26-0950-cv

United States Court of Appeals

for the

Second Circuit

SHAKIRA LESLIE, on behalf of themselves and all others similarly situated,

Plaintiff-Appellant,

SHAMILL BURGOS, on behalf of themselves and all others similarly situated,

Plaintiff,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NEW YORK CITY)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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– v. –

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Defendants-Appellees.

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

I. THIS CASE IS NOT MOOT 1

II. THE CITY'S SECRET DNA COLLECTION, ANALYSIS, AND INDEXING ARE SEARCHES 8

1. Leslie, like all New Yorkers, has an objectively reasonable expectation of privacy in her DNA 9

2. The Fourth Amendment did not require Leslie to affirmatively state her expectation of privacy as she was being tricked 15

3. The abandonment doctrine does not apply 18

III. THE CITY'S WARRANTLESS DNA COLLECTION, ANALYSIS, AND INDEXING ARE UNREASONABLE SEARCHES 21

IV. THE DISTRICT COURT ERRED BY DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

ACLU v. Clapper,
785 F.3d 787 (2d Cir. 2015) 3

Bellin v. Zucker,
6 F.4th 463 (2d Cir. 2021) 6

Birchfield v. North Dakota,
579 U.S. 438 (2016) 24

Carpenter v. United States,
585 U.S. 296 (2018) 12, 17, 20

Chatrie v. United States,
609 U.S. 605 (2026) ..... passim

Church of Scientology of Cal. v. United States,
506 U.S. 9 (1992) 3

Ciaramella v. Zucker,
2019 WL 4805553 (S.D.N.Y. Sept. 30, 2019) 7

Comer v. Cisneros,
37 F.3d 775 (2d Cir. 1994) 7

Conn. Citizens Def. League, Inc. v. Lamont,
6 F.4th 439 (2d Cir. 2021) 7

Cupp v. Murphy,
412 U.S. 291 (1973) 10

Doe v. McDonald,
128 F.4th 379 (2d Cir. 2025) 2, 3

Janakievski v. Exec. Dir., Rochester Psychiatric Ctr.,
955 F.3d 314 (2d Cir. 2020) 2

Kyllo v. United States,
533 U.S. 27 (2001) 12, 13, 15, 16

Leslie v. City of New York,
2023 WL 2612688 (S.D.N.Y. Mar. 23, 2023) ..... passim

Maryland v. King,
569 U.S. 435 (2013) ..... passim

TABLE OF AUTHORITIES
(continued)

Page(s)

Mhany Mgmt., Inc. v. Cty. of Nassau,
819 F.3d 581 (2d Cir. 2016) 6, 7

Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,
508 U.S. 656 (1993) 7

Nicholas v. Goord,
430 F.3d 652 (2d Cir. 2005) ..... passim

Palmieri v. Lynch,
392 F.3d 73 (2d Cir. 2004) 18

People v. Gibson,
17 N.Y.3d 757 (2011) 20

Radha Geismann, M.D., P.C. v. ZocDoc, Inc.,
909 F.3d 534 (2d Cir. 2018) 8

Riley v. California,
573 U.S. 373 (2014) 26, 27

Robidoux v. Celani,
987 F.2d 931 (2d Cir. 1993) 5

Roe v. Marcotte,
193 F.3d 72 (2d Cir. 1999) 21

Salazar v. King,
822 F.3d 61 (2d Cir. 2016) 4, 5

Samele v. Zucker,
324 F. Supp. 3d 313 (E.D.N.Y. 2018) 5

Skinner v. Railway Labor Executives' Association,
489 U.S. 602 (1989) 9, 10, 12

TransUnion LLC v. Ramirez,
594 U.S. 413 (2021) 26

United States v. Amerson,
483 F.3d 73 (2d Cir. 2007) ..... passim

United States v. Hasbajrami,
945 F.3d 641 (2d Cir. 2019) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Karo,
468 U.S. 705 (1984) 12, 13

United States v. Leeper,
187 F.4th 11 (2d Cir. 2026) 19, 20

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 12

Washington Nat'l Ins. Co. v. OBEX Grp. LLC,
958 F.3d 126 (2d Cir. 2020) 3

INTRODUCTION

Recognizing that people have "very strong privacy interests" in the "vast amount of sensitive information" in their DNA, this Court has subjected DNA indexing programs to close Fourth Amendment scrutiny for over two decades. *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007). The City's position that it can operate its discretion-laden DNA collection and indexing regime with impunity cannot be squared with that case law. This case is not moot; the Fourth Amendment applies; and whatever test this Court employs, the City's program is constitutionally unreasonable.

ARGUMENT

I. THIS CASE IS NOT MOOT.

The City argues that this case is moot because, less than two months after Leslie filed suit, it removed her DNA profile from the Suspect Index at the direction of counsel. Resp. 21. That argument is wrong for three independent reasons. First, whatever it has done with her DNA *profile*, the City continues to retain both Leslie's DNA *sample* (from which it created her DNA profile) and the data underlying her DNA profile—meaning this case still presents a live controversy. Second, as the district court correctly held, the inherently transitory exception to mootness applies to this class action because it is uncertain that any claim will remain live long enough for a court to certify the class. And third, because the City retains Leslie's DNA and

continues to collect and index abandonment samples, this case also falls within the voluntary cessation exception to mootness.

1. A case is moot only if "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome," making it "impossible for a court to grant any effectual relief whatever to the prevailing party." *Doe v. McDonald*, 128 F.4th 379, 385 (2d Cir. 2025) (cleaned up). Accordingly, the availability of even a "'partial remedy'" is "sufficient to render a case not moot." *Janakievski v. Exec. Dir., Rochester Psychiatric Ctr.*, 955 F.3d 314, 319 (2d Cir. 2020) (citation omitted). So long as a plaintiff continues to suffer "an actual injury redressable by a favorable decision," the case remains live. *Id.* at 321.

Here, the City asserts that this case is moot for one reason only—because the City "expunged Leslie's DNA profile from" its Suspect Index in May 2022. Resp. 21. Even if that is true, it is irrelevant. Whatever the City has done with Leslie's DNA *profile*, it admits that it retains her DNA *sample* (collected from her saliva) indefinitely, JA 586 ¶ 47; JA 622-23 ¶ 132, and her DNA *extract* (drawn from that sample) for as long as it has storage space, "in case any additional testing needs to be done at a later date," JA 592-93 ¶¶ 62-63; JA 619 ¶¶ 121-22; *see* Appellant's Opening Brief ("AOB") 12.

Those undisputed facts foreclose the City's argument. Leslie asserts a privacy interest not only in the DNA profile but in the DNA itself, which can reveal myriad

personal details about her. JA 637-38 ¶¶ 172-73. And the district court could undoubtedly grant her at least "a partial remedy by ordering the Government to destroy" her underlying DNA sample and extract, which are still "in its possession." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992) (taxpayer "still suffers injury by the Government's continued possession of [unlawfully acquired tape recordings], namely, the affront to the taxpayer's privacy"); *see also Washington Nat'l Ins. Co. v. OBEX Grp. LLC*, 958 F.3d 126, 133 (2d Cir. 2020) ("respondents have and maintain a privacy interest in the documents" in the other party's possession "and would be entitled to the[ir] return") (collecting cases); *ACLU v. Clapper*, 785 F.3d 787, 801-02 (2d Cir. 2015) (holding that the mere collection of telephone metadata is a Fourth Amendment injury regardless of whether the data is "reviewed or analyzed").

On top of the retention of Leslie's DNA sample, it is also undisputed that when the City "removes" a DNA profile from the Suspect Index, it still retains the underlying case record, paper file, and extract. AOB 12; *see* JA 622 ¶ 131. OCME thus can add a removed DNA profile back into the Index because it does not destroy the underlying DNA profile data unless ordered to do so by a court. JA 621-22 ¶¶ 129-31. Such removal, in name only, underscores that Leslie retains a "legally cognizable interest in the outcome" of this case. *McDonald*, 128 F.4th at 385 (citation omitted).

2. Though this Court need go no further, the City's mootness argument fails for another reason: As the district court found, *Leslie v. City of New York*, 2023 WL 2612688, at *7 (S.D.N.Y. Mar. 23, 2023), the City's post-filing removal of Leslie's DNA profile from the Suspect Index is a textbook case for applying the exception to mootness for inherently transitory claims, which allows a plaintiff's claims to "'relate back' to the time of the filing of the complaint with class allegations," *Salazar v. King*, 822 F.3d 61, 73, 75 (2d Cir. 2016) (citation omitted). "Under that exception, a case will not be moot, even if the controversy as to the named plaintiffs has been resolved, if: '(1) it is uncertain that a claim will remain live for any individual who could be named as a plaintiff long enough for a court to certify the class; and (2) there will be a constant class of persons suffering the deprivation complained of in the complaint.'" *Id.* at 73 (cleaned up).

Here, it is undisputed that the second requirement is satisfied because there exists a "constant class" of persons whose DNA the City surreptitiously collects, analyzes, and queries. *Leslie*, 2023 WL 2612688, at *8 (citation omitted). As to the first, the City argues that its policy of reviewing DNA profiles for removal from the Suspect Index after two years allows sufficient time for a plaintiff to seek class certification. Resp. 25. That is wrong for multiple reasons.

First, the City's purported two-year timeline presumes that people can initiate a lawsuit and litigate class certification immediately after it collects their DNA. But

the whole point of the City's program is to collect and analyze DNA samples *in secret*. *See* JA 567 ¶ 8. The City does not notify people that it has collected and indexed their DNA. JA 586-68 ¶ 48; JA 605 ¶ 90. That the City generally retains profiles for two years therefore does not provide sufficient time to litigate class certification because most people will not find out about its actions for months or years—if at all.

Further, the City can remove a profile from the Index at *any* time. Indeed, in this very case, the City expedited the removal of Leslie's DNA profile, "on the direction of counsel," less than two months after she filed suit. *Leslie*, 2023 WL 2612688, at *8 (citing Dkt. 46-6 ¶ 18). This Court applied the inherently transitory exception to similar circumstances in *Salazar*, where the Department of Education "wait[ed] for the victims to discover" school loan fraud "on their own, and then provide[d] them with a quick [loan] discharge to avoid exposure of its neglect." *Salazar*, 822 F.3d at 74-75. That was "precisely the sort of situation the inherently transitory exception is designed to correct." *Id.* at 75. So too here. Even if the City leaves DNA profiles in the Index for two years as a default matter, it "will almost always be able to process" a removal "before a plaintiff can obtain relief through litigation." *Robidoux v. Celani*, 987 F.2d 931, 939 (2d Cir. 1993) (applying the inherently transitory exception); *Samele v. Zucker*, 324 F. Supp. 3d 313, 330-32 (E.D.N.Y. 2018) (applying the inherently transitory exception because "[t]he

Defendant could continually pick off named plaintiffs in this case who had their services reduced by restoring their care to previous levels on a case by case basis.").

A plaintiff "need not show that *every* hypothetical plaintiff's claim faces certain dismissal," only that it is "uncertain that a claim will remain live for any individual who could be named as a plaintiff." *Bellin v. Zucker*, 6 F.4th 463, 474 (2d Cir. 2021) (emphasis added) (citation omitted). Given the City's conduct here, there is at least a "significant possibility" that the claim of any single named plaintiff would be mooted prior to class certification. *Id.*

3. For similar reasons, this case also falls under the voluntary cessation exception to mootness. *See Leslie*, 2023 WL 2612688, at *8-9. A defendant "claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 603-04 (2d Cir. 2016) (citation omitted). To carry that "stringent" and "formidable burden," the City must show both that "(1) there is no reasonable expectation that the alleged violation will recur" and that "(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* (citation omitted). Neither element is established here.

The City cannot show that there is no reasonable expectation that the alleged violation will recur, a conclusion that this Court reviews for abuse of discretion,

Conn. Citizens Def. League, Inc. v. Lamont, 6 F.4th 439, 446-47 (2d Cir. 2021), where it is *continuing* the violation by retaining Leslie's DNA and the data underlying her DNA profile. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993); *see* JA 586 ¶ 47; 622 ¶¶ 130-31. The City relies on a declaration asserting that "[o]nce removed from LDIS, a DNA profile is never re-entered." Resp. 23 (citing Dkt. 143-10 at 6). But the district court was well within its discretion to conclude the City did not carry its "very heavy burden" as to recurrence, *Comer v. Cisneros*, 37 F.3d 775, 800 (2d Cir. 1994), particularly given the "suspicious timing and circumstances" surrounding the removal of Leslie's DNA profile, *Mhany Mgmt.*, 819 F.3d at 604. As the district court observed, the City "made no effort to remove plaintiffs' DNA profiles for years but conducted an expedited review after plaintiffs filed suit," and even "reversed a prior decision refusing to remove [former plaintiff Shamill Burgos's] DNA from the Suspect Index." *Leslie*, 2023 WL 2612688, at *9. The City thus has hardly made an "unequivocal commitment" to never place Leslie's DNA profile in the Suspect Index again. *Ciaramella v. Zucker*, 2019 WL 4805553, at *5-6 (S.D.N.Y. Sept. 30, 2019).

Finally, the removal of Leslie's DNA profile from the Index does not "completely and irrevocably" eradicate the effects of its unlawful DNA collection policy. Leslie still suffers the effects of that policy. And because the City continues

its collection and indexing practices, *see Leslie*, 2023 WL 2612688, at *8-9, allowing such incomplete "relief provided to a plaintiff on an individual basis" to moot this case would risk "effectively allowing the use of tactical procedural maneuvers to thwart class litigation at will," *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 909 F.3d 534, 542-43 (2d Cir. 2018).

II. THE CITY'S SECRET DNA COLLECTION, ANALYSIS, AND INDEXING ARE SEARCHES.

The City does not dispute that DNA is the very building block of the "person" the Fourth Amendment protects, or that New York state law, like the laws of many other states, protects DNA privacy. AOB 24 & n.4. Nor does it dispute that this Court has repeatedly recognized that individuals have "very strong privacy interests" in the "vast amount of sensitive information that can be mined from" their DNA. *Amerson*, 483 F.3d at 85. Instead, the City contends that no Fourth Amendment search occurred here because (i) the collection, analysis, and indexing of Leslie's DNA do not invade any objectively reasonable expectation of privacy; (ii) Leslie did not voice a subjective expectation of privacy in her DNA; and (iii) Leslie "abandoned" her DNA when detectives handcuffed her and escorted her from the interrogation room. This Court should reject those arguments.

1. *Leslie, like all New Yorkers, has an objectively reasonable expectation of privacy in her DNA.*

a. To start, the City repeatedly asserts that its surreptitious collection of Leslie's DNA does not implicate the Fourth Amendment because it "involved no intrusion into her body." Resp. 29-30; *see id.* at 17, 19, 26-28, 31, 42. That argument is wrong as a matter of both law and logic.

In *Skinner v. Railway Labor Executives' Association*, the Supreme Court held that "the collection [of] biological samples *must* be deemed [a] Fourth Amendment search[.]" 489 U.S. 602, 618 (1989) (emphasis added). The Court specifically observed that the urine testing at issue there did "*not entail* a surgical intrusion into the body." *Id.* at 617 (emphasis added). Yet it was still a search because the "chemical analysis of urine, like that of blood, can reveal a host of private medical facts," including whether someone "is epileptic, pregnant, or diabetic." *Id. Skinner* thus definitively refutes the City's theory that physical intrusion is a precondition for a Fourth Amendment search of bodily material.[1]

Consistent with *Skinner*, this Court has held for two decades that DNA indexing regimes are "subject to the strictures of the Fourth Amendment" because

[1] Contrary to the City's suggestion, Resp. 42, *Skinner*'s holding did not turn on "visual or aural monitoring of the act of urination" because, as the Court noted, the regulations there did not require urine samples to be furnished under a monitor's observation. *Skinner*, 489 U.S. at 617, 626. The Court merely noted that monitoring "may in some cases" occur. *Id.* at 617.

they "authorize *both* a physical intrusion to obtain a tissue sample *and* a chemical analysis to obtain private physiological information about a person." *Amerson*, 483 F.3d at 77 (emphasis added); *see Nicholas v. Goord*, 430 F.3d 652, 669-70 (2d Cir. 2005) (same). And it has done so based on the long-settled principle "that a search that goes 'beyond mere physical characteristics … constantly exposed to the public … constitute[s] the type of severe, though brief, intrusion upon cherished personal security that is subject to constitutional scrutiny.'" *Amerson*, 483 F.3d at 77 (quoting *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)).

Indeed, this Court has recognized that "all the common methods of obtaining the DNA sample" involve, at most, only "minimal" physical intrusions. *Id.* at 84-85. Yet those programs triggered the Fourth Amendment nonetheless, because they implicated the "vast amount of [non-public] sensitive information" contained in DNA. *Id.* The "analysis and maintenance" of DNA in a government index thus presents a "serious invasion of privacy," however that DNA is collected. *Id.* at 85; *see Nicholas*, 430 F.3d at 658, 670; *Skinner*, 489 U.S. at 616 ("ensuing chemical analysis" of urine sample "is a further invasion of" privacy); AOB 37-42. And as this Court recently explained, "querying … stored data [can] have important Fourth Amendment implications," particularly when the government has amassed "a vast body of information" about the public "available for review … solely on the speculative possibility that evidence of interest to agents investigating a particular

individual might be found there." *United States v. Hasbajrami*, 945 F.3d 641, 670-71 (2d Cir. 2019). That aptly describes the City's Suspect Index, which contains over 34,000 DNA profiles. JA 606 ¶ 92.[2]

b. The City next argues that Leslie's privacy interest rests on "speculative hypotheticals about what DNA testing could potentially reveal in the future," which have "no bearing on the Fourth Amendment analysis," Resp. 36; *see also* Resp. 32-38. That is wrong.

Both the Supreme Court and this Court consider the information that might be revealed by a given search when evaluating whether the Fourth Amendment applies, *without* regard for what is in fact revealed in a particular case. *See* AOB 30-32. That is true whether the search concerns the location of a cell phone, *see Chatrie v. United States*, 609 U.S. 605, 629-30 (2026); *Carpenter v. United States*, 585 U.S. 296, 311

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[2] The City's frequent analogy to identification tools used during routine booking processes—like fingerprints and photographs—is inapt. *See* Resp. 35, 40-41, 48-49. Those analogies ignore *Amerson*'s and *Nicholas*'s holdings that "the analysis and maintenance of" DNA is a search that "is potentially a far greater intrusion than the initial extraction of DNA, since the state analyzes DNA for information and maintains DNA records indefinitely." *Nicholas*, 430 F.3d at 670; *see Amerson*, 483 F.3d at 85. The City admits both that (i) DNA analysis can reveal sensitive information not found in a fingerprint or photograph, JA 637-38, 640-43 ¶¶ 170, 172-74, 181-89; and (ii) it retains DNA samples indefinitely, JA 586 ¶ 47; JA 622 ¶ 132. And the City does not collect DNA from every arrestee as a part of a "strictly circumscribed" booking procedure. *Amerson*, 483 F.3d at 82; *see Nicholas*, 430 F.3d at 671; *Maryland v. King*, 569 U.S. 435, 447-49, 456, 465 (2013). Instead, officers decide, in their discretion, whom to subject to the ruse, for the purpose of investigating criminal wrongdoing—not identification.

(2018), the heat emanating from the walls of a house, *Kyllo v. United States*, 533 U.S. 27, 37-39 (2001), a urine sample, *Skinner*, 489 U.S. at 617,[3] or—as relevant here—DNA samples, *Amerson*, 483 F.3d at 76-77 (applying Fourth Amendment although government analyzed only "junk DNA"); AOB 31. The Fourth Amendment "makes 'no exception' for the officer 'who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor.'" *Chatrie*, 609 U.S. at 629 (quoting *Kyllo*, 533 U.S. at 37). Nor does it "give agents a pass if their wiretap is of limited duration and thus less likely to intrude on private matters." *Id.* "Where the Fourth Amendment applies, it applies—regardless of 'the quality or quantity of information' the government obtains." *Id.* (citation omitted). That reasoning is especially relevant where, as here, the only thing stopping law enforcement from gleaning more private information from DNA is its own, self-imposed and self-enforced policy decision.[4]

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[3] The City attempts to minimize *Skinner*'s import by observing that the Supreme Court later found it "constitutionally relevant" that the program in *Skinner* tested urine only for drugs. Resp. 39 n.5 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995)). But the *Vernonia School District* Court *agreed* with *Skinner* that the "collection and testing of urine … constitutes a 'search.'" 515 U.S. at 652. It weighed the fact that the tests at issue looked "only for drugs" when evaluating whether that search was *constitutionally unreasonable*. *Id.* at 658.

[4] *United States v. Karo*, 468 U.S. 705 (1984), which the City misleadingly cites in arguing that the Court may not consider what information can potentially be gleaned from DNA, (Resp. 37-38), is not to the contrary. There, the Court held that law enforcement did not conduct a search merely by transferring to a suspect a

The City casually dismisses this authority as "cases where the type of search conducted did or could, *in that case*, turn up highly sensitive information." Resp. 38-39. That argument misreads the cases. In *Kyllo*, for instance, the Court considered not only the capabilities of the thermal imaging device before it, but also the privacy implications of "advancing technology" that "could discern all human activity in the home." 533 U.S. at 35-36. "While the technology used" then "was relatively crude," the Court expressly took "account of more sophisticated systems that are already in use or in development." *Id.* at 36.

More fundamentally, the City's premise is wrong: The DNA it collects "could, *in [this] case*, turn up highly sensitive information." Resp. 38. The same DNA sample that the City collected (and retains) holds Leslie's personal medical, hereditary, and familial information. JA 586 ¶ 47; JA 622 ¶ 132; JA 637-38 ¶¶ 170, 172-74. That the City may not have analyzed Leslie's DNA for this information is irrelevant to the Fourth Amendment's applicability: the information is there and can be harvested at any time. If the Fourth Amendment does not apply at all—as the

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can of chemicals containing a then-unmonitored tracking device. *Karo*, 468 U.S. 711-12. The Court explained that holding otherwise "would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on." *Id*. Here, by contrast, the City has gone a step further—it has actually collected and analyzed Leslie's DNA.

City contends—then nothing, save the City's own grace, prevents it from uncovering and indexing that information too.

c. The City next asserts that Leslie had no objectively reasonable expectation of privacy in her DNA because she was under arrest when the NYPD surreptitiously collected her sample. Resp. 39-41. That conflates separate prongs of the Fourth Amendment analysis. This Court has consistently accounted for a person's status as an arrestee, prisoner, or convicted offender when evaluating the *reasonableness* of warrantless DNA collection, *not* when deciding whether that collection is a search at all. *See Amerson*, 483 F.3d at 85-86; *Nicholas*, 430 F.3d at 658, 671; AOB 29-30. The City's searches here are meaningfully different from the collection and indexing schemes at issue in *Amerson* and *Nicholas*, because of the discretion and absence of safeguards built into the City's policy. *See infra* Part III; AOB at 42-54.[5] For present purposes, however, what matters is that this Court has repeatedly rejected the proposition that an arrestee, a convicted offender, or a probationer "has *no* expectation of privacy" in her DNA; even where an individual's privacy interests

[5] And, as noted in Leslie's opening brief, AOB 30 n.6, the City's comparison to the FBI's DNA collection program operating under federal law is a non sequitur. *See* Resp. 40-41. This Court upheld that scheme as reasonable, but it considered it "settled law" that the DNA indexing scheme was a Fourth Amendment search. *Amerson*, 483 F.3d at 77.

are "diminished," they remain cognizable and must be weighed against the government's interest in the search. *Amerson*, 483 F.3d at 86.

d. Finally, the City claims that applying the Fourth Amendment here "would encompass the analysis of *all* DNA samples taken from crime scenes and in criminal investigations," calling into question "decades of criminal cases that have been resolved with the help of DNA evidence." Resp. 43. Not even close. To reverse the district court here, this Court need only hold that the Fourth Amendment applies when police surreptitiously collect DNA from a person in a custodial setting and affirmatively prevent her from retaining the item from which that DNA is harvested. Such a holding follows naturally from *Amerson*'s recognition of the "very strong privacy interests that all individuals have in" their DNA, *Amerson*, 483 F.3d at 85, and would in no way require the Court to disturb the forensic practice of collecting DNA from crime scene evidence or to decide whether DNA might be voluntarily discarded in other, non-custodial contexts.

2. *The Fourth Amendment did not require Leslie to affirmatively state her expectation of privacy as she was being tricked.*

The City next suggests that Leslie's Fourth Amendment challenge fails because she testified that she "did not know what information [her DNA] contained" and "never communicated a desire to keep the cup containing her DNA sample private." Resp. 44-46. That "mechanical interpretation of the Fourth Amendment" is wrong on the law and makes no sense here. *Kyllo*, 533 U.S. at 35.

The City does not, and cannot, dispute that both this Court (in *Amerson* and *Nicholas*) and the Supreme Court (in *Kyllo*, *Carpenter*, and *Chatrie*) applied the Fourth Amendment absent any affirmative communication of a subjective expectation of privacy. AOB 25-29. Tellingly, it ignores *Amerson*, *Nicholas*, and *Kyllo* entirely. *See* Resp. 44-46. But *Kyllo*, for example, specifically rejected the City's argument—that the petitioner "had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home"—because that logic would leave the public "at the mercy of advancing technology" that could detect private information in ways not previously thought possible. *Kyllo*, 533 U.S. at 31, 34-35. So it is here, where technological advances have enabled the City to collect and analyze DNA in novel ways, without the subject's consent or awareness.

Instead, the City attempts to distinguish *Carpenter* and *Chatrie*, asserting that (i) those cases "involved pervasive surveillance of a person's every movement," and (ii) in neither case "did the plaintiff affirmatively disclaim concerns about privacy." Resp. 45-46. The first argument is irrelevant, and the second is simply incorrect.

As for the first, in both *Carpenter* and *Chatrie*, the Court did not inquire into the petitioners' manifestations of a subjective expectation of privacy because, whether they realized it or not, their location records could provide "an intimate window into" their lives, resulting in the "too permeating police surveillance" the

Fourth Amendment was adopted to prevent. *Carpenter*, 585 U.S. at 305, 311 (citation omitted); *accord Chatrie*, 609 U.S. at 624, 630. The intimacy of the information and the practical inability to prevent its emission were sufficient. The same is true here. Indeed, the City does not dispute that the very DNA sample it collected from Leslie could reveal physical characteristics and genetic predispositions, biological familial relationships, and even past sexual associations. AOB 23.

As for the City's second assertion, in *Chatrie*, the petitioner *did* "affirmatively disclaim" privacy interests in his location data with Google, a third party—Google's location history was an "optional add-on" which a user had to "enable by an 'affirmative act.'" *Chatrie*, 609 U.S. at 635. But the Court considered that irrelevant to the Fourth Amendment's applicability because location history can be incredibly revealing, is information that cell phone users "reasonably understand[] as [their] own," and is "not truly shared, in the normal sense of wanting a third party to see or use it." *Id.* at 634-35 (cleaned up). This case is even more straightforward. Leslie *never* "affirmatively disclaim[ed]" privacy interests in her DNA, Resp. 45-46, nor did she "opt-in" to its collection, *Chatrie*, 609 U.S. at 637. She did not even know that the NYPD was collecting her DNA and had no reason to tell detectives that she regarded it as private. JA 626 ¶ 143. Just as a cell-phone user "is not to be viewed as sharing private information" with the government "just by doing the ordinary

things cell-phone users do," *Chatrie*, 609 U.S. at 637, Leslie cannot be viewed as "sharing private information" in her DNA with the government simply by drinking a cup of water, particularly in a custodial setting where the City forbids retention of such items. In any event, after learning what the City did, Leslie initiated this lawsuit and made clear that her "DNA is private," and that she believed the NYPD "stole my DNA." JA 88-89; JA 444-45 ¶ 56.

At bottom, whatever sense it might make to require a subjective manifestation in other settings, *see, e.g.*, *Palmieri v. Lynch*, 392 F.3d 73, 81 (2d Cir. 2004) (real property), doing so makes no sense when applied to the unconscious and unavoidable shedding of DNA in a custodial setting. The whole premise of the City's policy is to secretly extract DNA from everyday objects like a cup, in ways that no ordinary person would perceive or expect, and then to prevent the retention of those items. *See* JA 570-75 ¶¶ 15, 22, 23, 25-27. The City's insistence that Leslie should have seen through that carefully orchestrated ruse and affirmatively told detectives of her expectation of privacy is nonsensical.

3. *The abandonment doctrine does not apply.*

The City's cursory invocation of the abandonment doctrine similarly fails. Resp. 46-47. It concedes that the doctrine turns on intent and requires a voluntary and knowing abandonment. *Id.*; *see* AOB 33, 36. And it admits that when arrestees,

like Leslie, are in custody, it affirmatively prevents them from retaining items touched in an interrogation room. JA 574-75, 625 ¶¶ 25-27, 140.

Those concessions are dispositive. An arrestee cannot voluntarily abandon an item that officers prevent her from keeping. That conclusion is especially clear here, where NYPD detectives repeatedly urged Leslie to drink from a disposable cup after she initially refused, and handcuffed her immediately thereafter. JA 624-25 ¶¶ 139-40. Characterizing such circumstances as a voluntary abandonment would unmoor the doctrine from its rationale.

The City's response misreads the case law. For starters, it vastly overextends *United States v. Leeper*, 187 F.4th 11 (2d Cir. 2026). Resp. 46. The portion of *Leeper* on which the City relies addressed whether procedural due process required an adversarial hearing before law enforcement could test a DNA sample that it obtained with a valid warrant, not whether the Fourth Amendment applied. *Id.* at 21, 28. In dicta, the Court observed that some district courts have held a search warrant is not necessary before law enforcement analyze DNA from a sample "that has been abandoned *in a public place*." *Id.* at 28 (emphasis added). Neither *Leeper* nor the cases it cited support the sweeping proposition that a person voluntarily abandons DNA left on an item that police prevented her from retaining while in custody.

The City's reliance on *People v. Gibson*, 17 N.Y.3d 757 (2011), is even more misplaced. Resp. 46-47. *Gibson*'s one-page memorandum opinion did not expressly address the Fourth Amendment at all, let alone the abandonment doctrine: The Court of Appeals held that "the collection of defendant's DNA while he was in custody did not contravene his indelible right to counsel," and the closest it came to discussing any Fourth Amendment issue was a sentence adding that the detective did not "subject him to the functional equivalent of an uncounseled decision to consent to a search." *Gibson*, 17 N.Y.3d at 759. Nothing in *Gibson* holds that DNA surreptitiously collected from a disposable cup in a custodial setting, after an arrestee is escorted away in handcuffs, has been voluntarily abandoned.

The City again attempts to distinguish *Carpenter* and *Chatrie*—both of which counseled against "uncritically extend[ing]" doctrines like the abandonment rule, *Carpenter*, 585 U.S. at 318; *Chatrie*, 609 U.S. at 632-38—on the ground that the location histories there could create a "comprehensive record of the person's movements." Resp. 47 (citation omitted). But that is no meaningful distinction. DNA, too, "can reveal intimate details," *Leeper*, 187 F.4th at 28. And both *Carpenter* and *Chatrie* turned on the fact that the sharing of location data was not in any "meaningful sense" "voluntary." *Carpenter*, 585 U.S. at 315; *Chatrie*, 609 U.S. at 635-37. So too here.

III. THE CITY'S WARRANTLESS DNA COLLECTION, ANALYSIS, AND INDEXING ARE UNREASONABLE SEARCHES.

The City argues that its DNA collection and indexing regime, which compares individuals' DNA against DNA from tens of thousands of crime scenes for which the City has no reason to suspect their involvement, is not subject to the special-needs test because it is not a suspicionless search. Resp. 52-53. And it further argues that its DNA searches are reasonable under the general balancing test because an individual officer's suspicion is a sufficient safeguard to replace a warrant. Resp. 54-58. The City is wrong on both fronts. It cannot escape its obligation to justify its DNA indexing practice under the special-needs test, as this Court has required New York State, Connecticut, and the federal government to do. *See Nicholas,* 430 F.3d at 669; *Roe v. Marcotte,* 193 F.3d 72, 77-79 (2d Cir. 1999); *Amerson*, 483 F.3d at 84. But even under the general balancing test, the City's collection and indexing practices are unreasonable searches.

The City's claim that its DNA indexing is not a suspicionless search is baseless. As the City notes, "the challenged statute [in *Amerson*] required convicted persons to provide a DNA sample for indexing in CODIS without 'any suggestion that the individual is being suspected of having committed a crime (other than the one of which he had already been convicted).'" Resp. 53 (quoting *Amerson,* 483 F.3d at 82). Here, even if the City had individualized suspicion that Leslie committed the crime for which she was arrested, by including her DNA profile in

the Index, it compared her DNA to DNA found at over 32,000 crime scenes for which it had *no* reason to suspect her involvement. JA 606, 626 ¶¶ 93, 142. That is the definition of a suspicionless search. And the City's failure to offer *any* special-need justification (even as an alternative argument) is damning.

The City glosses over its DNA indexing practice to instead focus on the separate, preceding search that took place outside the Index: its comparison of Leslie's DNA to the gun that she was wrongly accused of possessing. Resp. 52-54; JA 595-96 ¶¶ 70-71. But just as a conviction for one crime did not furnish suspicion that Amerson had committed tens of thousands of crimes represented in CODIS, the City's suspicion that Leslie was involved in one crime for which she was arrested could not supply suspicion that she committed any of the over 32,000 other crimes represented in its Index. The City's DNA indexing is a suspicionless search like those at issue in *Nicholas* and *Amerson*. The key difference is that, unlike those DNA indexing regimes, which allowed DNA collection only from those actually convicted of a crime, the City here continued to compare Leslie's DNA to crime scene evidence for more than two years *after* her charges were dismissed, when it had no reason to suspect her of the arrest offense or any other crime. JA 626 ¶ 142. The City does the same for thousands of others whose charges were dismissed or who were never arrested at all. JA 605, 616 ¶¶ 116-17, 91.

Even under the general balancing test, the City's DNA collection, analysis, and indexing are unreasonable searches. *See* AOB 49-54.[6] Its contrary arguments ignore the fundamental differences between the program challenged here and those upheld in *Amerson*, *Nicholas*, and *King*.

To start, the City minimizes the privacy interests at issue here because arrestees, it says, have a diminished expectation of privacy, and because it does not collect DNA through "physical intrusion." Resp. 54-55. Neither assertion has merit. The City does not dispute that it collects DNA samples both from arrestees *and* from suspects who are not under arrest at all. JA 580 ¶ 36; JA 605 ¶ 91; *see* AOB 7-8, 10, 45. Indeed, because the City's practice lacks any of the statutory safeguards that *King*, *Amerson*, and *Nicholas* found critical—for instance, rules restricting DNA analysis to those charged with serious crimes after a judicial finding of probable cause, *King*, 569 U.S. at 443-44—the targets of its DNA searches are left almost entirely to the discretion of officers engaged in "the often competitive enterprise of ferreting out crime," *id.* at 448 (citation omitted).

And, even if its policy were limited to arrestees, the City's argument is still mistaken. *Amerson* and *Nicholas* analyzed DNA indexing statutes that covered

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[6] As this Court explained in *Amerson*, the second prong of the special needs test and the general balancing test are "very similar," and the application of either test can therefore lead to the "same result." *Amerson*, 483 F.3d 73, 79 n.6.

"convicted felons." *Amerson*, 483 F.3d at 85-86; *Nicholas*, 430 F.3d at 671. Here, the City's policy permits DNA collection and indexing as to *mere suspects* who have not been formally charged, let alone convicted. It does not require that "a judicial officer ensures that there is probable cause" before collecting and analyzing DNA. *See King*, 569 U.S. at 443. Nor does it require that DNA samples and profiles be "immediately destroyed" if the charges are dropped. *Id.* at 443-44. The *only* process that precedes the City's collection and indexing here is an individual officer's unchecked, subjective finding of reasonable suspicion. That is a world away from the regimes in *Amerson*, *Nicholas*, or *King*.

As for how the City collects DNA samples, this Court has repeatedly emphasized that the "more serious invasion of privacy" stems from the City's "analysis and maintenance of [suspects'] information" in the Suspect Index, whatever the means of collection. *Amerson*, 483 F.3d at 84 (quoting *Nicholas,* 430 F.3d at 670). To compare DNA searches here to a breath test, Resp. 54-55, simply ignores that DNA collection "put[s] 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). "A breath test, by contrast, results in a B[lood] A[lcohol] C[ontent] reading on a machine, nothing more," and leaves "no sample of anything … in the possession of the police." *Id.*

Next, the City claims that any intrusion on privacy interests is insignificant because targets are afforded "the inherent protection of individual suspicion," which it says renders other safeguards unnecessary. Resp. 54-56; *see id.* at 31. The City could not be more wrong. Because "DNA indexing has the *potential* to be broadly revealing," this Court only upheld previous DNA indexing programs specifically because of the "limits imposed on the collection, analysis, and use of DNA information *by the statute*." *Nicholas*, 430 F.3d at 670–71 (second emphasis added); *Amerson*, 483 F.3d at 89 (upholding the "DNA testing of convicted felons . . . given the safeguards of the 2004 DNA Act"); *King*, 569 U.S. at 465 (emphasizing the "statutory protections that guard against further invasion of privacy"). Indeed, *King* emphasized that it did "not speculate about the risks posed 'by a system that did not contain comparable security provisions.'" *King*, 569 U.S. at 465 (citation omitted). Without statutory safeguards that cabin "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," the City's discretion-ridden policy implicates the "significant reason for warrants" that was absent in *Amerson* and *Nicholas*—i.e., the need "to provide a check on the arbitrary use of government power." *Amerson*, 483 F.3d at 82; *see Nicholas*, 430 F.3d at 670-71.

Indeed, that the City conducts its warrantless DNA collection and analysis within "the context of a specific criminal investigation" is precisely why such

searches are unreasonable. Resp. 56-57. "When law enforcement officials undertake a search to discover evidence of criminal wrongdoing," as the NYPD does here, "the Fourth Amendment's requirement of reasonableness generally mandates that the officers have both probable cause *and* a search warrant." *Amerson*, 483 F.3d at 80 (emphasis added). An officer's unreviewed belief that there is reasonable suspicion or probable cause for the search is not enough. The warrant requirement "ensures that the inferences to support a search are drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Riley v. California*, 573 U.S. 373, 382 (2014) (cleaned up).

Finally, the City emphasizes that its PCR/STR analysis does not reveal "more sensitive personal information" contained in DNA, Resp. 54-55, and claims that it has a "compelling interest" in using DNA profiles to solve crimes, as in *Amerson* and *Nicholas*, Resp. 57.[7] But again, those DNA indexing programs were authorized—and severely limited—by statute, including strict rules, backed by

[7] The City also suggests that Leslie could not have suffered harm because she was exonerated. *See* Resp. 57-58. But that ignores that an unreasonable search is a harm in itself. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) (explaining that "traditional harms may also include harms specified by the Constitution itself"). Indeed, under the City's logic, it could conduct unlawful searches of millions of New Yorkers, and none of them would be harmed unless the searches resulted in a wrongful conviction. That cannot be correct.

criminal sanctions, on when officials could collect DNA and how they could use it. *Amerson*, 483 F.3d at 76-77; *Nicholas*, 430 F.3d at 670. It was those statutory constraints that mitigated DNA's "*potential* to be broadly revealing." *Nicholas*, 430 F.3d at 670. The City's policy, by contrast, is not governed by statute, but by officer discretion, and includes none of the safeguards considered essential to upholding the DNA programs in *Amerson* and *Nicholas*.

As for the government's interest, *Amerson* and *Nicholas* focused on the interest in storing "accurate identifying information from *convicted offender*s," not mere suspects. *Amerson*, 483 F.3d at 87 (emphasis added); *see Nicholas*, 430 F.3d at 669. Whatever interest the government has in the accurate identification of arrestees, the City's policy far exceeds that justification—it applies to suspects, whether under arrest or not, whether formally charged or not, whether suspected of a serious crime or a petty one, without any statutory or judicial check on officer discretion. *Compare King*, 569 U.S. at 443-44, 465. The City's interest here is the routine law enforcement interest of finding evidence against a suspect to prove criminal wrongdoing, and that interest "generally requires the obtaining of a judicial warrant." *Riley*, 573 U.S. at 382 (cleaned up).

IV. THE DISTRICT COURT ERRED BY DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION.

Finally, the district court should have retained supplemental jurisdiction to answer "whether, and to what extent, Article 49-B governs, authorizes, or preempts

the operation of OCME's Suspect Index." SPA 43. The City does not dispute that these claims are not "novel," as the district court held, or that they present only questions of statutory interpretation and preemption—matters federal courts routinely resolve. AOB 54-56. Nor does it dispute that other *Gibbs* factors—most notably, judicial economy and convenience—favor retaining jurisdiction. AOB 56-57. Instead, it primarily argues that supplemental jurisdiction is inappropriate because the New York Court of Appeals has not first settled the state law claims, while simultaneously opposing certification of those claims to the Court of Appeals. Resp. 59-61. The City cannot have it both ways. Insofar as the City frets that a "tentative federal court ruling could … be displaced by a contrary state court decision," Resp. 59, that only militates in favor of certifying the question to the Court of Appeals, especially given the significant record developed here. AOB 57-58.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

Date: November 12, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Second Circuit Local Rule 32.1(a)(4)(B). It contains 6,990 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type styles requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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