

1 SONYA D. WINNER, SBN 200348
2 DONALD W. BROWN, SBN 83347
3 KATE S. STEINHEIMER, SBN 226220
4 COVINGTON & BURLING
5 One Front Street
6 San Francisco, California 94111
7 Telephone: (415) 591-6000
8 Facsimile: (415) 591-6091

9 JULIA HARUMI MASS, SBN 189649
10 MARGARET C. CROSBY, SBN 56812
11 MAYA L. HARRIS, SBN 172115
12 AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF
13 NORTHERN CALIFORNIA, INC.
14 1663 Mission Street, Suite 460
15 San Francisco, CA 94103
16 Telephone: (415) 621-2493
17 Facsimile: (415) 255-8437

18 Attorneys for Plaintiffs

19 *[additional counsel on signature page]*

20 UNITED STATES DISTRICT COURT
21 FOR THE NORTHERN DISTRICT OF CALIFORNIA

22 MICHAEL WEBER, MARY PRUITT, RODNEY
23 WARE, RACHEL DELUCCI-YOUNGBERG,
24 JAMES BLAIR, THINH T. LAM, RUBEN
25 RIVAS, JASON CRAIG, LINDA WALKER, ALL
26 OF US OR NONE, and AMERICANS FOR SAFE
27 ACCESS,

28 Plaintiffs,

v.

BILL LOCKYER, Attorney General of California;
EVA STEINBERGER, Assistant Bureau Chief for
DNA Programs, California Department of Justice;
LANCE GIMA, Chief of the Bureau of Forensic
Services, California Department of Justice
Laboratory; CHARLES C. PLUMMER, Sheriff,
Alameda County; WARREN E. RUPF, Sheriff,
Contra Costa County; LOU BLANAS, Sheriff,
Sacramento County; JIM POPE, Sheriff, Shasta
County; MICHAEL HENNESSEY, Sheriff, San
Francisco County; ALBERT NAJERA, Chief of
Police, City of Sacramento; KEN JAMES, Chief of
Police, City of Emeryville, and HEATHER J.
FONG, Chief of Police, City of San Francisco,

Defendants.

Civil Case No.:

**CLASS ACTION COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

CLASS ACTION

1 Plaintiffs, for their Complaint in this action, allege and aver as follows:

2 **Introduction**

3 1. This is an action for declaratory and injunctive relief arising out of plaintiffs'
4 challenge, on behalf of themselves and classes of others who are similarly situated, to the
5 California DNA Fingerprint, Unsolved Crime and Innocence Protection Act (referred to herein
6 as "Proposition 69"). Proposition 69 mandates compulsory extraction, collection, analysis,
7 storage, and dissemination for law enforcement purposes of the DNA of hundreds of thousands
8 of California residents who have not been, and in many cases never will be, convicted of any
9 crime. Compulsory testing is also required of persons who, although previously convicted of
10 felony offenses, have long since served their debt to society and are no longer subject to the
11 supervision of the criminal justice system. Such compulsory sampling and testing, which is to
12 take place without any showing of probable cause or reasonable individualized suspicion,
13 violates plaintiffs' rights under the Fourth and Fourteenth Amendments to the United States
14 Constitution.

15 2. In the general election of November 2, 2004, a majority of California voters
16 approved a ballot measure enacting Proposition 69. Proposition 69 has amended the California
17 Penal Code, Sections 295 *et seq.*, to expand dramatically the scope of mandatory, suspicionless,
18 and warrantless sampling and testing of the DNA of persons in the State of California, and to
19 provide for broad sharing of data about those persons' DNA with law enforcement personnel
20 throughout the United States and internationally. As a result of Proposition 69, California now
21 has the most draconian program for the collection, retention, and sharing of DNA data in
22 existence anywhere in the United States.

23 3. Proposition 69 mandates DNA testing of all persons who are (or have ever
24 been) arrested for or charged with any felony. The arrest need not even be a lawful one, and
25 there is no requirement of a probable cause hearing or other steps toward prosecution, much less
26 any actual conviction, before the DNA sample is collected. Nor is there any requirement of
27 reasonable individualized suspicion implicating the DNA of a particular arrestee or other
28

1 specific justification for the testing of that individual; instead, the testing is across-the-board and
2 automatic for all felony arrestees.

3 4. Thus, Proposition 69 mandates the seizure and broad publication to local,
4 state, and national law enforcement agencies of DNA profiles from large numbers of persons as
5 to whom the state has no more legitimate interest in such information than it has for any other
6 law-abiding member of the public. The compulsory testing requirement applies to persons
7 arrested – but not even convicted – of many offenses for which their DNA has no conceivable
8 relevance, such as (to offer but a few examples) the use of unauthorized signatures in a
9 campaign advertisement, writing checks with insufficient funds, accepting a bribe to throw a
10 sporting event, racing a horse under a fictitious name, or counterfeiting railroad tickets. *See*
11 Cal. Penal Code §§ 115.1, 337c, 337f, 476(c), 481. Others caught in the DNA dragnet
12 established by the initiative include:

- 13 • persons who are arrested for a felony but against whom charges are quickly
14 dropped in the recognition that they are innocent and that no probable cause
15 existed for the arrest in the first place;
- 16 • persons for whom arrest warrants are issued as a result of mistaken identity,
17 including victims of identity theft;
- 18 • persons, such as victims of domestic violence, who are arrested for violence
19 committed in self-defense and who either have the charges against them
20 dropped or are subsequently acquitted;
- 21 • participants in political demonstrations and other activities who have
22 committed no crime but are nonetheless arrested in connection with broad
23 sweeps of participants by the police;
- 24 • persons who are wrongfully arrested due to police misconduct;
- 25 • persons who are arrested for felony possession of marijuana but against
26 whom charges are dropped or dismissed upon a showing that they were in
27 lawful possession of the marijuana for medical purposes;

- 1 • persons who are subject to overcharging upon their initial arrest for minor
2 offenses and are hence charged with felonies but are ultimately convicted of
3 nothing more than misdemeanors;
- 4 • persons who have been arrested for felony drug offenses and who, following
5 successful completion of treatment programs, have had their convictions
6 expunged in compliance with Proposition 36 or other state laws; and
- 7 • persons who were convicted of nonviolent felony offenses many years ago,
8 who served their sentences, and who have since then lived law-abiding lives
9 as ordinary members of the community.

10 Overall, approximately a third of all persons arrested for felony offenses in California in any
11 given year are ultimately never convicted of any crime whatever. Many others are convicted of
12 nothing more than a misdemeanor.

13 5. Under Proposition 69, a person whose DNA is taken but is subsequently not
14 charged (or is acquitted) may later petition for expungement of his or her DNA profile from the
15 state's database, but the ruling on any such petition is automatically delayed until after the data
16 will likely already have been made broadly available to other state, national, and international
17 databases over a substantial period of time. Even then, any expungement petition is subject to
18 cumbersome and onerous procedural barriers, including what is effectively a right of veto by the
19 prosecuting attorney and the unfettered and unreviewable discretion of the trial court to whom
20 the petition is directed.

21 6. The expansive mandatory DNA testing program established by Proposition
22 69 violates the Fourth and Fourteenth Amendments of the United States Constitution. The
23 statute not only permits, but *requires* broad and ongoing violations of the fundamental
24 protections afforded all persons by the Constitution to be secure in their persons from
25 unreasonable searches and seizures and to due process of law. Ignoring the clear limitations
26 recognized by the courts in upholding carefully circumscribed DNA testing programs for
27 persons who have been actually convicted of felony offenses, and as to whom there are
28 specifically articulated justifications for this invasion of fundamental privacy interests, the new

1 defendants resides within this District and/or performs official duties within the State of
2 California. This Court accordingly has personal jurisdiction over each of the defendants.

3 10. Venue properly lies within this District pursuant to 28 U.S.C. § 1391(b). The
4 named defendants perform their official duties in whole or in part in this District, and a
5 substantial part of the events or omissions giving rise to plaintiffs' claims have occurred or will
6 occur in this District.

7 **INTRADISTRICT ASSIGNMENT**

8 11. Pursuant to Local Rule 3-2, this action may properly be assigned to the San
9 Francisco or Oakland divisions of this Court.

10 **THE PARTIES**

11 **Plaintiffs**

12 12. Plaintiff Michael Weber is a resident of San Francisco, California. On
13 November 3, 2004, he attended an anti-war demonstration in San Francisco. Some time after a
14 bottle was thrown from the crowd of protestors in which Weber was standing, the police began
15 arresting everyone in the crowd. Weber was arrested for felony assault with a deadly weapon
16 other than a firearm on a police officer. Weber had not himself thrown the bottle or otherwise
17 assaulted or attempted to assault any officers at the demonstration. A few days later, the felony
18 charge was reduced to two misdemeanor charges, which were thereafter dismissed entirely.
19 Although Proposition 69 does not require Weber's DNA sample to be physically collected until
20 2009, the requirement for such sampling is now firmly established by statute and is subject to no
21 future contingencies or factual developments. His objection to such sampling is accordingly
22 ripe for resolution by this Court.

23 13. Plaintiff Mary Pruitt is a resident of Sacramento County, California. On
24 October 15, 2001, she was arrested in Sacramento, California, for possession of
25 methamphetamine and drug paraphernalia and subsequently pleaded guilty to those charges in
26 order to obtain a diversion to drug treatment in accordance with the California Substance Abuse
27 and Crime Prevention Act of 2000. Pruitt thereafter completed the required drug treatment
28 program, and the charges against her were dismissed pursuant to Cal. Penal Code

1 § 1210.1(d)(1). Pruitt is no longer under any supervision by the criminal justice system;
2 Proposition 69 nonetheless requires that Pruitt's DNA be collected and that the data concerning
3 her DNA be included in the California DNA database. Although Proposition 69 may not
4 require Pruitt's DNA sample to be collected until 2009, the requirement for such sampling is
5 now firmly established by statute and is subject to no future contingencies or factual
6 developments. Her objection to such sampling is hence ripe for adjudication by this Court.

7 14. Plaintiff Rodney Ware is a resident of Sacramento County, California, who
8 has been a victim of a crime commonly referred to as "identity theft." In April 2004, he was
9 arrested in Los Angeles on a felony warrant. Because the person for whom the warrant was
10 issued had used Ware's name under false pretences, the warrant was ultimately found not to
11 pertain to Ware; accordingly, the charges were not pursued. Nonetheless, because he has been
12 arrested for a felony, Proposition 69 requires that Ware's DNA be sampled and analyzed and
13 that data concerning his DNA be included in the California DNA Database. Although
14 Proposition 69 does not require Ware's DNA sample to be physically collected until 2009, the
15 requirement for such sampling is now firmly established by statute and is subject to no future
16 contingencies or factual developments. His objection to such sampling is accordingly ripe for
17 resolution by this Court.

18 15. Plaintiff Rachel Delucci-Youngberg is a resident of Shasta County,
19 California. In July 2001, she was arrested for and charged with murder in Shasta County,
20 California, after she shot her abusive husband in self-defense. At trial, after hearing all evidence
21 from both the prosecution and defense, the trial judge granted a motion for acquittal under Cal.
22 Penal Code § 1118.1, ruling that the prosecution had not presented substantial evidence to
23 disprove the defense theory of self-defense. Nonetheless, because she was arrested for a
24 felony, Proposition 69 requires that Delucci-Youngberg's DNA be collected and analyzed and
25 that data concerning her DNA be included in the California DNA Database.

26 16. Plaintiff James Blair is a resident of Alameda County, California. In
27 December 2003 and January 2004, he was arrested in Emeryville and Berkeley, California for
28 offenses related to his possession and cultivation of marijuana and charged with felony

1 violations of California Health and Safety Code §§ 11359 and 11358. The charges were
2 dismissed after Blair's physician appeared in court and confirmed that Blair's possession,
3 cultivation, and use of marijuana were pursuant to the physician's recommendation to treat pain
4 and muscle spasms related to a spinal cord injury and that therefore Blair had a valid defense
5 under the California Compassionate Use Act, Cal. Health and Safety Code § 11362.5.
6 Nonetheless, because he was arrested for a felony, Proposition 69 requires that Blair's DNA be
7 collected and analyzed and that data concerning his DNA be included in the California DNA
8 Database. Although Proposition 69 does not require Blair's DNA sample to be physically
9 collected until 2009, the requirement for such sampling is now firmly established by statute and
10 is subject to no future contingencies or factual developments. His objection to such sampling is
11 accordingly ripe for resolution by this Court. Blair is a member of plaintiff Americans for Safe
12 Access.

13 17. Plaintiff Think T. Lam is a resident of Orange County, California. He was
14 arrested on April 29, 2003, for murder. Those charges are currently pending, and he is currently
15 incarcerated in San Francisco awaiting trial. Lam has never been convicted of a felony or any
16 other criminal offense. Nonetheless, because he has been arrested for murder, Proposition 69
17 requires that Lam's DNA be sampled and analyzed and that data concerning his DNA be
18 included in the California DNA Database.

19 18. Plaintiff Ruben Rivas is a resident of Orange County, California. In 2000,
20 while serving as a volunteer legal observer for the National Lawyers Guild during the
21 Democratic National Convention in Los Angeles, he followed and videotaped a demonstration
22 by animal rights activists. After some of the activists began pounding on the gate of a store,
23 police officers arrived and arrested everyone who was present, including Rivas, charging them
24 with felony conspiracy to commit burglary. The charges against Rivas were dropped the next
25 day. Nonetheless, because he was arrested for a felony, Proposition 69 requires that Rivas's
26 DNA be collected and analyzed and that data concerning his DNA be included in the California
27 DNA Database. Although Proposition 69 does not require Rivas's DNA sample to be
28 physically collected until 2009, the requirement for such sampling is now firmly established by

1 statute and is subject to no future contingencies or factual developments. His objection to such
2 sampling is accordingly ripe for resolution by this Court.

3 19. Plaintiff Jason Craig is a resident of San Diego, California, and a student in
4 his senior year at San Diego State University. In February 2004, following a fraternity party at
5 which he became intoxicated, Craig was out with two friends and accompanied one of them into
6 an unlocked residence that the friend claimed was the home of an acquaintance who had
7 borrowed some video game equipment and magazines from him. The friend took the
8 equipment, which he claimed to own. Once outside, Craig agreed to carry the wires from the
9 game system. As they were walking down the street, a police officer stopped the group and then
10 arrested them. Craig was charged with the felony offense of burglary. He was subsequently
11 convicted only of a misdemeanor offense of receiving stolen property. Craig has no other
12 criminal record. Nonetheless, because he was arrested for a felony, Proposition 69 requires that
13 Craig's DNA be collected and analyzed and that data concerning his DNA be included in the
14 California DNA Database. Although Proposition 69 does not require Craig's DNA sample to be
15 physically collected until 2009, the requirement for such sampling is now firmly established by
16 statute and is subject to no future contingencies or factual developments. His objection to such
17 sampling is accordingly ripe for resolution by this Court.

18 20. Plaintiff Linda Walker is a resident of Contra Costa County, California.
19 Between about 1983 and 1993, Walker was arrested for and convicted of a number of felony
20 offenses, primarily related to petty theft and drug possession. Following those convictions,
21 Walker completed her sentences and was released and completed periods of probation and
22 parole. Walker is no longer subject to any kind of probation or other supervised release relating
23 to her arrest and conviction; nor has she been arrested for any other criminal offense since that
24 time. Nonetheless, Proposition 69 requires that Walker's DNA be sampled and that data
25 concerning her DNA be included in the California DNA Database. Walker is a member of
26 plaintiff All of Us or None.

27 21. As of the date of this Complaint, none of the individual plaintiffs in this
28 action has provided a DNA sample pursuant to Proposition 69; nor, with the exception of

1 plaintiff Lam, is any plaintiff's DNA profile in the possession of state or federal law
2 enforcement authorities or in any database to which such authorities have access. Lam has been
3 required to provide a biological sample for testing, but the court order requiring that sample
4 expressly provides that it may not be used in association with any other case and may not be
5 included in any city, state, or national database or databank.

6 22. Except for Plaintiffs Pruitt and Walker, none of the individual plaintiffs in
7 this action has ever been convicted of any felony, either in California or elsewhere. Except for
8 plaintiff Lam, who is incarcerated pending trial, none of the plaintiffs is currently incarcerated
9 or subject to any form of supervised release following incarceration. Upon information and
10 belief, none of the plaintiffs, other than Lam, is currently the subject of a valid warrant or court
11 order for the sampling of his or her DNA based upon a finding of probable cause or any
12 reasonable suspicion linking him or her to any crime for which such DNA would be relevant
13 evidence. Nor does any other ground currently exist (apart from Proposition 69) on which any
14 plaintiff may be compelled to submit a sample of his or her DNA for testing and use for law
15 enforcement purposes.

16 23. Plaintiff All of Us or None is an unincorporated association whose primary
17 purpose is to eliminate stigma, shame, and barriers to full participation in society resulting from
18 felony convictions and former incarceration. All of Us or None's membership includes many
19 individuals within California who have served criminal sentences for felonies and are no longer
20 under the supervision of the criminal justice system but are nevertheless subject to the new
21 mandatory testing provisions of Proposition 69. Implementation of Proposition 69 will have an
22 immediate and severe impact on the constitutional rights of its members.

23 24. Plaintiff Americans for Safe Access is a non-profit corporation that has as its
24 primary purpose working to protect the rights of patients and doctors legally to use marijuana
25 for medical purposes, including providing legal advocacy and training for patients and doctors
26 who are criminally charged for offenses related to medical marijuana. Americans for Safe
27 Access's members and constituents include individuals within California who are subject to the
28 new mandatory testing provisions of Proposition 69 due to arrests for offenses to which they

1 have an affirmative defense under California law in the legal use of marijuana for medical
2 purposes. Implementation of Proposition 69 will have a severe impact on the constitutional
3 rights of the members and constituents of Americans for Safe Access.

4 Defendants

5 25. Defendant Bill Lockyer is the Attorney General of the State of California.
6 Under Article 5, Section 13 of the California State Constitution, he is the “chief law officer of
7 the State” and has the duty “to see that the laws of the state are uniformly and adequately
8 enforced.” The California Constitution further grants him “direct supervision over every district
9 attorney and sheriff and over such other law enforcement officers as may be designated by
10 law...” As Attorney General, defendant Lockyer also supervises the operations of the
11 California Department of Justice, which is directly responsible for implementing key provisions
12 of Proposition 69. He is sued in his official capacity.

13 26. Defendant Eva Steinberger is the Assistant Bureau Chief for DNA Programs,
14 California Department of Justice. In that capacity, she has responsibility for supervising
15 functions of the Department of Justice and the California Department of Justice Laboratory in
16 implementing Proposition 69, including, *inter alia*, providing procedural guidance, equipment,
17 and materials to local law enforcement agencies for the collection of samples; receiving,
18 maintaining, storing, and analyzing samples; contracting with third parties to assist with DNA
19 analysis; and maintaining databases and databanks of analysis results and other information.
20 She is sued in her official capacity.

21 27. Defendant Lance Gima is the Chief of the Bureau of Forensic Services,
22 California Department of Justice Laboratory. In that capacity, he has responsibility for
23 supervising functions of the Department of Justice Laboratory in implementing Proposition 69,
24 including, *inter alia*, providing guidance, equipment, and materials to local law enforcement
25 agencies for the collection of samples; receiving, maintaining, storing, and analyzing samples;
26 contracting with third parties to assist with DNA analysis; and maintaining databases and
27 databanks of analysis results and other information. He is sued in his official capacity.

1 28. Defendant Charles C. Plummer is the Sheriff of Alameda County.
2 Proposition 69 vests in this defendant, and the other law enforcement officers of Alameda
3 County whom he supervises, the responsibility for collection of DNA samples from arrestees.
4 He is sued in his official capacity.

5 29. Defendant Warren E. Rupf is the Sheriff of Contra Costa County.
6 Proposition 69 vests in this defendant, and the other law enforcement officers of Contra Costa
7 County whom he supervises, the responsibility for collection of DNA samples from arrestees.
8 He is sued in his official capacity.

9 30. Defendant Lou Blanas is the Sheriff of Sacramento County. Proposition 69
10 vests in this defendant, and the other law enforcement officers of Sacramento County whom he
11 supervises, the responsibility for collection of DNA samples from arrestees. He is sued in his
12 official capacity.

13 31. Defendant Jim Pope is the Sheriff of Shasta County. Proposition 69 vests in
14 this defendant, and the other law enforcement officers of Shasta County whom he supervises,
15 the responsibility for collection of DNA samples from arrestees. He is sued in his official
16 capacity.

17 32. Defendant Michael Hennessey is the Sheriff of San Francisco County.
18 Proposition 69 vests in this defendant, and the other law enforcement officers of San Francisco
19 County whom he supervises, the responsibility for collection of DNA samples from arrestees.
20 He is sued in his official capacity.

21 33. Defendant Albert Najera is the Chief of Police for the City of Sacramento.
22 Proposition 69 vests in this defendant, and the other law enforcement officers of Sacramento
23 whom he supervises, the responsibility for collection of DNA samples from arrestees. He is
24 sued in his official capacity.

25 34. Defendant Ken James is the Chief of Police for the City of Emeryville.
26 Proposition 69 vests in this defendant, and the other law enforcement officers of Emeryville
27 whom he supervises, the responsibility for collection of DNA samples from arrestees. He is
28 sued in his official capacity

1 those samples, pursuant to Proposition 69 constitute an excessive government intrusion into
2 their private and personal genetic information in that it is neither supported by a legitimate state
3 purpose outweighing plaintiffs' privacy interests nor narrowly tailored to meet any legitimate
4 state purpose, thus violating plaintiffs' right to privacy under the Fourteenth Amendment of the
5 United States Constitution?

6 c. Do the compulsory sampling and analysis of the DNA of members of the
7 plaintiff classes pursuant to the requirements of Proposition 69, without a requirement of any
8 pre-testing due process protections or the mandatory expungement of data and samples from
9 persons against whom charges are dropped, who are acquitted, whose convictions are reversed,
10 or who are otherwise adjudicated to be innocent, violate the Due Process Clause of the
11 Fourteenth Amendment to the United States Constitution?

12 39. The claims of the named plaintiffs are typical of the claims of members of the
13 classes whom they represent.

14 40. The named plaintiffs will fairly and adequately protect the interests of the
15 plaintiff classes. The named plaintiffs have no interest that is now or may be potentially
16 antagonistic to the interests of the class. The attorneys representing the plaintiffs include
17 experienced civil rights attorneys and are considered able practitioners in federal constitutional
18 and statutory adjudications.

19 41. Defendants have threatened to act and will continue to act on grounds
20 generally applicable to the plaintiff classes, thereby making final injunctive and declaratory
21 relief appropriate to the classes as a whole.

22 **THE MATTERS IN CONTROVERSY**

23 **The Development and Sharing of DNA Databases**

24 42. Before the passage of Proposition 69, California law provided for mandatory
25 DNA testing of persons who had been convicted of certain serious felony offenses and the
26 inclusion of data derived from those tests in a state-wide database. Only persons who had
27 actually been convicted of one of the enumerated felonies were subject to this compulsory
28 testing program, and even in those cases the law provided important due process protections to

1 those whose DNA was taken. For example, the pre-Proposition 69 California statute provided
2 for the automatic expungement of the physical DNA sample and associated database entries for
3 any person whose conviction was reversed.

4 43. California routinely shares DNA profiles and other information gathered
5 through its DNA testing programs with law enforcement agencies elsewhere. For example,
6 California participates in a nationwide program, supervised by the Federal Bureau of
7 Investigation, to share automatically the contents of the California DNA Database through the
8 nationwide Combined DNA Index System (“CODIS”) database. The CODIS database currently
9 contains DNA information on more than 1.8 million individuals, including data derived from
10 state and federal DNA sampling programs. This data is widely available to law enforcement
11 agencies throughout the United States and is also made available to international law
12 enforcement agencies, such as Interpol, and the national law enforcement agencies of other
13 countries. Until recently, the federal authorizing legislation for the CODIS system permitted
14 only DNA data taken from persons actually convicted of a felony to be included in the system;
15 however, that legislation was recently amended to permit the inclusion of many arrestees as
16 well.

17 44. The sharing of DNA profiles and other information gathered through DNA
18 testing is not limited to the CODIS system. Law enforcement agencies in California are also
19 authorized to share DNA profiles and other information with one another, and with law
20 enforcement agencies in other states, through cross-references of individual state and local
21 databases.

22 45. The purpose of the collection and sharing of data in CODIS and other DNA
23 databases is to provide DNA profiles that can be used to match against DNA found in crime-
24 scene samples, in order to identify suspects in those crimes. The mandatory collection of DNA
25 from arrestees in California is intended to provide law enforcement with broad access to
26 otherwise unavailable information about those individuals that might link them to offenses other
27 than those for which they have been arrested.

1 are convicted of sex offenses and other serious and violent felonies. Further, a new provision of
2 the statute now requires DNA testing of “any adult person who is arrested for or charged with”
3 any felony offense of any kind. Persons arrested for (or charged with) murder, voluntary
4 manslaughter, or any offense under Section 290 of the Penal Code – or attempt to commit any
5 of those felonies – are immediately subject to compulsory DNA testing. For persons arrested
6 for all other felony offenses, compulsory testing is to take place beginning on January 1, 2009.

7 51. The initiative is expressly retroactive, requiring collection “regardless of
8 when the crime charged or committed became a qualifying offense pursuant to this chapter”
9 Proposition 69 § III(4)(b)(1). Thus, all persons who have *ever* been arrested for, or charged
10 with, murder, voluntary manslaughter, or Section 290 offenses (or attempts to commit those
11 felonies) are now required to have their DNA sampled and analyzed. All persons who have *ever*
12 been arrested for, or charged with, any other felonies will be required to submit to DNA testing
13 in 2009. For arrests occurring after enactment, sampling is to occur “immediately following
14 arrest, or during the booking or intake or reception center process or as soon as administratively
15 practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical
16 release from confinement or custody.” *Id.* § III(4)(a)(1)(A). For anyone else whose DNA has
17 not yet been obtained, “the court shall order the person to report within five calendar days to a
18 county jail facility ... or other designated facility to provide the required specimens....” *Id.*
19 § III(4)(a)(1)(B). The initiative affords the courts no discretion in issuing such orders; nor are
20 there any stated exceptions (*e.g.*, adjudicated innocence) from this mandate.

21 52. Proposition 69 establishes a presumption that samples will be taken through
22 the “buccal swab” method, through which inner cheek cells are taken from scraping the inside
23 of the mouth. However, samples may be taken through other methods instead (*e.g.*, blood
24 sampling) at the direction of the California Department of Justice. *Id.* § III(1)(e). The
25 Department of Justice is directed to provide appropriate equipment, materials, and instructions
26 to each facility at which samples are to be taken. Once taken, the samples are to be forwarded
27 to the DNA Laboratory of the Department of Justice, which is to arrange for the DNA analysis
28 to be performed, either by its own personnel or through third-party contractors. After the

1 analysis is completed, the results are entered into the state’s DNA Database and will be shared
2 freely with other law enforcement agencies nationally and internationally, including (but not
3 limited to) through the CODIS system.

4 53. Proposition 69 does not effectively limit the types of genetic information to
5 be collected and maintained from the biological sample and does not require destruction of the
6 underlying sample after the DNA analysis has taken place. Instead, the physical sample is
7 retained indefinitely for potential further analysis. Thus, Proposition 69 allows the state to
8 maintain *all* genetic information that can be derived from a person’s DNA.

9 54. As amended by Proposition 69, California law no longer provides for the
10 automatic expungement of data and samples taken from persons whose convictions are
11 overturned; nor is there any provision for automatic expungement of samples taken from
12 persons against whom charges are dropped or who are acquitted or otherwise found to be
13 innocent of the offense for which they were arrested. Instead, such a person may file a petition
14 for such expungement in the court of the county where the arrest occurred. However, no such
15 petition may be granted unless the court is able to certify that neither the prosecuting attorney
16 nor the Department of Justice has objected to it; thus, the initiative allows the prosecuting
17 attorney and Department of Justice, or either of them, to block expungement merely by filing an
18 objection. Further, the initiative expressly provides that “[t]he court has the discretion to grant
19 or deny the request for expungement,” and that “denial of a request for expungement is a
20 nonappealable order and shall not be reviewed by petition for writ.” Thus, the court’s ability to
21 deny such a petition is completely unfettered and unreviewable. Moreover, no expungement
22 petition may be granted until at least 180 days following the filing of the petition, and no limits
23 are imposed on the use of the petitioner’s DNA data or dissemination of that data to other law
24 enforcement agencies during that 180-day period. And even if the petition for expungement is
25 granted, no mechanism is provided for the return of the petitioner’s DNA sample, profile, or
26 other information from other law enforcement agencies with whom it has been shared.

27 55. Proposition 69 allows for the sharing of DNA profiles and/or the underlying
28 biological samples with a broad array of international, federal, state and local law enforcement

1 officers, including private crime laboratories and other third parties that have been approved by
2 the Department of Justice.

3 **The Nature Of DNA Testing And The Impact On Plaintiffs**

4 56. Under Proposition 69, the specimens that are taken from plaintiffs and others
5 will be processed to extract samples of their DNA, which are then analyzed to generate DNA
6 profiles. DNA (an abbreviation for “deoxyribonucleic acid”) is the cellular material that
7 contains each person’s unique genetic code.

8 57. The DNA profiles that are currently stored in law enforcement databases are
9 sometimes referred to as “DNA fingerprints.” This is a misnomer, for although fingerprints and
10 DNA resemble each other in that each is unique for each individual person, the seizure and
11 analysis of DNA samples differs fundamentally from the mere taking of a fingerprint.
12 Fingerprinting involves the creation of an image or impression of the external physical
13 conformation of the fingertips, and a fingerprint reveals nothing more about the person than the
14 unique patterns on the skin of his or her fingers. Thus, while fingerprints can be used
15 effectively to provide evidence of the identity of a person, they reveal no other information
16 about that person.

17 58. DNA, in contrast, is not directly displayed on the surface of the body; it is,
18 rather, a microscopic arrangement of chemical constituents within the nucleus of a human cell.
19 Once those chemical constituents are analyzed, they can reveal a vast array of highly private
20 information about that person, including, his or her relationship to other persons, ethnic traits
21 and other physical characteristics, genetic defects, and propensity to certain diseases, such as
22 certain types of cancers. The amount of information about a person that can be revealed by
23 DNA is expanding every year. Some scientists have suggested that DNA analysis can be used
24 to predict personality traits, propensity to antisocial behavior, and sexual orientation, as well as
25 an ever-expanding variety of existing and future health conditions and other physical traits.

26 59. Due to the expansive nature of the information available from DNA samples,
27 the compulsory seizure of such samples from plaintiffs provides law enforcement personnel and
28 other government officials with direct access to the most fundamentally private personal

1 information that any person possesses. Such sampling invades a location – the genetic code
2 locked within each person’s cells – in which, absent unusual circumstances, the average person
3 has the very highest possible expectation of privacy.

4 **Declaratory and Injunctive Relief Allegations**

5 60. An actual and substantial controversy exists between plaintiffs and
6 defendants as to their respective legal rights and duties. Plaintiffs contend that, as applied to
7 them and to others in the plaintiff classes, Proposition 69 is unlawful and unconstitutional.
8 Defendants contend the opposite.

9 61. If not enjoined by the Court, defendants will implement Proposition 69 in
10 derogation of the rights of plaintiffs and others in the plaintiff classes. Such implementation
11 will impose irreparable injury on the plaintiffs and other class members. Plaintiffs have no
12 plain, speedy, and adequate remedy at law.

13 **COUNT I: VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED**
14 **STATES CONSTITUTION (42 U.S.C. § 1983)**

15 62. Plaintiffs hereby reallege and incorporate by reference the allegations
16 contained in Paragraphs 1 through 61 as though fully set forth herein.

17 63. The Fourth Amendment to the United States Constitution protects the right of
18 people to be free from unreasonable searches and seizures and prohibits searches or seizures for
19 law enforcement purposes absent reasonable individualized suspicion.

20 64. Proposition 69 mandates the compulsory extraction of biological samples
21 from plaintiffs and other members of the plaintiff classes, and the analysis of those samples for
22 generalized law enforcement purposes, without requiring any showing of probable cause or
23 individualized suspicion linking the person at issue to any specific crime for which his or her
24 DNA is relevant.

25 65. The compulsory and warrantless extraction of biological samples from
26 plaintiffs and members of the plaintiff classes is inherently “unreasonable” within the meaning
27 of the Fourth Amendment and is not supported by any recognized exception to the Fourth
28 Amendment’s warrant and probable cause requirements. The subsequent DNA analysis of those
samples also constitutes an unreasonable search within the meaning of the Fourth Amendment

1 and is also not justified by any recognized exception to the warrant and probable cause
2 requirements. As applied to the plaintiff classes, Proposition 69 is accordingly unconstitutional.

3 **COUNT II: VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE**
4 **FOURTEENTH AMENDMENT TO THE CONSTITUTION (42 U.S.C. § 1983)**

5 66. Plaintiffs hereby reallege and incorporate by reference the allegations
6 contained in Paragraphs 1 through 65 as though fully set forth herein.

7 67. The Due Process Clause of the Fourteenth Amendment to the United States
8 Constitution provides a substantive right to privacy with respect to personal matters such as
9 medical and genetic information.

10 68. Because Proposition 69 requires government intrusion into private and
11 personal genetic information of plaintiffs by procuring, analyzing, indefinitely retaining and
12 disseminating their biological samples and DNA information, the Fourteenth Amendment to the
13 United States Constitution requires that the intrusion be supported by a legitimate governmental
14 purpose that outweighs plaintiffs' privacy interests and that the intrusion be narrowly tailored to
15 meet that legitimate purpose.

16 69. California's interest in maintaining biological samples and DNA profiles
17 from arrestees and persons no longer under supervision of the criminal justice system does not
18 outweigh plaintiffs' privacy interests with respect to their genetic material; nor is Proposition 69
19 narrowly tailored to further the state's interest. Application of Proposition 69 to plaintiffs and
20 other members of the plaintiff classes accordingly violates their rights to privacy and substantive
21 due process under the Fourteenth Amendment to the United States Constitution.

22 **COUNT III: VIOLATION OF PROCEDURAL DUE PROCESS UNDER THE**
23 **FOURTEENTH AMENDMENT TO THE CONSTITUTION (42 U.S.C. § 1983)**

24 70. Plaintiffs hereby reallege and incorporate by reference the allegations
25 contained in Paragraphs 1 through 69 as though fully set forth herein.

26 71. The Due Process Clause of the Fourteenth Amendment to the United States
27 Constitution prohibits the deprivation of life, liberty or property without due process of law.

28 72. Proposition 69 violates procedural process in numerous respects, including
the following:

1 a. Proposition 69 requires the deprivation of the arrestee plaintiffs' property
2 and liberty interests in their own genetic material without notice or any opportunity to be heard
3 as to whether the arrest giving rise to the compulsory collection of their biological samples was
4 lawful.

5 b. Proposition 69 denies plaintiffs any opportunity to be heard as to
6 whether any legitimate reason exists for the compulsory sampling and analysis of their DNA for
7 law enforcement purposes;

8 c. Proposition 69 denies plaintiffs meaningful remedies to assure complete,
9 certain, and immediate expungement of their samples, DNA profiles, and other data should their
10 arrests not lead to a felony conviction or if any conviction is overturned;

11 73. Because it fails to afford such basic procedural protections to plaintiffs and
12 other members of the plaintiff classes who are subject to its mandatory testing provisions,
13 Proposition 69 violates the Due Process Clause of the Fourteenth Amendment to the United
14 States Constitution.

15 **RELIEF SOUGHT**

16 WHEREFORE, Plaintiffs, on behalf of themselves and the plaintiff class, seek
17 the following relief:

18 1. A declaration that Proposition 69 is unconstitutional as applied to persons
19 who are subject to its compulsory sampling and testing provisions solely as a result of their
20 status as persons who have been arrested for or charged with a felony.

21 2. A declaration that Proposition 69 is unconstitutional as applied to persons
22 who are subject to its compulsory sampling and testing provisions solely by reason of their
23 status as persons who have been convicted of a felony, in those instances in which the formerly
24 convicted person is no longer incarcerated or otherwise subject to the continued supervision of
25 the criminal justice system.

26 3. A preliminary and permanent injunction:

27 a) enjoining defendants from the compulsory collection, DNA
28 analysis, and/or retention of biological samples from any member

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of the Arrestee Class until and unless he or she is actually convicted of a felony offense, unless such sampling is supported by a warrant issued on probable cause;

b) enjoining defendants from the compulsory collection, DNA analysis, and/or retention of biological samples from any member of the Formerly Convicted Persons Class absent a warrant issued on probable cause;

c) enjoining defendants from assisting any other state or local law enforcement official or third party in collecting, analyzing, or retaining biological samples, or DNA data obtained from such samples, from any member of the Arrestee Class until and unless he or she is actually convicted of a felony offense, unless such sampling, analysis, and/or retention is supported by a warrant issued on probable cause;

d) enjoining defendants from assisting any other state or local law enforcement official in collecting, analyzing, or retaining biological samples, or DNA data obtained from such samples, from any member of the Formerly Convicted Persons Class, unless such sampling, analysis, and/or retention is supported by a warrant issued on probable cause;

e) ordering defendant Lockyer to inform and instruct all law enforcement officials in the State of California that any application of Proposition 69 to member of the plaintiff classes, absent a new felony conviction or a warrant issued on probable cause, is unconstitutional and unlawful and may not proceed; and

f) instructing defendants to promptly destroy any biological samples from members of the plaintiff class that are in their possession or that have been, or in future are, forwarded to the Department of

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Justice (or any entity with which it has contracted), and to expunge all associated DNA profiles and other data from all state and local databases and other files, unless the submitting law enforcement agency has certified that the sample was taken either (a) following conviction for a felony offense or (b) pursuant to a warrant issued upon probable cause or other court order issued under authority other than Proposition 69.

- g) Costs and attorneys fees incurred in this action pursuant to 42 U.S.C. § 1988 or other applicable authority.
- h) Such other and further relief as may be just and proper.

DATED:

COVINGTON & BURLING

By: _____
Attorneys for Plaintiffs

SONYA D. WINNER, SBN 200348
DONALD W. BROWN, SBN 83347
KATE S. STEINHEIMER, SBN 226220
COVINGTON & BURLING
One Front Street
San Francisco, California 94111
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

JULIA HARUMI MASS, SBN 189649
MARGARET C. CROSBY, SBN 56812
MAYA L. HARRIS, SBN 172115
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN
CALIFORNIA, INC.
1663 Mission Street, Suite 460
San Francisco, CA 94103
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

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PETER ELIASBERG, SBN 189110
MARK ROSENBAUM, SBN 59940
RICARDO D. GARCIA, SBN 178111
ACLU FOUNDATION OF SOUTHERN
CALIFORNIA
1616 Beverly Boulevard
Los Angeles, CA 90026
Telephone: (213) 977-9500
Facsimile: (213) 250-3919

JORDAN BUDD, SBN 144288
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SAN DIEGO AND
IMPERIAL COUNTIES
P.O. Box 87131
San Diego, California 92138
Telephone: (619) 232-2121
Facsimile: (619) 232-0036

Attorneys for Plaintiffs

JEFFREY D. SCHWARTZ, SBN 80643
360 Ritch Street, #201
San Francisco, CA 94107
Telephone: (415) 777-3170
Facsimile: (415) 681-8643

Attorney for Plaintiff
Rachel Delucci-Youngberg

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

DATED: COVINGTON & BURLING

By: _____
Attorneys for Plaintiffs

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EXHIBIT A – ATTACH COPY OF PROP. 69