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7  
 8 **IN THE UNITED STATES DISTRICT COURT**  
 9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 **MICHAEL WEBER, ET AL.,**

C 04-5161

11 Plaintiff,

12 v.

13 **BILL LOCKYER, Attorney General of the State of**  
**California, et al.,**

14 Defendants.  
 15

16  
 17 **NOTICE OF MOTION AND MOTION OF DEFENDANTS LOCKYER,**  
**STEINBERGER AND GIMA TO DISMISS THE COMPLAINT**  
 18

19 Date: March 31, 2005  
 20 Time: 2:00 p.m.  
 Courtroom: 5, 17<sup>th</sup> Floor

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7 IN THE UNITED STATES DISTRICT COURT  
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9 **MICHAEL WEBER, ET AL.,**

C 04-5161

10 Plaintiff,

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 LOCKYER, STEINBERGER  
 AND GIMA TO DISMISS THE  
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11 v.

12 **BILL LOCKYER, Attorney General of the State of  
 13 California, et al.,**

14 Defendants.

Date: March 31, 2005  
 Time: 2:00 p.m.  
 Courtroom: 5, 17<sup>th</sup> Floor

15  
 16 TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

17 PLEASE TAKE NOTICE that, on March 31, 2005, at 2:00 p.m., in Courtroom 5, presided  
 18 over by United States District Judge Fern M. Smith, at the United States District Court for the  
 19 Northern District of California, located at 450 Golden Gate Avenue in San Francisco, California,  
 20 defendants Bill Lockyer, Eva Steinberger, and Lance Gima (the State Defendants) will ask the Court  
 21 for an order dismissing the complaint in this case under Rule 12(b)(1) of the Federal Rules of Civil  
 22 Procedure.

23 By this motion, the State Defendants seek dismissal of the complaint for lack of subject  
 24 matter jurisdiction on the grounds that plaintiffs lack standing to pursue the claims in their  
 25 complaint, that there is not a case or controversy presented by these plaintiffs, and that plaintiffs'  
 26 proposed as-applied challenge to Proposition 69, California's DNA Fingerprint, Unsolved Crime  
 27 and Innocence Protection Act, is not ripe. The State Defendants seek dismissal of plaintiffs' entire  
 28 complaint for its failure to present a justiciable controversy.

1 The State Defendants' motion to dismiss is based on this notice of motion and motion, the  
2 supporting memorandum of points and authorities, the declaration of Paul D. Gifford, and any other  
3 matter that may be presented at the hearing on this motion.

4 Dated: February 4, 2005

5 Respectfully submitted,

6 **BILL LOCKYER**  
Attorney General of the State of California

7  
8 **PAUL D. GIFFORD**  
9 Deputy Attorney General  
10 Attorneys for Defendants

11  
12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **ISSUES PRESENTED**

14 As a result of an initiative overwhelmingly approved by California voters at the last general  
15 election in November 2004, California's DNA Database and Data Bank Program will ultimately  
16 be expanded to include certain persons arrested for, or charged with, felonies, in addition to the  
17 convicted felons already included in the program's scope. But the nine individual named  
18 plaintiffs in this proposed class action will not be subject to the expanded DNA Data Bank  
19 Program on the basis of the past events alleged in their complaint, as a California Department of  
20 Justice Information Bulletin distributed to law enforcement officials confirms. Do plaintiffs  
21 have standing to maintain this action against the expanded DNA Data Bank Program? Is  
22 plaintiffs' as-applied challenge ripe in the absence of any application of the expanded program to  
23 them? Does plaintiffs' complaint present a current case or controversy in the absence of any  
24 credible showing that they are or will be subject to the expanded program?

25 **INTRODUCTION**

26 On November 2, 2004, California voters passed Proposition 69, a measure known as the  
27 DNA Fingerprint, Unsolved Crime and Innocence Protection Act. In relevant part, Proposition  
28 69 amended California's extant DNA Database and Date Bank Program immediately to include

1 in mandatory DNA sample collection persons convicted of any felony offense and persons  
2 arrested for or charged with murder, voluntary manslaughter or specified sex crimes. Their  
3 DNA samples will be taken by buccal cheek swab. The pertinent portion of Proposition 69 also  
4 amended the Data Bank Program to include in mandatory DNA sample collection, beginning in  
5 January 2009, adults arrested for or charged with any felony offense. Plaintiffs' challenge is  
6 aimed at the future implementation of this 2009 arrestee provision of California's DNA Data  
7 Bank Program.

8 The named individual plaintiffs say they fall into two categories, which they propose as  
9 plaintiff classes: (1) Plaintiffs Weber, Blair, Rivas, Ware, Craig, and Lam allegedly are persons  
10 who will be compelled to submit DNA samples solely by reason of the fact that they have  
11 previously been arrested for, or charged with, a felony; (2) plaintiff Walker allegedly is subject  
12 to compelled DNA sample collection, because she was previously convicted of a felony,  
13 although she is no longer subject to any criminal justice system supervision, having completed  
14 all periods of probation or parole. Plaintiff Walker is a member of plaintiff All of Us or None,  
15 an unincorporated association that allegedly works to eliminate the stigma and other residual  
16 consequences of past felony convictions and incarceration. Americans for Safe Access, a non-  
17 profit corporation involved in medical marijuana advocacy, is also a plaintiff. The complaint  
18 does not allege that any individual plaintiff is a member of this organization.

19 Plaintiffs expressly and specifically make an as-applied challenge to Proposition 69.  
20 (Complaint, p. 20, ¶¶60; p. 22, ¶¶ 1-2.) They allege that Proposition 69 is unconstitutional as  
21 applied to persons who have only been arrested for, or charged with, a felony and to persons who  
22 have been convicted of felonies, but who have completed their periods of incarceration or who  
23 have are no longer subject to any criminal justice system supervision. Plaintiffs seek declaratory  
24 and injunctive relief.

25 But plaintiffs lack standing to challenge Proposition 69 as allegedly applied to their  
26 circumstances or to their proposed classes. Plaintiffs are not, and will not be, subject to  
27 compulsory DNA sample collection under Proposition 69 under the circumstances alleged in  
28 their complaint. And their claims are not justiciable; ripeness and a present case or controversy

1 are lacking, particularly as to any injunctive relief claim. As even plaintiffs admit, the allegedly  
2 offending Proposition 69 provisions could not be applied to them until January 2009. Thus,  
3 there is no real and immediate threat of harm posed to these plaintiffs. For all these reasons, the  
4 State Defendants ask that plaintiffs' complaint be dismissed.

5 **STATEMENT OF FACTS<sup>1/</sup>**

6 With one exception, the named individual plaintiffs were arrested before November 2,  
7 2004, the date California voters approved Proposition 69. Plaintiffs allege that Mary Pruitt was  
8 arrested on October 15, 2001 (Complaint, p. 6, ¶13); that Rodney Ware was arrested in April  
9 2004 (Complaint, p. 7, ¶14); that Rachel Delucci-Youngberg was arrested in July 2001  
10 (Complaint, p. 7, ¶15); that James Blair was arrested in December 2003, and January 2004  
11 (Complaint, pp. 7-8, ¶16); that Think Lam was arrested on April 29, 2003 (Complaint, p. 8, ¶17);  
12 that Ruben Rivas was arrested in 2000 (Complaint, p. 8., ¶18); that Jason Craig was arrested in  
13 February 2004 (Complaint, p. 9, ¶19); that Linda Walker was arrested numerous times during the  
14 years from 1983 to 1993 (Complaint, p. 8, ¶20). The exception is Michael Weber, who allegedly  
15 was arrested on November 3, 2004. (Complaint, p. 6, ¶12.) According to the complaint, Weber  
16 was arrested for felony assault on a peace officer. (Complaint, p. 6, ¶12.)

17 Plaintiffs allege that only Mary Pruitt and Linda Walker have been convicted of a felony.  
18 The other seven individual plaintiffs have not been convicted of a felony. And Think Lam is the  
19 lone plaintiff currently incarcerated, while awaiting trial for murder. (Complaint, p. 10, ¶22.)

20 The individual plaintiffs have not provided DNA samples under Proposition 69. Although  
21 plaintiff Lam has been required to provide a DNA sample by previous court order, that order  
22 precludes the inclusion of Lam's sample in any state or national DNA database. (Complaint, pp.  
23 9-10, ¶21.)

24 Plaintiffs say that All of Us or None is an unincorporated association promoting the  
25 interests of former felons. Its membership includes many former California felons who have  
26

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27 1. This statement of facts reports or summarizes only those allegations relevant to plaintiffs'  
28 standing, the absence of a case or controversy, or the lack of ripeness.

1 completed service of their sentences and who are no longer subject to any criminal justice  
2 system supervision. (Complaint, p. 10, ¶23.) Plaintiff Linda Walker is a member of this  
3 organization. (Complaint, p. 9, ¶20.)

4 According to the complaint, Americans for Safe Access is a non-profit corporation trying to  
5 protect the interests of patients and doctors using marijuana for medical purposes. Plaintiffs  
6 allege that this organization's members will be subject to Proposition 69's DNA sample  
7 submission requirements solely on the basis of arrest for offenses that will be defensible under  
8 California medical marijuana laws. (Complaint, pp. 10-11, ¶24.)

9 The California Department of Justice has widely distributed to California law enforcement  
10 authorities an Information Bulletin describing as its subject "Proposition 69 – DNA Fingerprint,  
11 Unsolved Crime and Innocence Protection Act, Effective November 23, 2004." (Gifford Decl. p.  
12 1, ¶2.) Although the bulletin has not yet issued in its final form, it has been distributed  
13 throughout the California law enforcement community, and it is being used in Department of  
14 Justice training sessions for California law enforcement agencies. (Gifford Decl., pp.2-3, ¶3.)  
15 The bulletin "addresses central features of Proposition 69, including the responsibilities of law  
16 enforcement, correctional agencies, and mental health and sex offender treatment facilities with  
17 respect to the State's DNA Data Bank Program (PC 295 et seq)." (Gifford Decl., Exhibit A,  
18 p.1.)

19 Under the heading "Limitations on Collection," the DOJ bulletin explains: "Proposition 69  
20 does not authorize DNA sample collection for any arrests that occurred before November 3,  
21 2004, nor does it authorize DNA sample collection upon arrest based on *prior* felony convictions  
22 or adjudications of record. Likewise, the broader collection of felony arrestee samples from  
23 adults that will begin on January 1, 2009, is not retroactive to arrests that took place before  
24 January 1, 2009. (PC 296(a)(2)(C).)" (Gifford Decl., Exhibit A, p. 4 [italics in original].)  
25 Similarly, in a section specifying the persons who qualify for DNA sample collection under  
26 Proposition 69, the DOJ bulletin says that the new law will require DNA samples from "all  
27 adults arrested for any felony offense on or after January 1, 2009." (Gifford Decl., Exhibit A, p.  
28 3.) It makes clear that "[t]his expansion of the arrestee provision is not retroactive to arrests that



1 took place before January 1, 2009.” (Gifford Decl., Exhibit A, p. 3.)

2 **ARGUMENT**

3 **I.**

4 **THE NAMED PLAINTIFFS LACK STANDING TO CHALLENGE THE SPECIFIC**  
5 **PROPOSITION 69 PROVISIONS CHALLENGED IN THEIR COMPLAINT.**

6 Plaintiffs make clear that they do not challenge Proposition 69 in its entirety. (Complaint,  
7 p. 5, ¶7.) Rather, their as-applied challenge (Complaint, p.20, ¶60) attacks solely the new  
8 California Penal Code provisions that allegedly subject all adult felony arrestees and former  
9 convicted felons to DNA testing requirements. But plaintiffs do not have standing to bring their  
10 premature action.

11 **A. The challenged Proposition 69 provisions will not apply to any**  
12 **individual plaintiff under the circumstances alleged in the complaint.**

13 Plaintiffs’ complaint is based on the mistaken assumption that Proposition 69 is completely  
14 retroactive. According to plaintiffs, Proposition 69 will require that any person who has *ever*  
15 been arrested for, or charged with, any felony submit to DNA testing after January 1, 2009.  
16 (Complaint, p. 17, ¶51.) Plaintiffs also mistakenly say that Proposition 69 compels the collection  
17 of DNA samples from all former felons, regardless of their completion of sentences and releases  
18 from criminal justice supervision.

19 As amended by Proposition 69, California Penal Code section 296, subdivision (a)(2)(C)  
20 requires that “any adult person arrested or charged with any felony offense” provide a DNA  
21 sample “commencing on January 1 of the fifth year following enactment of ...” Proposition 69.  
22 Since Proposition 69 was enacted in 2004, compulsory DNA sample collection from all adult  
23 felony arrestees will begin in January 2009.

24 Despite plaintiffs’ contrary allegations, the State defendants would and could argue that  
25 Penal Code section 296, subdivision (a)(2)(C) is not retroactive. But extended debate on this  
26 point is not necessary, because California’s chief law enforcement official, its Attorney General,  
27 says that the expanded arrestee provisions of Proposition 69 are not retroactive to arrests that  
28 occur before January 1, 2009. (Gifford Decl., Exhibit A, p. 4.)

1 Under California's DNA and Forensic Identification Database and DNA Data Bank Act,  
2 California Penal Code section 295 et seq., the California Department of Justice is responsible for  
3 implementing the state's DNA Data Bank laws and for management and administration of the  
4 DNA program. Cal. Penal Code § 295, subs. (g) and (h). Fulfilling its responsibility under the  
5 Act, the Department of Justice has widely distributed an Information Bulletin directed to  
6 "California Law Enforcement Agencies and Personnel." (Gifford Decl., Exhibit A, p. 1.) That  
7 bulletin, which is being used in training of law enforcement personnel statewide, excludes all the  
8 individual plaintiffs from compulsory DNA sample collection based on the facts and  
9 circumstances alleged in their complaint, because it explains that Proposition 69's expanded  
10 arrestee provisions do not apply to persons arrested before January 1, 2009. (Gifford Decl.,  
11 Exhibit A, pp. 3 and 4.)

12 According to the complaint, eight of the nine individual plaintiffs were arrested for, or  
13 charged with, felonies before November 2, 2004. All those plaintiffs are not, and will not be,  
14 subject to any compulsory DNA sample collection under Proposition 69 based on their earlier  
15 arrests or convictions as alleged in the complaint. The one individual plaintiff arrested after  
16 November 2, 2004, Michael Weber, also is not, and will not be, subject to Proposition 69's  
17 mandatory DNA sample submission requirements.

18 Plaintiffs allege that Mr. Weber was arrested on November 3, 2004, for felony assault on a  
19 police officer. (Complaint, p. 6, ¶12.) His charged offense, however, does not make him a  
20 person who qualifies for compulsory sample collection. Until January 1, 2009, California's  
21 DNA law requires only certain felony arrestees to provide DNA samples. Penal Code section  
22 296, subdivision (a)(2) currently authorizes DNA sample collection from persons arrested for  
23 murder, voluntary manslaughter, a felony sex offense, or an attempt to commit one of those  
24 enumerated crimes. Until January 1, 2009, an arrest for any other felony offense does not  
25 qualify the arrested person for DNA sample submission. Thus, Mr. Weber is likewise not  
26 subject to Proposition 69's sample submission requirements.

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1       **B. The individual plaintiffs cannot sustain their burden of showing that**  
2       **they have standing to challenge the targeted provisions of Proposition**  
3       **69.**

3       Plaintiffs bear the burden of establishing their standing to bring this action. *Lujan v.*  
4 *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The required showing demands satisfaction of  
5 the three minimum Article III standing elements. Plaintiffs must first show they have suffered  
6 an injury in fact. Because they seek solely equitable relief, plaintiffs must establish a very  
7 significant possibility of future harm. *San Diego County Gun Rights Committee v. Reno*, 98 F.3d  
8 1121, 1126 (9<sup>th</sup> Cir. 1996). They then must establish a causal connection between their claimed  
9 injury and the defendants' conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. at 561. Finally,  
10 plaintiffs must show that their injury will likely be redressed by a favorable decision. *Id.* at 560-  
11 561. Plaintiffs cannot sustain their burden, which is an indispensable part of their case, not a  
12 mere pleading requirement. *Id.* at 561.<sup>2/</sup>

13       Plaintiffs have not suffered, and will not suffer, any injury caused by Proposition 69. To  
14 satisfy the injury element, plaintiffs must show “an invasion of a legally protected interest.” The  
15 injury must be “concrete and particularized” and “actual or imminent.” *Lujan v. Defenders of*  
16 *Wildlife*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495, U.S. 149, 155 (1990)). “An  
17 interest shared generally with the public at large in the proper application of the Constitution and  
18 the laws will not do.” *Arizonans For Official English v. Arizona*, 520 U.S. 43, 64 (1997).

19       At best, plaintiffs allege conjectural or hypothetical harm – a threat of compelled DNA  
20 sample collection in 2009 – based on their own, unofficial interpretation of Proposition 69's  
21 expanded arrestee provisions. They have not suffered any injury in fact, even if they  
22 unreasonably fear future DNA sample submission. Their unfounded fear is ethereal angst, not a  
23 concrete and particularized injury.

24       Plaintiffs also cannot establish any causal connection between an alleged injury and the  
25 State defendants' conduct. They bear the burden of showing that Proposition 69 is or will be

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27       2. As proposed class representatives, the individual plaintiffs must have standing for the  
28 class to have standing. *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260, 1264 (9<sup>th</sup> Cir. 1999).

1 enforced in their feared fashion. *San Diego County Gun Rights Committee v. Reno*, 98 F.3d at  
2 1127. But the Department of Justice’s Information Bulletin confirms that the State defendants do  
3 not interpret or intend to apply Proposition 69 in the manner that plaintiffs fear. That bulletin  
4 also confirms that the State defendants will not be taking any action to compel plaintiff’s  
5 submission of DNA samples based on the facts alleged in their complaint. Thus, plaintiffs will  
6 not be able to trace some claimed injury to the State defendants’ actions, failing another element  
7 of the standing test. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560.

8 **C. The association plaintiffs also cannot satisfy their burden of showing**  
9 **standing to attack the challenged provisions of Proposition 69.**

10 The named plaintiffs include two associations, All of Us or None and Americans for Safe  
11 Access. Plaintiff Linda Walker claims to be a member of All of Us or None, an unincorporated  
12 association that works to protect or to advance of the interests of former felons or inmates.  
13 (Complaint, p. 10, ¶23.) No individual plaintiff claims membership in Americans for Safe  
14 Access, a non-profit corporation acting as a medical marijuana advocacy organization.  
15 (Complaint, pp. 10-11, ¶24.) These two association plaintiffs also lack standing.

16 An association has standing to sue only if its members would have standing in their own  
17 right. *Arizonans For Official English v. Arizona*, 520 U.S. at 65-66. The requisite concrete  
18 injury to the association’s members must be apparent. *Id.* at 66. To establish standing, an  
19 association suing in a representative capacity must also show that “the interests it seeks to  
20 protect are germane to the organization’s purpose” and “neither the claim asserted nor the relief  
21 requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington*  
22 *Apple Advertising Commission*, 432 U. S. 333, 343 (1977).

23 Besides baldly saying that Proposition 69's implementation will have “an immediate and  
24 severe impact on the constitutional rights” of their members (Complaint, p. 10, ¶¶ 23-24), the  
25 association plaintiffs make little effort to satisfy the three-part test for association standing.  
26 Plaintiffs do not allege any apparent concrete injury to these associations’ members. They make  
27 no attempt to show that the interests their lawsuit seeks to protect are germane to the  
28 associations’ alleged purposes – protecting and advancing former felons’ rights or interests and

1 medical marijuana advocacy and training. For these reasons, and because any association  
2 members would lack standing on the basis of the allegations in the complaint, plaintiffs All of Us  
3 or None and Americans for Safe Access lack standing to pursue plaintiffs' claims.

## 4 II.

### 5 **PLAINTIFFS' PREMATURE CHALLENGE TO SPECIFIC PROVISIONS OF** 6 **PROPOSITION 69 ARE NOT RIPE FOR ADJUDICATION.**

7 The State defendants' standing argument contends that the named plaintiffs are not the  
8 proper parties to litigate this matter. The State defendants also contend that plaintiffs' claims are  
9 premature; that is, their specific Proposition 69 challenges are not ripe for adjudication. The lack  
10 of ripeness requires dismissal of the complaint.

11 Ripeness is a justiciability doctrine designed to prevent premature adjudication. *National*  
12 *Public Hospitality Assn. v. Department of Interior*, 538 U.S. 803, 807 (2003). Ripeness is  
13 essentially a question of timing. *Clinton v. Acequia, Inc.*, 94 F.3d 588, 572 (9<sup>th</sup> Cir. 1996). The  
14 ripeness doctrine seeks to avoid judicial entanglement in abstract disagreements. *Lee v. State of*  
15 *Oregon*, 107 F.3d 1382, 1387 (9<sup>th</sup> Cir. 1997).

16 A ripeness determination requires evaluation of "(1) the fitness of the issues for judicial  
17 decision and (2) the hardship to the parties of withholding court consideration." *National Public*  
18 *Hospitality Assn. v. Department of Interior*, 538 U.S. at 808. In this case, the required evaluation  
19 leads inevitably to the conclusion that plaintiffs' claims are not ripe.

20 Even assuming for the sake of argument that plaintiffs correctly interpret Proposition 69 as  
21 retroactively applicable to them – subjecting them to possible DNA sample submission in 2009 –  
22 the State defendants contend that plaintiffs' issues are not presently fit for judicial decision. As  
23 framed by plaintiffs, their dispute hinges on a future contingency that may never occur, the  
24 compelled collection of their DNA samples in 2009, on the basis of arrests that allegedly  
25 occurred long before that year. For that reason alone, plaintiffs' case is not ripe. *Clinton v.*  
26 *Acequia, Inc.*, 94 F.3d at 572.

27 Plaintiffs also cannot show any immediate and certain injury. The absence of that showing  
28 means that their dispute "has not 'matured sufficiently to warrant judicial intervention'." *Clinton*

1 *v. Acequia, Inc.*, 94 F.3d at 572, (quoting *Warth v. Seldin*, 427 U.S. 490, 499 n.10 (1975)). This  
2 Court should not entertain plaintiffs' premature action.

3 And plaintiffs will not suffer any hardship from the postponement of judicial action. Even  
4 under plaintiffs' interpretation of Proposition 69, they will not be at any risk of compelled DNA  
5 sample collection until January 1, 2009. Because plaintiffs try to make an as-applied challenge  
6 to limited portions of Proposition 69, their case should await any application of that law to them.  
7 See *Yee v. Escondido*, 503 U.S. 519, 533-534 (1992).

8 Plaintiffs' fail to present issues fit for judicial decision at this time. They are not able to  
9 establish any hardship from postponement of judicial intervention in their claims. Accordingly,  
10 their complaint should be dismissed for lack of ripeness.

### 11 III.

#### 12 **PLAINTIFFS' INJUNCTIVE RELIEF CLAIMS DO NOT PRESENT A JUSTICIABLE 13 CASE OR CONTROVERSY.**

14 "It goes without saying that those who seek to invoke the jurisdiction of the federal courts  
15 must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an  
16 actual case or controversy." *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983.) Plaintiffs' claims  
17 for injunctive relief do not satisfy this requirement.

18 Plaintiffs do not allege a likelihood of substantial and immediate injury. Because there is at  
19 least serious doubt whether the named plaintiffs will ever be subject to compelled DNA sample  
20 submission on the basis of the facts alleged in their complaint, their claim of future injury – in  
21 2009 – is speculative. That conjectural claim is not an adequate basis for plaintiffs' desired  
22 injunctive relief. *Los Angeles v. Lyons*, 461 U.S. at 111. For this reason, too, their complaint  
23 should be dismissed.

### 24 CONCLUSION

25 Plaintiffs are not the proper parties to litigate any claims about the validity of the  
26 Proposition 69 provisions that may never, and should not ever, be applied to them on the basis of  
27 the allegations in their complaint. Their claims are also premature, as, even under plaintiffs'  
28 interpretation of Proposition 69, there should not be any risk of plaintiffs' compelled DNA

1 sample submission until 2009. In part for that same reason, plaintiffs' injunctive relief claims do  
2 not present a case or controversy. Accordingly, the State defendants' motion to dismiss the  
3 complaint for lack of subject matter jurisdiction should be granted.

4 Dated: February 4, 2005

5 Respectfully submitted,

6 **BILL LOCKYER**  
Attorney General of the State of California

7  
8 **PAUL D. GIFFORD**  
9 Deputy Attorney General  
10 Attorneys for Defendants  
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7  
 8 IN THE UNITED STATES DISTRICT COURT  
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 **MICHAEL WEBER ET AL.,**

11 Plaintiffs,

12 v.

13 **BILL LOCKYER, Attorney General of the**  
 14 **State of California, et al.,**

15 Defendants.

C 04 5161 FMS

**DECLARATION OF PAUL D. GIFFORD IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS**

Date: March 31, 2005  
 Time: 2:00 p.m.  
 Courtroom: 5, 17<sup>th</sup> Floor

16  
 17 I, Paul D. Gifford, state that:

18 1. I am a deputy attorney general in the Civil Division of the California Attorney  
 19 General's Office. I am one of the attorneys assigned to represent the state defendants in this case,  
 20 Bill Lockyer, Eva Steinberger, and Lance Gima. I am working with two Criminal Division deputy  
 21 attorneys general, Enid Camps and Michael Chamberlain, on this case.

22 2. Attached to this declaration as Exhibit A is a true copy of a draft California  
 23 Department of Justice Division of Law Enforcement Information Bulletin, No. 04-BFS-03. The  
 24 subject of the bulletin is "Proposition 69 – DNA Fingerprint, Unsolved Crime and Innocence  
 25 Protection Act, Effective November 3, 2004." The bulletin is addressed to "California Law  
 26 Enforcement Agencies and Personnel."

27 3. I am informed and believe that my Criminal Division colleagues, Enid Camps and  
 28 Michael Chamberlain, and other Department of Justice personnel are currently using the attached



1 bulletin in statewide training sessions on Proposition 69 being offered to law enforcement personnel  
2 throughout California.

3 4. I make this declaration on the basis of personal knowledge and on the basis of  
4 information provided to me in my official capacity.

5 I declare under penalty of perjury that the statements in this declaration are true and that  
6 I executed this declaration in Oakland, California on February , 2005.

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Paul D. Gifford

Bill Lockyer, Attorney General

<p style="text-align: center;"><b>California Department of Justice DIVISION OF LAW ENFORCEMENT Patrick Lunney, Director</b></p>	<p style="font-size: 24pt; margin: 0;"><b>INFORMATION BULLETIN</b></p>	
<p><i>Subject:</i> Proposition 69 – DNA Fingerprint, Unsolved Crime and Innocence Protection Act, Effective November 3, 2004</p>	<p><i>No.:</i> 04-BFS-03</p> <p><i>Date:</i> 1/11/2005</p>	<p><i>For further information contact:</i> Bureau of Forensic Services DNA Laboratory, Richmond Phone: (510) 620-3300</p>

**To: California Law Enforcement Agencies and Personnel**

Effective November 3, 2004, voter initiative **Proposition 69** amended portions of the California Penal Code and California Government Code with the **DNA Fingerprint, Unsolved Crime and Innocence Protection Act**. Proposition 69 expands and modifies state law related to collection and use of criminal offender DNA samples and palm print impressions.

This Information Bulletin addresses central features of Proposition 69, including the responsibilities of law enforcement, correctional agencies, and mental health and sex offender treatment facilities with respect to the State's DNA Data Bank Program (PC 295 et seq.).

- **Buccal Swabs:** The DNA sample collected from qualifying persons will be in the form of a buccal swab (inner cheek scraping), unless the Department of Justice requests a blood sample. (PC 295(e).) Until buccal swab collection kits are distributed to agencies following training, existing blood/saliva collection kits should be used. Note the following regarding buccal swab collection:
  - **Thumbprint, Palm Prints.** The buccal swab sample must be accompanied by two right thumbprints. In addition, a full palm print impression of each hand must be collected. The preferred, but not required, method of palm print submissions is electronic transmission via a live scan device. (PC 296(a).)
  - **Training.** The Department of Justice will provide training in buccal swab sample collection. Questions about training dates and locations may be directed to the DNA Data Bank Program at [PC296.PC296@doj.ca.gov](mailto:PC296.PC296@doj.ca.gov). Buccal kits will be distributed to an agency only after it undergoes DOJ-approved training.
  - **Funding.** Because Proposition 69 provides for substantial funding routed directly to counties, the Department of Justice will not reimburse for buccal swab or palm print collection expenses. Reimbursement will continue for collections using existing blood/saliva kits, until an agency begins buccal collections.
  - **Re-testing.** Based on agency experience and initial testing, DOJ estimates that approximately 5% of buccal swab collections may fail to generate a full DNA profile. In these circumstances, DOJ will require the supplemental collection of blood samples. Therefore, if an agency has a phlebotomist under contract, we advise that it continue this arrangement. DOJ also recommends collecting blood samples where an offender refuses to cooperate with sample collection.

□ **Sample Collection:**

- **One-time collection.** A qualifying person must provide a DNA sample and palm print impressions for California's DNA Data Bank Program only if his/her sample and print impressions are not already on file with DOJ. Before collection occurs, the collecting agency should check the person's criminal history record(s) for a DNA collection flag.<sup>1</sup> In addition, individual counties should establish a means of communicating the fact of collection between local agencies that might otherwise collect duplicate samples. Questions concerning an offender's correct collection status may be directed to DOJ's Richmond DNA Laboratory via e-mail, fax, or telephone (see contact info. below). DOJ staff will respond promptly to inquiries received during normal business hours.
- **Collection noted on abstract of judgment.** The trial court is required to note on the abstract of judgment or juvenile disposition order the fact that DNA samples and palm print impressions have been collected from qualifying offenders. (PC 296(f).)

□ **Persons Who Qualify For DNA Sample Collection:**

- Adults and juveniles convicted or found not guilty by reason of insanity for any felony offense, and juveniles adjudicated under W&I Code § 602 for any felony offense. (PC 296(a)(1); 296(e).)
- Adults and juveniles currently in custody or on probation, parole, or other supervised release after a conviction or adjudication for any felony or misdemeanor offense, but with a past California or out-of-state qualifying felony conviction or adjudication of record. (PC 296.1(a)(2), (3), (4).)
- Adult and juvenile PC 290 sex and/or PC 457.1 arson registrants (even for misdemeanor crimes). (PC 296(a)(3); 299(e), (f).)
- Adults and juveniles referred to and housed in mental health treatment programs for felony offenses. (PC 296(a)(3), 296(c).) Includes those persons found incompetent to stand trial under Penal Code section 1368, those committed to a state hospital upon a finding of not guilty by reason of insanity, and those classified as mentally disordered sex offenders.
- Out-of-state offenders accepted into California for service of custody, probation, or parole under an interstate compact. (PC 296.1(a)(5).)
- Federal prison inmates with a prior California or out-of-state qualifying felony conviction or adjudication of record. Requires California connection (e.g., the inmate will be released in California) and approval of the FBI Director. (PC 296.1(a)(6).)
- Adults and juveniles who enter a plea conditioned upon collection of a DNA sample. (PC 296(a)(5).)
- Adults arrested on or after November 3, 2004 for felony PC 290 sex crimes, murder, voluntary manslaughter, or attempts to commit those crimes. (PC 296(a)(2).) The arrestee provision is not retroactive to arrests that took place before November 3, 2004.

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<sup>1</sup> See Appendix A for sample rap sheet "flags."

- Beginning in 2009, all adults arrested for any felony offense on or after January 1, 2009. (PC 296(a)(2)(C).) This expansion of the arrestee provision is not retroactive to arrests that took place before January 1, 2009.

□ **Timing of DNA Sample Collections:**

- Persons arrested on or after November 3, 2004, for murder, voluntary manslaughter, a felony PC 290 sex offense, or an attempt to commit one of those crimes must provide DNA samples and palm print impressions immediately following arrest or during booking. (PC 295(i)(1)(A); 296.1(a)(1)(A).)
- Persons convicted or adjudicated of a felony offense shall provide DNA samples and palm print impressions “immediately following . . . conviction [i.e., plea or verdict] . . . or adjudication.” (PC 295(i)(1)(A).) The court must verify *before sentencing* or disposition that samples have been obtained. (PC 296(f).)
  - Applies whether the adult or juvenile is in-custody or out-of-custody. (PC 296.1(a)(2), (3).)
  - Out-of-custody adults or juveniles pending sentencing or dispositional order must appear for collection within five days of notice. (PC 296.1(a)(3)(B).)
- There is no bar to collection of DNA samples and palm print impressions after sentencing or disposition, where the adult or juvenile is in state or local custody, or on probation, parole, or “other release.” (PC 296.1(a)(2), (3).)
  - Out-of-custody adults or juveniles under state control or supervision must appear for collection within five days of notice, if collection already has not taken place. (PC 296.1(a)(3)(B).)
- Registered sex offenders who have not provided a DNA sample and palm print impressions should be collected at their registration update or at an appointed time thereafter, or within 10 days of notification if prior to the annual registration update. (PC 296.2(c).)

□ **Limitations on Collection:**

- **Training.** Only persons trained to monitor and/or perform buccal collections on behalf of a collecting agency may do so.
- **Suspect Samples.** Proposition 69 DOES NOT authorize law enforcement to collect DNA samples from criminal suspects. Law enforcement agencies may, however, submit to their primary lab services provider for DNA testing and entry into the State Database a known sample of a suspect’s blood, saliva, or other biological substance that has been otherwise legally obtained. (PC 297(b)(1).) Once a suspect sample has been accepted for inclusion in the State’s DNA Data Bank Program, the submitting agency must notify the Department of Justice within two years whether the person remains a suspect in that particular investigation.
- **Arrestee samples.** Proposition 69 does not authorize DNA sample collection for any arrests that occurred before November 3, 2004, nor does it authorize DNA sample collection upon arrest based on *prior* felony convictions or adjudications of record. Likewise, the broader collection of felony arrestee

samples from adults that will begin January 1, 2009, is not retroactive to arrests that took place before January 1, 2009. (PC 296(a)(2)(C).)

□ **Verification Procedures:**

- The collecting agency has exclusive responsibility for verifying an offender's identity and status as a person qualifying for DNA collection. (PC 295(i)(1); 298(b)(5).) The Department of Justice's DNA collection kits will include a card requiring collecting personnel to certify the identity of the person providing the DNA sample, as well as the fact that the person's offense, conviction, adjudication, or other status qualifies him/her for DNA collection. Collecting agencies should use all means reasonably available to certify the offender's identity and qualifying status. This includes review of all available criminal history records.

□ **Expungement Procedures:**

- A person who has provided a DNA sample under Proposition 69 may request that his/her blood or buccal specimen be destroyed and corresponding profile expunged from searchable databases if any of the following circumstances exist, and the person has no other qualifying offense of record:
  - A DNA sample was collected upon the person's arrest, but no charges were filed within the applicable statute of limitations. (PC 299(b)(1).)
  - A DNA sample was collected upon the person's arrest, but the person was found not guilty or otherwise acquitted of the charges. (PC 299(b)(4).)
  - A DNA sample was collected based on conviction for a qualifying offense, but the conviction was subsequently reversed and the case dismissed. (PC 299(b)(2).)
  - A DNA sample was collected based on conviction for a qualifying offense, but a court subsequently found the person to be factually innocent of that crime. (PC 299(b)(3).)
  - A DNA sample for a suspect was profiled and entered into the Database, but the person is no longer considered a suspect by the investigating agency. (PC 297(b)(2).)
- The California District Attorneys Association is working with the California Department of Justice to develop a streamlined procedure that will provide notice to offenders who may qualify for expungement and that should facilitate the expungement process. Further information will be provided when this procedure is finalized.

□ **Related Crimes:**

- **Misdemeanor refusal to provide sample.** A person who refuses to provide a mandated DNA sample or accompanying thumb or palm print impressions is guilty of a misdemeanor punishable by up to one year in county jail and a \$500 fine. (PC 298.1(a).) California law continues to authorize a collecting agency to use reasonable force to collect DNA samples, specimens and print impressions from a qualifying offender who refuses to provide them. (PC

298.1(b) and (c).) There is no need for a court order, as long as mandated regulations are in place. (PC 298.1(c).)

- **Felony sample tampering.** It is a felony for any qualifying offender to knowingly facilitate the collection of a wrongfully-attributed DNA sample or identification information, or to knowingly tamper with any DNA sample or collection container with the intent to deceive the government as to his or her identity. (PC 298.2.)
- **Unauthorized use and/or disclosure.** Any person who knowingly misuses or discloses to an unauthorized entity a DNA sample collected or profile obtained for DNA Database purposes may be charged with a felony or misdemeanor offense. (PC 299.5(i)(1)(A).) Imposition of substantial fines may also occur if the unlawful act was undertaken for financial gain. (PC 299.5(i)(1)(B).) Civil damages are also authorized. (PC 299.5(i)(2)(A).)

- **Please inform the Department of Justice's DNA Legal Unit immediately if your agency is named in a lawsuit involving DNA Data Bank sample collection, sample use, or any aspect of the State's DNA Data Bank Program.**

**Department of Justice Contact Information**

Jan Bashinski DNA Laboratory, Richmond

[PC296.PC296@doj.ca.gov](mailto:PC296.PC296@doj.ca.gov) or (510) 620-3300 [for collection confirmation press "1-1" in the automated answering system; for other inquiries, contact Stacy Fox at ext. 3372]

Fax (510) 231-8744

DNA Legal Unit

[Michael.Chamberlain@doj.ca.gov](mailto:Michael.Chamberlain@doj.ca.gov) or (415) 703-5892

Automated Latent Print Section

[Palm.Print@doj.ca.gov](mailto:Palm.Print@doj.ca.gov) or (916) 227-3314

Administrative Services Division, Accounting Office  
(916) 324-6678

Sincerely,

PATRICK N. LUNNEY, Director  
Division of Law Enforcement

For BILL LOCKYER  
Attorney General

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**MICHAEL WEBER, ET AL.,**

Plaintiff,

v.

**BILL LOCKYER, Attorney General of the  
State of California, et al.,**

Defendants.

C 04-5161

**[PROPOSED] ORDER GRANTING  
MOTION OF DEFENDANTS  
LOCKYER, STEINBERGER AND  
GIMA TO DISMISS THE  
COMPLAINT**

On March 31, 2005, the Court held the hearing on the motion of defendants Bill Lockyer, Eva Steinberger, and Lance Gima (the state defendants) to dismiss plaintiffs' complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The state defendants contend that the named plaintiffs lack standing, that their claims are not ripe for adjudication, and that their injunctive relief claims do not present a justiciable case or controversy. The state defendants argue that, as interpreted by responsible state law enforcement officials, the challenged provisions of California's Proposition 69, have not been, and will not be, applied to the named plaintiffs under the circumstances alleged in their complaint.

The Court has read and considered the state defendants' motion and supporting papers, plaintiffs' opposition, and the state defendants' reply. The Court heard and considered the arguments of counsel. Good cause appearing therefor,

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IT IS HEREBY ORDERED that the state defendants' motion to dismiss for lack of subject matter jurisdiction is granted and that plaintiffs' complaint is dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Dated: \_\_\_\_\_

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FERN M. SMITH  
United States District Judge