

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	SUPREME COURT
	)	CASE NO. 2021-1254
Plaintiff-Appellee,	)	
	)	Appeal from the Logan County
vs.	)	Court of Appeals, Third Appellate
	)	District
RALPH E. BORTREE,	)	
	)	Court of Appeals Case No. 8-20-67
Defendant-Appellant,	)	
	)	
	)	

**BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, ELECTRONIC
FRONTIER FOUNDATION, AND OHIO JUSTICE & POLICY CENTER
IN SUPPORT OF JURISDICTION**

Eric Stewart (0071094)
Logan County Prosecuting Attorney
117 E. Columbus Avenue
Bellefontaine, Ohio 43311
Phone: (937) 599-7272
eric@co.logan.oh.us

Counsel for Appellee State of Ohio

Mark A. Vander Laan (0013297)
Ohio Justice & Policy Center
215 East 9th Street, Suite 601
Cincinnati, OH 45202
Phone: (513) 421-1108
Fax: (513) 562-3200
mvanderlaan@ohiojpc.org

Michael L. Zuckerman (0097194)
Ohio Justice & Policy Center
360 South Third Street
Columbus, OH 43215
Phone: (513) 421-1108
Fax: (513) 562-3200
mzuckerman@ohiojpc.org

Counsel for Amici Curiae

James P. Tyack (0072945)
Holly B. Cline (0096806)
The Tyack Law Firm Co., LPA
536 South High Street
Columbus, Ohio 43215
Phone: (614) 221-1341
Fax: (614) 228-0253
james@tyacklaw.com
holly@tyacklaw.com

Counsel for Appellant Ralph Bortree

Vera Eidelman (*pro hac vice* pending)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
veidelman@aclu.org

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INTRODUCTION

This appeal warrants review because it raises a substantial constitutional question, and one of great general or public interest that this Court must settle, *see* S.Ct.Prac.R. 7.08(B)(4)(a)–(b), namely: Does the abandonment doctrine, which allows police officers to collect abandoned items without a warrant, also authorize the warrantless extraction and search of the *genetic material* we all unavoidably shed on every item we use or touch? Or does our genetic material instead receive independent protection under the Fourth Amendment and Article I, Section 14 of the Ohio Constitution, given the breadth of private information it contains and the involuntariness with which we shed it?¹

The lower court’s answer—essentially, that our genetic material deserves no more protection than trash—runs counter to recent decisions of the U.S. Supreme Court and this Court, and endangers the privacy rights of all Ohioans. The DNA we involuntarily deposit on items we handle and later discard contains some of our most private, sensitive, and revealing information. Allowing the lower court’s decision to stand will not only sanction the State’s collection and analysis of Appellant’s unavoidably shed DNA without a warrant in this case, but will also mean that law enforcement can do the same to any person who has thrown a used tissue into a public trashcan, left cutlery on a restaurant table, discarded a coffee cup at work, or thrown away basically any household item at home. Indeed, here, law enforcement extracted and analyzed not only Appellant’s DNA from discarded cigarette butts, but also that of “an unrelated individual” who happened to use the same cigarette disposal receptacle outside Appellant’s place of work. Allowing the lower court’s decision to stand thus makes every Ohioan’s entire genetic code—

¹ This appeal also warrants review because it involves a felony. S.Ct.Prac.R. 7.08(B)(4)(c).

and all the private and sensitive information it reveals—vulnerable to extraction, search, and exploitation at the State’s whim.

This Court should settle the important question of whether, without a warrant, law enforcement can extract and analyze DNA unavoidably deposited by a known, free person on items that are not connected to any crime. This question is distinct from the ability of law enforcement to collect and process DNA evidence gathered from a crime scene or to collect trash without a warrant, and it is increasingly pressing today given the technological advances described below. This Court should correct the error of the court below and provide guidance to police and the public that adheres to the Fourth Amendment and Article I, Section 14 of the Ohio Constitution.

STATEMENT OF INTEREST OF AMICI CURIAE

The American Civil Liberties Union (“ACLU”) is a nonprofit, nonpartisan membership organization devoted to protecting the basic civil rights and liberties of all Americans, including the right to be free from unreasonable searches and seizures. The Electronic Frontier Foundation (“EFF”) is a member-supported, nonprofit civil liberties organization that has worked to protect privacy rights and free speech in the online and digital world for more than 30 years. Both organizations have a strong interest in supporting the guarantees of the Fourth Amendment so that the right to privacy remains protected for all of us. The ACLU and EFF have a longstanding interest in ensuring that constitutional protections for privacy are not eroded by the advance of technology. The Third District’s decision in this case represents just such an erosion.

The Ohio Justice and Policy Center (“OJPC”) is nonprofit public-interest law firm whose mission is to create fair, intelligent, redemptive criminal-justice systems. OJPC works to reduce the size of the prison population; to ensure safe, productive, healthy conditions of confinement and community integration for people with criminal records; and to advocate for sound criminal-

justice laws and policies. This case is of particular concern to OJPC because it impacts the privacy rights of OJPC clients and represents the possibility of a substantial expansion in the sweep of the criminal-justice system statewide.

STATEMENT OF THE CASE AND THE FACTS

As described in Appellant’s Memorandum in Support of Jurisdiction, police, surreptitiously and without a warrant, collected and analyzed the DNA that Appellant unavoidably shed on several cigarettes he smoked. After surveilling Appellant, police learned that he smoked during work breaks, so they put a foil “trap” into the trashcan nearby. They caught four cigarettes, extracted genetic material from each one, and generated DNA profiles from that material. The DNA on three of the cigarettes belonged to Appellant. The DNA on the fourth cigarette belonged to “an unrelated individual,” whose DNA was also extracted and searched without a warrant.

THIS CASE IS A MATTER OF GREAT PUBLIC INTEREST AND GENERAL PUBLIC CONCERN, AND IT INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Below, the Court of Appeals relied on decades-old federal caselaw regarding trash left behind in a vacated hotel room to hold that Appellant abandoned any privacy or property interest in his cigarettes when he threw them away. But the court then extended that principle further to hold that Appellant had also abandoned any privacy or property interest in his genetic material, which he could not have avoided depositing on those cigarettes. While older decisions of courts elsewhere in the country have reached the same conclusion, their reasoning in applying the abandonment doctrine to DNA has been undermined by the U.S. Supreme Court’s more recent decision in *Carpenter v. United States*, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018). That case, and several other recent U.S. Supreme Court decisions, *see, e.g., Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), make clear that older Fourth Amendment caselaw

cannot be mechanically extended to sanction warrantless, newly invasive searches like the DNA profiling at issue here.

This case does not call into question whether, under *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), and other abandoned property cases, the State can collect items thrown into the trash without a warrant. Rather, the question is whether police can proceed a step further by extracting DNA from those items, retaining that genetic material indefinitely, and profiling and searching it, all without a warrant.² This case thus raises a substantial constitutional question as to whether an old Fourth Amendment doctrine can be extended to a new, invasive technology. This is a question of great public interest because it concerns each Ohioan's protection against warrantless government collection and analysis of their DNA.

I. Old Fourth Amendment Doctrines Cannot Be Applied Reflexively to New Technologies.

“[P]olice technology [cannot be permitted] to erode the privacy guaranteed by the Fourth Amendment.” *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). To the contrary, the Fourth Amendment must “assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” *Carpenter*, 138 S.Ct. at 2214, quoting *Kyllo*, 533 U.S. at 34. Courts must therefore avoid “mechanically applying” older doctrines to new types of searches made possible by modern technologies, as these new technologies can reveal myriad “privacies of life” in ways that are “remarkably easy, cheap, and efficient compared to traditional investigative tools.” *Id.* at 2217–19; *accord Riley*, 573 U.S. at 393.

² Equally, the question presented here does not implicate law enforcement's ability to extract and analyze DNA deposited at a crime scene. In that scenario, police are processing evidence in an attempt to identify an *unknown* suspect—and in the typical case, doing so upon probable cause—rather than analyzing DNA from *known* individuals in order to learn more information about them.

Instead, any extension of an old Fourth Amendment doctrine to new technologies must “rest on its own bottom” and cannot “untether the rule from the justifications underlying the . . . exception.” *Riley*, 573 U.S. at 386, 393; *accord Carpenter*, 138 S.Ct. at 2214, 2216–17; *State v. Smith*, 124 Ohio St.3d 163, 169, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 23.

Both the U.S. Supreme Court and this Court have assessed whether the privacy implications of new technologies—that is, the “depth, breadth, and comprehensive reach” of the information they reveal—alter the Fourth Amendment analysis. *Carpenter*, 138 U.S. at 2223; *see also Riley*, 573 U.S. at 395–96; *Smith* at ¶ 23. As part of this analysis, “the rule the Court adopts ‘must take account of more sophisticated systems that are already in use or in development.’” *Carpenter*, 138 S. Ct. at 2218, quoting *Kyllo*, 533 U.S. at 36. The ease, cost, and efficiency of using the new technologies “compared to traditional investigative tools” is also important. *Id.* at 2217–18; *see also Riley*, 573 U.S. at 393.

For these reasons, this Court and the U.S. Supreme Court have declined to extend the search-incident-to-arrest exception to permit warrantless searches of cell phones. *Smith* at ¶¶ 22–24; *Riley*, 573 U.S. at 386. The U.S. Supreme Court has also applied this analysis in refusing to extend the third-party doctrine to permit warrantless searches of cell phone location information held by a cellular service provider, *Carpenter*, 138 S. Ct. at 2217; and in refusing to extend the public-exposure doctrine to permit warrantless surveillance of a home using thermal imaging technology, *Kyllo*, 533 U.S. at 34–36, or pervasive tracking of a person’s movements on public streets using a GPS device, *United States v. Jones*, 565 U.S. 400, 415–18, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring); *id.* at 429–31 (Alito, J., concurring in the judgment).

II. The Question Presented by the Surreptitious DNA Extraction and Analysis Here Is Distinct from Whether Law Enforcement Can Collect Trash Without a Warrant.

When *Abel* was decided sixty years ago, modern-day DNA sequencing and array technology did not exist. At that time, it would have been inconceivable that the hollow pencil and block of wood found in the wastebasket at Abel’s hotel would reveal an encyclopedic amount of private information about propensities for disease, familial relationships, facial structure, and more. Only recently, with new advances in forensic DNA technology, has such an intrusion become possible. For these reasons, *Abel* has little relevance to the search that occurred in this case.

A. Our DNA Implicates Privacy Interests Far Beyond Those Implicated by Our Trash.

The amount of information revealed by DNA is of a fundamentally different magnitude than that which any item of trash can disclose. Of course, physical items that a person knowingly abandons can sometimes reveal private information. But whatever personal details happen to be discoverable from an abandoned item, the privacy interest in the DNA on that item is categorically greater. Our DNA *always* contains the full scope of our genetic information, including propensities for certain medical conditions, such as Alzheimer’s, cystic fibrosis, breast cancer, and addiction; ancestry; and biological familial relationships, which can expose previously unknown parentage, among other things.

Much like the “chemical analysis” of blood and urine samples, therefore, the sequencing of DNA samples “can reveal a host of private medical facts about [an individual].” *Skinner v. Ry. Labor Execs.’ Assn.*, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). For that reason, courts—including this Court—have held that a person’s “legitimate expectation of privacy in his or her bodily fluids . . . extends to the DNA in the sample[.]” *State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, 981 N.E.2d 787, at ¶ 18 (rejecting Fourth Amendment

challenge to use of DNA sample and profile because it had been obtained pursuant to a warrant); *see also United States v. Davis*, 690 F.3d 226, 246 (4th Cir.2012) (holding that the extraction of an individual’s DNA and “the creation of his DNA profile constitute[] a search for Fourth Amendment purposes”); *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir.2007) (same, even if it is only for identification purposes). This is true whether the DNA is obtained directly from a person’s body, or from an item they have had contact with. *Davis*, 690 F.3d at 246.³

Indeed, “it 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].” (Emphasis sic.) *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir.1998). As with a person’s comprehensive location information, the “familial . . . and sexual associations” that can be revealed through DNA offer the State “an intimate window into a person’s life.” *Carpenter*, 138 S. Ct. at 2217, quoting *Jones*, 565 U.S. at 415. Thus, comparing the seizure of a used cigarette—or any other abandoned item—to the search of genetic information deposited on it is “like saying a ride on horseback is materially indistinguishable from a flight to the moon.” *Riley*, 573 U.S. at 393. Our genetic information “implicate[s] privacy concerns far beyond those implicated by” the mere visual inspection of a physical item on which it might be deposited. *Id.*

³ The U.S. Supreme Court similarly recognized in *Maryland v. King* that the creation of DNA profiles for identification purposes triggers Fourth Amendment protection. 569 U.S. 435, 446, 133 S.Ct. 1958, 158 L.Ed.2d 1 (2013). But the Court held that the particular program at issue—testing felony arrestees’ DNA—was reasonable due to the diminished privacy interests of people who have been arrested. *Id.* at 465–66. In this case, where the State extracted and analyzed the DNA of a free person who possesses the full measure of Fourth Amendment rights, the constitutional analysis is different. For the same reason, the out-of-state cases considering the constitutionality of DNA collection during interrogation that the court below found persuasive are inapposite.

B. Technological Advances Mean the Privacy Intrusions Posed by Surreptitious DNA Extraction and Analysis Are Even More Severe and Widespread.

Two different advances in DNA testing have made these searches more common and more intrusive than ever before, as new technology allows police to capture and analyze even trace amounts of DNA, and to generate genetic profiles cheaply and easily from that material.

First, when forensic DNA testing first came into use years ago, DNA profiles could be developed only from large amounts of blood.⁴ Today, “police can readily—and surreptitiously—collect a person’s DNA sample from . . . chewing gum, saliva on a straw, . . . sweat on a chair” or, as in this case, “a discarded cigarette butt.”⁵ This leap in technology has enabled the police practice at issue here: the surreptitious extraction and analysis of the DNA that all people unavoidably shed. Absent this Court’s intervention, that technique can be used on any Ohioan.

Second, rapid advances in DNA technology and research over the past decade “present additional privacy concerns,” *Maryland v. King*, 569 U.S. 435, 465, 133 S.Ct. 1958, 158 L.Ed.2d 1 (2013), because they allow ever-greater incursions into a person’s privacy when a DNA sample is analyzed. For example, the CODIS database⁶ contains only small, discrete sections of each person’s DNA, called “loci,” yet analysis of even those fragments increasingly yields highly

⁴ Stephen Mercer & Jessica Gabel, *Shadow Dwellers: The Underregulated World of State and Local DNA Databases*, 69 N.Y.U. Ann. Surv. Am. L. 639 (2014).

⁵ *Id.* at 646; see also Shanni Davidowitz, *23andeveryone: Privacy Concerns with Law Enforcement’s Use of Genealogy Databases to Implicate Relatives in Criminal Investigations*, 85 Brook. L. Rev. 185, 188 (2019) (“[N]ew techniques have . . . reduced the sample quantity necessary to develop a DNA profile.”).

⁶ 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.” Fed. Bureau of Investigation, *Frequently Asked Questions on CODIS and NDIS*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (accessed Oct. 7, 2021).

sensitive facts about a person. One study that examined the “STR” profiles⁷ stored in CODIS was able to identify information about individuals’ ancestry, which may in turn be used to reveal information about their phenotypic traits (i.e., physical appearance) based on assumptions about race and ethnicity.⁸ An even more recent study suggested that the profiles maintained in CODIS can now be matched to single-nucleotide polymorphism (“SNP”) profiles—which can be incredibly rich genetic profiles⁹ that reveal intimate details like “precise ancestry estimates, health and identification information.”¹⁰ And private companies purport to be able to use DNA for everything from identifying eye, hair, and skin colors;¹¹ to determining whether people are likely to be lactose intolerant, or prefer sweet or salty foods;¹² to discovering the likely migration patterns of their ancestors and the identities of family members they never knew they had.¹³

⁷ An STR profile seeks to identify individuals by looking at how many times so-called “short, tandem, repeat” (i.e., STR) sequences occur at designated locations (i.e., loci) on the genome. See Erin Murphy, *Inside the Cell: The Dark Side of Forensic DNA* 7–8 (2015).

⁸ Bridget Algee-Hewitt et al., *Individual Identifiability Predicts Population Identifiability in Forensic Microsatellite Markers*, 26 *Current Biology* 935, 939 (2016), available at <https://doi.org/10.1016/j.cub.2016.01.065>.

⁹ SNPs “are the places in the genome where people differ.” Nat’l Human Genome Rsch. Inst., *Single Nucleotide Polymorphisms (SNPs)*, <https://www.genome.gov/genetics-glossary/Single-Nucleotide-Polymorphisms> (accessed Oct. 7, 2021). “Researchers have found SNPs that may help predict an individual’s response to certain drugs, susceptibility to environmental factors such as toxins, and risk of developing particular diseases.” Nat’l Insts. of Health, *What Are Single Nucleotide Polymorphisms (SNPs)?*, <https://medlineplus.gov/genetics/understanding/genomicresearch/snp/> (accessed Oct. 7, 2021).

¹⁰ Michael Edge et al., *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 *Proceedings of the Nat’l Acad. of Scis.* 5671, 5675 (2017), available at <https://www.pnas.org/content/114/22/5671>.

¹¹ Parabon Snapshot, <https://snapshot.parabon-nanolabs.com/> (accessed Oct. 7, 2021); GEDmatch, <https://www.gedmatch.com/> (accessed Oct. 7, 2021).

¹² 23andMe, *Compare DNA Tests*, <https://www.23andme.com/compare-dna-tests/> (accessed Oct. 7, 2021).

¹³ Ancestry, *What to Expect from your AncestryDNA*, <https://support.ancestry.com/s/article/What-to-Expect-from-AncestryDNA> (accessed Oct 7, 2021).

While the State may argue that it does not look for such information, the extraction of genetic material places all of this information within its reach, without limitation.

New data-aggregation techniques have only increased the amount of sensitive information that can be gleaned from genetic material. Forensic genetic genealogy—through which investigators analyze a person’s DNA profile alongside vast genetic databases and public records to create detailed family histories—is just one example. These investigations, including the one in this case, are possible because direct-to-consumer genetic testing services and genetic genealogy databases (like AdvanceDNA, the provider used here) have proliferated in recent years.

As of early 2019, more than 26 million people had provided their DNA to such services to identify their biological relatives and build sprawling family trees.¹⁴ Research showed that one such site, GEDmatch, which, at the time of the study, had only 1.3 million users (about 0.5 percent of the adult U.S. population), could nevertheless be used to identify a significant proportion of Americans—many of whom have never provided genetic material to any testing service or database—simply because we all share genetic information with our relatives.¹⁵ When this genetic data is combined with birth, death, marriage, and other public records, the resulting web of relationships can expose a wealth of private information: adoptions, hidden infidelities, risk of early mortality, or a family history of certain diseases. The State relied on such a web here.

¹⁴ Antonio Regalado, *More Than 26 Million People Have Taken an At-Home Ancestry Test*, MIT Tech.Rev. (Feb. 11, 2019), <https://www.technologyreview.com/s/612880/more-than-26-million-people-have-taken-an-at-home-ancestry-test/>.

¹⁵ Jocelyn Kaiser, *We Will Find You: DNA Search Used to Nab Golden State Killer Can Home in on About 60% of White Americans*, Science (Oct. 11, 2018), <https://www.sciencemag.org/news/2018/10/we-will-find-you-dna-search-used-nab-golden-state-killer-can-home-about-60-white> (noting database’s ability to identify 60% of white Americans).

III. The Abandonment Doctrine Does Not Apply to Unavoidably Shed DNA.

In addition to ignoring the weighty privacy interests at issue in this case, the court below also reflexively applied the abandonment doctrine without considering whether its justifications can logically be extended to unavoidably shed DNA. They cannot.

“[A]bandonment raises a question primarily of intent.” *State v. Brown*, 20 Ohio App.3d 36, 37, 484 N.E.2d 215 (1st Dist.1984); *see also Abel*, 362 U.S. at 239 (warrantless seizure of items from hotel trashcan was permitted only because the suspect “*chose* to leave some things behind in his [hotel] room, which he *voluntarily* relinquished.”) (Emphases added.); *California v. Greenwood*, 486 U.S. 35, 40–41, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). While the abandonment doctrine may permit police to seize and visually examine the cigarettes discarded by Appellant without a warrant, it does not permit a warrantless search of his DNA.

Appellant did not in any meaningful sense “voluntarily discard[], le[ave] behind, or otherwise relinquish[] his interest” in his DNA. *Brown*, 20 Ohio App.3d at 37. We cannot avoid leaving our genetic information behind wherever we go. People constantly shed staggering numbers of skin cells, which contain our DNA.¹⁶ The average person also loses between 40 and 100 hairs per day, leaving behind even more DNA in the cells shed with those hairs.¹⁷ A single sneeze can spew about 3,000 cell-containing droplets into the world,¹⁸ and one milliliter of saliva contains more than 430,000 DNA-containing cells.¹⁹ Merely touching a surface with one’s

¹⁶ *See* Murphy, *supra* note 7, at 5.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Thais Francini Garbieri et al., *Human DNA Extraction from Whole Saliva that Was Fresh or Stored for 3, 6 or 12 Months Using Five Different Protocols*, 25 J.Appl. Oral Sci. 147, 148 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5393535/pdf/1678-7757-jaos-25-2-0147.pdf>.

fingertip causes DNA to be deposited there.²⁰ With every discarded coffee cup, crumpled tissue, plastic straw, cigarette butt, soda can, piece of gum, and drifting flake of dandruff, people unavoidably and involuntarily leave a sample—and often, many thousands of samples—of their genetic blueprint.

As the U.S. Supreme Court recently made clear in *Carpenter*, in the face of advancing police technological capabilities, voluntariness under the Fourth Amendment cannot be assumed. Like the abandonment doctrine, the third-party doctrine applies to information that is “voluntarily conveyed.” *United States v. Miller*, 425 U.S. 435, 442, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). But as the Court explained in *Carpenter*, the third-party doctrine does not extend to cell phone location information because it “is not truly ‘shared’ as one normally understands the term.” 138 S.Ct. at 2220. That is because cell phones “are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable to participation in modern society.” *Id.*, quoting *Riley*, 573 U.S. at 385. And once a person carries a cell phone, location information is logged “by dint of its operation, without any affirmative act on the part of the user Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data.” *Id.*

Similarly, because we shed DNA constantly, “[t]here is no way to avoid leaving behind a trail” of DNA, and “[a]s a result, in no meaningful sense does the [individual] voluntarily ‘assume[] the risk’ of turning over a comprehensive dossier” of genetic information. *Id.* (last alteration in original). A person attempting to avoid depositing DNA in their wake would have to relinquish the ability to participate in even the most basic aspects of everyday life.

²⁰ A.A. Oleiwi et al., *The Relative DNA-Shedding Propensity of the Palm and Finger Surfaces*, 55 Sci. & Just. 329, 329 (2015), available at <https://doi.org/10.1016/j.scijus.2015.04.003>.

The implications of letting the opinion below stand would be staggering for our genetic privacy. If we wanted to keep our genetic material out of the State’s hands, we would not only have to keep with us every item we touch whenever we leave the house, but then also incinerate every one of those items *and* all of our residential trash rather than putting it out for collection. We would have to scrub the saltshaker on the restaurant table, the pen used to sign a credit card slip, and every other item we touch with bleach wipes. Each of us would have to carry a cordless vacuum cleaner to Hoover up any skin cells or hairs that our bodies shed in a doctor’s office, pharmacy line, or barber’s chair. We would have to wear full-body protective suits, hair coverings, gloves, and respirators to avoid leaving behind even a trace of our DNA.

Society simply does not expect people to take such measures to avoid a government agent seizing and searching their private genetic information. And the U.S. Supreme Court has repeatedly made clear that the Fourth Amendment does not require people to take extraordinary measures to protect themselves from invasive modern surveillance techniques. *See Carpenter*, 138 S.Ct. at 2220 (rejecting idea that people must “disconnect[] the[ir] phone from the network” to avoid warrantless tracking of their location); *Kyllo*, 533 U.S. at 29–30 (rejecting the dissent’s suggestion that people should be required to add extra insulation to their homes to avoid warrantless thermal-imaging surveillance). Without this Court’s intervention, the State will continue exploiting modern technological capabilities to invade Ohioans’ genetic privacy without judicial oversight or constraint.

IV. This Case Warrants More Stringent Review Under the Ohio Constitution.

Even if the Court determines that this case does not raise a substantial question under the Federal Constitution, it warrants review for the substantial questions it raises under Article I, Section 14 of the Ohio Constitution, which “affords greater protection than the Fourth Amendment against searches and seizures conducted by members of law enforcement who lack

authority to make an arrest.” *State v. Brown*, 143 Ohio St.3d 444, 450, 39 N.E.3d 496, 2015-Ohio-2438, at ¶ 23. “The Ohio Constitution is a document of independent force,” and it is this Court’s “charge to determine and not to disturb the clear protections provided by the drafters of our [state] Constitution.” (Citation omitted.) *Id* at ¶ 24. Where “there are persuasive reasons,” this Court recognizes greater privacy protections under the state constitution. (Emphasis deleted.) (Citation omitted.) *State v. Bemby*, 151 Ohio St.3d 502, 511, 2017-Ohio-8114, 90 N.E.3d 891, ¶ 24; *see also State v. Mole*, 149 Ohio St.3d 215, 220, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 21 (“[T]his court . . . can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is both prudent and not inconsistent with the intent of the framers.”). Here, the extreme privacy implications of treating unavoidably shed DNA as abandoned—and the disconnect between the justifications underlying the abandonment doctrine and the reality of unavoidably shed, information-rich DNA—offer precisely such reasons.

CONCLUSION

In *Smith*, this Court declined to extend the search-incident-to-arrest exception to cell phones, explaining:

Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased. But because a person has a high expectation of privacy in a cell phone’s contents, police must then obtain a warrant before intruding into the phone's contents.

124 Ohio St.3d 163, 169, 2009-Ohio-6426, N.E.2d 949, at ¶ 23. This Court should apply the same logic here. Once a discarded item is in police custody, there is ample time and means for the State to secure a warrant before profiling the DNA unavoidably left on the item. In order to safeguard Ohioans’ high expectation of privacy in their genetic information, Amici respectfully urge this Court to review and reverse the decision of the Court of Appeals for the Third District of Ohio, Logan County.

Respectfully submitted,

/s/ Mark A. Vander Laan

Mark A. Vander Laan (0013297)
Ohio Justice & Policy Center
215 East 9th Street, Suite 601
Cincinnati, OH 45202
Phone: (513) 421-1108
Fax: (513) 562-3200
mvanderlaan@ohiojpc.org

Michael L. Zuckerman (0097194)
Ohio Justice & Policy Center
360 South Third Street
Columbus, OH 43215
Phone: (513) 421-1108
Fax: (513) 562-3200
mzuckerman@ohiojpc.org

Vera Eidelman (*pro hac vice* pending)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2649
veidelman@aclu.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on October 7, 2021, I filed the foregoing via the Court's electronic filing system, and I served a copy of this brief by e-mail to James P. Tyack, Counsel of Record for Appellant, at james@tyacklaw.com, and by U.S. Mail to the Logan County Prosecutor, Counsel of Record for Appellee at 117 E. Columbus Avenue, Bellefontaine, Ohio 43311.

/s/ Mark A. Vander Laan
Mark A. Vander Laan (0013297)