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UNITED STATES DISTRICT
FOR THE DISTRICT OF ALASKA

MICHAEL COLE, individually and on behalf of all others similarly situated, Plaintiff, v. GENE BY GENE, LTD., a Texas Limited Liability company d/b/a FAMILY TREE DNA, Defendant.	Case No. 1:14-cv-00004-SLG **STATE OF ALASKA'S MOTION TO INTERVENE**

The State of Alaska moves to intervene pursuant to Federal Rules of Civil Procedure 5.1 and 24(a) and 28 U.S.C. § 2403(b) to defend the constitutionality of Alaska's Genetic Privacy Act.[1] Counsel for Alaska conferred with counsel for Plaintiff and counsel for Defendant regarding this motion. Plaintiff does not oppose the motion.

[1] AS 18.13.010 - AS 18.13.100.

Counsel for Defendant indicated that it "does not expect to oppose the State's Motion to Intervene, but . . . reserves its right to do so once [its counsel] see the actual motion."

Defendant has challenged the constitutionality of the Genetic Privacy Act on numerous grounds. [Docket 109; Docket 131] Federal Rule of Civil Procedure 5.1(c) permits the Attorney General to intervene in an action where a party challenges the constitutionality of a state statute. Federal Rule of Civil Procedure 24(a)(1) further permits a non-party to intervene when the non-party "is given an unconditional right to intervene by federal statute." This provision also justifies intervention here, because 28 U.S.C. § 2403(b) authorizes the State to intervene in any federal action in which the constitutionality of a state statute is challenged:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Alaska's motion to intervene is timely. Rule 5.1(c) grants the Attorney General 60 days to intervene after a notice of constitutional question is filed.[2] Defendant served notice by mail on April 5, 2017.

[2] *See also* Fed. R. Civ. P. 24(a) (requiring filing a timely motion to intervene).

Alaska respectfully requests leave to intervene in this case to address Defendant's challenge to the constitutionality of the Genetic Privacy Act and submits with this motion the proposed pleading for which intervention is sought.

DATED June 7, 2017.

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CERTIFICATE OF SERVICE

I certify that on June 7, 2017 the foregoing was served electronically on all parties via CM/ECF.

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UNITED STATES DISTRICT
FOR THE DISTRICT OF ALASKA

MICHAEL COLE, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	Case No. 1:14-cv-00004-SLG
v.	)	**[PROPOSED] STATE OF ALASKA'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN DEFENSE OF THE CONSTITUTIONALITY OF ALASKA'S GENETIC PRIVACY ACT**
GENE BY GENE, LTD., a Texas Limited Liability company d/b/a FAMILY TREE DNA,	)	
Defendant.	)	

INTRODUCTION

Defendant Gene By Gene, Ltd. filed a motion for summary judgment[1] challenging the constitutionality of Alaska's Genetic Privacy Act.[2] The State of Alaska has moved to intervene to defend the constitutionality of that Act. This memorandum addresses only the constitutionality issues; it does not address any other argument raised by the parties.

[1] Docket 109; *see also* Docket 131.

[2] AS 18.13.010 – AS 18.13.100.

While Alaska takes no position on the non-constitutional issues in the case, it nevertheless respectfully submits that this Court must resolve the other issues raised by the parties first. The constitutional questions cannot properly be resolved when there are disputed facts, and resolution of the facts may allow the Court to avoid the constitutional questions altogether. If the Court does find it necessary to reach the constitutional questions at this time, then it should reject each of Gene by Gene's arguments.

I. The Court must resolve all factual disputes before it considers whether Alaska's Genetic Privacy Act is unconstitutionally vague.

When federal courts evaluate the constitutionality of state statutes, "every possible presumption is to be indulged in favor of the validity of [the] statute."[3] And when addressing a claim that a statute is void for vagueness, the question is not whether the statute is vague, but whether the statute is *unconstitutionally* vague.[4]

The vagueness doctrine applies differently depending on whether the Court is analyzing a civil or criminal statute.[5] In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the Supreme Court acknowledged that "[t]he degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair

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[3] *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *see also Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1167 (D.N.M. 2014) (same).

[4] *See K-S Pharmacies, Inc. v. Am. Home Products Corp.*, 962 F.2d 728, 732 (7th Cir. 1992) (recognizing that a Wisconsin statute was vague, but concluding that it was not unconstitutionally vague).

[5] *See Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 946 (9th Cir. 2013) ("'Economic regulation is subject to a less strict vagueness test than criminal laws'" (quoting *Great Am. Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986) (internal quotation marks omitted)).

enforcement—depends in part on the nature of the enactment."[6] "The Court has [] expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[7] Civil statutes are *unconstitutionally* vague only when they are "'so vague and indefinite as really to be no rule or standard at all,'" or they fail to give a person of ordinary intelligence fair notice that his or her conduct is forbidden. [8] And, importantly—whether the statute is criminal or civil—the complaining party "must demonstrate that the law is impermissibly vague in all of its applications."[9]

The question for this Court, then, is whether the Alaska Genetic Privacy Act is "sufficiently clear" to cover at least some of Defendant's conduct.[10] Because the Court has not resolved the all of the factual disputes between the parties, the Court is not yet able to answer that question.[11] Moreover, depending on how those factual disputes are resolved, the Court may be able to avoid a decision on this constitutional question. For example, the parties currently dispute whether Defendants disclosed Plaintiff's genetic

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6 455 U.S. 489, 498 (1982).

7 *Id.*

8 *Fang Lin Ai. v. United States*, 809 F.3d 503, 514 (9th Cir. 2015) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)).

9 *Village of Hoffman Estates*, 455 U.S. at 499.

10 *See id*. (rejecting defendant's challenge because, "under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to [defendant]").

11 *See* Docket 104, at 14–16 (discussing factual dispute as to whether Defendant's disclosed Plaintiff's genetic information).

information.[12] If the fact finder resolves this dispute in favor of Gene by Gene, the case is resolved without the Court having to address the constitutional issue. Only if the fact finder resolves this dispute in favor of Plaintiff—and concludes that Gene by Gene disclosed Mr. Cole's genetic information—will the Court need to address the constitutionality of the statute. And then the question would be whether the statute made it "sufficiently clear" that Gene by Gene's conduct was prohibited, not whether the statute has an express provision prohibiting its course of conduct.

II. The Court must give the statute meaning by applying the same principles of interpretation as the Alaska Supreme Court.

A statute is not unconstitutionally vague if it requires interpretation. "[F]or centuries courts have thought it sufficient that specificity may be created through the process of construction."[13] The statute is constitutional as long as it provides a starting place, and courts will resolve disputes as they arise.[14] With "every law there comes a first interpretation," and "[w]hen interpreting state laws, federal courts use the same principles as state courts do.[15]

In Alaska, the goal "is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[16] This requires the Court to look at three factors: "the language of the statute, the legislative history, and the legislative

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12 Docket 104, at 15.

13 *K-S Pharmacies, Inc.*, 962 F.2d at 732.

14 *Id.* (noting that the Sherman Act was not unconstitutional when it was first enacted in 1980).

15 *Id.* at 730 & 732.

16 *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896 (Alaska 1987).

purpose behind the statute."[17] When reviewing the language within the statute, the words "are to be construed in accordance with their common usage" unless they are given a peculiar meaning by virtue of a statutory definition or judicial construction.[18]

Once the factual disputes in this case are resolved, the Court must apply the principles set out by the Alaska Supreme Court and make every possible assumption in favor of the validity of the statute. Again, the question is not whether the Alaska Genetic Privacy Act defines every possible violation, but whether the statute is sufficiently clear to cover Gene by Gene's conduct. Without knowing the particulars of Gene by Gene's conduct, it is impossible to determine whether that conduct falls within a reasonable interpretation of the relevant statutes. For these reasons, the State urges the Court to deny Defendant's motion for summary judgment and address the constitutionality of the statute only if necessary, and only after factual disputes are resolved.[19]

Nevertheless, if the Court finds it necessary to address the issue now, it should uphold the constitutionality of Alaska's Genetic Privacy Act. As the Alaska Supreme Court recognized in *State v. O'Neill Investments, Inc.*—a case cited by Gene by Gene—"[t]he constitutional adequacy of the warning of proscribed conduct should be measured not only by common intelligence, but also by 'common practice.'"[20]

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[17] *W. Star Trucks, Inc. v. Big Iron Equip. Serv., Inc.*, 101 P.3d 1047, 1050 (Alaska 2004).

[18] *Curran v. Progressive Nw. Ins. Co.*, 29 P.3d 829, 832 (Alaska 2001).

[19] The State reserves the right to provide additional briefing in support of the Genetic Privacy Act's constitutionality if, and when, it becomes necessary.

[20] 609 P.2d 520, 534 (Alaska 1980) (quoting *U.S. ex rel. Shott v. Tehan*, 265 F.2d 191, 198 (6th Cir. 1966).

None of the alleged deficiencies in the Act fail to provide Gene by Gene with a "starting place." "Genetic characteristic" is defined by AS 18.13.100(2). It is a factual question as to whether the Defendant disclosed a "gene, chromosome, or alteration of a gene or chromosome that may be tested to determine the existence or risk of a disease, disorder, trait, propensity, or syndrome."[21] Although the Genetic Privacy Act does not define "person," it is defined elsewhere. Alaska Statute 01.10.060 provides that, "[i]n the laws of the state, unless the context otherwise requires . . . 'person' includes a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person."

"Disclosure," "informed and written consent," "resulted in profit or monetary gain," and "profit or monetary gain to the violator" may not be defined by the statute, but they are also not concepts that escape a common understanding. The Alaska Supreme Court looks to that common understanding when interpreting a state statute. Alaska also agrees with Mr. Cole's suggestion that the Court may properly rely on the dictionary definitions of these commonly used words to give the statutes meaning.[22] To withstand constitutional scrutiny, the statute need not define every possible variation of proscribed conduct; it need only make it "sufficiently clear" that that conduct is prohibited. The legislation's use of terms that are widely and commonly understood, and have dictionary definitions that give them meaning, satisfies this standard.

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21 AS 18.13.100(2).

22 *See* Docket 122, at 11–15.

III. The statute's damages provision does not violate due process.

For similar reasons, this Court should reject Gene by Gene's argument that the Genetic Privacy Act's statutory damages provision is unconstitutional. Here too, factual disputes need to be resolved, and the case needs to progress to verdict, before the Court properly can conduct a constitutional analysis. Gene by Gene's summary judgment motion argues that AS 18.13.020's statutory damages provisions are in essence punitive damages, and that such damages would be unconstitutionally grossly excessive if applied to Gene by Gene.[23] In response, Plaintiff characterizes the damages as statutory rather than punitive, and insists that they are not excessive.[24] But this Court need not and should not now resolve any constitutional questions related to the type or excessiveness of damages. In fact, such a ruling is not yet possible, given that no damages in any amount have been awarded in this case; it would be purely speculative to opine as to the constitutionality of a theoretical damages award that has not and may never be awarded. Both the substantive laws, and sound considerations of constitutional law and judicial restraint, compel the conclusion that the Court should decline to issue an advisory constitutional ruling about a theoretical damages award.

Substantively, Gene by Gene raised an interesting—but purely academic—question about whether the Genetic Privacy Act's statutory damages should be considered to be statutory damages or punitive damages. This threshold categorization is legally significant, because the two types of damages are analyzed differently with

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[23] Docket 109 at 11–26; Docket 131 at 2–9.

[24] Docket 24 at 15–24.

respect to whether a damages award satisfies constitutional due process principles. Statutory damages are analyzed under *St. Louis, I.M. & S. Railway Co. v. Williams*.[25] Under *Williams*, a statutory damages provision violates due process "only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[26] Courts analyze the constitutionality of punitive damages under a different mode of analysis, first articulated in *BMW of North America, Inc. v. Gore*.[27] Under *Gore* and its progeny, courts analyze excessiveness by looking to three guideposts: the degree of reprehensibility of the defendants' conduct; the ratio between compensatory and punitive damages; and how the punitive damages award compares to existing civil and criminal penalties for comparable misconduct.[28]

The Ninth Circuit has not plainly spoken about which analytical model applies to damages that are assessed and defined by statute, but also may have some characteristics of punitive damages awards. In Circuits that have squarely addressed the issue, though, the better view is that statutory damages are not subject to the more specific *Gore* guideposts. As the First Circuit has explained, "*Gore* did not overrule *Williams*, and the Supreme Court has not suggested that the *Gore* guideposts should extend to constitutional review of statutory damage awards."[29] And expansion of *Gore* to statutorily-defined

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[25] 40 S. Ct. 71 (1919).

[26] *Id.* at 66-67.

[27] 517 U.S. 559 (1996).

[28] *Id.* at 575-86; *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418-29 (2003).

[29] *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 70 (1st Cir. 2013).

damages makes little logical sense because "the concerns regarding fair notice to the parties of the range of possible punitive damage awards, which underpin *Gore*, are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award."[30] The Eighth Circuit elaborated on this theme, explaining that *Gore*'s "concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute."[31] Further, *Gore*'s punitive damages guideposts "would be nonsensical if applied to statutory damages."[32] After all, "[i]t makes no sense to consider the disparity between 'actual harm' and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate."[33] And "[n]or could a reviewing court consider the difference between an award of statutory damages and the 'civil penalties authorized,' because statutory damages *are* the civil penalties authorized."[34]

Although the Ninth Circuit has not adopted these holdings, it has suggested that it would do so if the issue were squarely presented. In *United States v. Citrin*, the court analyzed whether a statutory treble damages award for breach of a National Health Service Corps scholarship agreement violated due process.[35] The parties disputed

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30 *Id.*

31 *Capital Records, Inc. v. Thomas-Rassett*, 692 F.3d 899, 907 (8th Cir. 2012).

32 *Id.*

33 *Id.* at 907-08.

34 *Id.* at 908.

35 972 F.2d 1044 (9th Cir. 2014).

whether the damages award should be treated as a liquidated damages provision or a statutory damages award.[36] After choosing the latter, the court then applied *Williams*—not *Gore*—to determine whether the statutory penalty violated due process:

> [B]ecause the amount of damages was established by applying the formula in 42 U.S.C. § 254*o*(b)(1)(A), we will examine the damages as a statutorily prescribed penalty. A statutorily prescribed penalty violates due process rights "only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919)[.][37]

Citrin's unhesitating application of the *Williams* standard to statutory damages suggests that the Ninth Circuit would continue to apply *Williams*, not expand *Gore*, in cases like this one.

But this Court need not and should not resolve this academic question now. Under either of the two standards, federal courts are clear that the constitutional analysis cannot properly be undertaken unless and until a fact-finder actually has made an award of punitive damages. In fact, even where a jury *has* made a punitive damages award, principles of constitutional avoidance forbid courts from addressing due process considerations unless and until the court has first considered the non-constitutional doctrine of remittitur—after all, if a district court does apply remittitur and reduce the punitive damages award, it would alter or eliminate the need for a constitutional analysis

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36 *Id.* at 1051.

37 *Id.*

of excessiveness at all.[38] When a district court rules on the constitutionality of a damages award that may actually not be the final amount, its resulting "decision on a constitutional due process question [is] not necessary, [is] not inevitable, [has] considerable impermissible consequences, and contravene[s] the rule of constitutional avoidance," requiring reversal.[39]

In this case, any constitutional analysis would be even more speculative and premature, as no jury has yet awarded damages of any kind, or even found that the defendant is liable for anything.[40] Put simply, "[p]rior to a determination of defendant's liability, it is premature to analyze whether the potential penalty owed is unconstitutional."[41] Lower federal courts in this circumstance properly utilize the constitutional avoidance decline and defer analysis of constitutional standards and

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38 *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 508-09 (1st Cir. 2011) ("Facing the constitutional question of whether the award violated due process was not inevitable. The district court should first have considered the non-constitutional issue of remittitur, which may have obviated any constitutional due process issue and attendant issues.").

39 *Id.* at 508.

40 *See, e.g.*, *Malibu Media, LLC v. Weaver*, 2016 WL 1394331, at *8 (M.D. Fla. Apr. 8, 2016) ("At this stage of the proceedings, any determination as to the constitutionality of the amount of a statutory-damages award would be based on speculation. To be sure, Malibu Media has not yet been awarded any statutory damages, nor has Weaver's liability been determined."); *Coach v. Celco Customs Servs. Co.*, 2014 WL 12573411, at *24-25 (C.D. Cal., June 5, 2014) (constitutional avoidance doctrine required district court to decline to consider constitutionality of statutory damages award, or to decide what legal standard would apply to that challenge, because case would be retried); *Provine v. Office Depot, Inc.*, 2012 WL 2711085, at *7 (N.D. Cal. July 6, 2012) ("Prior to a determination of defendant's liability, it is premature to analyze whether the potential penalty owed is unconstitutional.").

41 *Provine*, 2012 WL 2711085, at *7.

application until such time as there is an actual damages award to review.[42] This Court should do the same. It should not issue an advisory opinion as to the constitutionality of the Alaska's Genetic Privacy Act based on an analysis of the excessiveness of a damages award that does not exist.

CONCLUSION

For the foregoing reasons, the Court should defer consideration of the constitutional issues raised by Gene by Gene until after all factual disputes are resolved and a ruling on these issues is necessary. The Court cannot consider whether the Genetic Privacy Act is unconstitutionally vague until all factual disputes are resolved, and the Court cannot consider whether a penalty is unconstitutionally excessive until damages have actually been awarded. The State reserves the right to provide additional briefing in support of the Genetic Privacy Act's constitutionality if, and when, it becomes necessary.

DATED June 7, 2017.

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[42] *E.g.*, *Malibu Media*, 2016 WL 1394331, at *8; *Coach*, 2014 WL 12573411, at *24-25; *Provine*, 2012 WL 2711085, at *7.

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MICHAEL COLE, individually and on behalf of all others similarly situated, Plaintiff, v. GENE BY GENE, LTD., a Texas Limited Liability company d/b/a FAMILY TREE DNA, Defendant.	Case No. 1:14-cv-00004-SLG **[PROPOSED] ORDER GRANTING STATE OF ALASKA'S MOTION TO INTERVENE**

This matter came to the Court on the State of Alaska's motion under Federal Rule of Civil Procedure 24(a) and 28 U.S.C. § 2403(b) to intervene in this matter as a matter of right. Having considered the motion, accompanying documents, and other documents on file in this case, it is hereby ORDERED that the State's Motion to Intervene is GRANTED.

It is further ORDERED that the State may participate in this case as an intervenor with full rights of the parties for the limited purpose of addressing the constitutionality of Alaska's Genetic Privacy Act.[1]

It is further ORDERED that the State's proposed Memorandum in Response to Defendant's Motion for Summary Judgment and in Defense of the Constitutionality of Alaska's Genetic Privacy Act is deemed filed as of the date of this Order.

Dated: _____.

_____
Judge Sharon L. Gleason
U.S. District Court Judge

[1] AS 18.13.010 - AS 18.13.100.

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