UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| SHAKIRA LESLIE; on behalf of herself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF NEW YORK; EDWARD CABAN, Police Commissioner for the City of New York, in his official capacity; JEFFREY MADDREY, Chief of Department for the New York City Police Department, in his official capacity; JAMES ESSIG, Chief of Detectives for the New York City Police Department, in his official capacity; BRIAN MCGEE, Deputy Chief in the Forensic Investigations Division of the New York City Police Department, in his official capacity; and DR. JASON GRAHAM, Chief Medical Examiner for the City of New York, in his official capacity;<br><br>Defendants. | Case No. 1:22-CV-02305 |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

For more than a decade, New York City (the "City") has secretly collected the DNA of unsuspecting New Yorkers, without their consent or a warrant, to add it to a "Suspect Index" where it is constantly compared against the City's entire database of DNA crime scene evidence. The more than 34,000 New Yorkers—including hundreds of children, as young as eleven years old—in the Suspect Index are rendered suspects in every crime involving DNA evidence without any actual suspicion that they were involved in those crimes. The New York City Police Department ("NYPD") has targeted primarily Black and Latino New Yorkers by bringing them into interrogation rooms specially prepared to capture their saliva, skin cells, or other genetic material that people shed frequently and uncontrollably. The NYPD then collects these DNA samples—whether a cup from which someone drank or a pen with which someone wrote, among other examples—and sends them to the Office of Chief Medical Examiner ("OCME"), which extracts the person's DNA, analyzes it, creates a DNA profile, and compares the profile against both specific evidence and OCME's entire crime scene evidence database.

Plaintiff Shakira Leslie was wrongly arrested and later cleared of all charges. Years after her charges were dropped, her DNA profile remained in the Suspect Index, subjecting her continually—without a warrant—to searches against new and old crime scene evidence in violation of U.S. Supreme Court and Second Circuit precedent. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617-18 (1989) ("collection and subsequent analysis of" "biological samples [constitute] Fourth Amendment searches"); *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007) ("analysis and maintenance" of DNA information in the government's DNA-indexing database is a search, especially given "the vast amount of sensitive information that can be mined from a person's DNA and the very strong privacy interests that *all* individuals have in this information").

The City does not dispute these facts. Instead, it attempts to side-step Fourth Amendment protections altogether by suggesting that the NYPD only collects DNA from items that individuals *abandon*, thus relinquishing any privacy interest in their DNA therein. This argument fails as a matter of law. The City's reliance on the abandonment doctrine cannot survive, among other decisions, *Carpenter v. United States*, where the U.S. Supreme Court held that people do not relinquish their privacy interest in their physical movements simply by virtue of cell carriers tracking this data, because (i) a catalogue of an individual's movements reveals deeply personal information about the person, and (ii) people do not voluntarily expose this information through any sort of "affirmative act." 585 U.S. 296, 314 (2018). The same is true here, where DNA can reveal even *more* sensitive details about a person than their physical movements, and people do not voluntarily expose their DNA, which people shed unconsciously and uncontrollably.

The City's abandonment premise also fails as a matter of undisputed fact. The record shows unmistakably that the NYPD *prevents* people from taking the allegedly "abandoned" soda cans, cups, or other DNA samples with them when they leave the interrogation room. For instance, NYPD policy forbids officers and detectives from permitting an individual to bring a soda can back to their holding cell after being interrogated. Likewise, NYPD policy requires that officers handcuff arrestees behind their back (as they did with Ms. Leslie) when escorting them out of interrogation rooms—effectively precluding them from exercising any choice over whether to bring the partially consumed item with them or leave it behind. Under these circumstances, "where the captive defendant uses an item and the police harvest it specifically to obtain DNA," the item "is not abandoned but rather seized." *People v. Flores*, 65 Misc. 3d 971, 975 (N.Y. Sup. Ct., Bronx Cnty. 2019).

Because Ms. Leslie and the putative class members (collectively "plaintiffs")[1] did not abandon their DNA, the City's failure to obtain a warrant before searching their DNA makes those searches unreasonable under the Fourth Amendment. But that is not all. State law also spells doom for the City's practice, because the City's operation of the Suspect Index is both unauthorized under state law—and thus *ultra vires*—and preempted by it, as explained further below. And defendants' arguments to the contrary in their motion for summary judgment fail because (i) they are based on disputed facts and (ii) ignore controlling, Supreme Court and Second Circuit precedent squarely in plaintiffs' favor.

## STATEMENT OF FACTS

Since 1991, the forensic scientific community has seen significant technological advances in DNA analysis and profiling. *See* Plaintiff's Local Civil Rule 56.1 Statement ("Facts") ¶ 178. In the early 1990s, forensic scientists learned that saliva samples were a usable form of DNA. Facts ¶¶ 146, 179 . Later that same decade, they discovered that skins cells were also a source of DNA. Facts ¶¶ 146, 179. Those discoveries, coupled with innovations in DNA testing technology, have made it possible to get usable DNA results from smaller and smaller amounts of starting material. Facts ¶ 178.

Modern forensic DNA analysis can now be used to reliably identify an individual and reveal myriad personal details about that individual and their background, including the person's ethnicity, their susceptibility to disease, their anticipated response to certain therapeutic agents, and—when paired with genealogical investigations—the person's kinship to near and distant relatives, among other information. Facts ¶¶ 146, 171-73. And because humans constantly,

[1] On April 28, 2023, Ms. Leslie wrote the Court and explained that she would defer her motion for class certification to follow summary judgment. *See* ECF No. 78.

unknowingly, and unavoidably shed DNA—through saliva, hair, and skin cells—and DNA generally persists for months in the environment, the possibilities for deploying those advances in forensic DNA testing are endless. Facts ¶¶ 146-65.

### A. The City's Policy and Practice of Secretly Collecting, Analyzing, and Indexing the DNA of Unsuspecting New Yorkers.

On the heels of these forensic DNA advances, the City developed a policy and practice of secretly collecting the shed DNA of people whom the NYPD deem suspects in crimes, analyzing their DNA, and then comparing it against both specific crime scene evidence and its entire database of crime scene evidence. *See generally* Facts ¶¶ 1-100, 121-32. The City's practice begins with the NYPD, which collects DNA samples without a warrant or court order and without the knowledge or consent of the individual, by taking what the NYPD refers to as "abandonment samples." Facts ¶¶ 1, 8. According to the NYPD, a DNA sample is abandoned when "[t]he item is left behind." Facts ¶ 10. And the NYPD assumes that "if something is left behind by an individual, then it's been discarded." Facts ¶ 11.

In most cases, the NYPD collects a suspect's DNA sample in "a controlled environment, meaning from a [police] interview room." Facts ¶¶ 12-13. The NYPD instructs its detectives to collect samples from a police "interview room" instead of a precinct cell because, unlike a cell, rooms are controlled environments that detectives can prepare to collect the suspect's DNA. Facts ¶¶ 12-13, 24. The NYPD's Detective Guide (the "Guide") gives detectives step-by-step instructions on how to prepare an interview room to collect a suspect's DNA sample. Facts ¶ 14. The Guide then instructs detectives to provide suspects with an object that will be partially consumed or drank. Facts ¶ 15. The NYPD specifically trains its detectives to collect "cigarette butts, water bottles, soda cans, and paper cups" because they have saliva and are "the best items" for DNA testing purposes. Facts ¶ 22. If NYPD detectives cannot collect an item with saliva, they

collect items that the suspects touched instead, like a pen. Facts ¶ 23. The NYPD trains its detectives that maintaining unbroken eye contact with the item until they collect it as an abandonment sample "is the most critical step in the process." Facts ¶ 17.

Once the detectives finish interrogating a suspect, NYPD policy requires that an NYPD officer "handcuff all" people in custody "with hands behind their back" before escorting them back to their cell. Facts ¶¶ 25-27. Detectives then return to the interview room to collect the person's DNA sample in an evidence bag. Facts ¶¶ 16, 21, 140. After the NYPD has collected the DNA sample, it does not notify suspects that it has their DNA. Facts ¶ 8.

The NYPD provides its detectives with wide discretion when collecting abandonment samples. Detectives have the discretion to make suspects wait multiple hours without food or water before offering them a beverage or food that will be partially consumed and produce a DNA sample. Facts ¶¶ 29-30. Detectives have discretion to decide who is a suspect, to collect abandonment samples from suspects who are not under arrest, to collect abandonment samples from any adult regardless of the crime, to collect abandonment samples from minors as young as 13-year-olds suspected of any felony crime, and to collect abandonment samples after the juvenile or their parent refuse to consent and give a DNA sample. Facts ¶¶ 31-36, 40-43, 45.

When the NYPD collects an abandonment sample, it then sends the sample to OCME for testing. Facts ¶ 55. OCME will only perform DNA testing on an abandonment sample if the NYPD submits crime scene evidence associated with the case for comparison. Facts ¶ 60. After receiving the sample and associated evidence, OCME analyzes the DNA sample, a process involving several steps. Facts ¶¶ 62-66. It then develops a DNA profile, compares the profile to specific crime scene evidence, and includes the profile in OCME's Suspect Index—regardless of whether it matched the crime scene evidence—where it is compared against all past and future crime scene evidence

DNA profiles. Facts ¶¶ 68-69, 82-85. As of August 1, 2025, the Suspect Index includes 34,183 searchable suspect DNA profiles that are compared against 64,995 forensic crime scene profiles and counting (as future crime scene DNA profiles are added). Facts ¶ 92.[2] OCME does not notify suspects when it uploads their DNA profile to the Suspect Index. Facts ¶ 90.

**B. The City's Suspect Index Exists Outside of Any Statute or Regulatory Scheme.**

Article 49-B of the New York State Executive Law establishes a single centralized, statewide DNA index. N.Y. Exec. Law §§ 995-c(1), c(2), § 995(6). Article 49-B identifies the people who must submit a DNA sample for inclusion in the index as any "designated offender" convicted of a felony or misdemeanor crime, and it lays out the procedures for collecting their DNA samples.[3] N.Y. Exec. Law § 995-c(3)(a), § 995(7). It also creates the Commission on Forensic Science to regulate the operation of the state DNA index and to accredit state and local DNA laboratories that perform forensic DNA testing. *See* N.Y. Exec. Law §§ 995-a, 995-b.

In 1999, then-Mayor Rudy Giuliani proposed the inclusion of arrestees in the state's "designated offender" category, *see* New York Bill Jacket, 1999 A.B. 9037, Ch. 560 (Westlaw), but the Legislature rejected that proposal, *see* N.Y. Exec. Law § 995-c(3)(a), § 995(7). The City later developed, on its own, the Suspect Index, which includes not only arrestees but also suspects not even under arrest. Facts ¶ 36. The Commission on Forensic Science has no statutory authority to oversee the City's Suspect Index. *See* Facts ¶¶ 99-100; *see also* N.Y. Exec. Law §§ 995-a, 995-b.

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[2] OCME uses "Suspect Index" or "Subject Index" interchangeably when referring to their index of suspect DNA profiles. *See* Facts ¶ 83. Since the term "Subject" is a vague euphemism, we use the clearer and more accurate term "Suspect Index" throughout.

[3] The statute provides an exception to the requirement that a convicted offender provide a DNA sample where a court finds that the convicted person was a victim of sex trafficking. N.Y. Exec. Law § 995(7).

### C. The City Collected, Analyzed, and Indexed Ms. Leslie's DNA Without Her Knowledge or Consent.

On July 3, 2019, at approximately 3:10 a.m., Ms. Leslie was riding in the back seat of her cousin's car when NYPD officers pulled the car over for a purported traffic infraction. Facts ¶ 133. The police ordered all occupants, including Ms. Leslie, out of the car to be searched. Facts ¶ 134. According to the NYPD, an officer recovered a firearm from the front-seat passenger. Facts ¶ 135. The officers then arrested Ms. Leslie and the other four passengers and transported them to the precinct. Facts ¶ 136.

Upon arrival at the precinct, officers confiscated Ms. Leslie's jewelry, took her fingerprints, and then handcuffed her to a bench in a cell. Facts ¶ 137. Ms. Leslie fell asleep, and around 10:10 a.m., NYPD detectives took her to an interview room. Facts ¶ 138. After questioning Ms. Leslie about the events leading up to her arrest, an NYPD detective asked Ms. Leslie if she wanted some water. Facts ¶ 139. Ms. Leslie declined. Facts ¶ 139. The detective followed up—asking "You sure?"—to which Ms. Leslie confirmed she did not want water. Facts ¶ 139. The detective then pressed further, stating that it would "[b]e a while before you get something to drink." Facts ¶ 139. Ms. Leslie then drank water from the disposable cup that had been placed on the interrogation table for her. Facts ¶ 139.

After Ms. Leslie drank from the cup, within thirty seconds, detectives handcuffed her and escorted her back to her cell. Facts ¶ 140. Within a minute, a detective returned to the interrogation room and retrieved the cup from which Ms. Leslie had sipped, collecting Ms. Leslie's DNA sample without her knowledge, consent, or a warrant. Facts ¶ 140. The NYPD sent the DNA sample cup to OCME for analysis, and OCME generated a DNA profile, entered it into the Suspect Index, and compared it to the firearm. *See* Facts ¶ 141. OCME determined that Ms. Leslie's DNA profile did not match any DNA evidence on the firearm, and the prosecution dropped all charges against her.

Facts ¶ 142. But Ms. Leslie's DNA profile remained in the Suspect Index. Facts ¶ 142. At no point did the NYPD inform Ms. Leslie that her DNA would be collected, analyzed, or retained, nor was she provided an opportunity to object or refuse to provide a DNA sample. Facts ¶ 143.

### D. The NYPD Enacted New Policies In 2020, But They Are Self-Governed and Have Not Slowed The Growth of the Suspect Index.

In February 2020, the NYPD created an exit procedure where it would review the DNA profiles in the Suspect Index and recommend to OCME that certain profiles be removed from the database based on the NYPD's own criteria. Facts ¶ 102. The NYPD promised to review all profiles in the Suspect Index in 2020, then review every profile after its first two years in the index, and conduct a full database review every four years. Facts ¶¶ 103, 106. Despite the NYPD's promised reform five years ago, the City's Suspect Index has in fact grown. Facts ¶ 93.

The NYPD's review process aims ostensibly to retain only profiles that "produce[] informative value to the criminal justice system," Facts ¶ 114, but exceptions swallow the rule. For example, the City retains profiles when there has been no judicial determination as to the person's guilt or innocence, including when the person's case was dismissed because the statute of limitations ran or the City failed to meet the speedy trial statute's requirements. Facts ¶ 117. While profiles not linked with a match in the database are supposedly recommended for removal, reviewers have authority to make exceptions for anyone they determine remains a suspect in an ongoing investigation. Facts ¶¶ 105, 115. And reviewers made hundreds of these exceptions when reviewing the database in 2020. Facts ¶¶ 115-16. These exceptions mean that profiles belonging to those who committed no crime may remain in the database indefinitely. Facts ¶ 118. Significant errors have also occurred during the review process—including data discrepancies, incorrect names, and duplicate profiles—delaying the removal of certain profiles. Facts ¶¶ 118, 120. And supervisors expressly instructed that the removal of certain profiles should be delayed. Facts ¶ 119.

Those DNA profiles were continually compared to any existing and newly-uploaded crime scene profiles during these delays. Facts ¶ 119. In Ms. Leslie's case, her DNA was kept in the Suspect Index for nearly three years, which exceeds the two-year time frame for automatic review, and was only removed after the filing of this lawsuit. Facts ¶ 142.

Even when the NYPD requests that OCME remove profiles from the Suspect Index, the "removal" does not actually require that the NYPD or OCME destroy the person's DNA sample or profile. Facts ¶¶ 126-31. Instead, OCME only removes the person's DNA profile from the Suspect Index, while keeping the underlying profile, extracts, and data. Facts ¶¶ 126-31. OCME can still (at NYPD's request) compare the person's profile directly to crime scene evidence. Facts ¶ 127. The NYPD also keeps the person's physical DNA sample *indefinitely*, even if the profile is removed from the Suspect Index. Facts ¶¶ 131-32. The DNA extract that OCME retains and the DNA sample that the NYPD retains can reveal myriad personal details about a person, such as their genetic predispositions toward certain medical conditions, their physical characteristics, and their biological familial relationships. *See* Facts ¶¶ 121-22, 170-73, 184.

## ARGUMENT

The City's policy and practice of secretly collecting and analyzing people's involuntarily shed DNA—without their knowledge or consent and without a warrant or court order—and maintaining it in a "Suspect Index" where it is compared to forensic crime scene evidence on an ongoing basis, violates both the Fourth Amendment and New York state law. Plaintiffs are entitled to summary judgment where "there is no genuine dispute as to any material fact," and plaintiffs are "entitled to judgment as a matter of law." *Guillen v. City of New York*, 2023 WL 2561574, at *3 (S.D.N.Y. Mar. 17, 2023) (Buchwald, J.) (quoting Fed. R. Civ. P. 56(a)). Facts are material if they "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Here, there is no dispute that the City collects, analyzes, and

indexes plaintiffs' DNA—a practice that under well-established caselaw constitutes a Fourth Amendment search. And that search is unreasonable here, given the City's blatant disregard for plaintiffs' vital privacy interests and lack of any articulable government interest beyond basic law enforcement work.[4] The City's attempt to justify its practice under the "abandonment doctrine" fails because (i) the abandonment doctrine cannot apply to DNA, which people involuntarily and unavoidably shed, and (ii) the undisputed facts show that plaintiffs could not have "abandoned" the items from which the City extracted plaintiffs' DNA. Moreover, state law does not authorize—and in fact preempts—the City's operation of the Suspect Index, providing another, independent reason to grant summary judgment for plaintiffs. The defendants' motion, on the other hand, must be denied because it relies on disputed facts and ignore controlling precedents in plaintiffs' favor.

## I. THE CITY'S PRACTICE OF SECRETLY COLLECTING UNSUSPECTING PEOPLE'S DNA, ANALYZING, AND MAINTAINING IT IN THE SUSPECT INDEX ARE SEARCHES UNDER THE FOURTH AMENDMENT.

The Fourth Amendment prohibits "unreasonable searches and seizures," thus safeguarding "the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter*, 585 U.S. at 303 (cleaned up). A "search" under the Fourth Amendment "occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)). The U.S. Supreme Court has recognized that the "collection and subsequent analysis of … biological samples must be deemed Fourth Amendment searches." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617-18 (1989). Consistent with this principle, the Second Circuit has held

[4] The City is liable for its policies and practices that violate the Fourth Amendment. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). Because the City's policy and practice of secretly collecting, analyzing, and indexing suspects' DNA is not in dispute, *see* Facts ¶¶ 1-100, 121-32, the question before this Court is simply whether it violates the Fourth Amendment.

unequivocally that the "analysis and maintenance" of DNA in the government's DNA-indexing database constitutes a Fourth Amendment search. *Nicholas v. Goord*, 430 F.3d 652, 670 (2d Cir. 2005). The collection, analysis, and indexing of DNA are searches because of "the vast amount of sensitive information that can be mined from a person's DNA and the very strong privacy interests that *all* individuals have in this information." *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007) (emphasis added); *see also Skinner*, 489 U.S. at 617–18 (the "collection and testing of [biological samples] intrudes upon expectations of privacy that society has long recognized as reasonable"). Under this well-settled, controlling precedent, plaintiffs maintain a "very strong" privacy interest in their DNA, and thus the City's surreptitious collection, analysis, and indexing of their DNA are Fourth Amendment searches. *Amerson*, 483 F.3d at 85.

Nevertheless, the City attempts to justify its policy and practice by arguing that Fourth Amendment protections do not apply because the City extracts DNA from partially consumed items that people abandon, thereby relinquishing any privacy right they might have in their DNA. *See, e.g.*, Defs.' Mem. of Law in Supp. of Mot. for Summary Judgment at 17 (ECF No. 128) ("Defs.' Br."). That argument fails because (i) the abandonment doctrine does not apply to DNA, which people involuntarily and uncontrollably shed at all times, and (ii) plaintiffs did not abandon the items they partially consumed in an interrogation room because the NYPD *prevents* suspects from taking such items with them.

### A. The Abandonment Doctrine Does Not Apply to Involuntarily Shed DNA.

The abandonment doctrine is an ill-suited fit for the City's surreptitious DNA indexing practice. The doctrine stems from *Katz*, where the U.S. Supreme Court held that "the Fourth Amendment protects people, not places," and thus "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351. The Court built on this concept in later cases. In *Smith v. Maryland*, the Court

established the third-party doctrine, holding that the government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." 442 U.S. 735, 743-44 (1979). And in *California v. Greenwood*, the Supreme Court held that the government's search of garbage bags the respondents left at the curb outside their home was not a Fourth Amendment search because respondents had no reasonable expectation of privacy in garbage they left outside "for the express purpose" of conveying it to a third party—the trash collector—simultaneously "expos[ing]" it to the public. 486 U.S. 35, 40-41 (1988).

But the Supreme Court has more recently warned against "uncritically extend[ing] existing precedents" "[w]hen confronting new concerns wrought by [] technology." *Carpenter*, 585 U.S. at 318.[5] In *Carpenter*, the Court held that people maintain a legitimate expectation of privacy in their physical movements, and thus the government's use of cell phone records that capture an individual's locations constitutes a Fourth Amendment search. *Id*. And while cell phone users arguably turn over their location data to wireless carriers by using cell phones, the Court "decline[d] to extend" the third-party doctrine because of (i) the deeply sensitive nature of the information at stake, which "reveal[s] not only [a person's] particular movements, but through them, his 'familial, political, professional, religious, and sexual associations,'" distinguishing cell location data from the limited information addressed in *Smith* and comparable cases, and (ii) the rationale of "voluntary exposure" underlying the doctrine does not "hold up when it comes to [the records]" because wireless carriers log cell phone location records "*without any affirmative act*"

[5] *See also Riley v. California*, 573 U.S. 373, 386 (2014) (declining to extend the search incident to arrest rule to cell phones because "[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered [in prior precedents].").

of the user, and "[a]part from disconnecting the phone from the network, there is no way to avoid leaving behind a trial of location data." *Id.* at 311, 314-15 (emphasis added and quotations omitted).

The same is true of DNA. The deeply revealing information in DNA implicates privacy concerns far beyond the limited narcotics-related evidence in the trash bags at issue in *Greenwood* and the phone number dialing information at issue in *Smith.* Indeed, modern forensic DNA analysis can reveal myriad personal details about an individual beyond their identity, "including the person's ethnicity, their susceptibility to disease, their anticipated response to certain therapeutic agents," their "neurological and psychosocial attributes," and when coupled with genealogical investigations, "the person's kinship to near and distant relatives." Facts ¶¶ 173, 183. Given this breadth of sensitive, private information, approving the City's DNA collection practice—like the use of cell location data in *Carpenter*—would require "a significant extension of [the abandonment doctrine] to a distinct category of information." *Carpenter*, 585 U.S. at 314.

Likewise, as in *Carpenter*, plaintiffs make no "voluntary exposure" that could justify applying the abandonment doctrine to the City's surreptitious DNA collection practice, so the voluntary exposure rationale does not hold up here either. 585 U.S. at 315; *cf. People v. Ramirez-Portoreal*, 88 N.Y.2d 99, 110 (1996) ("Property is deemed abandoned . . . [after] voluntarily and knowingly discarding the property."). Rather, "nearly every minute of every day," people "unconsciously and uncontrollably shed[] DNA into their environment," including on the items they touch, the air they exhale, and the ground on which they walk. Facts ¶¶ 151-53. Indeed, people shed DNA involuntarily through saliva, hair, and skin cells and cannot prevent shedding DNA into their environment. Facts ¶¶ 149, 152-53, 155. Thus, even if people in NYPD custody refused the food, drink, or cigarette, they would still leave behind DNA in police interrogation rooms. Facts

¶¶ 163-64. To avoid doing so, they would have to wear a sealed biohazard suit—normally used to protect against highly communicable diseases—but such a requirement is entirely impractical and underscores the absurdity of the City's position that plaintiffs have somehow abandoned their DNA. Facts ¶¶ 144, 158, 161, 163-64. Just as the Supreme Court would not require that people "disconnect[] the[ir] phone from the network" to preserve their privacy, *Carpenter,* 585 U.S. at 315, this Court should not require that people take the extreme step of wearing biohazard suits to preserve their DNA privacy.

The degree to which the City's practice relies on technology, training, and specialized equipment further distinguishes this case from those in which the Supreme Court has applied the abandonment doctrine. For instance, unlike *Greenwood*, where the Court reasoned that "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," 486 U.S. at 41, DNA is not visible to the public. Rather, only highly trained technicians with specialized equipment can extract and test DNA. Facts ¶¶ 67, 154, 157. But while advancements in science may "afford[] law enforcement a powerful new tool," courts are "obligated . . . to ensure that the 'progress of science' does not erode Fourth Amendment protections." *Carpenter*, 585 U.S. at 320 (quotations omitted); *Kyllo*, 533 U.S. at 34 (holding that use of a thermal imager to detect heat radiating from someone's home was a search because otherwise homeowners would be left "at the mercy of advancing technology"). That is especially true here, given that advancements in research and technology may soon enable the NYPD to collect DNA samples from suspects by vacuuming the air in interrogations rooms, s*ee* Facts ¶ 165—turning the mere act of breathing into an act of DNA abandonment. *See Carpenter*, 585 U.S. at 313 (the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development"). But adopting such a holding would "untether the rule from

the justifications underlying" the abandonment doctrine. *Riley v. California*, 573 U.S. 373, 386 (2014) (quotations omitted).

This Court should decline to extend the abandonment doctrine to DNA because in "no meaningful sense" do people "voluntarily" abandon their DNA and the sensitive information DNA reveals. *Carpenter*, 585 U.S. at 315. Worse, approving the City's abandonment justification would leave no limiting principle concerning the extent to which the government can use the private and sensitive information DNA reveals, because the entirety of someone's genetic code—not just the portions relevant for identification—would be abandoned. And with no Fourth Amendment protections, New Yorkers would be reliant on the City's self-restraint to protect their privacy. But "the lessons of history" teach that such reliance would be a dangerous risk. *Carpenter*, 585 U.S. at 320 (quotations omitted).

### B. Plaintiffs Cannot Have Abandoned Their DNA Because The NYPD Prevents Them From Taking The Partially Consumed Items With Them.

The City's reliance on the abandonment doctrine also fails because in practice the NYPD prevents people like Ms. Leslie from bringing the partially consumed items—in Ms. Leslie's case, a cup—out of interrogation rooms, which the NYPD considers "controlled environments." *See* Facts ¶¶ 12-13. To determine whether there has been a voluntary and knowing abandonment, courts "focus on the intent of the person who is purported to have abandoned the property" which can be inferred from "objective facts," such as "acts done" or "words spoken." *United States v. Lee*, 916 F.2d 814, 818 (2d Cir. 1990) (quotations omitted); *see also Ramirez-Portoreal*, 88 N.Y.2d at 110 (explaining that "intention to relinquish an expectation of privacy will be found if the circumstances reveal a purposeful divestment of possession of the item searched").

Here, the record shows indisputably that the NYPD prevents plaintiffs from taking the partially consumed items out of the interrogation room, undercutting the notion that plaintiffs

could somehow exercise a choice. Indeed, the NYPD trains its personnel that people "are not allowed" to bring soda cans back to their cells because they could be used as a weapon. Facts ¶ 25. Thus, plaintiffs cannot have abandoned the soda cans that served as DNA samples, because they *never had the option* to take such items with them in the first place. *Cf. United States v. Davis*, 624 F.3d 508, 511 (2d Cir. 2010) (abandonment found because no one "prevented" the defendant from taking or retrieving his property).

Another aspect of NYPD policy similarly prevents people like Ms. Leslie from taking their partially consumed items: NYPD officers must "handcuff all [people in its custody] with hands behind their back" when moving them between different areas of a precinct, making it practically impossible to take items out of the interrogation room. Facts ¶ 26. And officers follow this policy when escorting people out of interrogation rooms: in Ms. Leslie's case, NYPD indicated to Ms. Leslie that she stand up and place her hands behind her back before handcuffing her and escorting her out of the room. Facts ¶ 140; *see also* Facts ¶ 27. Indeed, as the NYPD acknowledged, Ms. Leslie's DNA collection video depicts what the NYPD expects its detectives or police officers to do when collecting an abandonment sample. Facts ¶ 140.

Under these circumstances, where Ms. Leslie and anyone similarly situated have no control of their physical movement and no discretion, "the mere act of setting down a [cup or any other item] would not constitute abandonment." *United States v. Thomas*, 864 F.2d 843, 846 (D.C. Cir. 1989); *see also Matter of Francis O.*, 208 A.D.3d 51, 57–58 (1st Dep't 2022) (holding that a 16-year-old child had not abandoned his DNA because he "was unaware that the cup, in which he had been offered a drink of water, would be used to collect a DNA sample that could be used against him at a later date and retained by OCME in perpetuity"). As one New York court recognized:

> [T]he term abandonment . . . . is a misnomer in the case where the captive defendant uses an item and the police harvest it specifically to obtain DNA. It is not abandoned

> but rather seized. Police would not allow a prisoner to keep his cigarette butt, a water bottle or the like when it is a recognized investigative tactic to obtain and secure it as an 'abandoned' sample. But an abandoned sample is one that a person discards in public. It is abandoned because the suspect has given up his right to privacy as regards the object.

*Flores*, 65 Misc. 3d at 975 (citation omitted). So too here, where unlike the typical abandonment case in which no one "prevent[s] [the person] from retrieving [their] property," *Davis*, 624 F.3d at 511, the NYPD's handcuffing policy does just that.

## II. THE CITY'S PRACTICE OF COLLECTING, ANALYZING, AND INDEXING UNSUSPECTING PEOPLE'S DNA ABSENT A WARRANT IS AN UNREASONABLE SEARCH IN VIOLATION OF THE FOURTH AMENDMENT.

Because plaintiffs maintain a privacy interest in their DNA that they have not abandoned, the Court must determine whether the City's searches of their DNA, through its collection, analysis, and indexing, are reasonable. Whether a search is reasonable "depends on all of the circumstances surrounding the search . . . and the nature of the search." *Skinner*, 489 U.S. at 619 (quotation omitted). In the Second Circuit, courts apply one of two tests to determine the reasonableness of a search: (1) the "general balancing test," which applies to searches based on individualized suspicion and accounts for the totality of circumstances; or (2) the "special-needs test," which applies to suspicionless searches. *See Amerson*, 483 F.3d at 78. Defendants apply neither test in their motion, and thus implicitly concede that the City's collection, analysis, and indexing of plaintiffs' DNA constitutes an unreasonable search if plaintiffs maintain their privacy interest in their DNA, which they do for the reasons explained above. *See supra* § I; *United States v. Maher*, 120 F.4th 297, 316 n.18 (2d Cir. 2024) (the Second Circuit "places the burden on the government to show that a challenged search fell within an exception to the warrant requirement"). In any event, this Court should apply the special-needs test because while the City suspects plaintiffs of committing an offense when it collects, analyzes, and compares their DNA to specific evidence, the searches the City subjects plaintiffs to by virtue of maintaining their DNA in the

Suspect Index are entirely suspicionless and thus are the "much more serious invasion of privacy" caused by the City's practice. *See Amerson*, 483 F.3d at 77, 79 n.5, 85 (holding that the special-needs test is "the proper framework" for analyzing the suspicionless searches involved in a "DNA indexing" program). These suspicionless searches are "highly disfavored" in the Second Circuit and "must" meet the "more stringent" special needs test. *Id.* at 77, 79, 79 n.5. But even if the Court were to apply the general balancing test, the City's practice still constitutes an unreasonable search.

**A. The City Has No Special Need To Operate the Suspect Index.**

Under the special needs test, courts first assess whether the search "is justified by a special need beyond the ordinary needs of normal law enforcement." *Amerson*, 483 F.3d at 80. Here, the City cannot satisfy this threshold requirement.

The U.S. Supreme Court has recognized that while the Fourth Amendment's reasonableness inquiry generally requires that officers have both probable cause and a search warrant, a warrantless, suspicionless search may be justified "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quotations omitted). The inquiry has historically been exacting. The Supreme Court has struck down, for example, an automobile checkpoint program "whose primary purpose was to detect evidence or ordinary criminal wrongdoing," *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and a hospital program that tested patients' urine for cocaine use, because the search's objective "was to generate evidence for law enforcement purposes." *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001).

That is precisely the point of the City's practice here, where the City surreptitiously collects DNA from suspects and arrestees, claiming their DNA will help it in connection with its investigation of a crime. And while the Second Circuit has held that the collection of DNA samples under the New York and equivalent federal DNA indexing statutes satisfies the special-needs test,

it did so because the government does not collect DNA samples under those statutes "for the investigation of a specific crime," but rather "to obtain a reliable record of an offender's identity that can then be used to help solve crimes [in the future]." *Amerson*, 483 F.3d at 81 (quoting *Nicholas*, 430 F.3d at 668-69). Here, by contrast, the City secretly collects DNA samples from some *suspects* when investigating *specific* crimes and then develops DNA profiles from those samples for inclusion in its Suspect Index. Facts ¶¶ 1, 31-32, 37. And under its current practice, OCME only agrees to analyze a suspect's "abandoned" DNA sample—and add that person's DNA profile to the Suspect Index—*after* the NYPD provides DNA evidence from a specific crime to test it against. Facts ¶ 60.

The vast discretion afforded to detectives further distinguishes the City's practice from the federal and state DNA indexing programs approved in *Amerson* and *Nicholas*. The *Amerson* Court clarified that "implicit" in its approval of the federal DNA indexing statute was "the programmatic nature of" the statutory scheme, which left "no discretion for law enforcement personnel to decide whether to force an individual to submit to a taking of a DNA sample or how to use the information collected." *Amerson*, 483 F.3d at 82. "This lack of discretion," the Court explained, "removes a significant reason for warrants—to provide a check on the arbitrary use of government power." *Id.* Here, by contrast, NYPD detectives have unchecked discretion to collect abandonment samples from any adult they suspect of a crime, and any juvenile they suspect of certain crimes. Facts ¶¶ 31-32, 39. And unsurprisingly, they abuse this discretion in ways that only a warrant could check. For instance, NYPD detectives have collected abandonment samples for misdemeanor crimes where DNA is irrelevant, like turnstile jumping, marijuana possession, unlicensed driving , and driving while intoxicated—to name a few. Facts ¶ 35.

Because the City collects abandonment suspect samples for ordinary crime detection, and detectives have wide discretion in doing so, the City's collection, analysis, and maintenance of plaintiffs' DNA in the Suspect Index is not a special need. This practice is thus an unreasonable search in violation of the Fourth Amendment.

### B. The City's Collection, Analysis, and Maintenance of Plaintiffs' DNA In The Suspect Index Fails the Balancing Test.

While the Court need not reach the second prong of the special needs test—"the balancing of the government interests versus the individual's privacy interests"—the City's practice fails this inquiry in any event. Under "this balancing test," courts weigh: "(1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs." *Amerson*, 483 F.3d at 83–84 (citing *Cassidy v. Chertoff*, 471 F.3d 67, 75 (2d Cir. 2006)). Applying these factors here, the City's "collection and analysis" of people's DNA for comparison to *specific* crime scene evidence is an unreasonable search.[6]

Plaintiffs' significant privacy interests and the government's intrusion upon those interests weigh strongly in favor of plaintiffs against the government interest here. First, while some of the people from whom the City collects and analyzes DNA are arrestees, some are not, *see* Facts ¶ 91, and thus the City's practice implicates expectations of privacy broader than those afforded to arrestees, *Maryland v. King*, 569 U.S. 435, 462 (2013).

Second, the "character and degree" of the City's intrusion upon plaintiffs' privacy interests is significant in light of the deeply personal information that DNA reveals, and the lack of statutory

[6] The Second Circuit has explained that courts " must" "tak[e] the two privacy interests"—both the initial collection and subsequent analysis of DNA—"together" in weighing them against the relevant government interest. *Amerson*, 483 F.3d at 87. Thus, both the collection of plaintiffs' DNA and the analysis of their DNA are examined here together.

safeguards that mitigate the intrusion. As the Second Circuit found, the analysis of a convicted person's DNA is a "significant intrusion" of their privacy interests. *Amerson*, 483 F.3d at 85 (citing *Nicholas*, 430 F.3d at 670). And while the Second Circuit in *Amerson* and *Nicholas* and the Supreme Court in *King* found that statutory safeguards preventing DNA testing beyond identification purposes mitigated the privacy interests in DNA,[7] no such statutory safeguards exist here. Because New York law does not authorize the City's surreptitious DNA collection and testing, it likewise does not limit the City's use of DNA collected under this policy and practice. *See infra* at 24-26. And besides ensuring that OCME abides by basic DNA testing standards, the Commission on Forensic Science has no statutory authority over the City's Suspect Index. Facts ¶¶ 99-100; *see also* N.Y. Exec. Law §§ 995-a, 995-b.

With no statutory safeguards present, the City has no limit on the information it can glean from each person's DNA. OCME holds each suspect's raw DNA (or DNA extract) for up to five years, and the NYPD holds each suspect's DNA sample (from which the City can obtain more raw DNA) indefinitely. *See* Facts ¶¶ 47, 121-22, 132, 184. Thus, the City's process of testing abandonment DNA to develop a DNA profile "put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained." *Birchfield v. North Dakota*, 579 U.S. 438, 463 (2016).

The safeguard of a uniform, non-discretionary DNA testing program found in *King* is also lacking here. In *King*, Maryland law required that every arrestee submit to a swab of their mouth

[7] *See King*, 569 U.S. at 444, 465 (explaining that the challenged law "provides statutory protections that guard against further invasion of privacy" under which "[n]o purpose other than identification is permissible"); *Amerson*, 483 F.3d at 85 (the statute "severely limits the circumstances and purposes for which the DNA profiles can be released and provides significant penalties for any misuse of the DNA samples or profiles"); *Nicholas*, 430 F.3d at 671 (finding the privacy concerns are mitigated "[g]iven the limits imposed on the collection, analysis, and use of DNA information by the statute").

as part of their booking procedure. *King*, 569 U.S. at 448. And as an added protection, Maryland law prohibited law enforcement from "process[ing] or plac[ing] [DNA] in a database before the individual is arraigned," where a judge can "ensure[] that there is probable cause to detain the arrestee." *Id.* at 443. The Supreme Court noted that this DNA collection was "not subject to the judgment of officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime." *Id.* at 448 (cleaned up). Considering these checks on police officer discretion, the Supreme Court held that these DNA searches were reasonable as a "routine booking procedure" because "the Fourth Amendment allows police to take certain routine administrative steps incident to arrest—*i.e.,* . . . book[ing], photograph[ing], and fingerprint[ing]" and Maryland's "DNA identification of arrestees" is an extension of those administrative methods. *Id.* at 461, 465 (cleaned up). Here, the absence of any similar checks on the NYPD's discretion to collect DNA further demonstrates that the City's intrusion on plaintiffs' privacy interests is significant. *See supra* at 6.

The NYPD's exit procedure to remove DNA profiles from the City's Suspect Index presents the same fundamental problem: the NYPD retains unchecked discretion under its self-imposed reform. *See* Facts ¶¶ 101-102, 109-110, 112, 114, 115. More importantly, the "removal" of a profile from the Suspect Index does not actually require that the NYPD or OCME destroy the person's DNA sample or extract because the NYPD retains the samples indefinitely and OCME retains the extracts for years. Facts ¶¶ 122, 128-32. So the City can still obtain myriad personal details about a person long after their profile is removed from the Suspect Index. Facts ¶¶ 170-176.

The City's DNA collection errors and its failure to adopt reforms to cut down the risk of errors increases the privacy intrusion here. *Cf. Amerson*, 483 F.3d at 86 ("the more accurate the

identification method the less intrusive it is because of the associated reduced risk that the sample will result in misidentification"). The NYPD found that 76 percent of all DNA collection errors involve "abandonment suspect samples," and that the causes for those errors are "human error, policy procedural inadequacies, and the need for more formal training." Facts ¶ 50. The NYPD admits that a consequence of these errors is that someone could be "wrongfully prosecuted and potentially convicted." Facts ¶ 49. In 2021, the then-Commanding Officer of the Forensic Investigations Division recommended three corrective actions to prevent further errors, and the then-Chief of Detectives approved each one, but the NYPD failed to implement *any* of the corrective actions. Facts ¶¶ 51-52. In fact, the NYPD has *no* quality assurance measures to ensure that detectives even follow the NYPD's best practices for DNA collection. Facts ¶ 54. That the NYPD continues the same error-prone DNA collection practices, despite the admitted risk of misidentification, further cements the significant privacy intrusion for plaintiffs.

Third, on the other side of the scale, the government's interest here is the routine law enforcement interest of finding evidence against a suspect or person of interest to prove their criminal wrongdoing. *See supra* at 18-19. That interest can be effectively addressed by the government obtaining a warrant or court order grounded in probable cause to collect and analyze a suspect's DNA. Indeed, "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Riley*, 573 U.S. at 382 (cleaned up).

Because the plaintiffs' privacy interests and the City's intrusion on those interests significantly outweigh the City's interest here, the City's searches of plaintiffs' DNA absent a warrant or their consent are unreasonable. As a result, this Court should find that plaintiffs are entitled to judgment as a matter of law on their Fourth Amendment claim.

## III. THE CITY'S SUSPECT INDEX IS NOT AUTHORIZED UNDER ARTICLE 49-B OF THE EXECUTIVE LAW AND ARTICLE 49-B PREEMPTS ITS OPERATION.

Under Article 49-B of the Executive Law, the Legislature established "a computerized state DNA identification index" and defined that as "the DNA identification record system for New York state." N.Y. Exec. Law § 995-c(1), § 995-c(2), § 995(6). The statute requires that any "designated offender" convicted of a felony or misdemeanor crime must provide their DNA sample for inclusion in the state index. N.Y. Exec. Law § 995-c(3)(a), § 995(7).

The City's operation of the Suspect Index violates Article 49-B for two distinct reasons.[8] First, a plain reading of the clear text of Article 49-B shows the Legislature's intent to create one statewide index of people convicted of designated crimes. The City's operation of a Suspect Index, which contains DNA profiles of people not convicted of crimes, lacks any basis in statute and is thus unlawful.[9] Second, under field preemption, the City cannot operate its index because it must yield to the State's comprehensive regulatory scheme for a statewide DNA index system.

### A. The City's Rogue Suspect Index Violates Article 49-B.

Whether Article 49-B "authorizes" the City's operation of the Suspect Index is "solely one of statutory interpretation." *Stevens v. N.Y. State Div. of Crim. Just. Servs.*, 40 N.Y.3d 505, 546 n.3 (2023). Applying state-law principles of statutory interpretation, this Court should find that the

[8] The parties previously briefed whether this Court should exercise supplemental jurisdiction over the plaintiffs' state law claim. *See* ECF No. 47 (Defs' Mem. of Law), at 19-20; ECF No. 55 (Pls' Mem. of Law), at 20-23; ECF No. 63 (Defs' Reply Mem. of Law), at 7-10. In denying defendants' Motion to Dismiss, the Court "reserve[d] decision" on the question of supplemental jurisdiction. ECF No. 70 (Memorandum and Order), at 29. Plaintiffs maintain that the Court should exercise supplement jurisdiction over their state law claim for the reasons previously stated. *See* ECF No. 55 (Pls' Mem. of Law), at 20-23.

[9] Indeed, juveniles—the vast majority of whom are prosecuted in family court or receive youthful offender treatment—cannot be convicted of a crime but instead are adjudicated, and are thus ineligible for inclusion in LDIS. Facts ¶ 79.

City's operation of the Suspect Index violates Article 49-B. *See Reyes v. City of New York*, 141 F.4th 55, 69 (2d Cir. 2025) (explaining that "federal courts should apply state, and not federal, principles of statutory interpretation when construing state law") (cleaned up). Under state-law principles, this Court's "primary consideration is to ascertain and give effect to the intention of the Legislature," and because "[t]he statutory text is the clearest indicator of legislative intent [this Court] should construe unambiguous language to give effect to its plain meaning." *Mestecky v. City of New York*, 30 N.Y.3d 239, 243 (2017) (cleaned up).

Here, it is undisputed that Article 49-B applies to OCME given the various provisions in the statute that apply to a "forensic DNA laboratory," which include "*any* forensic laboratory operated by the state or unit of local government." N.Y. Exec. Law § 995(2) (emphasis added); *see also Samy F. v. Fabrizio*, 176 A.D.3d 44, 51 (1st Dep't 2019) (listing the various provisions of Article 49-B that apply to forensic DNA laboratories like OCME and finding that "[g]iven OCME's responsibilities for the testing, storage and sharing of DNA data, the Executive Law clearly applies to an LDIS, like OCME's"). And the plain language of Article 49-B contains no provisions that authorize or could be construed to authorize OCME to create and operate an index for people suspected of crimes. Indeed, this Court has already held that "Article 49-B is clearly worded insofar as it does not expressly authorize the creation of local DNA indexes." *Leslie v. City of New York*, 2023 WL 2612688, at *10 (S.D.N.Y. Mar. 23, 2023) (J. Buchwald) (citing Article 49-B).

With the clarity of Article 49-B not in dispute, "the potential state law question [here] is whether local indexes are permissible because the statute does not expressly prohibit such indexes." *Id.* The premise that Article 49-B gives the City permission to index secretly-collected DNA of people not convicted of certain crimes conflicts with state-law principles of statutory

interpretation. Such an interpretation would render superfluous the statute's restriction that only the DNA profiles of "designated offenders," or people convicted of certain crimes, can be included in the State's DNA indexing system. *See* Facts ¶ 77; *see also Mestecky*, 30 N.Y.3d at 243 (explaining that, in statutory interpretation cases, "an interpretation that renders words or clauses superfluous should be rejected") (quotations omitted). Article 49-B does not authorize the indexing of known DNA profiles of people not convicted of certain crimes. Indeed, after examining Article 49-B, the First Department concluded that "[a]fter an arrest, but preconviction, a DNA sample may only be obtained from a suspect on consent, or by warrant or court order" and that Article 49-B "cannot be invoked to collect DNA from a suspect by law enforcement for use in the investigation or prosecution of a crime." *Samy F.*, 176 A.D.3d at 53; *see also People v. K.M.*, 54 Misc. 3d 825, 830 (N.Y. Sup. Ct., Bronx Cnty. 2016) (local DNA indexes that include people not convicted of any crime "run afoul of [the state law] which allows inclusion of a DNA profile into a wide-ranging database only after conviction"). State-law principles of statutory interpretation compel the conclusion that the City's rogue Suspect Index violates the clear text of Article 49-B.

To the extent state courts have upheld the Suspect Index, they have mistakenly relied on the lack of statutory text explicitly prohibiting the index as legislative intent to allow for its operation. *See Leslie*, 2023 WL 2612688, at *10 n.12 (citing examples). But the opposite is true. That "legislative silence" should not be taken as "an intent to take such significant action." *Reyes*, 141 F.4th at 72 (citing *People v. Ocasio*, 28 N.Y.3d 178, 183 n.2 (2016)). Indeed, injecting this intent into the statute would undermine the Legislature's carefully considered criteria for including only certain limited DNA profiles in New York's DNA indexing program.

**B. The Suspect Index is Preempted by Article 49-B.**

Article 49-B also preempts the City from operating its Suspect Index. While the City is empowered to take actions "relating to the welfare of its citizens through its police power, it is

prohibited from exercising that power [in a manner that is] inconsistent with the New York State Constitution or any general law of the state." *See People v Diack*, 24 N.Y.3d 674, 678-79 (2015) (citing NY Const, art IX, § 2 [c]; Municipal Home Rule Law § 10 [1] [i], [ii] [a] [12]). Under field preemption, a municipality cannot exercise its police power "when the Legislature has restricted such an exercise by preempting the area of regulation." *Id.* (quotations omitted). The Legislature's intent to preempt a field can "be implied from a declaration of State policy by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area." *Id*. It can further be implied from the Legislature's "need for State-wide uniformity in a given area." *Id*.

Here, the Legislature's declared policy goal to regulate DNA technology statewide combined with its comprehensive and detailed regulatory scheme for New York's DNA indexing system demonstrates that it intended to preempt the field of DNA indexing. In 1994, the New York State legislature enacted Article 49-B of the Executive Law to "ensure[] a reasoned approach to the implementation of forensic DNA technology in New York." *Stevens*, 40 N.Y.3d at 522–23 (citing Mem. in Support, Bill Jacket, L. 1994, ch. 737 at 5). As the Court of Appeals explained, "the legislature made the policy determination that New York State should have well-developed DNA testing programs to assist law enforcement, that the use of the information should be limited, and the data and results secure." *Stevens*, 40 N.Y.3d at 523. To accomplish this policy goal, the Legislature enacted Article 49-B to authorize the creation of "*the* DNA identification record system for New York state." N.Y. Exec. Law § 995-b(9) (emphasis added); § 995(6) (defining SDIS). And it created the New York State Commission on Forensic Science (the "Commission") to "develop minimum standards and a program of accreditation" for state and local forensic laboratories in New York. N.Y. Exec. Law § 995-a(1), § 995-b(1). The Legislature also enshrined

in Article 49-B the core requirement that only a "designated offender subsequent to conviction and sentencing" must submit a DNA sample for inclusion in the state DNA index system, and it provided the process for how local law enforcement and forensic laboratories should collect, transport, and safeguard their DNA samples. N.Y. Exec. Law § 995-c(3)(a), § 995-c(3)(b), § 995-c(5), §§ 995-c(6)-(8); § 995-d); *see also Stevens*, 40 N.Y.3d at 523 (explaining that the Legislature directed the Commission to create rules and administer its DNA testing program in line with its policy goal of "the protection of privacy interests").

Under these undisputed facts, the Legislature fully occupied the field of DNA indexing when it created a comprehensive and detailed regulatory scheme to accomplish its policy goal of implementing a statewide DNA indexing system. The First Department agrees and has held that "[b]y establishing a 'state' DNA identification index, the state has created a 'comprehensive and detailed regulatory scheme' with regard to the subject matter" and "OCME's operations fall firmly within the Executive Law umbrella and must yield to that of the State in regulating that field." *Samy F.*, 176 A.D.3d at 51-52 (quoting *Diack*, 24 N.Y.3d at 677). That conclusion is grounded in the Court of Appeals' precedent explaining that when the state takes a "top-down approach. . . dictating the relevant factors that local officials are required to consider," as the Legislature did here in Article 49-B, then that "plainly establishes . . . the exclusive bailiwick of the State and accentuates the State's intent to occupy the field." *Diack*, 24 N.Y.3d at 686.

The Legislature's intent to occupy the field of DNA indexing is further evident from its "continuing regulation" of the state's DNA index system. *Id.* at 680. Since it passed Article 49-B, the Legislature has "periodically expanded the list of crimes thus subject to mandatory provision of a DNA sample and inclusion in the databank." *People v. Husband*, 38 Misc. 3d 957, 958 (N.Y. Crim. Ct., N.Y. Cnty. 2012) (citing each legislative amendment). Because the Legislature "has

been continuously active in this field . . . it is evident that the State has chosen to occupy it." *Diack*, 24 N.Y.3d at 682, 685 (explaining that "SARA's enactment, with its various amendments over the years, provides clear evidence of the State's intention to occupy the field").

Finally, the City's Suspect Index undermines the Legislature's policy determination to limit DNA indexing to people convicted of crimes. In 1999, then-Mayor Guiliani "urged the New York Legislature to extend the [designated offenders] law to all persons arrested for certain crimes." *People v. Rodriguez*, 196 Misc. 2d 217, 220 (N.Y. Sup. Ct., Kings Cnty. 2003); *see also* New York Bill Jacket, 1999 A.B. 9037, Ch. 560 (Westlaw). And for years, the "[f]ormer New York City Police Commissioner Howard Safir had often urged the New York State Legislature to expand the state DNA Index System to include persons arrested for certain crimes." *Rodriguez*, 196 Misc. 2d at 220-21. Despite this advocacy, the City was spurned each time, as the Legislature chose to "prohibit[] the placing of DNA profiles obtained from non-convicted persons in the State DNA Index System." *Id.* This history further reinforces that the City's Suspect Index is merely a "shadow state DNA index that operates for just five counties," *see K.M.*, 54 Misc 3d at 830, and that its operation not only violates Article 49-B, but is a direct end run around the Legislature's policy determinations.

At its core, "the preemption doctrine embodies the untrammeled primacy of the Legislature to act . . . with respect to matters of State concern." *Diack*, 24 N.Y.3d at 679. (cleaned up). The Legislature considered and rejected proposals to include "arrestees" in the one, centralized state index of "designated offenders."[10] This Court should reject the City's overstep into the Legislature's terrain and find that Article 49-B preempts the City's operation of the Suspect Index.

[10] Indeed, in the last amendment of "designate offender" in 2012, Assemblyman Lentol [gave] an assurance that 'we won't start collecting [DNA] for those who have never committed a crime' and

## IV. THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THE FACTS MATERIAL TO THEIR ARGUMENTS ARE DISPUTED AND DEFENDANTS OVERLOOK CONTROLLING PRECEDENT IN PLAINTIFFS' FAVOR.

Defendants cannot meet their burden on summary judgment because the facts material to their arguments that Ms. Leslie had no expectation of privacy in her DNA, that she abandoned her privacy interest, that the City's Suspect Index is authorized by Article 49-B or other laws, and that the Suspect Index has been approved by independent bodies are all disputed. *See* Plaintiff's Responses to Defendants' 56.1 Statement ("Responses") ¶¶ 21-24; *see also* Facts ¶¶ 94-96, 100. That failure alone is fatal to their motion. *See* Fed. R. Civ. P. 56(a). But defendants also fail to address controlling precedents that directly undermine their arguments.

Defendants argue that Ms. Leslie (and presumably all other New Yorkers) would only have a legitimate expectation of privacy in her "DNA molecules" if she first tells police officers that she considers her DNA to be private. *See* Defs.' Br. at 14-15. From defendants' telling, New Yorkers in their every interaction with the NYPD, from asking for directions to any traffic encounter, should preemptively blurt out "my DNA is private" lest they lose any right to protect it from the City. That argument—apart from being absurd on its face—is wrong as a matter of law. The City ignores controlling precedent recognizing "the very strong privacy interests that *all* individuals have in [their DNA]" because of "the vast amount of sensitive information that can be mined from a person's DNA." *Amerson*, 483 F.3d at 85 (emphasis added); *see also Skinner*, 489 U.S. at 617-18 (the "collection and testing of [biological samples] intrudes upon expectations of privacy that society has long recognized as reasonable"). Ms. Leslie does not have to show that

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that he would 'adamantly oppose any further expansion of the database'" *People v. Halle*, 57 Misc. 3d 335, 345 n.12 (N.Y. Sup. Ct., Kings Cnty. 2017) (citing the N.Y. Assembly Debate on A9555, March 15, 2012).

she engaged in deep "thought about her DNA before she was arrested," refused to eat or drink in restaurants to avoid leaving her saliva behind, or developed expertise in all the differences between a DNA sample and DNA profile to have a privacy interest in her DNA.[11] *See* Defs. Mem. at 14-15. And defendants' claims to the contrary are baseless. That Ms. Leslie considers her DNA to be private is apparent in defendants' own papers. *See* Defs. Mem. at 11 (quoting Ms. Leslie's testimony that her "DNA is private"). Defendants' proffered facts to the contrary are thus clearly disputed.

The City's argument that the Supreme Court's decision in *King* controls because it "invalidated Leslie's claimed privacy interests as a matter of law" is wrong. *See* Defs. Mem. at 16-21. The Supreme Court explained that when "privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Riley*, 573 U.S. at 392 (citing *King*). In *King*, the Supreme Court only found the DNA testing scheme there to be reasonable because of Maryland's uniform, non-discretionary DNA testing for all arrestees upon their booking, its "statutory protections that guard against" testing for any purpose other than "identification," and other checks on police officer discretion that mitigated the privacy concerns. *King*, 569 U.S. at 448, 461-62. As discussed above, because none of those checks on officer discretion are present here with the City's surreptitious DNA collection practices, the City's intrusion on plaintiffs' privacy interests is significant and requires a warrant. *See supra* at 5-6, 19-20. For the same reason, the City's reference to other jurisdictions that have adopted *laws* (which come with statutory safeguards) requiring uniform DNA testing for arrestees like in

[11] Under Civil Rights Law 79-l, if a restaurant, bar, or local coffee shop owner attempted to willfully harvest and test people's DNA like the City does here, the NYPD would have to arrest them.

*King* is irrelevant. *See* Defs. Mem. at 20-21. The City cannot find cover for its rogue, unauthorized DNA testing practices under the laws of other jurisdictions.

Next, the City's argument that Ms. Leslie abandoned her DNA and thus forfeited her privacy interest is wrong on two fronts. *See* Defs. Mem. at 16-18. First, her "abandonment" is a disputed fact because the NYPD's policy prevents people like Ms. Leslie from taking items from police interrogations rooms and Ms. Leslie's interrogation video, where she is handcuffed and escorted out the room, confirms that in practice. *See supra* at 15-17. Second, under *Carpenter*, the abandonment doctrine does not extend to DNA. *See supra* at 11-15. The City conspicuously ignores *Carpenter* in its papers, instead citing pre-*Carpenter* cases or cases that fail to address *Carpenter*'s guidance to avoid mechanically extending its doctrines to new privacy concerns driven by innovations in technology. *See* Defs. Mem. at 17-18. Indeed, in *Poller*, which Defendants lean heavily on, the Second Circuit recognized that the U.S. Supreme Court in "*Kyllo* guarded against those technologies, such as thermal-imaging devices, that do not so much enhance police senses as they do replace them with something super-human, an ability to perceive that people simply do not have." *United States v. Poller*, 129 F.4th 169, 178-79 (2d Cir. 2025) (cleaned up).

When addressing its Suspect Index, the City suggests that (i) "putting a DNA profile into an index, and then comparing that DNA profile to other DNA profiles, is not a 'search' under the Fourth Amendment" and (ii) Ms. Leslie's "allegation that her indexed DNA profile was 'subject to suspicionless comparison' to thousands of other DNA profiles . . . is irrelevant to the legal analysis here." *See* Defs. Mem. at 22-24. Both arguments conflict with controlling Second Circuit precedent. As discussed above, the Second Circuit has repeatedly held that the "analysis and maintenance" of someone's DNA in an index is a Fourth Amendment search. *Nicholas*, 430 F.3d

at 670; *Amerson*, 483 F.3d at 89. And the Second Circuit has held that "suspicionless searches" are "highly disfavored" and are therefore subject to a stricter legal analysis: the special needs test. *Amerson*, 483 F.3d at 77-78. That is the opposite of being "irrelevant to the legal analysis." For the reasons stated above, this Court should find that the City's Suspect Index searches are unreasonable precisely because they do not qualify as a special need.

Turning to plaintiffs' state law claim, the City erroneously argues that plaintiffs' contention that LDIS is limited in its function under Article 49-B is "manufactured out of thin air" and that the First Department in *Samy F.* "held" that OCME is not prohibited from maintaining suspect profiles in LDIS. *See* Defs. Mem. at 25-26. But this holding does not exist. In the portion of *Samy F.* that defendants quote, the First Department summarizes Respondent's argument that "there is no prohibition in [Article 49-B] against the permanent storage of [a youthful offender's] profile" and it says that this "observation, while true, is not inconsistent with discretionary expungement of such records in appropriate circumstances." *Samy F.*, 176 A.D.3d at 55. That comment is miles apart from a "holding" and it does not even address suspect DNA. The only reference in *Samy F.* to suspect DNA is its conclusion that "[a]fter an arrest, but preconviction, a DNA sample may only be obtained from a suspect on *consent, or by warrant or court order*" and that Article 49-B "*cannot* be invoked to collect DNA from a suspect by law enforcement for use in the investigation or prosecution of a crime." *Id.* at 53 (emphasis added). *Samy F.* thus supports plaintiffs' entitlement to summary judgment, not the defendants' "manufactured" holding.

The City also argues that New York City Charter § 557(f)(3) gives OCME authority to create and operate the Suspect Index. *See* Defs. Mem. at 28. But the City selectively quotes the charter to not include the following qualifier: "The chief medical examiner may, *to the extent permitted by law*, provide forensic and related testing and analysis." New York City Charter §

557(f)(3) (emphasis added). Far from giving OCME the free-wheeling authority it desires, the city charter limits OCME to act only when permitted by law and, as discussed above, Article 49-B does not permit OCME's operation of the Suspect Index. *See supra* at 24-26.

Finally, the City argues that, through their accreditation of OCME, ANAB and the Commission on Forensic Science "approve" of the City's operation of the Suspect Index. But those are disputed facts: the Commission itself admitted that its accreditation "does not give [OCME] authority" to operate the Suspect Index and OCME's 30(b)(6) deposition testimony confirmed that no one in OCME has even spoken to ANAB about the Suspect Index. *See* Facts ¶¶ 95-100. The City's testing practices may meet scientific, accreditation standards, but its decision to operate an index of secretly-collected DNA profiles of people not convicted of designated crimes violates Article 49-B and undermines the Legislature's authority. *See supra* at 24-29.

## CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that this Court deny defendants' motion for summary judgment, grant plaintiffs' cross motion for summary judgment, and (1) declare that the City's practice of secretly taking, analyzing and maintaining peoples' DNA in its Suspect Index for comparison against crime scene evidence constitutes an unreasonable search in violation of the Fourth Amendment absent a warrant or court order permitting the search; (2) declare that the City's maintenance of a Suspect Index violates Article 49-B of the Executive Law; (3) enjoin the Defendants from continuing their policy and practice of secretly taking, analyzing and maintaining peoples' DNA in its Suspect Index subjecting the plaintiff and the putative class to the unconstitutional and unlawful practices described here; (4) enjoin the Defendants from continuing to operate the Suspect Index; and (5) order the Defendants to expunge all suspect profiles in the City's Suspect Index that were created and maintained as a result of the unconstitutional and unlawful policies and practices.

Dated: August 8, 2025
New York, N.Y.

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**WORD COUNT CERTIFICATION**

I, Craig McAllister, certify that this memorandum of law complies with the 12,500 word limit set forth in the parties' joint application for leave to file excess pages, filed August 1, 2025, which this Court granted on August 6, 2025. (ECF No. 139.) Excluding the caption, any index, table of contents, table of authorities, signature blocks, and any required certificates, this memorandum of law contains 11,506 words, according to the word-processing program used to prepare the document.

Dated: August 8, 2025

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