

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

State of Arizona,

Appellant,

v.

Ian Mitcham,

Appellee.

No. 1 CA-CR 23-0014

Maricopa County Superior Court  
No. CR 2018-118086-001

**BRIEF OF *AMICI CURIAE*  
AMERICAN CIVIL LIBERTIES UNION  
AND ACLU OF ARIZONA IN SUPPORT OF  
APPELLEE AND AFFIRMANCE**

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## STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (“ACLU”) is a nonprofit, nonpartisan membership organization devoted to protecting the civil rights and liberties of all Americans, including the right to be free from unreasonable searches and seizures. The ACLU of Arizona is a state affiliate of the ACLU. The ACLU and ACLU of Arizona have frequently appeared before courts to advocate for the constitutional right to privacy and to ensure that its protections are not eroded by the advance of technology. *See e.g., Carpenter v. United States*, 138 S. Ct. 2206 (2018). They submit this brief to highlight people’s expectation of privacy and possessory interest in their DNA; to address the proper scope of searches based on consent; and to emphasize the dire implications that adopting the State’s arguments in this case would have for all Arizonans.

### INTRODUCTION

Accepting the State’s argument in this case—that it can obtain DNA profiles from any biological sample in its lawful possession without any court oversight or approval—would mean that law enforcement could genetically test everything from blood samples taken from newborn babies to identify life-threatening diseases to the organs individuals have donated for transplant. This would violate reasonable expectations of privacy. It would ignore the scope of the consent that allowed collection of the biological material here in the first place. And it would undercut



important government programs. The Fourth Amendment does not allow those results.

Given the revealing nature of DNA, collecting and analyzing it constitutes a seizure and a search under the Fourth Amendment. Our DNA contains some of our most private and sensitive information—ancestry, family relationships, propensities for serious medical conditions, and more. When combined with other public data, it can also expose previously unknown family histories of adoptions, misattributed paternity, early mortality, or substance abuse disorders. The government must therefore obtain a warrant to search or seize DNA.

A person's limited consent to a search of biological material for a specific purpose—in this case, a blood alcohol test for a DUI arrest—does not overcome that requirement. A consent search is lawful only because the individual agrees to it. Accordingly, when a search is based on consent, that search can go no farther than the consent actually given. Here, Appellee agreed only to a blood-alcohol test, and was advised that the blood vial collected from him would be destroyed after 90 days. Instead of complying with these clear parameters, the State held onto his blood for three years, at which point a familial search of the state DNA database suggested that Appellee's brother was related to the perpetrator of the crime in this case. The State had two constitutional options to obtain a DNA sample at that point: it could have asked Appellee for consent to take a new sample, or it could have obtained a

warrant to obtain DNA from his body using a buccal swab or other means. Instead, a detective surreptitiously extracted DNA from Appellee's 2015 blood sample and generated a DNA profile.

The Court below was correct to hold that this search violated Appellee's Fourth Amendment rights. Affirming that decision is essential to protect the genetic privacy of all Arizonans whose biological material is currently held by the government, from newborn babies to survivors of sexual assault.

## **ARGUMENT**

### **I. DNA contains an individual's highly personal and sensitive information.**

A DNA sample contains a person's entire genetic makeup. With current technology, DNA tests can reveal sensitive medical information, ancestry, and—as shown by the facts of this case—biological familial relationships. Analysis of a DNA sample can expose our likelihood for having Alzheimer's, cystic fibrosis, breast cancer, Huntington's disease, and substance use disorder. It can uncover previously unknown family members. And private companies purport to be able to use it to identify everything from our eye, hair, and skin colors,<sup>1</sup> to our food preferences and

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<sup>1</sup> See, e.g., *Parabon Snapshot Advanced DNA Analysis: Genetic Genealogy, Phenotyping, Ancestry & Kinship Analysis*, Parabon Nanolabs, <https://snapshot.parabon-nanolabs.com>.

allergies,<sup>2</sup> to the likely migration patterns of our ancestors.<sup>3</sup> As technology and research continue to advance, DNA analysis will allow ever-greater incursions into our privacy.

Two types of DNA analysis are widely available today. The first generates a single nucleotide polymorphism (“SNP”) profile, which focuses on “the places in the genome where people differ” the most.<sup>4</sup> SNPs “may be responsible for the diversity among individuals, . . . the most common familial traits such as curly hair, interindividual differences in drug response, and . . . diseases such as diabetes, obesity, hypertension, and psychiatric disorders.”<sup>5</sup> SNP analysis can involve looking at hundreds of thousands of locations across the genome. Genetics researchers, private labs, and companies like 23andMe and Ancestry.com use SNP profiles to “help predict an individual’s response to certain drugs, susceptibility to environmental factors such as toxins, and risk of developing diseases.”<sup>6</sup> Law

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<sup>2</sup> *Compare DNA Tests*, 23andMe, <https://www.23andme.com/compare-dna-tests>.

<sup>3</sup> *What Do the Dots and Lines on the Map Represent?*, Ancestry, <https://www.ancestry.com/cs/dna-help/communities/dots-and-lines>.

<sup>4</sup> *Single Nucleotide Polymorphisms (SNPs)*, Nat’l Human Genome Rsch. Inst., <https://www.genome.gov/genetics-glossary/Single-Nucleotide-Polymorphisms>.

<sup>5</sup> Barkur S. Shastry, *SNPs: Impact on Gene Function and Phenotype*, 578 *Methods Molecular Biology* 3 (2009), <https://pubmed.ncbi.nlm.nih.gov/19768584/>.

<sup>6</sup> *What Are Single Nucleotide Polymorphisms (SNPs)?*, Nat’l Libr. Med., <https://medlineplus.gov/genetics/understanding/genomicresearch/snp>.

enforcement officers have also started using SNP profiles to conduct forensic genetic genealogy (“FGG”) investigations, which additionally involve building out family trees spanning generations, and can reveal private information from adoptions to hidden infidelities, not only about a suspect but also about their biological relatives.<sup>7</sup>

The second type of DNA analysis—the one used by law enforcement here—measures how many times “short, tandem, repeat” (“STR”) sequences occur at designated locations (called “loci”) on the genome.<sup>8</sup> STR analysis is used to create DNA profiles compatible with the FBI’s CODIS system.<sup>9</sup> Although courts sometimes refer to the STR loci as “junk DNA,” the “adjective ‘junk’ may mislead the layperson.” *Maryland v. King*, 569 U.S. 435, 442, 451 (2013). “The term apparently is intended to indicate that this particular noncoding region, while useful

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<sup>7</sup> In an FGG investigation, law enforcement will generate a SNP profile from DNA evidence collected at a crime scene, upload that profile to a vast genetic database, typically identify a partial match belonging to a distant relative of the crime-scene contributor, and scour public records to create detailed family histories in order to identify some set of biological suspects. *See, e.g.*, Rafil Kroll-Zaidi, *Your DNA Test Could Send a Relative to Jail*, N.Y. Times (Jan. 3, 2022), <https://www.nytimes.com/2021/12/27/magazine/dna-test-crime-identification-genome.html>.

<sup>8</sup> *See* Erin Murphy, *Inside the Cell: The Dark Side of Forensic DNA* 7–8 (2015).

<sup>9</sup> CODIS is “the generic term used to describe the FBI’s program of support for criminal justice DNA databases as well as the software used to run these databases.” *Frequently Asked Questions on CODIS and NDIS*, FBI, <https://www.fbi.gov/how-we-can-help-you/dna-fingerprint-act-of-2005-expungement-policy/codis-and-ndis-fact-sheet>.

and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits.” *Id.* at 443.

But advances in technology and usage show that STR profiles today yield information far beyond identity.<sup>10</sup> Indeed, in this case, officers used an STR profile to conduct a familial search—that is, not to look for an individual match, but to search for any biological relatives. In addition, researchers in a 2016 study were able to identify information about ancestry from STR profiles, which could in turn be used to approximate a person’s physical appearance.<sup>11</sup> A 2017 study suggests that STR profiles can now be linked to SNP profiles, thereby shedding light on intimate details like “precise ancestry estimates, health and identification information.”<sup>12</sup> A 2020 survey of existing research found that 57 studies have linked forensic STRs with a total of 50 unique traits, including schizophrenia, Parkinson’s disease, and

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<sup>10</sup> Even if the information revealed were limited to identity, the government’s collection and analysis of it could still intrude on a reasonable expectation of privacy. *Cf. Johnson v. VanderKooi*, 983 N.W.2d 779, 795–98 (Mich. 2022) (Welch, J., concurring) (recognizing that people have a privacy interest in their fingerprints, just as they do in their DNA, even when used for identity because the identifying information is “neither readily observable nor even very useful” without “technical expertise” or “the assistance of advanced software”).

<sup>11</sup> Bridget Algee-Hewitt et al., *Individual Identifiability Predicts Population Identifiability in Forensic Microsatellite Markers*, 26 *Current Biology* 935, 939 (2016), <https://doi.org/10.1016/j.cub.2016.01.065>.

<sup>12</sup> Michael Edge et al., *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 *Proceedings Nat’l Acad. Scis.* 5671, 5675 (2017), <https://www.pnas.org/content/114/22/5671>.

Down syndrome.<sup>13</sup> And last year, a new study “provide[d] evidence that contravenes the assumption that CODIS genotypes convey no trait information,” instead finding “six significant correlations” through which “the CODIS genotype may be informative about . . . psychiatric conditions,” like depression and schizophrenia, and whether a person is likely to have “a number of severe skin and platelet conditions” or other physical characteristics.<sup>14</sup> As the authors of that study concluded, “[t]hese results join a growing body of work showing that CODIS genotypes may contain more information than purely identity,” and “raise concerns about the medical privacy of individuals whose CODIS profiles are seized, databased, and accessed, as well as the genetic relatives of those persons.”<sup>15</sup> Thus, any DNA sample contains a multitude of private medical and familial information about a person and their relatives—and the same is true for DNA profiles.

## **II. Extracting an individual’s genetic material and generating a DNA profile from it constitutes a search and seizure.**

Given the “vast amount of sensitive information that can be mined from a

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<sup>13</sup> Nicole Wyner, et al., *Forensic Autosomal Short Tandem Repeats and Their Potential Association with Phenotype*, *Frontiers in Genetics* (Aug. 6, 2020), <https://www.frontiersin.org/articles/10.3389/fgene.2020.00884/full>.

<sup>14</sup> Mayra M. Bañuelos, et al., *Associations Between Forensic Loci and Expression Levels of Neighboring Genes May Compromise Medical Privacy*, *PNAS* (Sept. 27, 2022), <https://www.pnas.org/doi/10.1073/pnas.2121024119>.

<sup>15</sup> *Id.*

person’s DNA,” *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007), courts have had little trouble concluding that the extraction and analysis of an individual’s DNA sample “constitutes a search for Fourth Amendment purposes.” *United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012). Nearly thirty-five years ago, the Supreme Court recognized that “chemical analysis” of biological samples “can reveal a host of private medical facts.” *Skinner v. Railway Labor Execs.’ Ass’n*, 489 U.S. 602, 617 (1989). More recently, it highlighted the same concern with regard to DNA in particular, noting that even when it is “obtained . . . only for identification purposes, the process put[s] into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could . . . be obtained.” *Birchfield v. North Dakota*, 579 U.S. 438, 463 (2016).

“[I]t goes without saying that the *most basic* violation possible involves . . . the non-consensual retrieval of previously unrevealed medical information that may be unknown even to [the tested individuals].” *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998). And, as with a person’s comprehensive location information, the “familial . . . and sexual associations” that can be revealed through DNA offer the government “an intimate window into a person’s life.” *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

Accordingly, courts have repeatedly recognized people’s “very strong privacy

interests” in their DNA. *Amerson*, 483 F.3d at 85; *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014) (DNA “provide[s] a massive amount of unique, private information about a person that goes beyond identification of that person”); *People v. Buza*, 413 P.3d 1132, 1152 (Cal. 2018) (court was “mindful of the heightened privacy interests in the sensitive information that can be extracted from a person’s DNA”); *Maryland v. King*, 569 U.S. 435, 481 (2013) (Scalia, J., dissenting) (noting the “vast (and scary) scope” of information revealed by DNA). Therefore, extracting and analyzing DNA constitutes a search that is subject to Fourth Amendment scrutiny.

In the face of this clear caselaw, the State argues that extracting DNA and generating an STR profile from it is not a search. For this argument, it relies on what it deems “*King*’s express holding” that ““the processing of respondent’s DNA sample’s 13 CODIS loci did not intrude on respondent’s privacy in a way that would make his DNA identification unconstitutional.”” State OB at 13 (quoting *King*, 569 U.S. at 464). Relying on *King*, it asks this Court to conclude that generating an STR profile does not constitute a search. But the State’s argument misreads *King* in several critical respects.

As a threshold matter, *King* expressly recognized that the creation of a DNA profile for identification purposes *is* a search that triggers Fourth Amendment protection. 569 U.S. at 446. Though it relied on a bodily intrusion rationale, *id.*, it held that the buccal swab “effected” a “search,” *id.* at 448, and went on to subject



that search to Fourth Amendment scrutiny. To argue that no Fourth Amendment analysis is necessary here, the State relies on portions of *King* that assess whether or not the search at issue *satisfied* the Fourth Amendment’s reasonableness requirement—not whether it was protected by the Fourth Amendment at all.

The Supreme Court’s conclusion that the warrantless search at issue in *King* was reasonable under the Fourth Amendment is inapposite for four reasons. First, *King* held that the particular program at issue—testing felony arrestees’ DNA pursuant to a detailed regulatory regime—was not subject to a warrant requirement “in light of the standardized nature of the tests” and because “the permissible limits . . . [we]re defined narrowly and specifically in the regulations that authorize[d] them.” *Id.* at 448 (marks and citation omitted). The regulations dictated who was subject to the DNA collection (individuals charged with a serious offense); when that sample would be extracted and analyzed (after arraignment by a judge); when it must be destroyed (if the criminal proceeding does not result in a conviction, the conviction is overturned, or the individual is pardoned); and what it could be used for (nothing beyond identification, including an explicit ban on familial searches). *Id.* at 443–44. In addition, the individuals administering the program were not “officers whose perspective might be colored by their primary involvement in the . . . enterprise of ferreting out crime.” *Id.* at 448 (marks and citation omitted). Because this left those administering the program with “minimal discretion,” the Court

concluded that “the search effected . . . falls within the category of cases . . . analyzed by reference to . . . reasonableness, not individualized suspicion.” *Id.* (marks and citation omitted).

In contrast, the extraction and analysis here was not part of any standardized program. No “regulations . . . authorize[d] it,” much less defined “the permissible limits of the [the] intrusion[] narrowly and specifically.” *Id.* at 448. Moreover, the State exceeded the permissible bounds of the collection here, defined by Appellee’s consent, *see infra* Part III.B, and its representation that the blood sample would be destroyed after 90 days. In addition, the government official who conducted the search was actively engaged in “ferreting out crime.” *King*, 569 U.S. at 448. Thus, every fact that led the U.S. Supreme Court to apply a reasonableness test in *King* supports a warrant requirement in this case.<sup>16</sup> *See Carpenter*, 138 S. Ct at 2221

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<sup>16</sup> When assessing the privacy invasion enacted by the search, the Court also found the “statutory protections” relevant because they “guard[ed] against further invasion of privacy.” *Id.* at 465. The Court refused to “speculate about the risks posed by a system that did not contain comparable security provisions.” *Id.* at 465.

No such regulations protected Appellee in this case—nor would they protect the privacy of anyone whose biological material is already in the State’s possession. Indeed, while the regulatory scheme in *King* prohibited “[t]ests for familial matches,” *id.* at 464, that was the first step in the State’s investigation here. Amici do not address whether the familial search in Arizona’s STR database was constitutional or otherwise lawful. Assuming it was, and that the State had additional information supporting probable cause, *see* State OB at 26, the State could have obtained a warrant to extract and analyze Appellee’s DNA.

(“[W]arrantless searches are typically unreasonable where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.” (quotation marks and citation omitted)).

Second, when assessing the privacy intrusion, the Court explained that “the necessary predicate of a valid arrest for a serious offense”—not present here—was “fundamental” to its analysis. *King*, 569 U.S. at 461. “The expectations of privacy of an individual taken into police custody necessarily are of a diminished scope.” *Id.* at 462. “A search of the detainee’s person when he is booked into custody may involve a relatively extensive exploration, including requiring at least some detainees to lift their genitals or cough in a squatting position.” *Id.* (citations and marks omitted). The Court assessed the privacy intrusion involved in obtaining and testing a DNA sample only in that context—and it was careful to explain that this difference was “critical” in distinguishing from “searches of . . . the public at large” or “the average citizen.” *Id.* at 462–63.

Appellee’s DNA was extracted and analyzed when he was a free person and a member of the public at large; as such, he possessed the full measure of Fourth Amendment rights. *Davis*, 690 F.3d at 245 (“a court’s constitutional analysis [of a DNA search] may differ depending on whether the person is an arrestee or a ‘free

person”).<sup>17</sup> See also *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (noting “the absolute liberty to which every [free] citizen is entitled”).

Third, *King* relied heavily on the Court’s understanding of the DNA analysis involved at that time: processing “13 CODIS loci,” which were understood to “come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee.” 569 U.S. at 451, 464. The Court recognized that “science can always progress further” in ways that may “present additional privacy concerns.” *Id.* at 464, 465. See also *Buza*, 413 P.3d at 1152 (forecasting that “a new Fourth Amendment analysis will be required” by technological advances (citing *King*)); *Carpenter*, 138 S. Ct. at 2218 (“[T]he rule the Court adopts ‘must take account of more sophisticated systems that are already in use or in development.’” (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001))).

Science has indeed progressed. Since *King*, CODIS testing has expanded to

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<sup>17</sup> *Commonwealth v. Arzola*, 26 N.E.3d 185 (2015), which the State relies on to argue that people do not have a reasonable expectation of privacy in their STR profiles, supports this point. In that case, the court considered “a DNA profile from an *unknown* sample that was taken from lawfully seized evidence,” *id.* at 193, and distinguished it from cases, like this one, in which law enforcement created a DNA profile from biological material “*known* to contain the defendant’s DNA” in order “to compare it with other unknown samples obtained from various crime scenes.” *Id.* at 193 (distinguishing *Davis*, 690 F.3d 226) (second emphasis added).

20 loci,<sup>18</sup> and, as discussed in detail above, experts have discovered that these “non-coding” parts of our DNA provide genetic information beyond just identity, including sensitive medical information and familial relationships. *See supra* Part I.A (detailing post-*King* advances in science); *see also, e.g.*, Andrea Roth, “*Spit and Acquit*”: *Prosecutors as Surveillance Entrepreneurs*, 107 Cal. L. Rev. 405, 414 (2019).

Fourth, *King* emphasized that the government’s interest in identification there was specifically tied to “routine administrative procedure[s] at a police station house incident to booking and jailing the suspect.” 569 U.S. at 449 (quoting *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983) (quotation marks omitted)). In contrast, the DNA evidence here was obtained “for law enforcement purposes,” including “the specific purpose of incriminat[ion]”—a purpose that the Supreme Court has held not only “provides a basis for distinguishing” cases permitting warrantless searches but also “provides an affirmative reason for enforcing the strictures of the Fourth Amendment.” *Ferguson v. City of Charleston*, 532 U.S. 67, 83–85 (2001).

The government’s argument that it only intended to *identify* Appellee through extracting and analyzing his DNA, and not to learn other private facts about him, is also irrelevant for Fourth Amendment purposes. As the U.S. Supreme Court has

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<sup>18</sup> *See* Frequently Asked Questions on CODIS and NDIS, FBI, <https://www.fbi.gov/services/laboratory/biometricanalysis/codis/codis-and-ndis-fact-sheet>.

made clear in several cases decided after *King*, the Fourth Amendment is concerned with the *entirety* of the private information revealed to police through a search—not just the pieces of information the government ultimately considers useful. *See, e.g., Birchfield*, 579 U.S. at 464 (holding that seizure of a driver’s blood sample during blood alcohol testing is a search in part because it “places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond” what the government claims to seek); *Carpenter*, 138 S. Ct. at 2212, 2217 (considering the myriad “privacies of life” that *could be* revealed by the entirety of the data as compared to a small portion of that data the government considered inculpatory). The same principle applies to government extraction and analysis of DNA. When law enforcement collects an individual’s DNA, it gains access to that person’s entire genetic blueprint. *See, e.g., Thompson v. Spitzer*, 307 Cal. Rptr. 3d 183, 199 (Cal. Ct. App. 2023) (“[A] DNA sample contains a trove of personal information.”).<sup>19</sup> That violates reasonable expectations of privacy under the Fourth Amendment.

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<sup>19</sup> For similar reasons, the opinions the State relies on from other jurisdictions are unpersuasive. *See, e.g., Raynor v. State*, 99 A.3d 753, 762–65 (Md. 2014) (relying on *King*’s understanding of the 13 “junk” loci and noting that the petitioner “does not allege that law enforcement, at present, has the technological capabilities to [test any portion of his DNA other than 13 junk loci]” but recognizing that “there may be debate regarding privacy concerns should technological advances permit testing of DNA to glean more information”); *Commonwealth v. Arzola*, 26 N.E.3d 185, 191-92 (Mass. 2015) (relying on *King*’s understanding that STR loci “do[ ] not show more far-reaching and complex characteristics like genetic traits” but

Finally, in addition to constituting a search, the State’s extraction and analysis of Appellee’s DNA constituted a Fourth Amendment seizure because it “meaningful[ly] interfere[d] with his possessory interests.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). “[A] seizure deprives [an] individual of dominion over his or her person or property.” *Horton v. California*, 496 U.S. 128, 133 (1990). One of the most crucial property rights is the right to exclude others. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). Even if the owner retains an exact copy of the property seized (as we do with our DNA), this right may be violated if we are unable to control subsequent uses of our information. *See, e.g., United States v. Jefferson*, 571 F. Supp. 2d 696, 703 (E.D. Va. 2008) (copying contents of a person’s documents interferes with the person’s sole possession of the information in those documents). The State’s extraction and sequencing of DNA significantly interferes with one’s ability to control and exclude others from accessing their private genetic information.

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“recogniz[ing] that the science of DNA analysis may evolve and enable DNA profiling to uncover from these loci information more personal than the identity and sex of its source”); *People v. Mendez*, 73 Misc. 3d 715, 719 (N.Y. Sup. Ct. 2021) (relying on *King*’s finding that the CODIS loci “are not at present revealing information beyond identification”).

**III. The DNA in an individual’s blood cannot be extracted or analyzed in violation of the scope of consent under which the blood was obtained.**

Warrantless searches “are *per se* unreasonable under the Fourth Amendment.” *Arizona v. Gant*, 556 U.S. 332, 338 (2009). When it comes to biological evidence, “the importance of requiring authorization by a neutral and detached magistrate before allowing a law enforcement officer to invade another’s body in search of evidence of guilt is indisputable and great.” *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (marks and citation omitted). Law enforcement may avoid the warrant requirement when it conducts a search pursuant to valid consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). Consent searches must be limited, however, by the scope of the permission granted. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991); *Walter v. United States*, 447 U.S. 649, 656 (1980) (consent searches are “limited by the terms of [their] authorization.”).

The State makes two incorrect and dangerous arguments that this Court should reject. First, the State argues that, as long as it lawfully possesses an individual’s biological material, it may freely subject that material to a DNA test without any Fourth Amendment constraint. That argument ignores the fact that extracting and analyzing a person’s DNA constitutes a separate Fourth Amendment event from the initial collection of the biological material. And it ignores the reasons why the State’s possession of the biological material was lawful to begin with. When the State



obtains biological material pursuant to consent, it cannot conduct an additional search beyond the bounds of that consent unless it is granted new consent, obtains a warrant, or properly relies on another exception to the warrant requirement. *See United States v. McFarley*, 991 F.2d 1188, 1191 (4th Cir. 1993) (“[O]nce consent is withdrawn or its limits exceeded, the conduct of the officials must be measured against the Fourth Amendment principles.”). Holding otherwise would enable the government to subject everything from organs donated for transplant to blood collected from newborns to unfettered DNA testing for criminal investigations.

Second, the State ignores the fact that it was not lawfully in possession of the blood sample in this case at the time of the DNA analysis, because it had exceeded the 90-day destruction period it bound itself to when it obtained Appellee’s consent. The State cannot illegally and unreasonably retain such sensitive material and then later exploit it in a totally unrelated investigation. *Cf. United States v. Ganius*, 755 F.3d 125, 137 (2d Cir. 2014) (government may not “possess indefinitely personal records . . . that were beyond the scope of the warrant [used to seize them] while it looked for other evidence to give it probable cause to search the files”), *vacated on good-faith exception grounds*, 824 F.3d 199 (2d Cir. 2016) (en banc). To search Appellee’s DNA in this investigation, the State needed to obtain a new sample, which it could have done with a warrant or with Appellee’s consent.

**A. Extracting and analyzing a person’s DNA is a separate Fourth Amendment event from the collection of their blood to conduct a blood alcohol test.**

The fact that the State already possesses a person’s biological material cannot suffice to rob that material, or the information contained within it, of Fourth Amendment protection from further searches. “[I]t is obvious that the physical intrusion” involved in collecting biological material constitutes a search, and “[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested [individual’s] privacy interests.” *Skinner*, 489 U.S. at 616. The “collection and subsequent analysis of . . . biological samples must be deemed [separate] Fourth Amendment searches.” *Id.* at 618.

In a variety of contexts, courts have treated the search of private information differently than the initial seizure of the information. For example, in *Walter v. United States*, the Supreme Court held that “an officer's authority to possess a package is distinct from his authority to examine its contents.” 447 U.S. 649, 654 (1980). “The fact that FBI agents were lawfully in possession of . . . boxes of film did not give them authority to search their contents.” *Id.* “A partial invasion of privacy cannot automatically justify a total invasion.” *Id.* at 659 n.13. Instead, given the additional information that could be revealed, examination of the contents “must be characterized as a separate search” subject to its own warrant requirement. *Id.* at 657.

This is all the more important when it comes to searches using modern technologies that can reveal a wealth of private information. In *Riley v. California*, for example, the Supreme Court allowed police to seize a person’s cell phone incident to arrest, but prohibited police from searching the information stored in the phone without a warrant. 573 U.S. 373, 403 (2014). Likewise, courts routinely permit police to seize entire hard drives pursuant to a warrant permitting a search for only particular information, but require police to obtain a second warrant before searching for digital files outside the scope of the initial warrant. *See, e.g., People v. Hughes*, 958 N.W.2d 98 (Mich. 2020); *United States v. Hasbajrami*, 945 F.3d 641, 670 (2d Cir. 2019) (“querying . . . stored data does have important Fourth Amendment implications, and those implications counsel in favor of considering querying a separate Fourth Amendment event”).

Courts have already held that this applies to DNA. “[T]he extraction of DNA and the creation of a DNA profile result in a sufficiently separate invasion of privacy that such acts must be considered a separate search under the Fourth Amendment even when there is no issue concerning the collection of the DNA sample.” *Davis*, 690 F.3d at 246; *see also Amerson*, 483 F.3d at 85 (holding the same, even if it is only for identification purposes). Here, Appellee does not contest the State’s initial seizure of his blood; he argues only that its subsequent testing for DNA (or anything other than blood alcohol content) was a distinct Fourth Amendment event.

**B. Exceptions to the warrant requirement cannot be lumped together into one “lawfully obtained” category to avoid Fourth Amendment scrutiny.**

While there are exceptions to the warrant requirement, it is a “basic rule” that they are “few” and “specifically established and well-delineated.” *Gant*, 556 U.S. at 338. Once an exception to the warrant requirement is invoked, courts must ensure that its application is “limited in scope to that which is justified by the particular purposes served by the exception.” *Florida v. Royer*, 460 U.S. 491, 500 (1983); accord *Collins v. Virginia*, 138 S. Ct. 1663, 1671–72 (2018) (a warrantless search must not be “untether[ed] . . . from the justifications underlying it” (internal citation and quotation marks omitted)). Otherwise, officers may be “allowed so much latitude that [searches that initially fell within an exception] are turned into a purposeful and general means of discovering evidence of crime.” *Florida v. Wells*, 495 U.S. 1, 4 (1990) (citation omitted).

Assessing the relevant exception to the warrant requirement on its own precise terms is all the more important when applied, as here, to new technologies that can reveal myriad “privacies of life” in ways that are “remarkably easy, cheap, and efficient.” *Carpenter*, 138 S. Ct. at 2217-18 (internal citation and quotation marks omitted). In such circumstances, courts must ask whether application of the exception “to this particular category of effects would ‘untether the rule from the justifications underlying the . . . exception.’” *Riley*, 573 U.S. at 386 (quoting *Gant*,

556 U.S. at 343). *See also Carpenter*, 138 S. Ct. at 2214 (courts must avoid “mechanical interpretation” of the Fourth Amendment).

The State fails to even argue that any particular exception to the warrant requirement is satisfied here. Rather than point to any case in which biological material was obtained pursuant to an individual’s express consent, but then tested for DNA outside the bounds of that consent, the State relies on cases considering biological material “collected . . . from an object on which the material had been left” during police questioning, *Raynor*, 99 A.3d at 767, a blood stain on a T-shirt an individual was wearing “in plain view” when he was taken into custody, *Arzola*, 26 N.E.3d at 190, and a cigarette butt an individual intentionally abandoned, *Mendez*, 73 Misc. 3d at 716.<sup>20</sup> In each of these cases, the justification for the State’s

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<sup>20</sup> A number of the cases the State points to rely on the abandonment exception to the warrant requirement, which derives from cases holding that people have no reasonable expectation of privacy in trash left out for collection or items they otherwise intentionally abandon. *See, e.g., California v. Greenwood*, 486 U.S. 35, 40 (1988); *Abel v. United States*, 362 U.S. 217, 239 (1960). These cases rely on people *knowingly* and *voluntarily* discarding items. *See, e.g., Greenwood*, 486 U.S. at 40–41; *Abel*, 362 U.S. at 239. That justification cannot apply to our DNA, which we have no choice but to shed wherever we go, and on whatever we touch or eat. People constantly shed staggering numbers of skin cells, *see* *Murphy, Inside the Cell* at 5; the average person loses between 40 and 100 hairs per day, *see* *Sheldon Krinsky & Tania Simoncelli, Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* 117 (2012); a single sneeze spews about 3,000 cell-containing droplets into the world, *id.*; and merely touching a surface with one’s fingertip causes DNA to be deposited there, A.A. Oleiwi et al., *The Relative DNA-Shedding Propensity of the Palm and Finger Surfaces*, 55 *Sci. & Justice* 329, 329 (2015). T]here is no way to avoid leaving behind a trail” of DNA, and so “in no meaningful sense does the [individual] voluntarily ‘assume[] the risk’ of turning

possession of the biological material derives from different government interests, and reflects different privacy concerns; lumping them together necessarily means they have failed “to rest on [their] own bottom[s].” *Riley*, 573 U.S. at 393.

**C. Consent to a blood draw for a specific search does not rob all of the information contained in that blood of Fourth Amendment protection.**

As the court below correctly held, the relevant exception to the warrant requirement in this case is consent—and that exception did not authorize the State to extract and analyze Appellee’s DNA, because doing so exceeded the scope of the consent given.

The Fourth “Amendment requires that the scope of every authorized search be particularly described,” whether that authorization comes from a warrant or from consent. *Walter v. United States*, 447 U.S. 649, 657 (1980). And, like warrant-based searches, consent searches are “limited by the terms of [that] authorization.” *Id.* This includes limits “not only to a particular area but also to a specific purpose.” *Florida v. Jardines*, 569 U.S. 1, 9 (2013). See also *United States v. Blocker*, 104 F.3d 720, 728 (5th Cir. 1997) (Inspections are “limited to the purposes contemplated by the [consenting] suspect.” (alteration in original) (quoting *United States v. Bosse*, 898

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over a comprehensive dossier” of genetic information. *Carpenter*, 138 S.Ct. at 2220 (second alteration in original). In any event, Appellee did not “abandon” his DNA here. Instead, his blood was extracted for a limited purpose: to test blood alcohol content and nothing more within a limited time frame.

F.2d 113, 115 (9th Cir. 1990)). Just as “[c]onsent at a traffic stop to an officer’s checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics,” *Jardines*, 569 U.S. at 9, consent to collection of blood for a blood alcohol test does not permit an officer to rummage through DNA for an STR profile.

Moreover, “a consent to search does not mean the constitutional protection against unreasonable searches and seizures has been waived for all time.” *Gray v. State*, 441 A.2d 209, 221 (Del. 1981). There are “temporal limits of one’s consent,” such that consent once validly given can expire. *State v. Green*, 826 A.2d 486, 501 (Md. 2003). Courts that have upheld late-occurring searches based on earlier-signed consent forms have done so only when the delay between consent and search was short, and when the “written consent to search . . . contained no limitations on the time for search.” *State v. Williams*, 313 S.E.2d 236, 237 (N.C. Ct. App. 1984) (search conducted 23 hours after consent form signed); *see also State v. Grega*, 721 A.2d 445, 453 (Vt. 1998) (search reasonable when conducted on the two days following signing of the consent form, and the defendant “did not indicate, by word or action, that his consent expired at the end of [the first] day, or was in some other way restricted”). Here, the search occurred three *years* after consent was given to seize the blood sample, and the terms of that consent clearly delineated a 90-day expiration date for the seizure. Once that time limit passed, consent for the State to continue its

seizure of the blood sample expired, the seizure became constitutionally unreasonable, and any search based on the purported consent was unconstitutional.

Ensuring that the scope of the authorization is enforced is particularly important for consent searches because they are conducted without judicial authorization or oversight. If consent searches were not so limited, the government could obtain consent to conduct one type of search and then engage in indiscriminate searches and seizures of a person's home, property, digital devices, or body. That concern is particularly acute where data-rich material, like DNA, is the subject of the search. Given the privacy implications of allowing broad law enforcement access to genetic information, courts must narrowly interpret the scope of consent when biological material is in question.

**D. Allowing warrantless DNA testing of any biological material lawfully in the State's possession would have far-reaching and troubling consequences.**

Over and above the substantial doctrinal problems, the practical consequences of accepting the State's argument would be terrifying. The government has lawful access to our biological material in a wide variety of contexts—from blood submitted for medical research to organs donated for transplant to specimens collected from survivors of sexual assault. Under the government's theory, the State could extract any person's DNA from that material, create a genetic profile, and add it to the CODIS database, all without implicating, let alone respecting, any



constitutional protection.

At the federal level, the government collects many samples of our biological material for public health reasons. For example, the National Institutes of Health (NIH) collects blood, body fluids, tissues, and other biological materials to study the genetic and environmental factors associated with diseases, and to develop new treatments.<sup>21</sup> The Environmental Protection Agency collects biological samples from people living near contaminated sites or from populations that may be at higher risk of exposure to environmental pollutants.<sup>22</sup> The Centers for Disease Control and Prevention (CDC) collects biological samples—for example, blood for Ebola<sup>23</sup> and nasal or throat specimens for COVID-19<sup>24</sup>—to study epidemiology and to develop new treatments; it also collects blood from approximately 5,000 people each year

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<sup>21</sup> *Guidelines for Human Biospecimen Storage, Tracking, Sharing, and Disposal within the NIH Intramural Research Program*, National Institutes of Health (Sept. 2019) at 4, <https://oir.nih.gov/system/files/media/file/2021-11/guidelines-biospecimen.pdf>

<sup>22</sup> *Exposure Assessment Tools by Approaches - Exposure Reconstruction (Biomonitoring and Reverse Dosimetry)*, United States Environmental Protection Agency (last updated April 12, 2023) <https://www.epa.gov/expobox/exposure-assessment-tools-approaches-exposure-reconstruction-biomonitoring-and-reverse>

<sup>23</sup> *Guidance for Collection, Transport, and Submission of Specimens for Ebolavirus Testing*, CDC (Dec. 6, 2022), <https://www.cdc.gov/vhf/ebola/laboratory-personnel/specimens.html>.

<sup>24</sup> *Interim Guidelines for Collecting and Handling of Clinical Specimens for COVID-19 Testing*, CDC (July 15, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/lab/guidelines-clinical-specimens.html>.

“to assess the health and nutritional status of adults and children.”<sup>25</sup> And the Health Resources and Services Administration oversees “the nation’s organ and blood stem cell transplant systems.”<sup>26</sup>

The federal government also collects biological material for more individualized purposes that are nevertheless distinct from investigating the donors as possible perpetrators of crimes. For example, some U.S. citizens and lawful permanent residents provide buccal swabs to verify their familial relationships to people seeking to immigrate to the United States.<sup>27</sup> People donate biological material to help identify or locate missing family members.<sup>28</sup> And Olympic and Paralympic athletes submit biological samples, including blood, to the United States Anti-

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<sup>25</sup> *About the National Health and Nutrition Examination Survey*, CDC  
[https://www.cdc.gov/nchs/nhanes/about\\_nhanes.htm](https://www.cdc.gov/nchs/nhanes/about_nhanes.htm).

<sup>26</sup> *About Us*, Health Resources & Services Admin.,  
<https://www.organdonor.gov/about-us>.

<sup>27</sup> *See, e.g., DNA Relationship Testing Procedures*, U.S. Department of State,  
<https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration/dna-relationship-testing-procedures.html>.

<sup>28</sup> *See DNA Analysis and CODIS Searching*, NamUs,  
<https://namus.nij.ojp.gov/services/dna#faq-what-is-a-family-reference-sample>  
 (“Family members of missing persons are asked to provide DNA samples . . . These samples, known as Family Reference Samples, are voluntary DNA submissions that are used only in the search for a missing loved one.”).

Doping Agency (USADA) to test for prohibited substances.<sup>29</sup>

Significant biospecimen collection also happens at the state and local level, including in Arizona. For example, the Pima County Medical Examiner’s Office is currently working to collect DNA from Latin American individuals to help identify more than 1,200 human remains.<sup>30</sup> The Arizona Department of Health Services collects and analyzes blood specimens “[i]n order to improve understanding of what opioids are responsible for causing overdoses in Arizona and to better target treatment and prevention efforts.”<sup>31</sup> The Arizona State Public Health Laboratory can collect blood from all people involved in a chemical-exposure event.<sup>32</sup> And the State

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<sup>29</sup> *Sample Collection Process*, United States Anti-Doping Agency, <https://www.usada.org/sample-collection-process/>.

<sup>30</sup> Shelby Slaughter, *New DNA Project Aims to Help Identify Southern Arizona John Does*, 13 News (Mar. 8, 2023), <https://www.kold.com/2023/03/09/new-dna-project-aims-help-identify-southern-arizona-john-does/>. Similarly, Tulsa, Oklahoma has hired scientists to collect DNA from Black people to identify individuals killed during the Tulsa race massacre. Emily Mulin, *An Effort to ID Tulsa Race Massacre Victims Raises Privacy Issues*, Wired (Sept. 6, 2022), <https://www.wired.com/story/an-effort-to-id-tulsa-race-massacre-victims-raises-privacy-issues/>.

<sup>31</sup> *Guide to Laboratory Services: Chemistry Addendum*, Arizona Department of Health Services (Aug. 2017) at 3, <https://www.azdhs.gov/documents/preparedness/state-laboratory/toxicology-guide.pdf>.

<sup>32</sup> *Chemical Emergency Response*, Arizona State Public Health Laboratory (Jan. 2010) <https://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/infectious-diseases-training/2018/handout-5.pdf>.

collects biological materials from the victims or survivors of crimes, including children subjected to physical or sexual abuse<sup>33</sup> and adult survivors of sexual assault.<sup>34</sup>

In all of these instances, we give the government access to our biological material for limited, clearly-specified purposes, which do not include investigating us or our families as possible perpetrators of a crime. The State might argue that existing regulations protect this biological material from being used for investigative purposes. Yet police officers have relied on such samples for criminal investigations. In *Davis*, “the [police department] had possession of [the suspect’s] DNA because he was the victim of a crime.” 690 F.3d at 245. In San Francisco, a woman’s “DNA from a rape kit was used by the police to arrest her in connection with an unrelated property crime” five years later. Eduardo Medina, *Woman Sues San Francisco Over Arrest Based on DNA From Her Rape Kit*, *New York Times* (Sept. 13, 2022).<sup>35</sup> And New Jersey police recently sought to use blood collected from newborn babies “to

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<sup>33</sup> Angelo P. Giardino *et al.*, *Child Sexual Abuse*, *Medscape* (Nov. 29, 2021), available at <https://reference.medscape.com/article/915841-overview>.

<sup>34</sup> See, e.g., A.R.S. § 13-1426; see also *Sexual Assault Kit Initiative*, City of Phoenix, <https://www.phoenix.gov/police/sexual-assault-kit-initiative> (“In Arizona, a Sex Crimes Evidence Kit . . . is used statewide [and] . . . will not be destroyed regardless of lab results,” and “may be used in future cases regardless of the outcome of the initial sexual assault investigation.”).

<sup>35</sup> Available at <https://www.nytimes.com/2022/09/13/us/rape-kit-dna-san-francisco.html>.

test[ ] for a panel of potentially life-threatening inherited disorders” to investigate a cold case. Crystal Grant, *Police Are Using Newborn Genetic Screening to Search for Suspects, Threatening Privacy and Public Health*, ACLU (July 26, 2022).<sup>36</sup> Equally, here, Appellee consented to give the government his blood for one purpose—to determine his blood alcohol content on a particular day in January 2015—and with the understanding that it would be destroyed after 90 days, yet the State used it to search and seize his DNA three years later while investigating an unrelated crime. This Court cannot sanction that investigative technique.

### CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the trial court’s grant of Appellee’s motion to suppress.

Respectfully submitted this 18th day of May, 2023.

By /s/Jared G. Keenan  
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<sup>36</sup> Available at <https://www.aclu.org/news/privacy-technology/police-are-using-newborn-genetic-screening>.