

**ARIZONA SUPREME COURT**

State of Arizona,

Appellant,

v.

Ian Mitcham,

Appellee.

No. CR-23-0236-PR

Court of Appeals, Division 1

No. 1 CA-CR 23-0014

Maricopa County Superior Court

No. CR 2018-118086-001

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

Jared G. Keenan (AZ Bar #027068)

Lauren K. Beall (AZ Bar #035147)

American Civil Liberties Union

Foundation of Arizona

2712 North 7th Street

Phoenix, AZ 85006

(602) 650-1854

jkeenanacluaz.org

lbeallacluaz.org

Vera Eidelman\*

American Civil Liberties Union

Foundation

125 Broad Street, 18th Floor

New York, NY 10004

(212) 549-2500

veidelmanaclu.org

*\*Pro Hac Vice Pending*

*Counsel for Amici Curiae*

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**STATEMENT OF INTEREST OF AMICI CURIAE .....1**

**INTRODUCTION.....1**

**ARGUMENT.....4**

**I. Extracting an individual’s genetic material and generating a DNA profile from it constitutes a search and seizure.....4**

**II. Absent a valid exception, the State cannot extract or analyze the DNA in an individual’s blood without a warrant. ....9**

**A. Extracting and analyzing a person’s DNA is a separate Fourth Amendment event from the collection of blood to conduct a blood alcohol test, and it requires a warrant. ....9**

**B. Consent to a blood draw for a specific search does not rob all of the information contained in that blood of Fourth Amendment protection.....13**

**III. Allowing warrantless DNA testing of any biological material lawfully in the State’s possession would have far-reaching and troubling consequences...16**

**CONCLUSION.....20**

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Birchfield v. North Dakota</i> , 579 U.S. 438 (2016).....	3, 4, 8
<i>Carpenter v. United States</i> , 585 U.S. 296 (2018).....	3, 5, 8, 16
<i>Ferguson v. City of Charleston</i> , 532 U.S. 67 (2001).....	13
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013).....	11, 12, 13, 14
<i>Florida v. Wells</i> , 495 U.S. 1 (1990).....	15
<i>Gray v. State</i> , 441 A.2d 209 (Del. 1981) .....	14
<i>Illinois v. Lafayette</i> , 462 U.S. 640 (1983).....	13
<i>Johnson v. VanderKooi</i> , 983 N.W.2d 779 (Mich. 2022).....	7
<i>Katz v. United States</i> , 389 U.S. 347 (1967).....	9
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	9
<i>Mario W. v. Kaipio</i> , 230 Ariz. 122 (2012).....	<i>passim</i>
<i>Maryland v. King</i> , 569 U.S. 435 (2013).....	11, 12, 13
<i>Norman-Bloodsaw v. Lawrence Berkeley Lab.</i> , 135 F.3d 1260 (9th Cir. 1998) .....	5

<i>People v. Buza</i> , 413 P.3d 1132 (Cal. 2018).....	5
<i>Skinner v. Railway Labor Execs. ' Ass'n</i> , 489 U.S. 602 (1989) .....	4
<i>State v. Green</i> , 826 A.2d 486 (Md. 2003) .....	14
<i>State v. Grega</i> , 721 A.2d 445 (Vt. 1998).....	14
<i>State v. Medina</i> , 102 A.3d 661 (Vt. 2014).....	5
<i>State v. Mitcham</i> , 256 Ariz. 104 (App. 2023).....	3
<i>State v. Williams</i> , 313 S.E.2d 236 (N.C. Ct. App. 1984).....	14
<i>United States v. Blocker</i> , 104 F.3d 720 (5th Cir. 1997) .....	14
<i>United States v. Davis</i> , 690 F.3d 226 (4th Cir. 2012) .....	4, 10, 19
<i>United States v. Amerson</i> , 483 F.3d 73 (2d Cir. 2007) .....	10
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984).....	8
<i>Walter v. United States</i> , 447 U.S. 649 (1980).....	10, 14
<b>Constitutional Provisions</b>	
U.S. Const. Amend. 4 .....	<i>passim</i>
<b>Statutes</b>	
A.R.S. § 13-1426.....	19

## Other Authorities

3008 – <i>NIH Human Biospecimen Program</i> , Nat’l Insts. Of Health Off. Of Mgmt. (Oct. 4, 2023) .....	17
<i>About the National Health and Nutrition Examination Survey</i> , CDC .....	17
<i>About Us</i> , Health Resources & Services Admin. ....	17
Angelo P. Giardino <i>et al.</i> , <i>Child Sexual Abuse</i> , Medscape (Nov. 29, 2021) .....	19
<i>Chemical Emergency Response</i> , Arizona State Public Health Laboratory (Jan. 2010).....	18
<i>Compare DNA Tests</i> , 23andMe .....	5
Crystal Grant, <i>Police Are Using Newborn Genetic Screening to Search for Suspects, Threatening Privacy and Public Health</i> , ACLU (July 26, 2022) .....	19
<i>DNA Analysis and CODIS Searching</i> , NamUs.....	17
Eduardo Medina, <i>Woman Sues San Francisco Over Arrest Based on DNA From Her Rape Kit</i> , New York Times (Sept. 13, 2022) .....	19
Erin E. Murphy, <i>Inside the Cell: The Dark Side of Forensic DNA</i> 7–8 (2015) .....	6
<i>Fresh or Stored for 3, 6 or 12 Months Using Five Different Protocols</i> , J. Appl. Oral Sci. 147 (2017).....	16
Frequently Asked Questions on CODIS and NDIS, FBI .....	13
<i>Guide to Laboratory Services: Chemistry Addendum</i> , Arizona Department of Health Services (Aug. 2017) .....	18
Mayra M. Bañuelos, <i>et al.</i> , <i>Associations Between Forensic Loci and Expression Levels of Neighboring Genes May Compromise Medical Privacy</i> , PNAS (Sept. 27, 2022).....	8

Nicole Wyner, et al., <i>Forensic Autosomal Short Tandem Repeats and Their Potential Association with Phenotype</i> , <i>Frontiers in Genetics</i> (Aug. 6, 2020).....	7
<i>Parabon Snapshot Advanced DNA Analysis: Genetic Genealogy, Phenotyping, Ancestry &amp; Kinship Analysis</i> , Parabon Nanolabs.....	5
<i>Sample Collection Process</i> , United States Anti-Doping Agency.....	18
<i>Sexual Assault Kit Initiative</i> , City of Phoenix .....	19
Shelby Slaughter, <i>New DNA Project Aims to Help Identify Southern Arizona John Does</i> , <i>13 News</i> (Mar. 8, 2023).....	18
Sheldon Krimsky & Tania Simoncelli, <i>Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties</i> 117 (2012).....	15
<i>Single Nucleotide Polymorphisms (SNPs)</i> , Nat’l Hum. Genome Rsch. Inst.....	6
<i>Suspects, Threatening Privacy and Public Health</i> , ACLU (July 26, 2022) .....	19
Thais Francini Garbieri <i>et al.</i> , <i>Human DNA Extraction from Whole Saliva that Was Fresh or Stored for 3, 6 or 12 Months Using Five Different Protocols</i> .....	15
<i>What Are Single Nucleotide Polymorphisms (SNPs)?</i> , Nat’l Libr. Of Med. ....	6
<i>What Do the Dots and Lines on the Map Represent?</i> Ancestry .....	6

## **STATEMENT OF INTEREST OF AMICI CURIAE**

The American Civil Liberties Union (“ACLU”) is a nonprofit, nonpartisan membership organization devoted to protecting civil rights and liberties, 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.

Though Amici agree with Petitioner that the court below erred in holding that, though the collection and analysis of Petitioner’s DNA exceeded the scope of his consent and was therefore unconstitutional, there should be no suppression remedy, they submit this brief to address the questions presented in the State’s Cross-Petition for Review: (1) whether obtaining a blood sample and extracting a DNA profile from it are distinct searches under the Fourth Amendment; and (2) whether the State can, consistent with the Fourth Amendment, collect and analyze a DNA profile “from evidence lawfully in police custody” without a warrant. Resp. to Pet. 4, 5.

### **INTRODUCTION**

For public health and other reasons, states frequently acquire biological material from their residents. Here, the State argues that it can, without any court oversight whatsoever, permit law enforcement to access and build DNA profiles from any such biological material that it lawfully acquires. That argument, if

accepted, would have drastic consequences. It would allow the State to leverage its public health functions into a capacity to build, for law enforcement's unfettered use, a vast DNA database of Arizonans. Law enforcement could exploit everything from the blood samples taken during health screenings of newborn babies to the tissues of organ donors. Accepting this argument would vitiate the scope of the consent that allowed the biological material's collection in the first place. And it would undercut public trust, and even participation, in important public health programs.

The Fourth Amendment does not allow those results. DNA contains some of a person's most private and sensitive information—ancestry, family relationships, propensities for serious medical conditions, and more. The reasonable expectation of privacy in this information means the government must obtain a warrant to search or seize DNA. As this Court recognized in 2012, collecting and analyzing DNA, even from biological material in the government's lawful possession, constitutes a Fourth Amendment search. *See Mario W. v. Kaipio*, 230 Ariz. 122, 127 (2012). Since then, advances in research and technology have only confirmed the wisdom of that holding—and, contrary to the State's thin argument, Resp. Br. 20–21, the U.S. Supreme Court's subsequent decision in *Maryland v. King* did not negate it.

A person's 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 the warrant requirement. A consent search is lawful only because the individual agrees to it, and



it can go no farther than the consent actually given. Here, as both courts below concluded, the DNA profiling at issue exceeded Petitioner’s consent because he agreed only to a blood-alcohol test related to a DUI, and was advised that the blood vial collected from him would be destroyed after 90 days. Instead of complying with these clear limitations, the State held onto his blood for three years, and then tested it for entirely different information to investigate an entirely different crime.

Though it correctly ruled on the scope of Petitioner’s consent, the appellate court more broadly agreed with the State’s argument that it could create “a DNA profile from a lawfully held blood sample.” *State v. Mitcham*, 256 Ariz. 104 (App. 2023), ¶ 2. That conclusion is wrong. It ignores this Court’s holdings about genetic privacy in *Mario W.*, overreads the U.S. Supreme Court’s narrow and fact-bound opinion in *King*, and disregards its more recent cases regarding the application of old doctrines to new, privacy-invasive technologies. *See, e.g., Birchfield v. North Dakota*, 579 U.S. 438 (2016); *Carpenter v. United States*, 585 U.S. 296 (2018).

This Court should reaffirm *Mario W.*’s holding that DNA profiling constitutes a distinct Fourth Amendment event, and reject the State’s argument that it becomes permissible as soon as the government lawfully possesses a person’s biological material. To hold otherwise would put the genetic privacy of all Arizonans whose biological material is currently held by the government—from newborn babies to survivors of sexual assault—at risk.

## ARGUMENT

### **I. Extracting an Individual’s Genetic Material and Generating a DNA Profile From it Constitutes a Search and Seizure.**

This Court has already held that DNA profiling is a Fourth Amendment search, and it should not accept the State’s invitation to reverse course here. Indeed, because “the extraction of [a person’s] DNA profile” constitutes a “serious intrusion on the[ir] privacy interests,” and because it “reveal[s] . . . intimate personal information about the individual,” including “individual genetics,” *see Mario W.*, 230 Ariz. at 127, DNA profiling is among the most invasive searches that a state can conduct.

*Mario W.*’s holding is consistent with guidance from the U.S. Supreme Court, which has long recognized that “chemical analysis” of biological samples is a search because it “can reveal a host of private medical facts.” *Skinner v. Railway Labor Execs.’ Ass’n*, 489 U.S. 602, 617 (1989). The Court has applied this concern to DNA in particular, holding that blood tests for alcohol concentration are more concerning than breath tests precisely because extracting blood “put[s] into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information”—including genetic information—can be obtained. *Birchfield*, 579 U.S. at 463.

*Mario W.* is also consistent with the conclusions of many courts around the country. *E.g. United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012) (holding that

collection and analysis of DNA constitutes a search); *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”).

In the decade since this Court decided *Mario W.*, advances in technology and research have only reinforced its conclusion. DNA tests can now expose one’s likelihood for having Alzheimer’s, cystic fibrosis, breast cancer, Huntington’s disease, and substance use disorders. “[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). DNA profiling can also uncover previously unknown family members and parentage, implicating the kind of “familial . . . and sexual associations” that the U.S. Supreme Court cautioned could offer the government “an intimate window into a person’s life.” *Carpenter*, 585 U.S. at 311. And companies purport to be able to use DNA profiling to identify everything from our eye, hair, and skin colors, to our food preferences and allergies, to our ancestors’ likely migration patterns.<sup>1</sup>

---

<sup>1</sup> See, e.g., *Parabon Snapshot Advanced DNA Analysis: Genetic Genealogy, Phenotyping, Ancestry & Kinship Analysis*, Parabon Nanolabs, <https://snapshot.parabon-nanolabs.com>; *Compare DNA Tests*, 23andMe,

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>2</sup> 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>3</sup> Law enforcement officers also use SNP profiles to conduct forensic genetic genealogy (“FGG”) investigations, which 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.

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>4</sup> STR analysis is used to create

---

<https://www.23andme.com/compare-dna-tests>; *What Do the Dots and Lines on the Map Represent?*, Ancestry, <https://www.ancestry.com/cs/dna-help/communities/dots-and-lines>.

<sup>2</sup> *Single Nucleotide Polymorphisms (SNPs)*, Nat’l Hum. Genome Rsch. Inst., <https://www.genome.gov/genetics-glossary/Single-Nucleotide-Polymorphisms>.

<sup>3</sup> *What Are Single Nucleotide Polymorphisms (SNPs)?*, Nat’l Libr. Of Med., <https://medlineplus.gov/genetics/understanding/genomicresearch/snp>.

<sup>4</sup> See Erin E. Murphy, *Inside the Cell: The Dark Side of Forensic DNA* 7–8 (2015).

DNA profiles compatible with the FBI’s CODIS system. Though sometimes mischaracterized as revealing only identity, STR profiles can expose far more.<sup>5</sup>

Indeed, as this Court has already recognized, typically, “the State does not seek a profile simply to *identify* any [individual] in the normally accepted use of that term”; “it does not claim that it needs a DNA profile . . . to determine who [a specific individual] is.” *Mario W.*, 230 Ariz. at 125. Instead, it relies on profiles “to investigate whether the [individual] has committed . . . uncharged crimes.” *Id.* And the fact that, to do so, it “subsequent[ly] publi[shes the profile] to law enforcement nationwide” only adds to the “privacy concern.” *Id.* at 128.

Recent research also highlights the information STR profiles can reveal beyond identity. A 2020 research review found that 57 studies have linked forensic STRs with a total of 50 unique traits, including schizophrenia, Parkinson’s disease, and Down syndrome.<sup>6</sup> Also, a 2022 study found “six significant correlations” through which “the CODIS genotype may be informative about . . . psychiatric

---

<sup>5</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>6</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>.

conditions,” and physical characteristics, like “severe skin and platelet conditions.”<sup>7</sup> “These 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.”<sup>8</sup>

The State’s argument that it only *intended* to learn Petitioner’s identity, and not other private facts about him, is irrelevant. Under the Constitution, the *entire universe* of private information that can be gleaned from a DNA sample—not just the portion of that universe the government ultimately uses—is what matters. *See Birchfield*, 579 U.S. at 464 (holding that blood alcohol tests require greater protection than breath alcohol tests, even though they ostensibly seek the same information, because a wealth of additional private information can be gleaned from blood). *Accord Carpenter*, 585 U.S. at 302–3, 311 (holding that defendant had reasonable expectation of privacy in location data, notwithstanding small portion government relied on at trial, because of all that *could be* revealed by the entirety).<sup>9</sup>

---

<sup>7</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>8</sup> *Id.*

<sup>9</sup> In addition to constituting a search, the State’s extraction and analysis of Petitioner’s DNA was a Fourth Amendment seizure because it “meaningful[ly] interfere[d] with his possessory interests,” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), including the ability to control and exclude others from access—among

## **II. Absent a Valid Exception, the State Cannot Extract or Analyze the DNA in an Individual’s Blood Without a Warrant.**

“It has been long established that warrantless searches ‘are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’” *Mario W.*, 230 Ariz. at 126 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Here, no exception applies.

The State’s contrary arguments are dangerously flawed. First, it claims that, as long as it lawfully possesses an individual’s biological material, it may freely subject that material to DNA testing without any Fourth Amendment constraint. That claim misreads both this Court’s opinion in *Mario W.* and the U.S. Supreme Court’s opinion in *King*. Second, the State claims that it lawfully possessed the blood sample in this case. In fact, that is inaccurate. At the time of the DNA analysis, the State had exceeded the 90-day destruction period to which it had committed itself, and thus its possession of the material had become unlawful.

### **A. Extracting and Analyzing a Person’s DNA is a Separate Fourth Amendment Event From the Collection of Blood to Conduct a Blood Alcohol Test, and it Requires a Warrant.**

*Mario W.* held that, even once the government has obtained a person’s biological material, collecting and analyzing DNA from that material constitutes a

---

the most crucial property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

separate event for Fourth Amendment purposes. 230 Ariz. at 127. Other courts have reached the same conclusion. *Davis*, 690 F.3d at 246; *Amerson*, 483 F.3d at 85 (holding the same, even if it is only for identification purposes).

That holding accords with U.S. Supreme Court caselaw. *See Skinner* 489 U.S. at 616 (“[I]t is obvious that . . . chemical analysis of the sample to obtain physiological data is a further invasion of the tested [individual’s] privacy interests.”). 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, where additional information could be revealed, examination of the contents “must be characterized as a separate search” subject to a warrant requirement. *Id.* at 657.

Contrary to the State’s argument that *King* negates *Mario W.*’s two-search holding, it remains good law. The State relies on a single line from *King*: “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.” Resp. Br. at 20-21 (quoting *King*, 569 U.S. at 464). But the State’s



argument misses the forest for the trees. *King* expressly recognized that the creation of a DNA profile for identification purposes *is* a Fourth Amendment search. 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 subjected that search to Fourth Amendment scrutiny. In the passage the State cites, the Court was assessing whether the search at issue *complied with* the Fourth Amendment—not whether it was a Fourth Amendment search at all. Also, its reasoning on that question neither alters this Court’s holding in *Mario W.* that DNA profiling is a separate, constitutionally significant event nor negates the need for a warrant in this case for four reasons.

First, *King* held that the program at issue—testing felony arrestees’ DNA pursuant to detailed regulations—was subject only to a reasonableness analysis because “the permissible limits . . . [we]re defined narrowly and specifically” by regulations cabining whose DNA could be collected, when, and for what purposes. *Id.* at 448 (marks and citation omitted). In addition, “officers whose perspective might be colored by their primary involvement in the . . . enterprise of ferreting out crime” were not involved. *Id.* Because this left those administering the program with “minimal discretion,” “*the search effected . . . [was] analyzed by reference to . . . reasonableness.*” *Id.* (marks and citation omitted, emphasis added).

In contrast, the extraction and analysis here was not part of any standardized program. No “regulations . . . authorize[d] it,” much less “narrowly and specifically”

defined its “permissible limits.” *Id.* at 448. In fact, the State exceeded the permissible bounds of the collection here, as defined by Petitioner’s consent, *see infra* Part II.B. And the government official who conducted the search was actively engaged in “ferreting out crime.” *King*, 569 U.S. at 448.<sup>10</sup> In other words, every factor that led to a reasonableness analysis in *King* pushes for a warrant requirement here.

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” because arrestees’ privacy interests are diminished. *King*, 569 U.S. at 461. The Court emphasized that this difference was “critical” and that “searches of . . . the public at large” or “the average citizen” would be seen differently. *Id.* at 462–63. This Court highlighted the same point in *Mario W.*, noting that no “case suggest[s] that the[ ] law enforcement goals [involved in DNA testing of arrestees] would justify DNA sampling and profiling of ordinary citizens.” 230 Ariz. at 125. Here, Petitioner was a member of the public at large when his DNA was collected and analyzed; as such, he possessed the full measure of Fourth Amendment rights.

Third, *King* relied heavily on the Court’s understanding of the DNA analysis involved in 2009: processing “13 CODIS loci,” which were understood to “come

---

<sup>10</sup> The Court also found the “statutory protections” relevant because they “guard[ed] against further invasion of privacy.” *Id.* at 465. It refused to “speculate about the risks posed ‘by a system that did not contain comparable . . . provisions.’” *Id.* at 465. No such regulations protected Petitioner—nor would they protect anyone whose biological material is already in the State’s possession.

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, 464-65. Science has indeed progressed. Since *King*, CODIS testing has expanded to 20 loci,<sup>11</sup> and, as discussed above, experts have discovered that these markers can reveal medical information, physical traits, and familial relationships. *See supra* Part I

Fourth, *King* emphasized that the government’s interest in identification 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,” which not only distinguishes *King* but “provides an affirmative reason for enforcing the strictures of the Fourth Amendment.” *Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2001).

**B. 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 courts below correctly held, the asserted exception to the warrant requirement in this case is consent—and that exception did not authorize the State to extract and analyze Petitioner’s DNA, because doing so exceeded the scope of the consent given. The Fourth Amendment “requires that the scope of every authorized

---

<sup>11</sup> *See* Frequently Asked Questions on CODIS and NDIS, FBI, <https://www.fbi.gov/services/laboratory/biometricanalysis/codis/codis-and-ndis-fact-sheet>.

search be particularly described,” and any resulting search is “limited by the terms of [that] authorization.” *Walter v. United States*, 447 U.S. 649, 657 (1980). 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)). 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 a person’s DNA for an STR profile.

Moreover, “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,” such that consent once validly given can expire. *State v. Green*, 826 A.2d 486, 501 (Md. 2003).<sup>12</sup> Here, the search occurred three *years* after consent was given to seize the blood sample,

---

<sup>12</sup> 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 in the two days after 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”).

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 prior consent was unconstitutional.

Enforcing limits on the scope of consent is particularly important because consent searches are conducted without judicial authorization or oversight. Without such limits, officers could be “allowed so much latitude that [such] searches [would be] turned into a purposeful and general means of discovering evidence of crime.” *Florida v. Wells*, 495 U.S. 1, 4 (1990) (citation omitted).

Here, the scope of consent was clearly delineated and violated. But it is worth noting that in many instances of law enforcement’s collection and analysis of DNA, consent is never sought at all—for example, when it is obtained from items left in the trash—and the voluntary sharing of genetic information cannot be assumed. We leave behind a staggering number of cells containing our DNA virtually everywhere we go and on virtually everything we touch. We constantly shed skin cells and lose hair strands, which include our DNA; a single sneeze can spew about 3,000 cell-containing droplets and one millimeter of saliva contains more than 430,000 DNA-containing cells.<sup>13</sup> We cannot avoid it.

---

<sup>13</sup> See Murphy, *supra* note 4, at 5; Sheldon Krinsky & Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* 117 (2012); Thais Francini Garbieri et al., *Human DNA Extraction from Whole Saliva that Was*

Voluntariness, which is key to the consent exception, is not present where technological advances have given police the ability to gather information people do not intend to share. In *Carpenter*, the U.S. Supreme Court declined to apply a different consent-based rule—the third-party doctrine—to location information that is shared “by dint of [a cellphone’s] operation, without any affirmative act on the part of the user,” particularly since cellphones “are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable.” 585 U.S. at 315 (internal citation omitted). That is all the more true for DNA, which unavoidably appears in every biological sample we produce, from skin cells to bodily fluids to hair follicles.

### **III. Allowing Warrantless DNA Testing of any Biological Material 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, free of any Fourth Amendment limits. That would severely

---

*Fresh or Stored for 3, 6 or 12 Months Using Five Different Protocols*, 25 J. Appl. Oral Sci. 147, 148 (2017),  
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5393535/pdf/1678-7757-jaos-25-2-0147.pdf>.

violate privacy, and potentially reduce participation in—and therefore the efficacy of—public health and other programs.

At the federal level, the government collects many samples of our biological material for public health. For example, the National Institutes of Health (NIH) collects blood, body fluids, tissues, and more to study diseases and to develop new treatments.<sup>14</sup> The Centers for Disease Control and Prevention (CDC) collects blood from approximately 5,000 people each year “to assess the health and nutritional status of adults and children.”<sup>15</sup> The Health Resources and Services Administration oversees organ and blood stem cell transplant systems.<sup>16</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, people donate biological material to help identify or locate missing family members.<sup>17</sup> And Olympic and Paralympic

---

<sup>14</sup> *3008 – NIH Human Biospecimen Program*, Nat’l Insts. Of Health Off. Of Mgmt. (Oct. 4, 2023), <https://policymanual.nih.gov/3008>.

<sup>15</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>16</sup> *About Us*, Health Resources & Services Admin., <https://www.organdonor.gov/about-us>.

<sup>17</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 . . .

athletes submit biological samples, including blood, to the United States Anti-Doping Agency (USADA) to test for prohibited substances.<sup>18</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 working to collect DNA from Latin American individuals to help identify more than 1,200 human remains.<sup>19</sup> The Arizona Department of Health Services collects and analyzes blood specimens to study opioid overdoses and inform treatment and prevention efforts.<sup>20</sup> The Arizona State Public Health Laboratory can collect blood from anyone involved in a chemical-exposure event.<sup>21</sup> And the State collects biological materials from victims and survivors of crimes, including children

---

These samples, known as Family Reference Samples, are voluntary DNA submissions that are used only in the search for a missing loved one.”).

<sup>18</sup> *Sample Collection Process*, United States Anti-Doping Agency, <https://www.usada.org/sample-collection-process/>.

<sup>19</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/>.

<sup>20</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>21</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>.



subjected to physical or sexual abuse<sup>22</sup> and adult survivors of sexual assault.<sup>23</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.<sup>24</sup> And New Jersey police recently sought to use blood collected from newborn babies “to test[ ] for a panel of potentially life-threatening inherited disorders” to investigate a cold case.<sup>25</sup> Equally, here, Petitioner

---

<sup>22</sup> Angelo P. Giardino *et al.*, *Child Sexual Abuse*, Medscape (Nov. 29, 2021), available at <https://reference.medscape.com/article/915841-overview>.

<sup>23</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>.

<sup>24</sup> Eduardo Medina, *Woman Sues San Francisco Over Arrest Based on DNA From Her Rape Kit*, New York Times (Sept. 13, 2022), <https://www.nytimes.com/2022/09/13/us/rape-kit-dna-san-francisco.html>.

<sup>25</sup> Crystal Grant, *Police Are Using Newborn Genetic Screening to Search for Suspects, Threatening Privacy and Public Health*, ACLU (July 26, 2022), <https://www.aclu.org/news/privacy-technology/police-are-using-newborn-genetic-screening>.

consented to give the government his blood for one purpose—to determine his blood alcohol concentration 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 hold that the Fourth Amendment prohibits the State from extracting and analyzing DNA from biological specimens in the State’s possession without a warrant.

Respectfully submitted this 11th day of June, 2024.

American Civil Liberties Union  
Foundation of Arizona

By /s/Jared G. Keenan  
Jared G. Keenan

Vera Eidelman  
American Civil Liberties Union Foundation

*Counsel for Amici Curiae*