UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHAKIRA LESLIE, on behalf of herself and all others similarly situated, Plaintiff, v. 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; Defendants.	No. 1:22-CV-02305-NRB

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

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ARGUMENT

The City's opposition fails to raise any genuine dispute of material fact or rebut Ms. Leslie and the putative class's ("plaintiffs") legal arguments in support of their cross motion for summary judgment. Instead, the City references several "concessions" that plaintiffs never made, mischaracterizes controlling U.S. Supreme Court and Second Circuit caselaw, and even objects to plaintiffs' use of the City's *own* data reflecting its DNA collection practices. Because the City's legal arguments are unavailing and plaintiffs' facts are undisputed, plaintiffs are entitled to summary judgment.

I. THE CITY'S PRACTICE OF SEARCHING PLAINTIFFS' DNA.

A. Under Settled Law, New Yorkers Have a Reasonable Expectation of Privacy in their DNA.

The City suggests that plaintiffs' claim fails because Ms. Leslie did not demonstrate a subjective expectation of privacy by, for instance, "communicat[ing] a desire to keep her DNA private," Defs. Opp. at 5-6 (ECF No. 151), but this defies common sense and ignores controlling caselaw holding that DNA analysis necessarily implicates the Fourth Amendment.[1] Indeed, the Second Circuit in *Nicholas v. Goord* explicitly "reject[ed] the . . . suggestion that the Fourth Amendment might not apply to New York's DNA statute because plaintiffs may not have a reasonable expectation of privacy in their DNA," and held instead that the "analysis of [their] blood for DNA-indexing purposes constituted [as a matter of law] a search implicating the Fourth Amendment." 430 F.3d 652, 658 (2d Cir. 2005); *see also United States v. Davis*, 657 F. Supp. 2d 630, 645 (D. Md. 2009) ("Courts addressing whether DNA analysis comports with the Fourth

[1] This argument also ignores that the City secretly collects the DNA of *unsuspecting* New Yorkers, Defs. Resp. to Pls. Rule 56.1 Statement ¶ 8 (ECF No. 157), who should still somehow foresee the need to communicate that their DNA is private.

Amendment in other contexts seem to operate on the premise that individuals *always* have a *subjective* expectation of privacy in their DNA, unless and until a DNA sample is taken from them, with their knowledge, for law enforcement purposes."), *aff'd*, 690 F.3d 226 (4th Cir. 2012). And in *United States v. Amerson*, the Second Circuit declared that "[i]t is settled law that DNA indexing statutes . . . are subject to the strictures of the Fourth Amendment," describing the "analysis and maintenance" of DNA in a database as a separate, "much more serious invasion of privacy" than the physical intrusion of collecting DNA.[2] 483 F.3d 73, 77, 80 (2d Cir. 2007). These decisions comport with the U.S. Supreme Court's approach in Fourth Amendment cases. In *Carpenter v. United States*, for example, the Court held—based on precedent and without considering what evidentiary showing the defendant made concerning his subjective expectations—that people have a reasonable expectation of privacy in the record of their physical movements captured through cell-site location records. 585 U.S. 296, 309-13 (2018).

In opposition, Defs. Opp. at 4-5, the City cites cases for the general rule that Section 1983 plaintiffs have the burden of proof—a burden that is met here because courts "operate on the premise that individuals *always* have a *subjective* expectation of privacy in their DNA," *Davis*, 657 F. Supp. 2d at 645, as the Second Circuit did in *Nicholas*, a Section 1983 case, 430 F.3d at 656-58. And the City's citation to *People v. Sterling*, 57 A.D.3d 1110 (3d Dep't 2008), cannot overcome the "settled" Second Circuit law that all individuals have a reasonable expectation of privacy in their DNA.

[2] *Amerson* rejected the City's claim that including DNA in CODIS presents a minimal privacy intrusion, *see* Defs. Opp. at 2, 7-8, when it held that the "analysis and maintenance of [offenders'] information in CODIS, the federal database is, in itself, a significant intrusion." 483 F.3d at 85 (cleaned up).

B. The City Offers No Serious Defense for Why Items that the NYPD Prevents People from Taking Are "Abandoned."

The City argues that plaintiffs cannot prevail on their Fourth Amendment claim because their DNA is abandoned, Defs. Opp. at 8-9, but this argument fails because the City admits facts showing that it *prevents* people, like Ms. Leslie, from taking items with their DNA out of police interrogation rooms. *See* Defs. Resp. ¶¶ 22, 25-27, 140. It is a "misnomer" to call a DNA sample abandoned when a "captive defendant uses an item and the police harvest it specifically to obtain DNA" because that sample was "not abandoned but rather seized." *People v. Flores*, 65 Misc. 3d 971, 975 (N.Y. Sup. Ct., Bronx Cnty. 2019). When the NYPD "prevent[s] [plaintiffs] from retrieving" the cans, cups, or other items with their DNA, plaintiffs could not have abandoned those items. *Cf. United States v. Davis*, 624 F.3d 508, 511 (2d Cir. 2010).

The undisputed facts show that NYPD's policy is to prevent suspects from retaining their DNA samples—a policy it executed here. Ms. Leslie's DNA collection video is a clear example of how the NYPD's "investigative tactic"—to "not allow a prisoner to keep [their] . . . water bottle or the like" so it could "obtain and secure it as an 'abandoned' sample"—works. *Flores*, 65 Misc. 3d at 975. And after the NYPD handcuffed and escorted Ms. Leslie back to a holding cell, her after-the-fact belief that the NYPD must have thrown out the cup she drank from only confirms that she had not "purposefully divested [herself] of the cup or [her] DNA" because she "was unaware that the cup, in which [s]he had been offered a drink of water, would be used to collect a DNA sample that could be used against [her] at a later date and retained by OCME in perpetuity." *Matter of Francis O.*, 208 A.D.3d 51, 57-58 (1st Dep't 2022).

The lone case the City cites to argue that these NYPD policies do not prevent abandonment lends it no support. *See* Defs. Opp. at 19 (citing *Commonwealth v. Bly*, 448 Mass. 473, 489-91 (2007)). In *Bly*, the Massachusetts court never addressed the defendant's argument that "no legal

abandonment can occur in circumstances where he was required by the Commonwealth to leave the items behind," explaining that its holding was not based on "a finding that [Bly] legally abandoned" the items with his DNA.[3] 448 Mass. at 490. The City's only remaining defense is an unserious one: that people leaving interrogation rooms must overcome their handcuffs to "take the [item] with [them]" to avoid abandoning their DNA. Defs. Opp. at 19. But such a rule would make a mockery of the requirement that abandonment must be voluntary. *See California v. Greenwood*, 486 U.S. 35, 40-41 (1988). The Fourth Amendment does not require that New Yorkers perform Houdini-like tricks to maintain their privacy interests.

C. Under *Carpenter*, the Abandonment Doctrine Does Not Apply to Involuntarily-Shed DNA, and the City's Attempts to Distinguish *Carpenter* Fail.

The City suggests that *Carpenter* is distinguishable because the City's testing of Ms. Leslie's DNA revealed only her genetic profile and her sex while the data shared with the government in *Carpenter* was more "deeply revealing."[4] Defs. Opp. at 11-12. But the City misunderstands *Carpenter*, where the cell-site location records could "not on their own suffice to place [Carpenter] at" a specific location because the records only "placed him within a wedge-shaped sector ranging from one-eighth to four square miles." 585 U.S. at 312 (cleaned up). Despite this lack of precision, the Court still found that the records hold the "privacies of life," because "the Government *could*, in combination with other information, deduce a detailed log of

[3] The facts in *Bly* are also materially different from here because detectives "prompted" Bly to go back and collect the items from the room and waited 30 minutes for him to "return or protest." 448 Mass. at 490-91. The court's discussion of whether Bly had an expectation of privacy in his DNA directly conflicts with Second Circuit law. *See id.*; *compare Amerson*, 483 F.3d at 84-85.

[4] Dr. Noureddine's reliance on a 2022 study that suggests that DNA profiles may reveal personal medical information is not speculation merely because the study is not "definitive." Defs. Opp. at 12.

Carpenter's movements." *Id.* at 311-12 (emphasis added) (cleaned up). Thus, the Court found that what the location records *could* reveal—not just what they *did* reveal—was central to the privacy interest at stake. *Id.*

Given *Carpenter*'s holding, the City's repeated attempts to liken DNA to fingerprints fail. Defs. Opp. at 15-18. The limited information that the City can glean from fingerprints pales in comparison to the vast information it could extract from DNA, Defs. Resp. ¶¶ 173, 183, the breadth of which is even greater than what was at stake in *Carpenter*. Despite focusing on DNA profiles, the City does not contest (nor could it) that under its view of the abandonment doctrine, the entirety of a suspect's genome would be abandoned. Indeed, the undisputed facts show that the NYPD retains every "abandoned" DNA sample indefinitely. Defs. Resp. ¶ 47. Thus, the City's practice of collecting the DNA samples of unsuspecting New Yorkers routinely "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).

The City looks to *Maryland v. King* to support its attempt to limit the privacy concern here, Defs. Opp. at 11-15, but the City's practice lacks *any* of the safeguards found in *King*. By statute, Maryland deployed a uniform, non-discretionary DNA testing program for arrestees for serious offenses at booking, had "statutory protections that guard against" testing for any purpose other than "identification," and 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." 569 U.S. 435, 443, 448 (2013). Against this backdrop, the Supreme Court held that the privacy interests were reduced and upheld the DNA searches as a reasonable "routine booking procedure." *Id.* at 461-62. Here, by contrast, the City affords its detectives wide discretion to collect DNA and, with no statutory safeguards, the NYPD ostensibly polices itself

through self-imposed discretion-laden policies, some of which the NYPD admits it has repeatedly violated. Defs. Resp. ¶¶ 31-34, 39-43, 107-12, 119.

This case is similar to *Carpenter* not only because DNA analysis reveals private information, but also because ordinary citizens cannot help exposing the purportedly abandoned information. The City admits that, short of wearing a biohazard suit, there is nothing Ms. Leslie nor any New Yorker could do to prevent shedding their DNA into a police interrogation room. Defs. Resp. ¶¶ 161, 164. This admission confirms that, as in *Carpenter*, the "voluntary exposure" argument does not "hold up" with respect to DNA because people shed DNA "without any affirmative act" and cannot avoid "leaving behind" DNA.[5] *Carpenter,* 585 U.S. at 315.

The City also asks this Court to reject as speculation that technological advancements will erode Fourth Amendment protections by, for instance, enabling the City to vacuum the air in interrogation rooms to collect DNA samples. Defs. Opp. at 17-18. But this "air sampling" technology *is* in development, and researchers have suggested it could be used to aid criminal investigations. Dr. Noureddine Expert Rep., Appendix B, at 472, 522-23, 535 (ECF Nos. 144-47, 144-48). And turning a blind eye to this fact, as the City suggests, would ignore *Carpenter*'s teaching that the "rule" courts adopt "*must* take account of more sophisticated systems that are already in use *or in development.*" 585 U.S. at 313 (emphasis added) (quoting *Kyllo*, 533 U.S. at 36).

The City cites a handful of post-*Carpenter* state court cases to distinguish *Carpenter*, Defs. Opp. at 13-14, but none are persuasive. For example, *State v. Hartman* does not even involve a

[5] The City claims without support that the fact that DNA evidence is invisible to the naked eye and cannot be properly analyzed without special equipment and expertise "has no bearing on" the privacy analysis. Defs. Opp. at 17. But whether the item was voluntarily and knowingly exposed to the public (and the public's ability to analyze that item) is key to the analysis. *Greenwood*, 486 U.S. at 39-41; *Kyllo v. United States*, 533 U.S. 27, 33, 40 (2001).

Fourth Amendment claim, and instead addressed the Washington Constitution's provision that "[n]o person shall be disturbed in his private affairs . . . without authority of law," which the court acknowledged "is qualitatively different from the Fourth Amendment." 534 P.3d 423, 431 (Wash. Ct. App. 2023). The City's reliance on *McCurley v. State* is likewise misplaced because McCurley conceded that he abandoned the property at issue. 653 S.W.3d 477, 490 (Tex. Ct. App. 2022).

People v. Mendez is no more persuasive. There, the court relied on cases "decided before *Carpenter*" to find that the analysis of DNA to develop a DNA profile is not a search, 73 Misc. 3d 715, 719 (N.Y. Sup. Ct., Bronx Cnty. 2021), which directly conflicts with Second Circuit law. *See Amerson*, 483 F.3d at 84-85. Finally, the City relies on *State v. Burns*, which (i) myopically narrowed *Carpenter*'s teachings to the records of "a person's *physical movements*," on which "DNA provide[s] almost no information," and (ii) held that the DNA analysis at issue revealed no deeply personal information, 988 N.W.2d 352, 364-65 (Iowa 2023), disregarding *Carpenter*'s clear holding that the "privacies of life" are implicated by what *could be* revealed, not just what was revealed.

Finally, in a last-ditch effort to escape *Carpenter*, the City resorts to the old saw that protecting individual liberties would make law enforcement activity more difficult. Defs. Opp. at 20-23. But "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (declining to adopt a "murder scene exception" to the warrant requirement). If the City finds the warrant requirement inconvenient, its gripe is not with plaintiffs, but with "those who wrote the Bill of Rights." *Id.*

II. THE CITY'S PRACTICE OF SEARCHING PLAINTIFFS' DNA IS UNREASONABLE.

The City's arguments defending their practice of searching plaintiffs' DNA as reasonable are foreclosed under controlling law. First, the City claims that the comparison of a person's DNA to crime scene DNA is not a search and thus no warrant is required. But that argument is meritless. The Second Circuit has repeatedly held that the "analysis and maintenance" of someone's DNA in an index, where it is compared to crime scene DNA evidence, is a Fourth Amendment search. *Nicholas*, 430 F.3d at 670; *Amerson*, 483 F.3d at 83. The City's argument that DNA comparison is not a search finds no support in *Arizona v. Hicks*, a case that pre-dates *Nicholas* and *Amerson* and has nothing to do with DNA. 480 U.S. 321 (1987). Indeed, *Hicks*' suppression of a serial number undermines the City's (incorrect) argument that plaintiffs have little privacy interest in their DNA profiles, *see* Defs. Opp. at 23-25, because it held that "[a] search is a search" and "[i]t matters not that the search uncovered nothing of any great personal value." *Id.* at 325.

Second, the City argues that Ms. Leslie was not subjected to a suspicionless search because she was arrested on suspicion of gun possession and, as a result, the special needs test does not apply here. Defs. Opp. at 23-25. But the City is conflating different searches. The balancing test applies to the City's comparison of Ms. Leslie's DNA to the gun because it suspected her of possessing the gun. Pls. Mem. at 20 (ECF No. 141). But the special needs test applies to the City's comparison of Ms. Leslie's DNA to its entire database of crime scene DNA evidence because that is a series of suspicionless searches, as the City had *no* basis to suspect her in those countless crimes. *Id.* at 18-20; *Amerson*, 483 F.3d at 81.

Finally, the City applies the balancing test and ignores many of plaintiffs' undisputed facts to fix the scale in its favor. Defs. Opp. at 23-25; *compare* Pls. Mem. at 20-23. Contrary to the City's claim, Ms. Leslie's privacy interest in the analysis of her DNA (which the City never

addresses) is a "significant intrusion" regardless of her status as an arrestee. *Amerson*, 483 F.3d at 85. And the City's interest here is not compelling because it collects DNA samples to prove criminal wrongdoing, which is merely a "normal law enforcement interest." *Id.* at 89 n.16.

III. THE CITY'S SUSPECT INDEX VIOLATES THE EXECUTIVE LAW, AND ITS LONE ARGUMENT OTHERWISE IS MERITLESS.

The City's argument that Executive Law § 995-c(9)(b) undermines plaintiffs' state law claim both mischaracterizes the statute and ignores appellate authority rejecting this argument. *See* Defs. Opp. at 28-29. New York Executive Law § 995-c(9)(b)—which never uses the word "index"—provides for the expungement of DNA records *not* included in the state DNA Identification index. Executive Law § 995-c(9)(b) only contemplates the expungement of DNA records that local laboratories like OCME obtained "*voluntarily or pursuant to a warrant or order of a court*" for "DNA testing in connection with the investigation or prosecution of a crime" (emphasis added). The Executive Law does not allow laboratories to *index* those DNA records unless the person is a "designated offender." N.Y. Exec. Law § 995-c(3). The First Department confirmed: the "mandatory DNA requirements of [the Executive Law] do not apply and cannot be invoked to collect DNA from a suspect by law enforcement for use in the investigation or prosecution of a crime." *Samy F. v. Fabrizio*, 176 A.D.3d 44, 53 (1st Dep't 2019). Because plaintiffs' state law claim only challenges the City's Suspect Index, not the City's ability to conduct DNA testing upon consent or a warrant, Executive Law § 995-c(9)(b) has no bearing on this case. The 20-year-old letter from former Commissioner Parker the City also cites for support is irrelevant because the Executive Law does not authorize its indexing practice, *see id.*, and the Commission on Forensic Science confirmed it has no "statutory authority" over OCME's local index. Facts ¶ 100 (ECF No. 142). Still, this Court should strike the letter as inadmissible because defendants' counsel lacks personal knowledge to authenticate it. Fed. R. Civ. P. 56(c)(4).

IV. DR. STARKEY'S DECLARATION IS ADMISSIBLE AS SUMMARY CALCULATIONS UNDER FRE 1006 AND CANNOT BE PRECLUDED.

The City claims that the Court should exclude Dr. Starkey's declaration as improper expert witness testimony, Defs. Opp. at 31-34, but Dr. Starkey did not provide expert testimony. Rather, Dr. Starkey, an employee of plaintiffs' counsel, The Legal Aid Society, merely presented calculations of the City's own data, which is not expert opinion evidence and thus not subject to the disclosure requirements. *See Sec. & Exch. Comm'n v. Lek Sec. Corp.*, 2019 WL 3034888, at *3 (S.D.N.Y. July 11, 2019) (finding that summary witnesses are "not testifying as experts and [the proponent] had no duty to disclose them as expert witnesses").

A party may provide "a summary, chart, or *calculation* offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006(a) (emphasis added). The rule's purpose is to avoid forcing the fact finder "to examine boxes of documents in order to make simple calculations." *Fagiola v. Nat'l Gypsum Co.*, 906 F.2d 53, 57 (2d Cir. 1990). The Starkey Declaration is merely a description of the "calculation[s]" she made to summarize a voluminous spreadsheet the City produced during discovery. Starkey Decl. ¶¶ 8, 11-12, 14, 15-16 (ECF No. 145); Defs. Opp. at 32 (admitting they produced the spreadsheet). Indeed, the underlying spreadsheet contains 15,017 rows and 37 columns of data describing several years of abandonment sample collections. Desgranges Decl. Ex. 28 (ECF No. 143-28); Starkey Decl. ¶ 6 (ECF No. 145). Dr. Starkey's calculations simply summarize the information found in the data set provided by City, and the City cannot credibly claim to be prejudiced by a summary of its *own* dataset.[6] Dr. Starkey clearly laid out her

[6] The City asks the court to preclude Dr. Starkey's testimony based on Rule 37(c)(1) because it is "no[t] harmless." Defs. Opp. at 32. But the purpose of that rule is to prevent "sandbagging" the other party with new evidence, *Highland Cap. Mgmt. v. Schneider*, 551 F. Supp. 2d 173 (S.D.N.Y. 2008) (cleaned up), and the City cannot be sandbagged with a summary of its *own* data.

methodology, the deficiencies in the City's data, and any assumptions that were required to summarize the data. Starkey Decl. ¶¶ 7-20; *see Sec. & Exch. Comm'n*, 2019 WL 3034888, at *3 ("[T]he use of" disclosed and reasonable "assumptions is appropriate and does not convert the summary evidence into expert testimony."). The Court should therefore reject the City's request to exclude the Starkey Declaration.

CONCLUSION

Plaintiffs respectfully request that this Court deny defendants' motion for summary judgment, grant plaintiffs' cross motion for summary judgment, and grant the relief requested in their cross motion.

Dated: September 22, 2025
New York, N.Y.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I, Craig McAllister, certify that this memorandum of law complies with the Local Rule 7.1. Excluding the caption, any index, table of contents, table of authorities, signature blocks, and any required certificates, this memorandum of law contains 3,485 words, according to the word-processing program used to prepare the document.

Dated: September 22, 2025

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