox STREET ADDRESS: 1100 New York Avenue, NW CITY: Washington STATE: DC ZIP CODE: 20005 TELEPHONE NO.: 202-371-2600 FAX NO.: 202-371-2540 E-MAIL ADDRESS: cdashe@sternekessler.com ATTORNEY FOR (*name*): Andrea Roth, Brandon Garrett, and Yvette Garcia Missri	SUPERIOR COURT CASE NUMBER:
APPELLANT/ PETITIONER: William Thompson and Simon Cole RESPONDENT/ REAL PARTY IN INTEREST: Todd Spitzer and County of Orange	

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2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	Andrea Roth	Amici Curiae
(2)	Brandon L. Garrett	Amici Curiae
(3)	Yvette Garcia Missri	Amici Curiae
(4)		
(5)		

[ ] Continued on attachment 2.

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RULE 8.200(C)(3) CERTIFICATION

Pursuant to California Rule of Court 8.200(c)(3), *amici* certify that the accompanying brief was authored by Andrea Roth, Brandon L. Garrett, Yvette Garcia Missri, and their undersigned counsel. No party or any counsel for a party in the pending appeal authored the brief in whole or in part. Further, no person or entity made a monetary contribution intended to fund the preparation or submission of the brief.

October 27, 2022

Respectfully submitted

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INTRODUCTION

The Orange County District Attorney's Office ("OCDA") is now in the business of collecting DNA from a large segment of the populace who are not required by state law to give DNA. OCDA's database, which contains nearly 200,000 DNA profiles, is the only prosecutor-run database in the country and is larger than those maintained by more than twenty-five *states*.

The database owes its immense size to the oppressive scope of OCDA's DNA Collection Program ("Program"). Most states limit permanent DNA collection to individuals convicted of a felony. The Program, by contrast, allows prosecutors to collect and permanently retain DNA from people *charged only with misdemeanors*—including the most minor alleged offenses—as long as the accused misdemeanant agrees to the invasion on the promise of reduced or dismissed charges. By stockpiling DNA from hundreds of thousands of alleged jaywalkers, petty thieves, and other low-risk individuals, OCDA has effectively taken "Big Brother to the extreme."[1]

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[1] Smith, *Orange County Prosecutors Operate "Vast, Secretive" Genetic Surveillance Program*, Intercept (June 3, 2021), <https://theintercept.com/2021/07/03/orange-county-prosecutors-dna-surveillance/> (quoting Prof. Lara Bazelon).

The Program is unsettling and ethically dubious. It is also unconstitutional. In particular, as Appellants have alleged, the Program violates the unconstitutional conditions doctrine to the extent it extracts waivers of community members' constitutional rights in exchange for a "benefit"—a plea deal or dismissal—that a properly motivated prosecutor would offer anyway. The unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595, 604. It also prevents the government from "attaching strings strategically" and "striking lopsided deals" in such a way as to "erod[e] constitutional protections." *United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 866-67. But that is exactly what the Program appears to do here. OCDA cannot legally directly compel someone merely accused of a misdemeanor to surrender her DNA. It should not be permitted to use the Program to indirectly accomplish that same result.

The County defends the Program by characterizing it as a mutually beneficial, bargained-for exchange similar to a run-of-the-mill plea bargain. *See, e.g.*, Cnty. Br. 46-54. The County's

entire argument against application of the unconstitutional conditions doctrine is built upon its forced analogy between the Program and plea bargaining that occurs under "the long tradition of negotiated dispositions of criminal matters[.]" *Id.* at 42.

That analogy is deeply flawed. There is nothing "traditional" about the Program. For one thing, the constitutional right that an individual is compelled to relinquish—the right to privacy in her genetic information—goes to the heart of the integrity of the individual's person. Moreover, the impingements on privacy rights engendered by the Program go far beyond those necessary to achieve the government's legitimate interests in criminal prosecution. Even after charges have been dismissed, OCDA enjoys nearly unlimited control over individuals' DNA. The database is subject to no limit as to how long DNA can be retained, and, because DNA technology advances so quickly, stored DNA can be exploited in the near future and used in disturbing ways that we cannot even foresee.

Further, in a large swath of cases, OCDA's Program does not appear to reflect a "bargain" at all, or at least not a meaningful one. On the contrary, the "benefit" offered in

exchange for accused misdemeanants waiving their privacy rights is one that, for many if not most defendants, would likely have been offered anyway in the absence of the Program. Not only does the prospect of securing DNA samples appear to unconstitutionally motivate OCDA to bring low-level misdemeanor charges that would not otherwise have been brought, but it also improperly motivates OCDA's decision whether to reduce, dismiss, or elevate charges. Indeed, plea bargaining was routine *before* the Program, and yet now a DNA sample is a requirement for *every misdemeanor plea deal in Orange County*. The "benefit" of the Program for the accused is therefore illusory.

In short, OCDA's Program is worlds apart from run-of-the-mill plea bargains and presents an intolerable unconstitutional conditions problem. Appellants have shown that the trial court erred in sustaining a demurrer, and, with the factual predicate for the County's response undermined, this Court should reverse.

ARGUMENT

I. OCDA'S PROGRAM INHERENTLY BREEDS UNPRECEDENTED, UNFETTERED, AND COERCIVE PROSECUTORIAL POWER AT EVERY STEP OF THE PROCESS.

As explained below, unlike traditional plea bargaining, OCDA's Program possesses coercive elements at every step of the process, from before charges are even brought to long after they are dismissed. The Program, moreover, places burdens on accused misdemeanants' privacy rights that go far beyond those justified by OCDA's legitimate criminal justice interests. The end result is that many accused misdemeanants accept an illusory benefit in the face of a contrived threat—that is, one they would have nonetheless received if the Program were not in place.

A. Pre-Charging: The Prospect of Securing DNA Samples Appears to Drive OCDA to Bring Low-Level Misdemeanor Charges It Would Not Have Otherwise Brought.

The only limit on OCDA's ability to collect DNA under the Program is that the individual must be charged with a misdemeanor. But that is no meaningful limit at all. The offenses that can qualify as misdemeanors are vast in scope, ranging from making "[n]oise that is unreasonably loud, raucous or jarring" after 10:00 pm, to having weeds in one's yard, to walking one's

dog without a leash (or with a leash longer than six feet). *See* Orange Cnty. Cod. Ord. Sec. 3-13-3(d); *id.* Secs. 3-15-4(b), 3-15-6(b); *id.* Sec. 4-1-45. Few among us have not committed an offense that could qualify as a misdemeanor in Orange County.

Further, many of the statutorily proscribed offenses are broadly and vaguely worded and thus could be enforced in such a way as to cover a wide range of non-criminal conduct. Take, for example, Orange County Codified Ordinance Sec. 3-13-4(14), which prohibits "[u]se [of] a garage, or any portion thereof, as a temporary or permanent living space or as a meeting room." If a Little League baseball team gathers in Coach's garage to discuss strategy before the game, has Coach violated this ordinance?

Still further, a prosecutor's decision to charge an individual for a misdemeanor is rarely questioned, as more intense scrutiny is typically reserved for individuals charged with more serious crimes. In other words, misdemeanors are easy to charge, and decisions to do so are subject to little oversight. The non-economic "costs" associated with bringing such charges are thus relatively low.

The "rewards," by contrast, are high. Just a single cubic millimeter of saliva contains more than 43,000 DNA-containing

cells.[2] And so OCDA can obtain an accused misdemeanant's *entire* genetic makeup with a quick-and-easy buccal swab. Further, OCDA has received millions of dollars from the Orange County Board of Supervisors and from federal grants and defendant fees to fund its office and Program, and the prospect of continued funding may provide its own reward.[3] From a prosecutor's perspective, these low costs and high rewards create incentives for OCDA to bring misdemeanor charges simply to obtain a DNA sample.[4]

OCDA has not disclosed how many accused misdemeanants are offered leniency based on an agreement to provide DNA, so meaningful statistics are difficult to obtain. But OCDA has made

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[2] Garbieri, *Human DNA extraction from whole saliva that was fresh or stored for 3, 6 or 12 months using five different protocols* (2017) 25 J. Appl. Oral Sci. 147, 148.

[3] Edds, *D.A. Gets $1.4 Million for 'Spit and Acquit'*, Orange Cnty. Reg. (Dec. 16, 2010), <https://www.ocregister.com/2010/12/16/da-gets-14-million-for-spit-and-acquit/>; Roth, *"Spit and Acquit": Prosecutors As Surveillance Entrepreneurs* (2019) 107 Calif. L. Rev. 405, 421-422.

[4] *See* Jones & Wade, *"Spit and Acquit": Legal and Practical Ramifications of the DA's NDA Gathering Program* (2009) 51-SEP Orange Cnty. L. 18, 23 ("[T]he low cost (from the prosecutor's perspective) of the bargained-for dismissal could well have a negative effect on the prosecutor's judgment in making both the original charging decision or the decision to continue with the prosecution.").

DNA a standard condition on *every* plea deal in Orange County, which "suggest[s] a blanket policy—one more add[-]on to a contract of adhesion—rather than an offer of conditional leniency to people who would not otherwise receive it."[5]

The few statistics that *are* available suggest that the prospect of obtaining DNA inherently and heavily influences OCDA's charging decisions. The number of misdemeanor pleas and trials significantly increased shortly after the Program's creation, suggesting that the Program drives OCDA "to pursue more misdemeanor prosecutions."[6]

Qualitative research also supports this conclusion. *Amicus* Social Justice Legal Foundation, for example, describes a case in which a prosecutor told a 58-year-old teacher charged with improper use of a disability placard that the prosecutor "didn't even know what she was doing there" for such a minor offense and offered to drop the charges in exchange for providing DNA. Many defense attorneys have similarly reported that most individuals who surrender their DNA "would have received a dismissal anyway had they held out," leading to the conclusion

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5 Roth, *supra* n.3, at 420, 443.

6 *Id.* at 442.

that OCDA's "entire misdemeanor practice ha[s] been skewed" by the Program.[7] Even some judges are on record stating that they believe OCDA is "filing some cases knowing they [are] never going to pursue the case unless they absolutely ha[ve] to, just to get the DNA."[8]

To the extent additional evidence corroborating Appellants' allegations on this score is uniquely in the possession of OCDA, Appellants should have been permitted to obtain such evidence during discovery. "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A. v. William S. Hart Union High Sch. Dist.* (Cal. 2012) 53 Cal.4th 861, 872. Further, "the particularity required of a pleading varies given the parties' relative knowledge of the facts in issue. Less particularity is required where the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff." *Randall v. Ditech Fin., LLC* (Cal. Ct. App. 2018) 23 Cal.App.5th 804, 810-11 (cleaned up). Thus, at the

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7 *Id.* at 444.

8 *Id.* at 443.

demurrer stage, the trial court should have given Appellants the benefit of a reasonable inference that the prospect of procuring DNA improperly motivates OCDA to bring charges that would not have been brought but for the Program. Appx108(¶27).

Finally, while OCDA possesses broad discretion to bring (and dismiss) charges, such discretion is not so broad as to include the power to exact waivers of constitutional rights. *See Wayte v. United States* (1985) 470 U.S. 598, 608 ("Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints.") (cleaned up); *Murgia v. Municipal Ct.* (Cal. 1975) 15 Cal.3d 286, 303-05. That is what the Program does here. It exploits prosecutorial discretion in a way that erodes constitutional rights.

In sum, the record strongly suggests that OCDA's Program has led to over-charging in an attempt to obtain individuals' DNA. And, as explained below, that is just the tip of the iceberg.

B. During the Charging Process: the Record Indicates the "Benefit" of Dismissed or Reduced Charges Is Likely Illusory and the "Threat" of Elevated or Maintained Charges Is Likely Contrived.

OCDA's improperly motivated coercion is perhaps at its zenith during the charging process itself. At that time,

prosecutors may dismiss or reduce charges for individuals who agree to give up their DNA, or instead *elevate* charges for individuals who reject the invitation. It is unsurprising that most individuals faced with this "choice" go along with OCDA's demands. Moreover—and of particular relevance to Appellants' unconstitutional conditions claim—the "benefit" that these accused misdemeanants end up receiving is in many cases an illusory one (i.e., one they would have received even if the Program were not in place).

Based on *amici*'s research, 75-80% of accused *pro se* misdemeanants offered this "deal" accept it.[9] This finding is consistent with research showing that pretrial detention pressured people charged with misdemeanors to plead guilty (indeed, plead guilty faster than those charged with felonies).[10] In contrast, when people are *not* coerced to plead guilty, more cases proceed to trial or are dismissed and fewer result in pleas.[11] That

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9 *Id.* at 418.

10 Subramanian *et al.*, *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Institute Just. (Sept. 2020), 14-15, <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf>.

11 Garrett *et al.*, *Monitoring Pretrial Reform in Harris County Fifth Report of the Court-Appointed Monitor*, (Sept. 3, 2022), 5, 7 <https://ojs.harriscountytx.gov/Portals/70/documents/ODonnell%2

coercive effect is at play here when accused misdemeanants are arraigned (often in large, public courtrooms); acceptance of a prosecutor's deal is rarely *truly* voluntary in such settings.[12] Appx104-106(¶¶19-21); *see also* SJLF Amicus Br. "Where the choice 'is between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Garrity v. New Jersey* (1967) 385 U.S. 493, 498 (cleaned up).

Additionally, individuals are regularly unrepresented and under-informed during this process. As OCDA itself acknowledges, prosecutors often present these plea deals to defendants *after* a "Sixth Amendment right to counsel has attached."[13] *See* Cnty. Br. 26-27. And yet, individuals rarely—if ever—consult with an attorney and rarely have a full understanding of the consequences of giving up a DNA sample for

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0Monitor%20Fifth%20Report%20v.25.pdf?ver=RzKXKoeVO7aflU8sraxW_A%3d%3d>; Heaton, *The Effects of Misdemeanor Bail Reform*, Quattrone Center for the Fair Administration of Justice (Aug. 16, 2022), Section 7, <https://www.law.upenn.edu/institutes/quattronecenter/reports/bailreform/#/lessons/298QqaqdYgFhhsKx7ei9zGKvT8ILGEVt>.

[12] Subramanian, *supra* n.10, at 14-15; Roth, *supra* n.3, at 417, 443-44.

[13] *OCDA DNA Program FAQ: How Is the OCDA DNA Collection Program Voluntary?*, OCDA Sci. & Tech., <https://orangecountyda.org/science-technology/>.

permanent retention by OCDA.[14] Appx104-106(¶¶19-21); Appx108(¶26); Appx109-111(¶¶35-42). The County suggests that these concerns are overstated given that plea bargains are subject to judicial oversight. *See* Cnty. Br. 29-30, 35-36. But, in practice, few accused misdemeanants ask the court questions about the Program, and, in any event, OCDA's practice allows the plea to escape judicial scrutiny entirely in some cases. For example, prosecutors may request a continuance, and if the accused misdemeanant fulfills certain conditions during that time and gives up her DNA, the prosecutors dismiss the case "without the judge ever having to approve a guilty plea" at all.[15]

Even in cases where an accused misdemeanant is fully informed of her rights and knowingly provides DNA, the "benefit" to the accused misdemeanant—i.e., reduced or dismissed

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[14] *See* Roth, *supra* n.3, at 418 (noting that, according to one judge, "75 to 80 percent of misdemeanors in Orange County resolve on the first appearance through a plea or dismissal without an attorney"); *id.* at 444-45 ("It seems doubtful that the average Spit and Acquit participant understands the stakes of giving a DNA sample. … Unless defendants have a fuller understanding of the risks of inclusion in a DNA database, beyond simply the chance of being caught for a serious crime they actually committed, it is hard to say that defendants who accept Spit and Acquit deals are doing so in a knowing and voluntary way.").

[15] *Id.* at 419-20.

charges—often appears to be illusory. As explained above, in many instances, OCDA appears to bring charges or maintain charges that would otherwise be dropped solely to collect DNA. In those instances, OCDA walks away with an accused misdemeanant's entire genetic makeup (and $110, to boot), while the accused misdemeanant walks away only with a dismissal of charges that should never have been brought in the first place. And, for an individual who does not initially cooperate with OCDA's demands, the purported threat to the individual—i.e., prosecution under existing or elevated charges—is contrived. If the charges should never have been brought, OCDA's threat to prosecute an individual on such charges has no purpose other than to exact a DNA sample.

In the end, an examination of the available evidence, along with the plausible inferences arising from Appellants' well-pleaded allegations, indicates that the Program is predicated on coercion, spurious benefits, and contrived threats.

C. Post-Dismissal: OCDA's Control Over Individuals' DNA Extends Long After Charges Have Been Dismissed.

The Program's coercive effect does not cease after DNA has been collected and charges have been dismissed. On the contrary,

OCDA wields control over accused misdemeanants' DNA indefinitely, as the database contains no restriction on how long DNA information may be stored nor any mechanism for expungement.

In fact, as explained below, OCDA's database is severely under-regulated, particularly when compared to other states' databases. That lack of regulation, coupled with the fast-evolving nature of DNA technology, makes OCDA's Program susceptible to "function creep"—i.e., a likelihood that the database will someday be used for illegitimate purposes in ways that we cannot anticipate.

1. OCDA's Database Is Severely Under-Regulated and DNA Information Is Permanently Retained.

OCDA's Program lacks important safeguards to reduce the risk of error and misuse. To be sure, DNA analysis is generally accurate, well-tested, and useful as a forensic tool—indeed, it is far more accurate than many other types of forensic evidence historically used to secure criminal convictions.[16] And it has

[16] *See* Nat'l Res. Council of the Nat'l Acad., *Strengthening Forensic Science in the United States: A Path Forward* (2009), 7 ("With the exception of nuclear DNA analysis[] … no forensic method has been rigorously shown to have the capacity to

proven invaluable in exonerating individuals who were wrongfully convicted based on unreliable, faulty evidence.[17]

But DNA analysis is not infallible. It is subject to human error and misuse just like any other forensic tool. It is thus imperative that DNA collection programs be subject to rigorous testing, regulation, and oversight.[18]

California's DNA collection program, for example, is governed by the DNA and Forensic Identification Data Base and Data Bank Act of 1998 (as amended), a comprehensive statutory framework restricting how DNA samples are collected, processed, and used. *See* Cal. Penal Code, §§ 295-300.4. The Act requires police departments to process collected DNA using in-state public

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consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."), *available at* <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf>; Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions* (2009) 95 Va. L. Rev. 1, 9 (finding that 60% of forensic analysts who testified at the trials of 137 individuals later exonerated by DNA misstated empirical data or drew conclusions that were unsupported by empirical data).

17 *DNA Exonerations in the United States*, Innocence Project, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (noting that DNA has exonerated 375 individuals to date).

18 Roth, *supra* n.3, at 424-26; *Quality Assurance DNA Standards*, Forensic DNA Evidence: Science and the Law, §§ 4:2, 4:3 (May 2022 update) ("DNA Handbook").

laboratories that meet certain minimal state and federal requirements. *Id.*, §§ 296(a), 297(a). The program's administration is overseen by the California Department of Justice's DNA Laboratory, which is charged with adopting quality assurance policies, regulations, and procedures. *Id.*, §§ 295(h), 298(b)(6). These safeguards are ostensibly aimed at both maximizing the accuracy of DNA analysis and minimizing the extent of the program's intrusion on individuals' privacy.

OCDA's Program, by contrast, lacks even these minimal safeguards. As the County itself acknowledges, the database is not subject to the statutory provisions that govern California's state database. Cnty. Br. 44. Rather, just four local ordinances govern the OCDA's database's use. *See* Orange Cnty. Cod. Ord. Sec. 3-17-1 to 3-17-4. And those ordinances do not require that DNA collected under the Program be processed by accredited laboratories nor impose any other quality controls. Further, the Program is not subject to any external oversight. OCDA alone created the database; OCDA alone populates it; and OCDA alone oversees compliance with the (minimal) regulations that apply to it. Because the Program lacks critical safeguards and quality controls, many of its DNA profiles—including all those extracted

pursuant to a dismissal—would not be eligible for inclusion in the FBI's national link of state and local DNA databases, the Combined DNA Index System (CODIS).[19]

Indeed, CODIS contains several other safeguards that the OCDA database lacks, including requirements as to "stringency" of searches (to avoid casting too wide a net when looking for profiles similar to a crime scene profile); a requirement that an uploaded reference sample be from the perpetrator of an unsolved crime (to avoid abusive searches unrelated to crime-solving); a requirement that participating states have expungement provisions; and prohibitions against familial searching, controversial low-quantity DNA testing, and uploading crime scene samples collected with Rapid-HIT machines.[20]

OCDA, for its part, provides limited insight as to how its Program works—to the extent OCDA has promulgated quality assurance standards, those standards have not been publicly disclosed. The sum of what we know about the Program is as follows:

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19 Roth, *supra* n.3, at 423.

20 Roth, *supra* n.3, at 423-26.

- Once an individual "agrees" to participate in the Program, she walks down a hallway of the courthouse to OCDA's DNA Collection Office. There, an investigative assistant takes a buccal swab of the individual's mouth. The swab is then shipped to a private biotechnology company called Bode Cellmark Forensics.[21] Appx106-107(¶23).

- Bode tests the sample, generates a forensic DNA profile, and then sends the sample and profile back to OCDA, which uploads the profile into the Program's database.[22] *Id.*

- In addition to storing DNA profiles, OCDA also stores the DNA samples, themselves, in a purportedly secure location.[23]

We do not know how or where the DNA samples are stored and shipped, how they are processed by Bode, if and how long Bode retains samples, or whether Bode disseminates DNA information to others. Appx107(¶24).

Perhaps most concerning, OCDA's database is unlimited in temporal scope—as the County acknowledges, "the DNA sample will be *permanently* retained." Cnty. Br. 56 (emphasis added); Appx103(¶15). The Program thus stands in stark contrast to other DNA collection programs.

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[21] OCDA, Effectively Utilizing DNA Technology to Solve Crime in Orange County: 2009-2010 Annual Report, 13.

[22] *Id.*

[23] Roth, *supra* n.3, at 420.

Many states that collect DNA from arrestees automatically expunge DNA samples and profiles upon dismissal of charges or upon acquittal.[24] Many others, including California, provide a mechanism for arrestees to request expungement in such circumstances.[25] OCDA's database, by contrast, contains no such temporal limitation, means, or circumstances by which DNA information may be expunged upon dismissal of charges. In fact, DNA is often collected *on the condition* that charges are dismissed, and individuals who provide their DNA under the Program are required to *certify that they will never challenge OCDA's retention of their sample*.[26]

Effectively, then, presumptively innocent individuals have their DNA maintained indefinitely, forever accessible to OCDA and any future third parties whom the District Attorney decides ought to access it. *See* Orange Cnty. Cod. Ord. Sec. 3-17-4(d). This leads to a troubling incongruity: "[p]eople charged with some of the pettiest of crimes have forever given up their genetic information, where individuals charged with far more serious

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24 *Id.* at 411.

25 *Id.* at 426.

26 *Id.* at 426-27, Appx. A.

offenses are, under certain circumstances, able to have their genetic information expunged."[27] These features of the Program strongly suggest that the Program is less about resolving misdemeanors and more about aggregating a massive trove of DNA evidence that will allow OCDA to exercise oversight over the Orange County populace for years to come.[28]

2. The Program's Under-Regulation, Coupled with the Quickly Evolving Nature of DNA Technology, Makes the Program Susceptible to "Function Creep" In the Future.

Even accepting the County's representation that OCDA's Program has a legitimate and laudable purpose, and assuming (contrary to all available evidence) that the Program has actually achieved any of them, the Program is still deeply problematic. The Program's lack of regulation or oversight make it dangerously susceptible to "function creep"—the "operationally driven use" of the Program "for new purposes not envisaged when

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27 Smith, *supra* n.1, at 9.

28 Subramanian, *supra* n.10, at 16 (noting that misdemeanor plea deals sometimes indicate a strategy of "managerial justice," under which "prosecutors use various adjudicatory tools that avoid formal punishment but enable them to document a person's criminal justice encounters and track behavior over time (such as conditional discharge or an adjournment in contemplation of a dismissal) so that law enforcement agencies . . . have a record to use in calibrating future responses").

the [Program] was established."[29] That is, even if the Program is appropriately used for crime-solving purposes *today*, OCDA (and others) could misuse the DNA for unforeseeable and intrusive purposes *in the future*. And, because DNA technology evolves so quickly, OCDA's database could one day be used in illegitimate ways that we cannot yet foresee.

This concern is neither speculative nor exaggerated. We have seen several examples of function creep in the DNA-collection context in modern history:

- In the early 1990s, the Havasupai tribe permitted a public university to collect DNA of its members to support a study hoping to "provide genetic clues to the tribe's devastating rate of diabetes."[30] Yet, over time, the collected DNA was also used to research the tribe's rate of inbreeding and propensity for mental illness.[31]

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29 Roman-Santos, *Concerns Associated with Expanding DNA Databases* (2010) 2 Hastings Sci. & Tech. L.J. 267, 294; Simoncelli & Steinhardt, *California's Proposition 69: A Dangerous Precedent from Criminal DNA Databases* (2005) 33 J.L. Med. & Ethics 279, 282-84; *see also* Paul, *DNA Collection from Felony Arrestees in California*, California Policy Options (2021), ch. 6, at 141-42; Ferrell, Comment, *Twenty-First Century Surveillance: DNA "Data-Mining" and the Erosion of the Fourth Amendment* (2013) 51 Hous. L. Rev. 229, 261; Bartusiak, Comment, *Plea Bargaining for DNA: Implications on the Right to Privacy* (2011) 13 U. Pa. J. Const. L. 1115, 1128-29.

30 Harmon, *Indian Tribe Wins Fight to Limit Research of its DNA*, N.Y. Times (Apr. 21, 2010), <https://www.nytimes.com/2010/04/22/us/22dna.html>.

31 *Id.*

- Consumer DNA databases such as 23andMe and Ancestry were originally designed to help individuals learn about their family histories. Yet, emboldened by the capture of the alleged Golden State Killer, police departments across the country are now trying to use information furnished from such databases—which comprise more than fifteen million peoples' DNA—to facilitate "familial searching" whereby partial matches between DNA collected from a crime scene might indicate a familial relationship with an individual whose DNA is stored in a commercial database.[32]

- As part of a Newborn Genetic Screening program, California, like many states, gives babies heel pricks shortly after birth to test for dozens of congenital disorders. Over time, the state began storing collected blood spots in a biobank and even sold the genetic material to outside researchers without the parent's knowledge or consent.[33] Other states are doing the same, and law enforcement is now using the blood spots for investigative purposes.[34]

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[32] Van Ness, *DNA Databases Are Boon to Police But Menace to Privacy, Critics Say*, PEW Stateline (Feb. 20, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/02/20/dna-databases-are-boon-to-police-but-menace-to-privacy-critics-say>; Hill & Murphy, *Your DNA Profile Is Private? A Florida Judge Just Said Otherwise*, N.Y. Times (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/business/dna-database-search-warrant.html> (describing issuance of warrant allowing investigators to access GEDmatch's database containing nearly one million DNA profiles); *New Investigative Tools*, DNA Handbook, *supra* n.18, § 13:8; Simoncelli & Steinhardt, *supra* n.29, at 284.

[33] *DNA of Every Baby Born in California Is Stored. Who Has Access to It?*, CBS News (May 12, 2018), <https://www.cbsnews.com/news/california-biobank-dna-babies-who-has-access/>.

[34] Mullin, *Police Used a Baby's DNA to Investigate its Father for a Crime*, Wire (Aug. 15, 2022),

These examples demonstrate that function creep is real and pervasive. And OCDA's Program is particularly susceptible to function creep given its lack of meaningful safeguards and oversight.

OCDA asserts that such risk is low because it currently analyzes only non-coding regions of DNA called "junk DNA."[35] In the OCDA's telling, such DNA cannot reveal genetic traits and other private information.[36] But that understanding of junk DNA is inaccurate. Recent studies have shown that DNA regions previously thought to be incapable of revealing genetic traits do in fact convey sensitive information, including, for example, individuals' disposition to certain diseases and medical conditions.[37] Additionally, researchers are currently exploring the

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<https://www.wired.com/story/police-used-a-babys-dna-to-investigate-its-father-for-a-crime/#:~:text=The%20New%20Jersey%20lawsuit%20alleges,genetic%20genealogy%2C%20or%20forensic%20genealogy>.

35 *See, e.g.*, *OCDA DNA Program FAQ*, OCDA Sci. & Tech., <https://orangecountyda.org/science-technology/> (stating that tested regions of DNA "do not contain genes," such that "information regarding hair color, eye color, ethnicity, and disease, among other characteristics, cannot be obtained").

36 *Id.*

37 *See, e.g.*, Hysi *et al.*, *Meta-Analysis of 542,934 Subjects of European Ancestry Identifies New Genes and Mechanisms Predisposing to Refractive Error and Myopia* (2020) 52 Nat. Genet. 401 (describing research identifying 336 novel regions of

relationship between individuals' genetic code and their proclivity for certain behavior (both criminal and non-criminal).[38] Thus, the continued analysis of so-called "junk DNA," coupled with the "rapidly advancing ability to scrutinize DNA in detailed ways that were unthinkable only a few years ago, . . . is paving the way for intrusive analyses that have the potential to reveal information about one's health, one's family, and one's future health."[39]

In any event, the concern here extends not just to OCDA's current practice but to its potential future practices as well. As explained above, in addition to retaining DNA profiles, OCDA

DNA associated with myopia); *Genetic Privacy*, DNA Handbook, *supra* n.18, § 13:13 (discounting the notion that junk DNA cannot reveal sensitive information); Roman-Santos, *supra* n.29, at 291-92 (describing research revealing links between DNA "fingerprints" and a person's susceptibility to disease); Kim *et al.*, *Statistical Detection of Relatives Typed with Disjoint Forensic and Biomedical Loci* (2018) 175 Cell 848, 848 (revealing the ability to match forensic DNA profiles in offender databases to relatives' DNA information in commercial genealogy websites, based on genetic markers previously unknown to overlap between the two different types of testing employed).

[38] Ferrell, *supra* n.29, at 261; Beaver, *Molecular Genetics and Crime, Biosocial Criminology* (2008) 50, 50-69; Ruiz-Ortiz & Tollkuhn, *Specificity in Sociogenomics: Identifying Causal Relationships Between Genes and Behavior* (2021) 127 Hormones & Behavior 104882.

[39] Skuse *et al.*, *Justice as Fairness: Forensic Implications of DNA and Privacy* (2015) 39-APR Champ. 24, 24.

also retains *full physical DNA samples* containing each accused misdemeanant's full genome. Such samples contain "a treasure trove of information about one's familial relationships, genetic traits, propensity for diseases, and the like."[40] And given OCDA Program's lack of regulation and oversight, the "potential for misuse of this vast information is real"—even if OCDA does not *currently* analyze the entirety of such information today, there is nothing to prevent it from doing so in the future.[41]

The harmful effects of function creep are especially troubling given the growing number of individuals targeted. California's program provides an illustration. Established in 1990, the program originally collected DNA only from those convicted of certain sex offenses and violent felonies.[42] After more than three decades of expansion, the program now collects DNA from adult felony *arrestees* and certain misdemeanants.[43] California's database is thus one of the largest in the world, with

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40 Roth, *supra* n.3, at 413.

41 Simoncelli & Steinhardt, *supra* n.29, at 288.

42 *History and Purpose of California's Program*, DNA Handbook, *supra* n.18, § 8:3.

43 *Id.*

more than three million profiles.[44] If a regulated database created after intense public debate and voter participation can expand so quickly in such a short time, there is no hope for OCDA's under-regulated, under-the-radar database.

To be clear, the risk of function creep is not necessarily predicated on some bad faith or ill motive on the part of OCDA. "Even governments with benign intentions have proven unable to regulate or use wisely vast stores of information they collect regarding their citizen[ry]." *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 843 (Reinhardt, J., dissenting). Rather, the risk here is a natural consequence of the under-regulated nature of OCDA's database and the ever-evolving nature of DNA technology.

And, while OCDA's Program takes DNA collection to the extreme, it is not alone. San Francisco, for example, recently revealed that it had expanded its own rogue database to store DNA not just from those who committed crimes, but *also* from *victims* of crimes, including rape victims and child abuse

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44 *Id.*, § 8:1.

victims.[45] If OCDA's Program is permitted to stand, police departments and prosecutor offices throughout the country will continue pushing the envelope beyond constitutional and ethical limits. Continuing down this "path of unaccountable 'function creep' may bring us to a day when the entire U.S. population finds itself in a government database."[46]

II. THE AVAILABLE RECORD INDICATES THAT OCDA'S PROGRAM VIOLATES THE UNCONSTITUTIONAL OCDA'S PROGRAM VIOLATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE, AS IT—UNLIKE TRADITIONAL PLEA BARGAINING—IMPLICATES FUNDAMENTAL PRIVACY RIGHTS AND APPEARS TO REST ON CONTRIVED THREATS AND ILLUSORY BENEFITS.

Appellants have explained at length in their pleading—as well as in their briefs on appeal—why OCDA's Program, based on the record evidence available thus far, violates the unconstitutional conditions doctrine. Appx112-113(¶¶53-56); Appellants' Br. 45-50. As Appellants explain, a government entity

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45 Abdollah, *Rape Survivors, Child Victims, Consensual Sex Partners: San Francisco Police Have Used DNA from All of Them for 7 Years*, USA Today (Feb. 23, 2022), <https://flipboard.com/topic/–sexualviolence/rape-survivors-child-victims-consensual-sex-partners-san-francisco-police-hav/f-48727a713c%2Fusatoday.com>; Lynch, *Not Just San Francisco: Police Across the Country Are Retaining and Searching DNA of Victims and Innocent People*, Elec. Front. Found. (Feb. 16, 2022), <https://www.eff.org/deeplinks/2022/02/not-just-san-francisco-police-across-country-are-retaining-and-searching-dna>.

46 Simoncelli & Steinhardt, *supra* n.29, at 290.

that imposes conditions on a discretionary benefit that burden fundamental constitutional rights must establish, in substance, (i) that the conditions reasonably relate to the interests that purportedly justify the burden; (ii) that the governmental interest in extracting the waiver "manifestly outweighs" the impairment of constitutional rights; and (iii) that there are no less restrictive alternatives for achieving that governmental interest. Appellants' Br. 46. So, for example, in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, the U.S. Supreme Court held that the California Coastal Commission could not condition receipt of a discretionary building permit on a requirement that the builders allow a public easement on their property because the government's purported justifications for the easement (which, absent the builder's consent, would violate the Fifth Amendment Takings Clause) were not reasonably related to the justifications for requiring building permits in the first place. *Id.* at 837. In other words, the condition in question violated factor (i) of the three-part inquiry above (sometimes referred to as the "germaneness" requirement).

To use another example, the governor could not condition welfare benefits on the recipient's promise not to criticize him for

a year, even if such welfare benefits were discretionary and even if the recipient agrees to a waiver of their First Amendment rights in exchange for the benefit. That is because the Governor's condition is not reasonably related to granting welfare benefits. A properly motivated Governor would make the welfare benefit decision without regard to the recipient's waiver of their constitutional rights, making the threat of withholding the welfare benefits a contrived and improperly motivated threat.

As this section explains, taking the allegations in the complaint as true, the OCDA Program presents a classic unconstitutional condition for two distinct reasons. *First*, the Program burdens accused misdemeanants' privacy rights in fundamental ways that go far beyond those justified by any legitimate interests in prosecution. The burden instead appears related to OCDA's desire to cultivate the largest non-CODIS DNA database in the country. *Second*, there is no meaningful bargain to speak of because the "benefit" conferred (reduced or dismissed charges) is illusory in nature, based on a contrived threat (elevated or continued charges that should not have been brought in the first place). In these ways, the Program is utterly unlike traditional plea bargains that courts have held do *not*

violate the unconstitutional conditions doctrine. The County's attempt to analogize the program to run-of-the-mill plea bargaining therefore fails.[47]

A. DNA Goes to the Heart of the Integrity of an Individual's Person and Is thus Fundamental to the Right of Privacy of Accused Misdemeanants.

The constitutional right at issue—the right of privacy in and control over one's genetic material—is paramount to personal integrity and is therefore not the type of bargaining chip used in properly motivated plea negotiations in a minor case. A single DNA sample contains an individual's entire genome, which provides tremendous insight into the individual's hereditary traits, genetic diseases, aggression, substance addiction, criminal tendency, and sexual orientation.[48] DNA provides a "massive

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[47] Notably, even the County acknowledges that plea bargains are not per se constitutional. Cases like *Alhusainy* and *Scott* demonstrate that plea bargains can in fact run afoul of the unconstitutional conditions doctrine. Cnty. Br. 47-48 (citing *Alhusainy v. Superior Court* (Cal. Ct. App. 2006) 143 Cal.App.4th 385; *Scott*, 450 F.3d at 865-66 (invalidating bargain requiring defendant to submit to unconstitutional drug tests as a condition for pre-trial release)); *see also People v. Richardson* (Ct. App. 2021) 65 Cal.App.5th 360, 371-75 (striking down plea bargain as "a legal fiction," where the underlying facts of the offense precluded the defendant from being guilty of the crime to which he pleaded).

[48] *See* Roman-Santos, *supra* n.29, at 290-292.

amount of unique, private information about a person that goes beyond identification of that person." *State v. Medina* (Vt. 2014) 102 A.3d 661, 691.

The nature of the constitutional right at issue thus differs from an ordinary plea-bargain case. In the traditional plea bargain, an individual waives rights that inhere in a criminal trial—e.g., the right to trial, the right against self-incrimination, the right to confrontation, etc.—in exchange for lighter sentencing. Accordingly, the surrender of such rights is more likely to be germane to the government's legitimate interests in prosecuting the crime charged. That is not the case here—an accused misdemeanant's surrender of DNA has nothing to do with the crime charged or trial for such crimes.[49] The Program—like the easement condition struck down in *Nollan*, and unlike the typical plea-bargaining scenario—thus fails factor (i) of the unconstitutional conditions standard. The County nowhere acknowledges this crucial distinction.

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[49] Jones & Wade, *supra* n.4, at 20-21; Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative* (2007) 17 Rev. L. & Soc. Just. 33, 36-37.

Further, even to the extent some plea bargains impinge upon a privacy right that is analogous to the one implicated here, the individual making the plea typically has a diminished expectation of privacy. For example, many such cases involve convicted felons and probationers who are "more likely than others to violate the law," and thus whose "reasonable expectation of privacy [is] significantly diminished." *United States v. Knights* (2001) 534 U.S. 112, 113, 119-20. Here, by contrast, accused misdemeanants have no such diminished expectation. They have not been convicted of a crime, much less a serious one. Nor has OCDA shown these low-level misdemeanor arrestees to be meaningfully more likely than anyone among us to commit DNA-solvable crimes in the future.

For these reasons alone, Defendants' attempt to analogize OCDA's Program to plea bargaining falls flat.

B. OCDA Wields Coercive Power Over Individuals and Appears to Use a Contrived Threat to Unlawfully Condition a Spurious Benefit in Exchange for a Protected Constitutional Right.

The County's analogy between the Program and plea bargaining fails for a second reason: the Program does not appear to provide accused individuals with a "bargain" at all. Rather,

judging from the available data, it offers only a false benefit in the face of a contrived threat.

In a true plea bargain, the defendant receives an actual benefit that she would not have otherwise received (e.g., the prosecutor's agreement to a reduced sentence) in exchange for giving up a right (e.g., the right to trial by jury). *See generally Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363. "Plea bargaining," in other words, "flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Id.* (quoting *Brady v. United States* (1970) 397 U.S. 742, 752); *see also People v. Grimes* (Cal. 2016) 1 Cal.5th 698, 736 ("It is not a constitutional violation[] . . . for a prosecutor to offer benefits, in the form of reduced charges, in exchange for a defendant's guilty pleas, or to threaten to increase the charges if the defendant does not plead guilty."). Indeed, as the County acknowledges, in typical plea-bargain cases, "*both* parties bargain[] for and *receive*[] substantial benefits." Cnty. Br. 53 (quoting *Ricketts v. Adamson* (1987) 483 U.S. 1, 9) (emphases added). While a more traditional plea bargain can also be an unconstitutional condition if it results from a prosecutor's decision to overcharge simply to extract a

waiver of a right,[50] at least waivers of trial rights (waivers that save the prosecutor time and involve acceptance of responsibility) are more generally related to offers of leniency than conditions involving less obviously related rights like the First Amendment or genetic privacy.

The situation here is very different because the so-called benefits are illusory. As explained above, OCDA has coercive bargaining power at every stage of the criminal process and uses that power to impose a DNA condition in every misdemeanor plea in Orange County. The accused's decision to provide her DNA to the County is the product of an arms-length negotiation between two willing parties in about the same sense as a pedestrian's decision to provide her wallet to a mugger in exchange for remaining physically unharmed.[51] *See People v. Hernandez* (Cal. Ct. App. 1964) 229 Cal.App.2d 143, 148 (rejecting notion that constitutional rights may be "dependent upon a kind of 'contract'

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[50] *See, e.g.*, Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions* (2001) 90 Geo. L.J. 1, 37 (explaining that the plea deal in *Bordenkircher* was an unconstitutional condition because it involved admitted overcharging).

[51] *See* Bartusiak, *supra* n.29, at 1133 (suggesting the Program is not analogous to traditional plea bargaining because it is not truly "voluntary").

in which one side has all the bargaining power"). OCDA's imposed condition thus "seems less a bargained-for exchange than a piled-on sanction."[52] And the mere fact that accused misdemeanants ostensibly "agree" to the condition "cannot by itself render the bargain constitutional because the unconstitutional conditions doctrine focuses on the propriety of the condition, not the fact that the [accused] agreed to it." *Stephens v. County of Albemarle* (W.D. Va. 2005) 2005 WL 3533428, at *6.

Thus, the "benefit" received by many if not most or all accused misdemeanant under the Program appears, from the available data, to be spurious. The Program incentivizes prosecutors to bring charges (or threaten to maintain charges that would otherwise be dropped) solely to obtain the accused's DNA. The dismissal of such charges confers no real benefit, as the charges should never have been pressed in the first place. *Cf. Bordenkircher*, 434 U.S. at 364 (limiting the constitutionality of plea bargaining to situations in which "the prosecutor has probable cause to believe that the accused committed an

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[52] Roth, *supra* n.3, at 440.

offense"); *United States v. Whitten* (2d Cir. 2010) 610 F.3d 168, 195 ("Whether [a sentencing] differential is a reward for cooperation or a penalty for invoking a constitutional right depends on the benchmark—the 'normal' sentence that would be meted out if constitutional rights were not salient.") (cleaned up). Again, the mugger analogy is apt; avoiding unprovoked bodily harm is not a "benefit" in any meaningful sense of the word. This case is therefore a particularly egregious unconstitutional conditions case: the "benefit" of having one's charge dismissed is one the individual should have had all along.[53] *Cf. Scott*, 450 F.3d at 866 (noting that "[t]he unconstitutional conditions doctrine limits the government's ability to exact waivers of rights as a condition" of even "fully discretionary" benefits) (cleaned up).

While the County reminds us that "negotiated guilty plea[s]" are generally constitutional, Cnty. Br. 35, the very case to which it cites for that proposition establishes that a plea

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[53] *See* Bartusiak, *supra* n.29, at 1132 ("If a prosecutor has insufficient evidence to secure a conviction, the ethical action is to drop the charges, not to collect the defendant's DNA."); Roth, *supra* n.3, at 440 ("[I]f . . . the defendant should have been entitled to dismissal ('screening out') rather than a diversionary alternative, then the additional requirement of giving a DNA sample to avail himself of the diversionary program and avoid prosecution is no longer a fair exchange.").

defendant must be "fully aware" of the "*actual value* of any commitments made to him" under the plea. *Brady*, 397 U.S. at 755 (emphasis added). Accused misdemeanants who provide their DNA in Orange County are apprised of neither the full nature of what it means for the state to have one's DNA indefinitely nor the spurious nature of the benefit—i.e., the likelihood that the person would be given leniency even in the absence of the Program—and thus do not know the "actual value" of the purported benefit they receive under the Program.

Further, if the benefit provided to accused misdemeanants under the Program is illusory, then the threat of prosecution for refusing the benefit is necessarily "contrived"—i.e., the threat has no legitimacy but for the Program.[54] "When a threat is contrived, the government benefit would have been provided in the but-for world without that condition, and thus the threat to withhold the benefit penalizes the exercise of a constitutional right."[55] Stated differently, "contrived threats force persons who accept the

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[54] *See generally* Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail* (2016) 83 U. Chi. L. Rev. 503, 507 (contrived threats by the government give rise to unconstitutional conditions).

[55] *Id.* at 509-10; *see also id* at 557.

condition to give up their constitutional rights in exchange for nothing."[56] And they thus necessarily fail the germaneness requirement of conditions that burden constitutional rights.

That is precisely the situation here. The prospect of securing DNA evidence incentivizes OCDA to bring misdemeanor charges that it would not have brought in the but-for world (i.e., a world in which the Program does not exist). The County's threat to maintain these spurious charges thus penalizes the accused misdemeanant's exercise of her constitutional right to privacy.[57] *Cf. NFIB v. Sebelius* (2012) 567 U.S. 519, 580 (federal government's threat to withdraw preexisting Medicaid funds from states that did not take part in Affordable Care Act's Medicaid expansion was unconstitutionally coercive because the "threat serve[d] no purpose other than to force unwilling states to sign up for the dramatic expansion in health care coverage effected by the Act"); *Nollan*, 483 U.S. at 837 (if purpose of the allegedly unconstitutional condition is not related to the asserted

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56 *Id.* at 559; *see also* Berman, *supra* n.50, at 37 (arguing that a condition is presumptively unconstitutional when the government would grant the benefit in question if "the government knew that granting or withholding [the] benefit would have no effect on the exercise of a particular right").

57 *See* Elhauge, *supra* n.54, at 559.

legitimate state interest, "[t]he purpose then becomes, quite simply," infringing the constitutional right). And, indeed, at least one scholar has explained that this very scenario runs afoul of the unconstitutional conditions doctrine:

> [S]uppose the prosecutor is overcharging—that is, threatening to bring charges she would not have brought in the no-threat world—in order to coerce a plea bargain. Then the prosecutor is making a contrived threat that does penalize the defendant for exercising his constitutional rights, because he would not have faced the same charges in the no-threat world. Accordingly, plea bargains produced by such contrived threats should be unenforceable.[58]

These concerns, which form the crux of the unconstitutional conditions problem here, are simply not present in typical plea-bargain cases.

C. OCDA Controls Accused Misdemeanants' DNA Well After a "Deal" Is Struck.

Finally, OCDA's Program differs from plea bargaining in another significant way. In a typical plea-bargaining case, once the plea is entered, the prosecutor's control over the defendant

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[58] *Id.* at 571; *see also* Berman, *supra* n.50, at 101 (arguing that overcharging violates the unconstitutional conditions doctrine); *cf.* Bartusiak, *supra* n.29, at 1134 ("Given the challenges an innocent person faces when defending against criminal accusations, the relative ease of dropping misdemeanor charges in exchange for a DNA sample results in a database containing the DNA of presumptively innocent people.").

ceases. After a defendant enters a guilty plea, the defendant carries out the agreed-upon sentence without significant involvement from the prosecutor. Plea bargains are more or less one-and-done deals. This characteristic of plea bargaining properly reflects its function as a substitute for the trial process itself.[59] Even where a defendant is placed on probation following a plea, that probation is time-limited, not indefinite.

Not so with OCDA's Program. As explained above, there are no temporal limits on how long DNA information is maintained in OCDA's database and no mechanism for expungement. The prosecutor maintains control over the individual's DNA *forever*. As also explained above, given the under-regulated nature of the Program and the ever-evolving nature of DNA technology, there is a significant risk that stored DNA information will someday be used for illegitimate and intrusive purposes—purposes that have nothing to do with the government's legitimate criminal justice interests. Thus, even after an accused misdemeanant accepts the prosecutor's "deal" and walks away from the courthouse, she never truly walks away

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[59] *See, e.g.*, McCoy & Mirra, *Plea Bargaining as Due Process in Determining Guilt* (1980) 32 Stan. L. Rev. 887, 915.

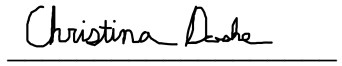
from the prosecutor's control and influence. The resulting burden on individuals' constitutional rights to privacy—including, it bears emphasis, the rights of many individuals who are *never convicted at all*—goes far beyond any that could be justified by Orange County's interests in prosecuting misdemeanors. The Program, in short, is akin to a life sentence of genetic surveillance.

CONCLUSION

OCDA's Program presents an unconstitutional conditions problem that cannot be tolerated. If left unchecked, the Program will continue to permit OCDA to abuse its power in exacting unlawful waivers of fundamental constitutional rights and continue expanding its DNA database to unprecedented scope, all at the expense of individual privacy. The trial court's ruling sustaining a demurrer to Appellants' complaint should be reversed.

October 27, 2022

Respectfully submitted



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PROOF OF ELECTRONIC SERVICE

This is to certify that on October 27, 2022, pursuant to California Rules of Court, Rules 8.200(c)(4), 8.212(c), and 8.78, a true and correct copy of **Brief for *Amici Curiae* Andrea Roth, Brandon L. Garrett, and Yvette Garcia Missri in Support of Plaintiffs-Appellants** was served electronically on the following counsel of record and the superior court clerk for delivery to the trial judge:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated this 27th day of October, 2022, Washington, DC.

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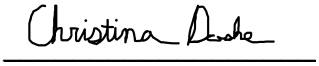
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that this brief contains 8,265 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare this brief.

October 27, 2022



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