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COMM 4460 Legal Brief

## I. SUMMARY OF THE ARGUMENT

This Court should vacate the appellate court's decision on Petitioner's SPECTAR Act claim and grant the Village's motion to dismiss for lack of subject matter jurisdiction. The Rule 68 offer of judgment for the full relief available to Petitioner mooted this claim—both for Petitioner and his uncertified prospective class.

Article III of the Constitution limits federal courts to the adjudication of live cases and controversies, and to meet this standard a plaintiff must maintain standing at every stage of litigation, otherwise his case is mooted. And a class action plaintiff is no exception; if a live controversy no longer exists between the named plaintiff and the defendants the case is moot absent some alternate basis for jurisdiction.

This Court has recognized three instances where federal courts may still exercise jurisdiction over a seemingly mooted claim—namely, a class that establishes a separate legal status before the plaintiff's claim is moot; a plaintiff with a continuing economic interest in class certification; and a claim so inherently transitory that it is capable of repetition yet evades review. Petitioner's claim does not fall under any of these narrow exceptions to the general mandate of Article III. He lost any stake in the outcome of this case when he was offered full individual relief prior to filing his class certification motion, and this Court should reverse the lower court and dismiss Petitioner's SPECTAR claim as moot.

On the § 1983 claim this Court should affirm the appellate court's opinion granting summary judgment for Petitioner. Respondent's DNA search of Petitioner was reasonable and does not violate the Fourth Amendment.

A search meets Fourth Amendment standards if the totality of the circumstances show that the search was reasonable, as measured by balancing the legitimate state interest driving the search against the degree to which the search intrudes on an individual's expectation of privacy. If the legitimate state interest outweighs the intrusiveness of the search, the search is reasonable and does not violate the Fourth Amendment. The government's interest in obtaining Petitioner's DNA outweighs the intrusion on his privacy. The DNA search of Petitioner only minimally intruded on his privacy. As an arrestee, Petitioner had a diminished expectation of privacy, and the cotton buccal swab and resulting storage of non-coding DNA were minimally invasive. Further, the government has a significant and legitimate interest in obtaining the identity of felony arrestees like Petitioner. Identification information is vital to law enforcement and DNA is the best way to obtain it. Accordingly, this court should affirm the appellate court's grant of summary judgment for Respondent because the search was reasonable.

## II. TABLE OF AUTHORITIES

**Cases:**

**Other Authorities:**

## III. FACTS OF THE CASE

In the early morning of Election Day on November 6, 2012, Petitioner Felix Leiter sat at a computer and attempted to rig the town's presidential vote. *Leiter v. Village of Spies-Roth*, 231 F.Supp. 6th 4, 5 (D. Wig. 2012). As the tiny village of Spies-Roth patiently awaited the results of its midnight polling, Sergeant Lynd, assigned to monitor the voting process, noticed the suspicious twitching of one of the voting machine cables. *Id.* She followed the cable down the hall to find that it led under the door of the Presidential Suite. *Id.* Lynd knocked on the door of the Suite, announced herself, and, receiving no response, declared to those inside that she was about to enter. *Id.* Upon kicking in the door Lynd saw Petitioner "feverishly typing commands into a computer" to fraudulently rig the town votes, a felony offense under Wigmore law. *Id*.

Acting on her determination of probable cause, but without a warrant, Lynd removed Petitioner from his chair, secured his wrists and ankles, and placed him next to the Village voting administrator who lay passed out on the bed. *Id*. Captain Klebb, after receiving a report of the incident from Lynd, ordered her to obtain a DNA sample from Petitioner. *Id.* Lynd conducted a buccal swab, brushing the inside of Petitioner's mouth with the Q-Tip to obtain the DNA sample. *Id.*

Lynd booked Petitioner at the station and entered his DNA sample into both the State County Municipal Offender Data System (SCMODS) and the Federal Combined DNA Index System (CODIS). *Id.* Petitioner's DNA came back with an exact match; it was the same DNA that was found on an envelope previously sent to Mayor Broccoli with a bribery attempt. *Id*.

Although Petitioner was never prosecuted, he brought suit alleging two claims; a class action seeking injunctive relief through 42 U.S.C. §1983 and *Monell v. City of New York Department of Social Services*, 436 U.S. 658 (1978), for a Fourth Amendment challenge to the

Village's DNA testing policy, and a class action under Wigmore's State Privacy, Expectations, Civility, Trust, Accountability, and Respect Act (SPECTAR), seeking $1000 per plaintiff. *Id.* at 6; 50 W.C.L. § 007 (2012). Both classes consisted of individuals whose DNA the Village had collected. *Id.*

The Village answered, denying everything. *Id.* Petitioner served discovery to obtain the identities of his proposed class; on the same day, the Village served Petitioner with a Rule 68 Offer of Judgment in which it offered Petitioner complete relief available under the SPECTAR Act—$1000, attorneys' fees, and costs. *Id.* Petitioner rejected the offer, and three days later filed a motion for class certification. *Id.* Nine days later the Rule 68 Offer expired; that same day the Village filed a motion to dismiss Petitioner's SPECTAR claim as moot, and a motion for summary judgment on the § 1983 claim. *Id.*

The district court granted the Village's motion to dismiss and consequently denied Petitioner's motion to certify his SPECTAR class, as a plaintiff "cannot certify a class for a claim that he can no longer marshal himself." *Id.* The court granted Petitioner's motion to certify his unopposed § 1983 claim, but granted summary judgment on that claim for the Village. *Id.* On appeal, the appellate court affirmed the district court's grant of summary judgment to the Village and reversed the lower court on the SPECTAR issue, finding a Rule 68 offer of judgment will not moot an action so long as a complaint making class allegations was previously filed. *Id.* at 16, 17.

## IV. PREVIOUS DECISIONS

Petitioner and his uncertified class lost any personal stake they had in the outcome of this claim when Petitioner was offered full individual relief prior to filing a motion for class certification. Article III of the Constitution limits federal courts to the adjudication of live "cases" and "controversies." U.S. CONST. art. III, § 2. A plaintiff must have standing at every stage of litigation in order to satisfy the constitutional requirements of Article III and if he fails to satisfy this requirement at any point the case must be dismissed as moot. *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Petitioner's claim was mooted when he received a Rule 68 offer of judgment for the full relief available to him and should be dismissed for lack of standing. *See* U.S. CONST. art. III, § 2; FED. R. CIV.P. 68.

The Rule 23 class action, though a useful tool for plaintiffs, does not trump Article III's substantive constitutional limits on federal jurisdiction. *See* FED. R. CIV. P. 23. A plaintiff who files a class action complaint is generally no different than any other plaintiff; he must maintain a personal stake in the outcome of the litigation at all times. *See Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975) (per curiam). However, a narrow set of class action exceptions to this general standing rule may allow a court to sustain jurisdiction over a seemingly mooted claim— specifically, if a class establishes a separate legal status before the plaintiff's claim is moot, *Sosna v. Iowa*, 419 U.S. 393 (1975); if a plaintiff maintains a continuing economic interest in the narrow issue of class certification, *U.S. Parole Commission v. Geraghty*, 445 U.S. 388 (1980); or if a claim is so inherently transitory that it is capable of repetition yet evades review, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Petitioner's original claim was mooted, and his case fits none of the three class action exceptions. Petitioner's class was never certified and thus never acquired a legal interest separate from his own; he has no remaining economic interest in certification because he already received all the concrete financial relief available to him; and his claim is not inherently transitory. This Court should therefore dismiss Petitioner's SPECTAR claim on mootness grounds.

**A. Petitioner lost any individual legal interest in his substantive SPECTAR claim after the Rule 68 offer of judgment.**

Petitioner's case was mooted when he was offered full relief through the Village's Rule 68 offer of judgment. The Constitution requires that litigants have a "personal stake" in an actual controversy in order to invoke the jurisdiction of the federal courts, and in order to satisfy this "irreducible minimum" constitutional requirement a litigant must have Article III standing at the outset of an action. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *see also Davis v. FEC*, 554 U.S. 724, 733 (2008) ("[T]he requirement that a claimant have 'standing is an essential and unchanging part of the case-or-controversy requirement of Article III.'") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The standing requirement is at the core of our democratic separation of powers principles, confining federal courts to the exercise of "judicial power" by limiting their cases to those in which parties have a personal stake in the litigation. *See, e.g., Lujan*, 504 U.S. at 581 (Kennedy, J., concurring).

That a case presents an actual controversy when litigation is commenced, however, is not itself sufficient; rather the actual controversy must be "extant at all stages of review" in order to sustain the jurisdiction of the federal courts. *Arizonans for Official English*, 520 U.S. at 67. If at any point a litigant loses his personal stake in the outcome of a case the court must dismiss the action as moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the cases before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *see also Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("[A] case is moot when the issues presented are [1] no longer 'live' or [2] the parties lack a legally cognizable interest in the outcome.").

A Rule 68 Offer of Judgment that provides all the available relief to the sole plaintiff in a case renders that plaintiff's claim moot. *See Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004) ("[A]n offer for the entirety of a plaintiff's claim will generally moot the claim."); FED. R. CIV. P. 68. This is true even where a plaintiff does not voluntarily accept the offer. *See, e.g.*, *Rand v. Monsanto Co.,* 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate."). When a plaintiff has been fully satisfied and parties are no longer adverse, federal courts lose jurisdiction. It would be untenable to force defendants to continue to litigate a claim when, as here, they have already accepted liability and agreed to fully remedy the plaintiff. *See Greisz v. Household Bank (Illinois), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) ("You cannot persist in suing after you've won.").

Petitioner's SPECTAR claim was mooted by Respondent's Rule 68 offer of judgment, and the fact that Petitioner's claim is a class claim does nothing to salvage his personal interest. Standing and mootness are rooted in the Constitution and thus constrain class action litigants just as they do individual litigants. Indeed, pleading a class action in no way exempts a plaintiff from his constitutional duty to maintain standing; the Rules Enabling Act prevents any reading of a procedural rule, like Rule 23, that would "abridge, enlarge, or modify any substantive right." RULES ENABLING ACT, 28 U.S.C. § 2072(b). *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2561 (2011); *see also* FED. R. CIV. P. 82 (procedural rules "do not extend or limit the jurisdiction of the district courts."). A purported class action cannot abridge the irreducible minimum requirements of Article III and must be dismissed as moot "if a case or controversy no longer exists between the named plaintiffs and the [defendants]" absent some alternative basis for jurisdiction. *Jacobs*, 420 U.S. at 129.

### B. <u>Petitioner has no basis for standing apart from his mooted SPECTAR claim.</u>

Petitioner's substantive SPECTAR claim was mooted and he has no alternative basis for standing. A case may survive notwithstanding a plaintiff's mooted claim if (1) plaintiff can rely on the separate legal interest of his class; (2) plaintiff can maintain a separate economic interest in the procedural issue of class certification; or (3) plaintiff's case falls in the narrow class of "inherently transitory" claims. Unfortunately for Petitioner, none of these alternative bases for standing applies. Accordingly, his case is moot.

#### 1. Petitioner's class never acquired a separate legal interest and may not provide standing for Petitioner's claim.

Petitioner may not rely on his purported class for standing because the class has not obtained a separate legal status at any point in the course of this litigation. This Court has long recognized that a class "acquire[s] a legal status separate from the [named plaintiff]" when it is certified *before* the named plaintiff's claim is mooted. *Sosna*, 419 U.S. at 399 (emphasis added). *Sosna* is grounded in Article III's limits on federal jurisdiction—the named plaintiff must maintain his personal stake until the class is certified, thus ensuring that there is a party with a live controversy at all times throughout litigation.

The point at which unnamed class members come into a case has important ramifications outside the mootness determination, and it is entirely inconsistent to contend that a class is not a party to avoid one jurisdictional limit (*res judicata*) while arguing that it is a party to satisfy another jurisdictional limit (mootness). *See Smith v. Bayer*, 131 S.Ct. 2368 (2011) (holding that class members remain "nonparties" until their class is certified for claim preclusion purposes). If purported class members are deemed in the case merely upon the filing of a complaint then any adverse ruling on the merits of the named plaintiff's claim would strip countless individuals of their legal rights without giving them any meaningful choice in the matter.

2. **Petitioner has been offered full relief and has no separate economic interest in class certification sufficient to maintain standing.**

Petitioner may not rely on a separate economic interest in class certification to maintain standing because he was offered all the relief available to him under the SPECTAR Act. A named plaintiff who retains a financial interest in class certification after an offer of judgment still has a "personal stake" in the outcome of the case. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332-33 (1980). In *Roper*, the named plaintiff had a continuing legal interest to appeal the narrow procedural issue of class certification only because the offer of judgment did not cover his litigation expenses and a successful appeal would have allowed him to shift some of those costs to the class members. *Id.* at 334. Petitioner's claim is easily distinguishable from *Roper* because he has been offered full relief including all "attorneys' fees and costs." *See Leiter v. Village of Spies-Roth*, 231 F.Supp. 6th 4, 6 (D. Wig. 2012).

Furthermore, the possibility of a speculative incentive payment does not alone give Petitioner Article III standing. Petitioner has no substantive right to an incentive payment before a class is certified. And, even if he were the named representative of a certified class there is "no provision of rule or statute that authorizes incentive awards . . . in class actions." *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012). If Rule 23 cannot abridge, enlarge, or modify a substantive right, surely an unwritten practice developed to incentivize class actions cannot do so. *See Roper*, 445 U.S. at 332 ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."). Not only would Petitioner's argument exclude Rule 23 from the coverage of Rule 68, it would render Rule 23 outside the bounds of Article III's irreducible minimum case or controversy requirement.

3. **Petitioner's claim is not inherently transitory and he may not rely on this basis to maintain standing.**

Petitioner's claim for *retrospective* relief is not inherently transitory and therefore does not fit into the "narrow class of cases," *Gerstein v. Pugh*, 420 U.S. at 110 n.11, that would escape review without allowing this alternate basis for standing. *See McLaughlin*, 500 U.S. at 52. "Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest

expires." *Geraghty*, 445 U.S. at 399. In the rare cases that qualify for this exception the court relies on the legal fiction that the class certification decision "relate[s] back" to the filing of the complaint for mootness purposes. *See Sosna*, 419 U.S. at 402, n.11. This is a form of protective jurisdiction—the court is reaching out to hold onto an otherwise moot case solely because it would otherwise completely evade review, and as such this exception is reserved for only the most "exceptional situations." *City of L.A. v. Lyons*, 461 U.S. 95, 109 (1983).

Petitioner's case is not an exceptional situation—a retrospective claim that seeks damages is not inherently transitory. In order to be capable of repetition yet evading review a claim must be "by [its] nature temporary," such that the "individual and other persons similarly situated" could suffer repeated violations of the alleged right. *Gerstein*, 420 U.S. at 110, n. 11. The relation back doctrine is based on the temporal nature of prospective claims and the likelihood they will "naturally and inevitably expire," *Zeidman v. J. Ray McDermott & Co., Inc*., 651 F.2d 1030, 1049 (5th Cir. 1981), absent any action by the plaintiff or defendant. *See McLaughlin*, 500 U.S. 44 (finding that individuals detained up to seven days without a probable- cause hearing presented claim capable of repetition, yet evading review); *compare with Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (declining to extend doctrine because "[Plaintiff] ha[d] not shown . . . that the time between parole revocation and expiration of sentence is always so short as to evade review."). Petitioner's claim is wholly retrospective—it can only be extinguished by a settlement or judgment of the court in his favor and therefore falls well beyond even the outer bounds of the relation back doctrine.

The Court of Appeals' decision extends the relation back doctrine beyond its logical limit to exempt all class action complaints from the fundamental requirements of Article III. *See Leiter v. Village of Spies-Roth*, 528 F.4th 16, 17 (13th Cir. 2013). The court was concerned with plaintiffs being "picked off," so to prevent this tactic it found a legal interest in the class where none existed. *Leiter*, 528 F.4th at 17. However, the filing of a class complaint does not create a legally cognizable interest in purported class members sufficient to sustain jurisdiction over an otherwise moot claim. Although this Court expressed concern with "picking off" in *Geraghty* and *Roper* neither of those cases support the drastic approach adopted by several of the circuit courts. In both *Geraghty* and *Roper*, the plaintiff presented a live controversy at the time the district court ruled on class certification and these holdings were narrowly limited to the right to appeal this decision. *See Geraghty*, 445 U.S. at 406; *Roper*, 445 U.S. at 339. The "picking off" referred to in these cases was an attempt by defendants to foreclose appellate review of class certification decisions. *See Geraghty*, 445 U.S. at 406. *Geraghty* explicitly reaffirmed that a named plaintiff must still have a personal stake in the outcome at the time "class certification is [decided]." *Geraghty*, 445 U.S. at 407 n.11 ("If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back… still would not prevent mootness of the action."). Application of the relation back doctrine would be inappropriate in this case.

### C. **Petitioner's SPECTAR claim is moot because he has no personal stake in the litigation and no alternative basis for standing.**

Petitioner's SPECTAR claim should be dismissed for lack of standing; his claim was mooted and he can provide no alternative basis for standing. Respondent's Rule 68 Offer of Judgment fully compensated Petitioner and he retains no concrete economic interest in class certification. Further, Petitioner cannot stand in for an uncertified class that never acquired a separate legal status of its own. Finally, Petitioner's damages claim is not inherently transitory and it has not evaded review. Petitioner's claim was not mooted because it naturally expired; it was mooted because Respondent accepted liability and fully compensated Petitioner. Accordingly, neither Petitioner nor his uncertified class have a personal stake in the SPECAR claim and it should be dismissed for lack of subject matter jurisdiction.

## I. THE TAKING AND STORAGE OF A DNA SAMPLE FROM A FELONY ARRESTEE IS A REASONABLE SEARCH AND DOES NOT VIOLATE THE FOURTH AMENDMENT.

Sampling and storing DNA from a person arrested on suspicion of a felony does not violate the Fourth Amendment. When evaluating an alleged Fourth Amendment violation the

first step is to determine whether a search or seizure occurred. *Katz v. United States,* 389 U.S. 347, 353 (1967). Under the Fourth Amendment a search is a government intrusion on an individual's objectively reasonable expectation of privacy. *Id.* at 361 (Harlan, J. concurring). Respondent does not dispute that its taking of Petitioner's DNA constituted a search for Fourth Amendment purposes.

Thus, the Fourth Amendment applies and a warrantless suspicionless search like the one at issue is constitutional upon showing that it is reasonable given the totality of the circumstances. *Samson v. California*, 547 U.S. 843 (2006). In evaluating the totality of the circumstances, the court must balance the legitimate government interests driving the search with the degree to which the search intrudes on an individual's privacy interest; if the former outweighs the latter the search is reasonable and constitutional. *United States v. Knights*, 534 U.S. 112, 119 (2001).

The search conducted by Respondent—a DNA test of Petitioner upon arrest—was reasonable, and therefore constitutional. The mildly invasive procedure was a minimal intrusion on Petitioner's diminished privacy interest. Further, the Village had a legitimate government interest in identifying Petitioner using his DNA. The search did not violate the Fourth Amendment because the legitimate government interest in accurately identifying Petitioner outweighed the minimal intrusion on his privacy.

**A. <u>A DNA search minimally impacts an arrestee's privacy interest.</u>**

A DNA search only minimally impacts the privacy interest of an arrestee. Two relevant considerations factor into a search's impact: the individual's expectation of privacy, and the invasiveness of the search. *See Haskel v. Harris*, 669 F.3d 1049, 1058 (9th Cir. 2012) *reh'g en banc granted,* 686 F.3d 1121 (9th Cir. 2012) (examining both a felon's "expectation of privacy" and the "physical intrusiveness of the search"). In this case both factors weigh against

Petitioner's Fourth Amendment claim; as an arrestee he had a diminished expectation of privacy, and the DNA search was only minimally invasive.

**1. Petitioner had a diminished expectation of privacy as an arrestee.**

A felony arrest diminishes an individual's expectation of privacy. Privacy expectations fall along a spectrum, with a citizen in the street on one end, and an incarcerated individual on the other. *See Samson*, 547 U.S. at 850. Arrestees fall somewhere between these two extremes, having, by virtue of arrest, a "diminished expectation of privacy." *United States v. Mitchell*, 651 F.3d 387, 390 (3d Cir. 2011), *cert. denied,* 132 S.Ct. 1741 (2012). Indeed, there is reason to place arrestees on the latter side of the spectrum; that is, their privacy expectations are arguably more akin to inmates than free citizens. Upon arrest, arrestees may constitutionally be held in a jail cell, *Bell v. Wolfish*, 441 U.S. 520, 558 (1979), put through immediate search of person and possessions, *United States v. Robinson*, 414 U.S. 218, 235 (1973), subjected to visual body cavity searches, *Id.*, pepper-sprayed, *Garret v. Athens-Clarke Cnty., Ga.*, 378 F.3d 1274, 1281 (2004), and monitored by guards while showering and using the toilet, *Johnson v. Phelan*, 69 F.3d 144, 151 (7th Cir. 1995). These restrictions may be implemented even in the case of arrests for minor offenses, such as a traffic violation. *Florence v. Board of Chosen Freehodlers of County of Burlington*, 132 S.Ct. 1510 (2012). That arrestees may face these procedures is evidence of their diminished expectation of privacy.

Petitioner attempts to buttress his reasonable privacy expectation by putting forth as his "primary rationale" that he "is the beneficiary of a presumption of innocence." *Leiter*, 231 F.Supp. 6th at 13. Petitioner is mistaken. The due process right to presumptive innocence is irrelevant to an arrestee's pretrial Fourth Amendment rights. *Bell*, 441 U.S. at 533 (The presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."). It has no bearing on an arrestee's privacy expectation, and cannot serve to advance Petitioner's cause.

**2. DNA testing is not overly invasive.**

The DNA search did not violate Petitioner's privacy interest because it was only minimally invasive. As Judge No in dissent points out, DNA testing involves two separate searches: the physical collection of the DNA and the processing and storage of the sample. *Leiter*, 528 F.4th at 22. Neither the collection of the DNA sample by buccal swab nor the processing and storing of the sample intrude greatly on privacy; the process, as a whole, is minimally invasive.

The first search—collection of DNA by buccal swab—is only mildly intrusive. The process involves briefly inserting a small cotton swab into the arrestee's mouth, and lightly rubbing the inside of the cheek. *Haskell,* 669 F.3d at 1059. It is "perhaps the least intrusive" of all tests. Jules Epstein, *"Genetic Surveillance"—The Bogeyman Response to Familial DNA Investigations,* 2009 U. ILL. J.L. TECH & POL'Y 141, 152 (2009). Indeed, a swab of the cheek is less intrusive than a needle to the vein—a procedure this Court has consistently upheld. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

The second search—the processing of the DNA sample—similarly does not infringe on an arrestee's reasonable expectation of privacy. It is this second search that is the primary focus of Judge No's dissent. *Leiter,* 528 F.4th at 21. Judge No likens GPS surveillance in *United States v. Jones*, 132 S.Ct. 945 (2012), to DNA testing in the present case. *Leiter*, 528 F.4th at 22. The analogy, however, is a false one. As a preliminary matter, the court in *Jones* faced the question of whether monitoring an individual's activities was a *search* for Fourth Amendment purposes. 132 S.Ct. at 945. Neither party in the present case disputes that taking and storing Petitioner's

DNA constituted a search; rather, at issue is the *reasonableness* of the search, an issue *Jones* refused to address. 132 S. Ct at 954 ("We have no occasion to consider the argument . . . We consider the argument forfeited.").

But *Jones* should not be dismissed entirely on its non-relevant holding, for Judge No's concerns lie primarily with the principles espoused in its concurrences. The crux of the dicta in the *Jones* concurrences is a concern over the government's ability to obtain and use "a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track," enabling it to "ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." 132 S.Ct. at 956 (Sotomayor, J., concurring).

This concern, however, has no bearing on the present case, as an individual's CODIS data consists only of a name linked with thirteen numbers. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004). In populating the CODIS database the FBI takes a full genome provided by local law enforcement, splices out thirteen pre-determined, non-coding strands, and counts the length of each strand (which varies by person). *Id.* The result is thirteen numbers, each corresponding to a length of one of the spliced strands. *Id.* Given those thirteen numbers, current (and foreseeable) technology can reproduce only one thing: an individual's name.

Conceding—as most courts do[1]—that the thirteen numbers stored in the CODIS database presently can reveal nothing about an individual aside from matching his DNA with his identity, two security concerns remain. First, future technology may uncover methods to obtain sensitive medical information simply from these thirteen CODIS numbers alone. Second, regardless of

[1] Even courts that find DNA testing of arrestees unreasonable generally concede that CODIS data poses no *current* threat. *See, e.g., Kincade,* 379 F.3d at 850 (Reinhardt, J., dissenting).

what is stored in CODIS, the government might access and utilize the original DNA sample containing an individual's entire genome from which the thirteen strands were originally spliced. Neither argument carries weight.

The first argument—that future technology may be able to glean sensitive medical data from the length of thirteen non-coding strands—is speculative at best. Petitioner has provided no scientific basis upon which to conclude that this *might* even be possible. Indeed, current evidence suggests the opposite; the thirteen non-coding strands were specifically chosen such that "it is impossible to determine anything medically sensitive from this DNA." 151 Cong. Rec. §13757 (daily ed. Dec. 16, 2005) (statement of Sen. Kyl). This is not to say that it will *never* be possible to obtain medical information from these non-coding strands, but rather that there is no indication *today* that it will ever be possible, and when settling the constitutionality of a law this Court "must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotations omitted).

The second argument—that the government retains the original full DNA sample and might use it to extract genetic traits—presents a less speculative scenario. However, like the first argument, it is also meritless. First, there is no evidence that the government intends to or has ever attempted to extract genetic trait information from DNA samples. *United States v. Pool*, 621 F.3d 1213, 1221 (9th Cir. 2010) *vacated*, 659 F.3d 761 (9th Cir. 2011). Second, there is no evidence that the government could lawfully do so. *Id.*

Judge No's use of the *Jones* analogy to forward this argument in dissent is misguided. He suggests that "if indeed the secret monitoring and cataloguing of every movement of an individual's car intrudes on a reasonable expectation of privacy . . . the collection, analysis, and limitless data-mining of an individual's entire genetic code . . . is both intrusive and properly subject to control with the requirement of a search warrant." *Leiter*, 528 F.4th at 22. But again, the analogy fails. Unlike in the GPS tracking context, where the court had evidence of actual data obtained from GPS tracking, there is no indication in the current case that the government has the intention or legal ability to use non-CODIS full-genome DNA. Any suggestion otherwise is entirely speculative and is an improper basis for judicial decision. *See United States v. Karo*, 468 U.S. 705, 712 (1984) ("[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches.................... "); *Kincade,* 379 F.3d at 838 ("[C]ourts base decisions not on dramatic Hollywood fantasies . . . but on concretely particularized facts....... "). And unlike *Jones*, where no legal authority (apart from the Fourth Amendment) existed to condemn the government's collection of data, the collection and storage of CODIS DNA is highly regulated, with federal law imposing criminal penalties for misuse of DNA samples. *United States v. Weikert*, 504 F.3d 1, 13 (1st Cir. 2007).

**B. <u>The government has a significant interest in obtaining arrestees' DNA.</u>**

On the opposite side of the balance is the government's significant interest in obtaining DNA from arrestees. The government has an interest in determining the identity of arrestees. *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County,* 542 U.S. 177, 186 (2004).
Under the Fourth Amendment identity has two components: who a person is and what they have done. *Mitchell*, 652 F.3d at 414. The government has a compelling interest in both of these components.

The government has a significant interest in identifying arrestees. *Jones v. Murray,* 962 F.2d 302, 306 (4th Cir. 1992) (finding that identity of an individual becomes a legitimate state interest upon probable cause arrest). The government also has an equally significant interest in connecting arrestees to past and future crimes. *Hiibel,* 542 U.S. at 186. This information helps an officer determine whether a suspect is dangerous, and what level of protection to afford the arrestee; it allows them to know "who they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Id.* It also allows them to clear innocent suspects, as "DNA databases have proved remarkably effective in exonerating the innocent." *Haskell*, 669 F.3d at 1064.

This interest in identity is best fulfilled through DNA testing. Though fingerprinting (the other primary method of identifying arrestees) and DNA CODIS identification provide the same information—an individual's identity—DNA is more effective. *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) ("DNA is a further—and in fact more reliable—means of identification."). Not only is it more reliable than fingerprinting, it is much more likely to be found at the scene of a crime, better enabling the government to fulfill its interest in connecting arrestees to past and future crimes. *Haskell*, 669 F.3d at 1064 ("[I]t is much easier for a criminal to cover his fingerprints than it is to prevent any DNA from being left at a crime scene."). The use of DNA is pivotal in meeting the government's significant interest in identifying arrestees.

## IV. Conclusion

For the foregoing reasons, the Respondent, the Village of Spies-Roth, respectfully requests that this Court reinstate the district court's dismissal of Petitioner's SPECTAR claim, and affirm the district and appellate courts' granting of summary judgment for Petitioner on the §1983 claim