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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Hood, P.J., and Swartzle and Redford, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 167154
Court of Appeals No. 355554

v

DAVID SERGES,

Defendant-Appellant.

BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union Fund of Michigan ("ACLU of Michigan") is a non-profit, non-partisan membership organization devoted to protecting civil rights and liberties for all Michiganders. The American Civil Liberties Union Foundation ("ACLU") is among the oldest, largest, and most active civil rights and civil liberties organizations in the United States. For decades, the ACLU of Michigan and the ACLU have 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., *State v Mitcham*, 258 Ariz 432; 559 P3d 1099 (2024) (amicus challenging warrantless search of DNA); *Carpenter v United States*, 585 US 296; 138 S Ct 2206 (2018) (counsel challenging warrantless acquisition of cell phone location information); *Riley v California*, 573 US 373; 134 S Ct 2473 (2014) (amicus challenging cell phone searches incident to arrest); *United States v Jones*, 565 US 400; 132 S Ct 945 (2012) (amicus challenging warrantless GPS tracking); *Johnson v Vanderkooi*, 509 Mich 524 ; 983 NW2d 779 (2022) (counsel challenging warrantless fingerprinting during *Terry* stops); *People v Hughes*, 506 Mich 512; 958 NW2d 98 (2020) (amicus challenging search of cell phone outside scope of warrant).

Amici also have expertise in Michigan state constitutional law and have submitted amicus briefs in numerous cases raising issues under the 1963 Constitution, including questions relating to the constitutionality of searches and seizures. See, e.g., Brief of Amici Curiae the American Civil Liberties Union of Michigan, NAACP Legal Defense & Education Fund, and NAACP Michigan State Conference, *People v Armstrong*, __ Mich __; __ NW3d __ ; (2025) (Docket No. 165233); Brief of Amici Curiae the American Civil Liberties Union of Michigan, Juvenile Law

[1] Pursuant to MCR 7.312 (H)(5), amici state that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amici curiae, their members, or their counsel made any such monetary contribution.

Center, and Sentencing Project, *People v Taylor*, __ Mich __; __ NW3d __ (2025) (Docket No. 166428); Brief of Amici Curiae the American Civil Liberties Union of Michigan, American Civil Liberties Union, and Michigan Association for Justice, *Mich Immigrant Rights Ctr v Whitmer*, Michigan Supreme Court Docket Nos. 167300, 167301 (October 8, 2024); Brief of Amici Curiae the American Civil Liberties Union of Michigan and the National Lawyers Guild, Michigan–Detroit Chapter, *Bauserman v Unemployment Ins Agency*, 509 Mich 673; 983 NW2d 855 (2022).

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STATEMENT OF THE QUESTIONS PRESENTED

1. Was the defendant unlawfully arrested such that his pants should be excluded as the result of an unreasonable seizure under US Const, Am IV or Mich Const 1963, art 1, § 11?

   Amici do not address this question.

2. If the defendant was lawfully arrested, did police violate the defendant's rights under US Const, Am IV or Mich Const 1963, art 1, § 11 by having his pants tested for DNA without a warrant while in possession of the pants due to the defendant's detention in jail, *People v Trudeau*, 385 Mich 276; 187 NW2d 890 (1971); *People v Carr*, 370 Mich 251; 121 NW2d 449 (1963)?

   Amici contend the answer is "yes."

3. Did the defendant's trial attorney render ineffective assistance of counsel by failing to file a motion to suppress the evidence obtained as a result of the seizure and testing of the clothing?

   Amici do not address this question.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to answer in the affirmative the second question presented by this Court: Even assuming that David Serges was lawfully arrested, the police violated his rights under the Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Michigan Constitution by having his pants tested for DNA without a warrant while in possession of the pants due to his arrest and detention in jail. Accepting the State's argument to the contrary would untether the search-incident-to-arrest doctrine from its purpose and allow police officers to go on a limitless fishing expedition for genetic information anytime they arrest someone, including pretextual arrests for minor and unrelated crimes.

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. Because DNA reveals so much about us, collecting and analyzing it constitute both a seizure and a search under the Fourth Amendment and—separately and independently—Article I, Section 11, which provides broader protections than the federal standard. The government must therefore obtain a warrant to search or seize DNA, including DNA found on items seized incident to a lawful arrest.

As a matter of federal law, courts have determined that the extraction and analysis of DNA constitute a search subject to the Fourth Amendment's warrant requirement. Courts have recognized that when the privacy interests at stake are weighty, as they are with DNA testing, the search-incident-to-arrest exception to the warrant requirement does not apply. Extending that exception to DNA testing would be particularly inappropriate because it would not advance the rationales justifying the exception: protecting officer safety and preventing destruction of evidence. This Court's and the United States Supreme Court's recent precedents rejecting the

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application of the search-incident-to-arrest exception to cell phone data—which, like DNA, contain vast amounts of intimate personal information—confirm that the Fourth Amendment does not permit warrantless DNA testing.

Nor does the Michigan Constitution. Although this Court need not interpret Article I, Section 11 more broadly than the Fourth Amendment to conclude that it imposes a warrant requirement for DNA testing, that provision does in fact confer more protection for Michiganders' genetic privacy than federal law. As reflected in a recent amendment governing electronic data and communications, the text of Article I, Section 11 guards against the government using ever more powerful technology to pry into the recesses of our lives. This Court has repeatedly held that a person's status as an arrestee does not eliminate Article I, Section 11's safeguards. Enforcing those safeguards would help ensure that law-enforcement officials do not make pretextual arrests to obtain DNA to facilitate investigations that the officials otherwise lack legal grounds to conduct.

Accordingly, this Court should reverse the decision below and hold that the Fourth Amendment and Article I, Section 11 each require a warrant to authorize DNA extraction and testing.

BACKGROUND

On November 27, 2017, Gail Anderson was found dead in her kitchen by a neighbor. T V, 43–44. Both in her kitchen and elsewhere in the home, the police found blood and other genetic material. T III, 64–83; T IV 79, 172, 196, 197; T V 44–45.

On November 29, the police arrested David Serges at his home. EH, 22.[2] Mr. Serges did odd jobs around Ms. Anderson's neighborhood and had been seen in the neighborhood the week

[2] "EH" refers to the transcript from the February 1, 2023 evidentiary hearing. For consistency, this is the same notation used in Mr. Serges's brief.

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before she was found. EH, 20–21; T IV, 101. Although the police later claimed that they arrested Mr. Serges "on suspicion of the homicide," the police report at the time of his arrest indicated that he was arrested on an outstanding warrant relating to a misdemeanor ordinance violation. EH, 22, 24, 41–42. Within two days, the police submitted a warrant request to charge Mr. Serges with the homicide, but the prosecutor denied the request for lack of evidence. EH, 27, 41.

Nevertheless, the police continued to hold Mr. Serges on the misdemeanor warrant. EH, 27, 37–38, 41–42. And detectives requested that the Sheriff Department turn over Mr. Serges's possessions, including his clothes, on the grounds that he was arrested for murder. EH, 42, 45. Over the next six weeks, the police conducted DNA testing on eleven items: things from Ms. Anderson's home, blood found at the scene, and more. T V, 178–179. None of these samples matched Mr. Serges's DNA. T V, 183–191. Nor did the one unidentified fingerprint found at the scene belong to him. T V, 151.

On January 19, 2018—long after the warrant request was denied and fifty-one days after the arrest—the police sent Mr. Serges's pants to a forensic lab to be tested. EH, 51. The police did not obtain a warrant authorizing the testing. Nor had they noticed anything unusual about the pants at the time of the arrest, EH, 53–54. Instead, after the pants were sent to the lab, it took a lab biologist, using a lit magnifying glass, to find possible stains. T V, 92. Tests revealed that the pants contained trace amounts of blood nearly invisible to the naked eye. PE, 45; EH, 51–54.

Once again without a warrant, the police then sent samples of the blood stains for DNA analysis. T V, 100. One stain, from the left pant leg, exclusively had Mr. Serges's own DNA. T VI, 14. The other stain, from the right pant leg, was mixed: it contained two different DNA profiles. T VI, 15. One profile was identified as consistent with Ms. Anderson's DNA; the other was

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indeterminable. T VI, 15. Only after this report, on March 12, 2018, did the prosecutor charge Mr. Serges with murder. Joint Exhibit AA (Stipulated Timeline of Key Events in 2017–2018).

The State continued to test the many items found at the crime scene, but none matched Mr. Serges's DNA. T V, 191–193. The one DNA match they could find—from the nearly invisible spot on Mr. Serges's right pant leg—was described as the "central" evidence in the case. H 11/26/2018, 4.

ARGUMENT

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

A DNA sample contains a person's entire genetic makeup—the blueprint for the body and its functions. With current technology, DNA tests can reveal sensitive medical information, ancestry, and biological familial relationships—including significant information not previously known to the person whose DNA is being tested.

Analysis of a DNA sample can expose a person's likelihood for having Alzheimer's, cystic fibrosis, breast cancer, Huntington's disease, and substance use disorder. It can uncover family relationships to others. And private companies purport to be able to use it to identify everything from one's eye, hair, and skin colors,[3] to food preferences and allergies,[4] to the likely migration patterns of one's ancestors.[5] As technology and research continue to advance, DNA analysis will

[3] See, e.g., Parabon Nanolabs, *Parabon Snapshot Advanced DNA Analysis: Genetic Genealogy, Phenotyping, Ancestry & Kinship Analysis* <https://snapshot.parabon-nanolabs.com> (accessed October 31, 2025).

[4] 23andMe, *Compare DNA Tests* <https://www.23andme.com/compare-dna-tests> (accessed October 31, 2025).

[5] Ancestry, *What Do the Dots and Lines on the Map Represent?* <https://www.ancestry.com/cs/dna-help/communities/dots-and-lines> (accessed October 31, 2025).

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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 "place where your genome varies from another" the most.[6] 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."[7] 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."[8] Law enforcement officers have also started using 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.[9]

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[6] Nat'l Human Genome Research Institute, *Single Nucleotide Polymorphisms (SNPs)* (updated October 31, 2025) <https://www.genome.gov/genetics-glossary/Single-Nucleotide-Polymorphisms> (accessed November 3, 2025).

[7] Shastry, *SNPs: Impact on Gene Function and Phenotype*, 578 Methods Molecular Biology 3 (2009), available at <https://pubmed.ncbi.nlm.nih.gov/19768584/>.

[8] Medline Plus, National Library of Medicine, *What Are Single Nucleotide Polymorphisms (SNPs)?* <https://medlineplus.gov/genetics/understanding/genomicresearch/snp> (accessed November 3, 2025).

[9] 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., Kroll-Zaidi, *Your DNA Test Could Send a Relative to Jail*, New York Times (January 3, 2022) <https://www.nytimes.com/2021/12/27/magazine/dna-test-crime-identification-genome.html>.

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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.[10] STR analysis is most commonly used to create DNA profiles compatible with the FBI's CODIS system.[11]

Although courts sometimes refer to the STR loci as "'junk' DNA," the "adjective 'junk' may mislead the layperson." *Maryland v King*, 569 US 435, 442; 133 S Ct 1958; 186 L Ed 2d 1 (2013). "The term apparently is intended to indicate that this particular noncoding region, while useful and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits." *Id*. at 443. As members of this Court have recognized, information that reveals identity can intrude on a reasonable expectation of privacy. See *Johnson v VanderKooi*, 509 Mich 524, 556–557; 983 NW2d 779 (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").

Moreover, advances in technology and usage since 2013 mean that STR profiles today yield information far beyond identity. Since *King*, CODIS testing has expanded to 20 loci, from

[10] See Murphy, *Inside the Cell: The Dark Side of Forensic DNA* (New York: Nation Books, 2015), pp 7–8.

[11] 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." Federal Bureau of Investigation, *Frequently Asked Questions on CODIS and NDIS* <https://www.fbi.gov/how-we-can-help-you/dna-fingerprint-act-of-2005-expungement-policy/codis-and-ndis-fact-sheet> (accessed November 3, 2025).

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the previous 13.[12] And in this case, the government used a DNA test kit that facilitates analysis of 24 loci, designed to "deliver[] more information."[13] Officers now use STR profiles to conduct familial searches—that is, not to look for an individual match, but to search for *any* biological relatives. A 2016 study shows that STR profiles can reveal information about ancestry, which could in turn be used to approximate a person's physical appearance.[14] A 2017 study suggests that STR profiles can be linked to SNP profiles, thereby shedding light on intimate details like "precise ancestry estimates, health and identification information."[15] 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 Down syndrome.[16] And in 2022, a study found "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

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[12] See *Frequently Asked Questions on CODIS and NDIS* <https://www.fbi.gov/services/laboratory/biometricanalysis/codis/codis-and-ndis-fact-sheet> [see #19, "What are the CODIS core loci?"].

[13] See App'x C to David Serges's Suppl Br (Laboratory Report) ("DNA recovered from the above submitted samples was processed using the polymerase chain reaction (PCR) and the PowerPlex® Fusion System."); Promega, *PowerPlex® Fusion System*, <https://www.promega.com/products/forensic-dna-analysis-ce/str-amplification/powerplex-fusion-system/?catNum=DC2402> (accessed November 3, 2025) ("The PowerPlex® Fusion System provides all of the materials needed for co-amplification and fluorescent detection of 24 loci.").

[14] 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>.

[15] Edge et al., *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 Proceedings Nat'l Academy of Sciences 5671, 5675 (2017), available at <https://www.pnas.org/content/114/22/5671>.

[16] Wyner et al., *Forensic Autosomal Short Tandem Repeats and Their Potential Association with Phenotype*, Frontiers in Genetics (August 6, 2020), available at <https://www.frontiersin.org/articles/10.3389/fgene.2020.00884/full>.

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"a number of severe skin and platelet conditions" or other physical characteristics.[17] 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."[18]

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. Warrantless DNA testing violates the Fourth Amendment to the U.S. Constitution.

A. Extracting an individual's genetic material and generating a DNA profile from it constitutes a search.

Given the "vast amount of sensitive information that can be mined from a person's DNA," *United States v Amerson*, 483 F3d 73, 85 (CA 2, 2007), and the "trove of personal information" contained in a DNA sample, *Thompson v Spitzer*, 90 Cal App 5th 436, 458; 307 Cal Rptr 3d 183 (2023), courts have had little trouble concluding that the extraction and analysis of an individual's DNA sample "constitute[s] a search for Fourth Amendment purposes," *United States v Davis*, 690 F3d 226, 246 (CA 4, 2012). 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]." *Norman-Bloodsaw v Lawrence Berkeley Laboratory*, 135 F3d 1260, 1269 (CA 9, 1998). And, as detailed above, the "familial . . . and sexual associations" that can be revealed through DNA offer the government "an intimate window into a

[17] Bañuelos et al., *Associations Between Forensic Loci and Expression Levels of Neighboring Genes May Compromise Medical Privacy*, PNAS (September 27, 2022), pp 1, 7 available at <https://www.pnas.org/doi/10.1073/pnas.2121024119>.

[18] *Id*., p 7.

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person's life." *Carpenter v United States*, 585 US 296, 309–311; 138 S Ct 2206; 201 L Ed 2d 507 (2018) (recognizing reasonable expectation of privacy in comprehensive location information in part because it reveals such details).

Accordingly, courts have repeatedly recognized people's "very strong privacy interests" in their DNA. *Amerson*, 483 F3d at 85; *State v Medina*, 197 Vt 63, 93–94; 2014 VT 69; 102 A3d 661 (2014) (DNA "provide[s] a massive amount of unique, private information about a person that goes beyond identification of that person"); *People v Buza*, 4 Cal 5th 658, 689; 413 P3d 1132 (2018) (court was "mindful of the heightened privacy interests in the sensitive information that can be extracted from a person's DNA"); *King*, 569 US at 481 (Scalia, J., dissenting) (noting the "vast (and scary) scope" of information revealed by DNA).[19] Therefore, extracting and analyzing DNA constitutes a search that is subject to Fourth Amendment scrutiny.

This holds regardless of what the government purports to use the DNA for, or what information the police choose to focus on. It is the entirety of the information collected that matters.

[19] In *King*, the Supreme Court expressly recognized that the creation of a DNA profile for identification purposes is a search that triggers Fourth Amendment protection. 569 US 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.

The Court ultimately concluded that the warrantless search in *King* was reasonable, but for reasons that make the holding inapplicable here. *King* held that the particular program at issue—testing felony arrestees' DNA pursuant to a detailed regulatory regime setting forth 1) who was subject to the DNA collection, 2) when a sample could be extracted and analyzed, 3) when it must be destroyed, 4) what it could be used for, and 5) that those administering the program were not police officers or investigators—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). Not one of those limits is present here. To the contrary, the DNA evidence in this case was obtained by police officers for "the specific purpose of incriminat[ion]"—which 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 Charleston*, 532 US 67, 83–85; 121 S Ct 1281; 149 L Ed 2d 205 (2001).

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See, e.g., *Carpenter*, 585 US at 302, 311 (considering not just the 16 physical locations where the defendant was tracked that law enforcement relied upon at trial, but the entirety of the 127 days of data the government obtained without a warrant); *Kyllo v United States*, 533 US 27, 38; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (considering not only thermal imaging device's exposure of heat signatures from marijuana grow lamps in an attached garage, but its ability to expose more "intimate" details, such as "at what hour each night the lady of the house takes her daily sauna and bath"). Indeed, with regard to DNA specifically, the Supreme Court has highlighted 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 US 438, 463; 136 S Ct 2160; 195 L Ed 2d 560 (2016).

B. Extracting and testing DNA constitutes its own Fourth Amendment event.

Critically, extracting the DNA from an existing biological sample, as well as the subsequent analysis of such DNA, each constitute a separate Fourth Amendment event from the initial collection of the biological material or the item on which that material was deposited (here, Mr. Serges's jeans). In the Supreme Court's words, "it is obvious that [the] physical intrusion" involved in collecting biological material constitutes a search, *and* that "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested [individual's] privacy interests." *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 616; 109 S Ct 1402; 103 L Ed 2d 639 (1989). The "collection and subsequent analysis of . . . biological samples must be deemed [separate] Fourth Amendment searches." *Id*. at 618.

Courts have already recognized this distinction when it comes to DNA specifically, holding that "the 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

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Amendment even when there is no issue concerning the collection of the DNA sample." *Davis*, 690 F3d at 246; see also *State v Mitcham*, 258 Ariz 432, 438; 559 P3d 1099 (2024) (holding that "extracting a DNA profile from [a biological] sample" constitutes a "second search" separate and apart from the initial collection of the biological material); *State v Martinez*, 570 SW3d 278, 292 (Tex Crim App, 2019) (concluding that subsequent testing of blood drawn for medical purposes constituted "a Fourth Amendment search separate and apart from the seizure of the blood by the State"); *Amerson*, 483 F3d at 85 (holding the same, even if it is only for identification purposes).

Treating the search of private information differently than the initial seizure of the information is not unique to biological material. For example, in *People v Hughes*, this Court held that the seizure and search of a cell phone pursuant to a warrant authorizing a search for particular materials does not extinguish a person's reasonable expectation of privacy in the entire contents of the phone. 506 Mich 512, 529; 958 NW2d 98 (2020). Rather, "[a]ny further review of the data [on the phone] beyond the scope of that warrant constitutes a search that is presumptively invalid under the Fourth Amendment." *Id*. at 537. Similarly, in *Walter v United States*, the United States Supreme Court held that "an officer's authority to possess a package is distinct from his authority to examine its contents." 447 US 649, 654; 100 S Ct 2395; 65 L Ed 2d 410 (1980). "The fact that FBI agents were lawfully in possession of . . . boxes of film did not give them authority to search their contents," *id*., for "[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." *Id*. at 657. See also *State v Granville*, 423 SW3d 399, 426 (Tex Crim App, 2014) (Keller, P.J., concurring) (people can have expectations of privacy in the informational dimension of property separate and apart from the expectation of privacy in the physical dimension of that property); *United States v Hasbajrami*,

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945 F3d 641, 670 (CA 2, 2019) ("querying . . . stored data does have important Fourth Amendment implications, and those implications counsel in favor of considering querying a separate Fourth Amendment event [from collection of that data]"). Here, even if the State had lawful possession of Mr. Serges's jeans, its subsequent testing of those jeans for DNA and analysis of that DNA was a distinct Fourth Amendment event subject to its own warrant requirement.[20]

C. Warrantless search of DNA violates the Fourth Amendment.

Warrantless searches "are *per se* unreasonable under the Fourth Amendment." *Arizona v Gant*, 556 US 332, 338; 129 S Ct 1710; 173 L Ed 2d 485 (2009). And, 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

[20] A warrant is required for searching DNA regardless of the initial justification for the seizure of the item on which the DNA is deposited or contained. See, e.g., *Mitcham*, 258 Ariz at 441 (police violated Fourth Amendment by analyzing DNA in blood sample obtained with consent for sole purpose of testing blood alcohol content); *Davis*, 690 F3d at 250 (even if bloody clothing was properly seized pursuant to the plain-view doctrine, extraction and testing of DNA was a separate search that required a warrant).

Notably here, a warrant is required regardless of the grounds for the arrest. As explained below, the search-incident-to-arrest exception to the warrant requirement does not extend to extraction and analysis of DNA from items in an arrestee's possession. See *infra* Parts II.C, III. Although the fact that police initially arrested Mr. Serges on a misdemeanor charge for failing to appear in court (rather than for homicide) may provide an alternative ground for decision, see *People v Serges*, __ Mich App __; __ NW3d __ (2024) (Docket No. 355554) (SWARTZLE, J., concurring dubitante); slip op at 2–5; *infra* Part III.C, it is not dispositive of the question whether a search of DNA is reasonable without a warrant. Indeed, the United States Supreme Court has explained that, outside of the "unique" circumstances of vehicle searches, extending the search-incident-to-arrest exception to novel contexts should not turn on whether police were searching for evidence of the crime of arrest. *Riley v California*, 573 US 373, 398–399; 134 S Ct 2473; 189 L Ed 2d 430 (2014). This is particularly important in the context of DNA searches because, as with the cell phone searches at issue in *Riley*, the privacy interest is high, meaning that allowing warrantless search "would in effect give police officers unbridled discretion to rummage at will among a person's private" information. *Id*. at 399 (internal quotation marks and citation omitted).

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indisputable and great." *Missouri v McNeely*, 569 US 141, 148; 133 S Ct 1552; 185 L Ed 2d 696 (2013) (marks and citation omitted).

The State did not obtain a warrant here, instead arguing that the search was authorized as a search incident to arrest, relying primarily on *United States v Edwards*, 415 US 800; 94 S Ct 1234; 39 L Ed 2d 771 (1974). *Edwards* does not render the State's warrantless search lawful. In that case, the Supreme Court applied the rule first announced in *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), that the Fourth Amendment can "permit[ ] warrantless searches incident to custodial arrests" where it is justified by "the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained." *Edwards*, 415 US at 802–803. In particular, "[w]hen it bec[omes] apparent that the articles of clothing [seized upon arrival of the accused at the place of detention a]re evidence of the crime for which [the accused i]s being held, the police [a]re entitled to take, examine, and preserve them for use as evidence," *id*. at 806, including by, as in *Edwards* itself, "subjecting [the clothing] to laboratory analysis" like "brush[ing] down and vacuum[ing]" them to collect paint chips for analysis, *id*. at 804, 806.

But "[n]ot every search 'is acceptable solely because a person is in custody.'" *Riley v California*, 573 US 373, 392; 134 S Ct 2473; 189 L Ed 2d 430 (2014), quoting *King*, 569 US at 463. "To the contrary, when 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Riley*, 573 US at 392, quoting *King*, 569 US at 463. *Chimel* itself—which simultaneously recognized the search-incident-to-arrest exception *and* refused to apply it to the facts of the specific search and arrest before the Court—is a prime example. Because "*Chimel* refused to 'characteriz[e] the invasion of privacy that results from a top-to-bottom search of a man's house as minor,' . . . the Court

concluded that a warrant was required," notwithstanding the presence of a potentially justifying arrest. *Id*., quoting *Chimel*, 395 US at 766–767, n 12. Thus, the search-incident-to-arrest exception has always been limited to searches that do not implicate "weighty" privacy concerns. That alone is enough to distinguish this case from *Edwards*; though both involved "laboratory analysis" of a detained person's pants, the technically sophisticated DNA testing of blood here was a far more intrusive seizure and search than the collection and analysis of paint chips at issue in *Edwards*, which were essentially in plain view such that they could have been extracted by simply brushing down the defendant's clothing.

If *Chimel* were not enough to make that clear, the Supreme Court's jurisprudence "confront[ing] how to apply the Fourth Amendment to . . . new phenomen[a]" explains that "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, th[e] Court has sought to 'assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter*, 585 US at 305, 309, quoting *Kyllo*, 533 US at 34. Accordingly, courts must ensure that people are not left "at the mercy of advancing technology." *Carpenter*, 585 US at 305, quoting *Kyllo*, 533 US at 35. To do so, a court must ask "whether application of [an exception to the warrant requirement] to th[e] particular category of effects [at issue] would 'untether the rule from the justifications underlying the . . . exception.'" *Riley*, 573 US at 386, quoting *Gant*, 556 US at 343 (imposing this requirement specifically on search-incident-to-arrest doctrine). See also *Carpenter*, 585 US at 309 (considering whether the "logic [of the third-party doctrine] extends to the qualitatively different category of" data exposed by new technology).

The State attempts to sweep *Riley* aside by limiting it to its facts, but that ignores the Supreme Court's rule for new technologies and misreads *Riley* itself, which sets forth a roadmap

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for how to assess when the search-incident-to-arrest exception can apply to a search using modern technology that can reveal a wealth of private information. See *Riley*, 573 US at 386. The degree of privacy interest in the relevant information and whether the search actually advances the interests underlying the search-incident-to-arrest exception are both centrally relevant. Thus, in *Riley*, the Court addressed both the extraordinary privacy interest in the contents of our phones, *id*. at 393–398, and that a warrantless search of cell phone data does not meaningfully advance the twin rationales for the search-incident-to-arrest exception: protecting officer safety against dangerous objects secreted on an arrestee and avoiding destruction of evidence while an arrestee is being transported and processed, *id*. at 387–391. Once a cell phone is seized incident to an arrest, it can be securely held pending application for a search warrant, without compromising those interests.

So too here. Start with the privacy interest. As detailed above, the privacy interests implicated by DNA analysis are far more significant than those involved in a paint chip left on a pant leg, or a wallet or letter that could be kept in one's pocket. And, as the Supreme Court made clear in *Riley*, it would be misguided to reflexively apply older search-incident-to-arrest caselaw involving searches of billfolds, address books, wallets, and purses to a search of data, which differs "in both a quantitative and qualitative sense from other objects that might be kept on an arrestee's person." *Id*. at 393. Equating the two kinds of searches "is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to B, but little else justifies lumping them together." *Id*. The Court in *Riley* specifically identified the revelation of medical information—there, details implied by internet searches for certain symptoms of disease coupled with frequent visits to WebMD—as a significant privacy concern. *Id*. at 395–396. See also *Granville*, 423 SW3d at 408–412 (holding a person has a legitimate

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expectation of privacy in the contents of his cell phone because of its ability to contain a large amount of data involving intimate details of an individual's life, including medical information). Here, the disclosure of medical information that extends to the very biological building blocks of the individual is, if anything, more obvious and concerning.

The United States Supreme Court in *Carpenter* also made clear that the "depth, breadth, and comprehensive reach" of data "and the inescapable and automatic nature of its collection" all matter for determining Fourth Amendment protection—and, specifically, whether older cases applying warrant exceptions to less intrusive searches can be extended to information revealed by new technologies. 585 US at 320. Again, as detailed above, DNA tests can reveal a host of sensitive, personal details about an individual. And individuals have no choice but to shed DNA wherever they go, and on whatever they touch or eat. People constantly shed staggering numbers of skin cells, see Murphy, *Inside the Cell: The Dark Side of Forensic DNA* (New York: Nation Books, 2015), p 5; the average person loses between 40 and 100 hairs per day, see Krimsky & Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* (New York: Columbia University Press, 2012), p 117; 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, Oleiwi et al., *The Relative DNA-Shedding Propensity of the Palm and Finger Surfaces,* 55 Science & Justice 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 over a comprehensive dossier" of genetic information. *Carpenter*, 585 US at 315 (second alteration in original).

Nor is the warrantless search of DNA on an arrestee's clothing meaningfully related to the rationales for a warrantless search. Where, as here, the justification for the relevant exception to

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the warrant requirement is preventing the destruction of evidence, the government's interest in a warrantless search is diminished if "officers could have seized and secured the [physical object] to prevent destruction of evidence while seeking a warrant," for that means "there is no longer any risk that the arrestee himself will be able to [destroy] incriminating data." *Riley*, 573 US at 388. Just like the cell phone in *Riley*, the State here could have (and indeed, did) seized Mr. Serges's pants without a warrant and held them securely. Then, in the months that passed between the seizure of the pants and the DNA search, there was no barrier whatsoever—except for the potential lack of probable cause—to the government seeking a warrant for the DNA test. In light of the tremendous privacy interests at stake, failure to obtain a warrant violates the Fourth Amendment.

III. Article I, Section 11 of the Michigan Constitution independently protects Michiganders against warrantless DNA testing.

The Michigan Constitution is the "preeminent law of" this state. *Mays v Snyder*, 323 Mich App 1, 33; 916 NW2d 227 (2018). Thus, when presented with a state constitutional question, it is "this Court's obligation to independently examine our state's Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].'" *People v Tanner*, 496 Mich 199, 222; 853 NW2d 653 (2014) (alterations in original). The Court "need not, and cannot, defer to the United States Supreme Court" in interpreting a state constitutional provision, *id*., even if it is identically worded to a provision of the federal Constitution, *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004). Conducting such an independent analysis, this Court has held in numerous contexts that the Michigan Constitution provides broader rights than the U.S. Constitution for people facing criminal investigation and punishment.[21]

[21] See, e.g., *People v Stovall*, 510 Mich 301, 313–314, 322; 987 NW2d 85 (2022) (Michigan Constitution bars imposition of life sentences with parole for juveniles even though Eighth Amendment does not); *People v Parks*, 510 Mich 225, 232; 987 NW2d 161 (2022) (Michigan Constitution bars imposition of mandatory life-without-parole sentences for 18-year-olds even

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Here, the Court can rule in Mr. Serges's favor on state constitutional grounds without needing to hold that Article I, Section 11 confers broader protections than the Fourth Amendment because the U.S. Supreme Court has not yet addressed whether the federal search-incident-to-arrest exception extends to DNA testing. Cf. *State v Leonard*, 943 NW2d 149, 156 n 9 (Minn, 2020) ("In the absence of controlling Fourth Amendment precedent, by definition we do not read Article I, Section 10 of the Minnesota Constitution more broadly than the Fourth Amendment on this issue."). This Court should exercise its independent obligation to interpret Article I, Section 11 regardless of how the question might be answered under the Fourth Amendment, and it need not even address the Fourth Amendment if it concludes that Article I, Section 11 protects against the challenged warrantless search.[22]

Article I, section 11 *does*, however, provide more protection than its federal counterpart. To determine whether the Michigan Constitution confers greater protections than the U.S. Constitution, the following "factors . . . may be relevant":

> 1) the textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest. [*Tanner*, 496 Mich at 223 n 17 (citation omitted).]

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though Eighth Amendment does not); *People v Bullock*, 440 Mich 15, 30; 485 NW2d 866 (1992) (Michigan Constitution provides more protection against disproportionate punishment than the Eighth Amendment); *People v Juillet*, 439 Mich 34, 85; 475 NW2d 786 (1991) (CAVANAGH, C.J., concurring) (Michigan Constitution provides more protection than federal Due Process Clause against police entrapment).

[22] Nonetheless, as argued above, federal precedent does indicate that DNA testing requires a warrant under the Fourth Amendment, whether or not it is incident to a lawful arrest. See *supra* Part II.C.

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These factors are not dispositive, and the Court's "ultimate task" is to "undertake by traditional interpretive methods to independently ascertain the meaning of the Michigan Constitution."[23] *Id*.

Article I, Section 11's text and history, the case law applying it, and Michigan's interest in deterring law-enforcement overreach all support the conclusion that the Michigan Constitution does not permit warrantless testing of DNA, including incident to a lawful arrest.

A. The text of Article I, Section 11 evidences a special commitment to the privacy of Michiganders, particularly in light of evolving technology.

The text of Article I, Section 11, as underscored by a recent amendment, articulates the constitutional baseline: Searches and seizures must be circumscribed by a particularized warrant. In relevant part, it provides:

> The person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things or to access electronic data or electronic communications shall issue without describing them, nor without probable cause, supported by oath or affirmation. [Const 1963, art 1, § 11.]

On its face, this text forbids government officials from "enter[ing] any and all places agreeable to themselves," and "search[ing] and seiz[ing] such papers and evidences as their will dictated." *People v Marxhausen*, 204 Mich 559, 564; 171 NW 557 (1919), holding modified by *Goldston*,

[23] Although courts have sometimes described this analysis as looking for a "compelling reason" to construe the state Constitution more broadly than the federal one, this Court has rejected the notion "that there is some specific burden . . . to identify a 'compelling reason' or justification for interpreting the words of the Michigan Constitution differently than the words of the United States Constitution." *Tanner*, 496 Mich at 222 n 16.

Even if the search-and-seizure protections of the Michigan Constitution were textually identical to the Fourth Amendment, that would not diminish this Court's responsibility to interpret the language independently. Michigan first adopted its search-and-seizure provision in 1835, long before the Fourth Amendment was incorporated against the states in 1961. See Const 1835, art 1, § 8; *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). Thus, Michigan courts could not have assumed that the state Constitution's search-and-seizure protections were in lockstep with federal Fourth Amendment precedent.

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470 Mich 523. Instead, it sets forth requirements "for a lawful search and seizure, one supported by oath or affirmation, describing the place to be searched and the person or things to be seized." *Id*. at 563.

A 2020 amendment to Article I, Section 11 demonstrates that its protections apply with special force to evolving technologies. That year, Michiganders overwhelmingly approved a ballot proposal clarifying that Article I, Section 11 applies to "electronic data" and "electronic communications." See Ballotpedia, *Michigan Proposal 2, Search Warrant for Electronic Data Amendment* (2020) <https://perma.cc/Y47Y-WLZW> (captured September 15, 2025) (reporting that 88.75% of voters supported the proposal). They did so even though it was already the practice of Michigan law-enforcement agencies "to obtain a warrant or subpoena to gain access to electronic data and communications," and the United States Supreme Court had already indicated that the Fourth Amendment's protections apply with full force to electronic data. Senate Fiscal Agency, *November 2020 Ballot Proposal 20-2: An Overview*, available at <https://perma.cc/4GMX-CU3P> (captured September 15, 2025), pp 2–4, citing *Riley*, 573 US 373 and *Carpenter*, 585 US 296. This reflects Michiganders' understanding that Article I, Section 11 does not countenance any diminution in their privacy rights as technological advances increase the government's capacity to probe into the most intimate corners of their lives.

The 2020 amendment also reflects that the Michigan Constitution rejects the third-party doctrine's application to repositories of sensitive information. The third-party doctrine holds that Fourth Amendment protections typically do not extend to "information [a person] voluntarily turns over to third parties," such as phone numbers provided to the phone company and documents given to the bank. *Smith v Maryland*, 442 US 735, 743–744; 99 S Ct 2577; 61 L Ed 2d 220 (1979); *United States v Miller*, 425 US 435, 443; 96 S Ct 1619; 48 L Ed 2d 71 (1976). But this doctrine

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does not overcome Fourth Amendment protections over cell phone location information because such information holds the "privacies of life" and is "qualitatively different" than things like "telephone numbers and bank records." *Carpenter*, 585 US at 309, 311. And cell phone location information "is not truly 'shared'" with wireless carriers since "carrying [cell phones] is indispensable to participation in modern society." *Id*. at 315 (citation omitted). Similarly, much of our "electronic data" and "electronic communications" are inevitably held by third-party service providers. See *United States v Jones*, 565 US 400, 417; 132 S Ct 945; 181 L Ed 2d 911 (2012) (Sotomayor, J., concurring) ("[In] the digital age, . . . people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers."). Thus, protecting these categories of information, as Article I, Section 11 does, necessarily means extending those protections to information that has been entrusted to third parties.

Like electronic data and communications, our DNA holds "the privacies of life" and is "qualitatively different" than the types of items and information subject to the third-party doctrine. *Carpenter*, 585 US at 309, 311. And, like electronic data and communications, our DNA is data about us that is constantly being shed and that can therefore come into the possession of a third party against our will. Further, the analysis of DNA is a technologically sophisticated process that involves the use of computers and digital technology[24]—generating precisely the type of electronic

[24] See, e.g., Stanley et al., *Forensic DNA Profiling: Autosomal Short Tandem Repeat as a Prominent Marker in Crime Investigation*, 27 Malays J Medical Science 22, 26 (2000), available at <https://doi.org/10.21315/mjms2020.27.4.3> (discussing the "general methodology of DNA profiling," which relies on "a genetic analyser using bioinformatics" followed by "searching the DNA sequence databases").

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data about us that the 2020 amendment was designed to protect. Accordingly, pursuant to Article I, Section 11's text, the mere fact that a person leaves biological matter containing their DNA on something does not necessarily mean they have relinquished a constitutionally protected privacy interest in it.

B. Michigan's constitutional and common-law history evinces courts' scrupulous efforts to uphold Article I, Section 11's protections, especially when the government seeks to search particularly sensitive personal information.

Case law reflects that Article I, Section 11 has been a bulwark against unreasonable searches and seizures from its ratification in 1835 to today.[25] Historically, Michigan courts have described the rights it protects as "sacred." *Marxhausen*, 204 Mich at 567. And in recent years, this Court has affirmed that those rights remain sacrosanct and must be vigorously protected when the government seeks to conduct searches that implicate significant privacy interests.

Michigan was the first state to determine that its Constitution mandates an exclusionary rule for illegally acquired evidence. In 1919, more than forty years before the U.S. Supreme Court applied the federal exclusionary rule to the states in *Mapp v Ohio*, 367 US 643 (1961), this Court declared that Michigan courts have a "duty" to suppress evidence obtained "in violation of [the defendant's] constitutional rights, and by unlawful search and seizure, and without any search warrant at all," *Marxhausen*, 204 Mich at 573. This Court traced the exclusionary rule back to colonial protests against general warrants issued by the crown, which specified no object and thus allowed unfettered searches. *Id*. at 563–567. The rule was necessary, the Court explained, because

[25] The Michigan Constitution's search-and-seizure provision has been situated in Article I, Section 11 since 1963. In prior eras, the provision has resided in different places in the Constitution. See 50 Constitutions, *Section 11. Searches and Seizures* <https://50constitutions.org/mi/constitution/section-amendment-id-76320> (accessed October 31, 2025) (tracing the provision's history). To avoid confusion, this brief refers to the search-and-seizure provision as Article I, Section 11 regardless of its location during different historical periods.

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constitutional safeguards against unreasonable searches and seizures must be "held sacred," and courts have a duty to counter "any attempt to fritter them away." *Id*. at 567.

In the century following *Marxhausen*, this Court has time and again demonstrated its "commitment to the protection of liberty" by affirming strong search-and-seizure rights under state law. *Sitz v Dep't of State Police*, 443 Mich 744, 775–776; 506 NW2d 209 (1993). In *People ex rel Roth v Younger*, for example, the Court held that the State cannot condition the granting of a license on the waiver of the constitutional right against unreasonable searches and seizures. 327 Mich 410, 434; 42 NW2d 120 (1950) (teaching that Michigan's search-and-seizure protections "should receive a liberal construction"). And decades later, in the very same case in which the United States Supreme Court allowed suspicionless stops at sobriety checkpoints under the Fourth Amendment, this Court held that they violated Article I, Section 11. *Sitz*, 443 Mich at 776–779. *Sitz* affirmed that Article I, Section 11 "offers more protection than the United States Supreme Court's interpretation of the Fourth Amendment" in certain circumstances. *Id*. at 777; see *id*. at 763 (observing that following federal precedent would have led to "a major contraction of citizen protections under our constitution").[26]

This Court has been particularly attentive to ensuring that emerging technologies do not erode Article I, Section 11's protections. During prohibition, "[t]he automobile" became "the

[26] In the last several years, members of this Court have highlighted additional areas in which Article I, Section 11 may confer more robust rights than the Fourth Amendment. *See People v Duff*, 514 Mich 617, 646; 22 NW3d 476 (2024) (WELCH, J., concurring) (questioning whether the federal test for determining when a seizure has taken place is sufficiently protective of individual rights and whether Michigan should adopt a different test); *People v Pagano*, 507 Mich 26, 38–46; 967 NW2d 590 (2021) (VIVIANO, J., concurring) (suggesting that Article I, Section 11 offers more protection than the Fourth Amendment against searches and seizures based on anonymous tips); *People v Montgomery*, 508 Mich 978; 965 NW2d 549 (2021) (WELCH, J., concurring) (positing that the Michigan Constitution may afford stronger protections than the Fourth Amendment against searches of people on parole).

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convenient instrument of bandits and rum runners" and "present[ed] a most difficult problem to officers in their efforts to solve crime." *People v Roache*, 237 Mich 215, 220; 211 NW 742 (1927). Yet this Court refused to relax search-and-seizure standards for automobiles. See, e.g., *People v Kamhout*, 227 Mich 172, 187–188; 198 NW 831 (1924) (holding that officers must have reasonable suspicion that the law is being violated to stop and search an automobile).

This Court has similarly ensured that a person's custody status does not eliminate the protections of Article I, Section 11. See *People v Carr*, 370 Mich 251; 121 NW2d 449 (1963). In *Carr*, a defendant had previously been arrested and convicted of a separate offense, resulting in his car being held in the jail parking lot for the duration of his confinement, seemingly in the sheriff's custody. *Id*. at 253–254. Police began to suspect the defendant of another crime and searched his car without a warrant, uncovering incriminating evidence. *Id*. at 254. This Court ruled that Article I, Section 11 prohibits warrantless searches of a defendant's property while he is serving a jail sentence for an unrelated offense. *Id*. at 256. In so doing, the Court explained—in words directly relevant here—that a defendant cannot be "stripped of his civil rights and his constitutional safeguards merely because" he is in jail. *Id*. at 255.

Carr is particularly relevant because it was decided *only a month* after the People voted to ratify the 1963 Constitution. And this Court, "in seeking for [the] real meaning" of the Michigan Constitution must "take into consideration the times and circumstances under which the State Constitution was formed—the general spirit of the times and the prevailing sentiments among the people." *Sitz*, 443 Mich at 764 (citation omitted). Those circumstances and that spirit would have been reflected in an important case upholding the rights of arrestees against unreasonable searches and seizures.

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Here, just as in *Carr*, the police took advantage of their possession of a defendant's property due to his incarceration to conduct a further search. Here, just as in *Carr*, they were able to do so only because the defendant was in jail. And here, just as in *Carr*, given that the defendant was incarcerated and unable to assert authority over his own possessions, there was nothing preventing officers from obtaining a warrant if they had probable cause that the defendant had committed the crime they were investigating.

Two recent decisions from this Court, together with *Carr*, show that Article I, section 11 requires a warrant to authorize DNA testing regardless of an individual's custody status. See *People v Carson*, __ Mich __; ___NW3d___ (2025); Docket No. 166923; slip op at 10, 16; *People v Hughes*, 506 Mich 512; 958 NW2d 98 (2020). *Hughes* and *Carson* were both grounded in the Fourth Amendment because the defendants did not press arguments under Article I, Section 11. See *Hughes*, 506 Mich at 524 n 5; *Carson*, slip op at 11 n 11. But this Court noted that the Michigan Constitution may well "provide[] broader protection," *Carson*, slip op at 11 n 11, demonstrating that Article 1, Section 11 would provide independent safeguards even if the United States Supreme Court were to regress in its interpretation of Fourth Amendment protections.[27]

Both *Hughes* and *Carson* involved overbroad searches of cell phones pursuant to general warrants allowing searches of the entire phone. This Court explained that unregulated searches of

[27] The United States Supreme Court has done so in many other areas of constitutional law, including relating to privacy rights. See, e.g., *Dobbs v Jackson Women's Health Organization*, 597 US 215; 142 S Ct 2228; 213 L Ed 2d 545 (2022). In other cases, the Court has maintained protections, but in the face of dissents calling for retreat from longstanding Fourth Amendment rules. See *Collins v Virginia*, 584 US 586, 601; 138 S Ct 1663; 201 L Ed 2d 9 (2018) (Thomas, J., concurring) (calling for the reversal of *Mapp* and its holding applying the exclusionary rule to the states); *Carpenter*, 585 US at 343 (Thomas, J., dissenting) (calling for reconsideration of Fourth Amendment protections based on the "reasonable expectation of privacy" test announced in *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967)); *id*. at 391 (Gorsuch, J., dissenting) (similar).

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cell phones would be "especially problematic in light of the 'sheer amount of information contained in cellular data and the highly personal character of much of that information.'" *Carson*, slip op at 13 (quoting *Hughes*, 506 Mich at 541). "Cell phones in the modern world hold 'the privacies of life,'" including "sensitive health-related records and information." *Id*. at 14–16 (quoting *Riley*, 573 US at 403). It is therefore necessary, the Court reasoned, to "distinguish[] cell-phone data from other [physical] items . . . in terms of the privacy interests at stake." *Hughes*, 506 Mich at 531.

To adequately protect these privacy interests, this Court articulated several constitutional principles. To begin, "the 'search incident to a lawful arrest' exception to the warrant requirement" does not apply to cellphone data. *Hughes*, 506 Mich at 525–526, quoting *Riley*, 573 US at 395–397. This is for two reasons. First, an arrestee does not "lose[] all expectation of privacy"; rather, "when privacy-related concerns are weighty enough," as with cell phone data, "a search may require a warrant" as to an arrestee. *Id*. at 525 (cleaned up). See also *People v Custer*, 465 Mich 319, 334 n 4; 630 NW2d 870 (2001) (emphasizing that an arrestee's reasonable expectation of privacy is "merely diminished"); *People v Gonzales*, 356 Mich 247, 256; 97 NW2d 16 (1959) ("A lawful arrest does not justify any and all coincidental searches and seizures without warrant."). Second, the justifications for the search-incident-to-arrest exception—"potential harm to officers and the destruction of evidence—are less compelling in the context of digital data." *Hughes*, 506 Mich at 525, quoting *Riley*, 573 US at 386.

Next, this Court held that a warrant authorizing a cell phone search must be sufficiently specific to ensure the search is reasonably directed at the identified criminal activity and does not reach other data. *Carson*, slip op at 19–21. The warrant "should be as particular as the

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circumstances presented permit and consistent with the nature of the item to be searched." *Id*. at 20.

Finally, a warrant is not a license to conduct a fishing expedition. Rather, the search of cell phone data "must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in [the authorizing] warrant." *Hughes*, 506 Mich at 516.

The rationale of *Hughes* and *Carson* applies with equal force to DNA searches. Like cell phones, DNA "differ[s] in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Hughes*, 506 Mich at 526. It contains a "sheer amount of information" of a "highly personal character" that cannot be compared to the contents of a physical container, such as a wallet or a backpack. *Carson*, slip op at 13. This includes a person's genetic information, predisposition to medical conditions, as well as familial relationships and ancestry.[28] See Part I, *supra*. The privacy interests at stake are correspondingly weightier and must be "jealously guard[ed]." *Carson*, slip op at 16. Those privacy interests do not dissipate merely because a person is arrested. See *Mitcham*, 258 Ariz at 440–441 ("emphatically reject[ing]" the

[28] Other state supreme courts have acknowledged that the processing of a person's DNA sample to create their DNA profile constitutes a "serious intrusion on [their] privacy interests" because it "reveal[s] . . . intimate personal information about the individual," including "individual genetics." *Mario W v Kaipio*, 230 Ariz 122, 127, 129; 281 P3d 476 (2012); see also *supra* Part II.A.

More generally, this Court has consistently emphasized that we each have significant privacy interests in our medical information. See *People v Keskimaki*, 446 Mich 240, 246; 521 NW2d 241 (1994) ("Generally, information relating to medical treatment falls within the ambit of the physician-patient privilege, and remains confidential."). This State's statutory law further evinces an intent to protect the privacy interest in medical information beyond federal statutory standards. See *Isidore Steiner, DPM, PC v Bonanni*, 292 Mich App 265; 807 NW2d 902 (2011) (discussing the ways in which Michigan allows less medical disclosure than the federal Health Insurance Portability and Accountability Act).

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argument that law enforcement could extract a defendant's DNA profile from his blood sample "simply because the State lawfully possessed the blood" pursuant to an arrest).

Moreover, DNA evidence poses neither any "harm to officers" nor any risk of "destruction of evidence."[29] *Hughes*, 506 Mich at 525, citing *Riley*, 573 US at 386. So, with respect to DNA testing, there is every reason to require a particularized warrant and no reason to apply the search-incident-to-arrest exception to the warrant requirement. See *Hughes*, 506 Mich at 516–517.

In sum, this Court's precedent indicates that a particularized warrant is required to authorize DNA testing, including when it is incident to a lawful arrest.

C. Michigan has a strong interest in deterring the police misconduct and overreach that warrantless DNA testing would incentivize.

Requiring a warrant for DNA testing would also advance Michigan's interest in deterring police misconduct and overreach. If officers have unfettered discretion to extract and analyze any person's DNA upon their arrest, the officers could engage in the type of "ungrounded" and "over-zealous" policing that Article 1, Section 11 prohibits. *Sitz*, 443 Mich at 768, quoting *Roache*, 237 Mich at 224–225; see *Marxhausen*, 204 Mich at 567 (instructing that law-enforcement officials' attempts to circumvent the warrant requirement "must meet with the clear and earnest disapproval of the courts").

In particular, if there were no warrant requirement for DNA testing, the police would be incentivized to make pretextual (but potentially lawful) arrests and obtain DNA to facilitate further investigation that they otherwise would not have a legal basis to pursue. This Court has warned that "[i]t would be a dangerous rule of law and an invitation to circumvent the constitutional

[29] Nor is there any exigency justifying the warrantless testing of DNA, since it does not degrade in the time it takes for officers to secure a warrant. See *People v Kaigler*, 368 Mich 281, 296; 118 NW2d 406 (1962) (ordering suppression of evidence obtained from a warrantless search and "not[ing] that the police had ample time to swear out a valid search warrant, yet failed to do so").

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guaranty against unreasonable search and seizure were the citizen convicted of a misdemeanor and in jail . . . to be stripped of all his civil liberties." *Carr*, 370 Mich at 255. That is even more true today given the profusion of misdemeanor offenses for which many Michiganders may be susceptible to being arrested or charged, particularly poverty-related charges such as driving without insurance or with a suspended license.

As noted above, in *Carr*, the police conducted a warrantless search of the defendant's car to investigate a larceny while he was in jail on an unrelated offense. See *id*. at 253–254. This Court ruled the resulting evidence inadmissible, reasoning that the police could not circumvent the defendant's "civil rights and his constitutional safeguards" by investigating him "without process" "merely because" he was in jail. *Id*. at 255. Similarly, in *People v Trudeau*, this Court held that the police violated the defendant's Article I, Section 11 rights by seizing and searching the shoes he was wearing to investigate one crime while he was in custody for another. 385 Mich 276, 280; 187 NW2d 890 (1971). The Court noted that the police normally "would have had to obtain a warrant" to seize and search the shoes, reiterating that the "[d]efendant did not lose his civil rights or liberties while he was in police custody awaiting trial on another charge." *Id*. at 280–281. *Carr* and *Trudeau* illustrate the mischief that could arise if this Court were to permit the police to take advantage of an individual's incarcerated status to conduct wide-ranging investigations into other matters. Indeed, such a rule would incentivize police to arrest and jail people for minor offenses—including offenses that would otherwise not be deemed worthy of law-enforcement resources—in order to conduct searches that would otherwise be forbidden.

This case illustrates that concern. As the Court of Appeals recounted, a contemporaneous police report stated that Mr. Serges was arrested on misdemeanor charges relating to outstanding warrants, yet the police later claimed they arrested him for murder—even though there was no

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probable cause to suspect him of murder. *People v Serges*, __ Mich App __; __ NW3d __ (2024) (Docket No. 355554); slip op at 3–4; 2024 WL 1469924, at *2–3; see *id*., slip op (concurring) at 1–2; 2024 WL 1469924, at *24 (SWARTZLE, J., concurring dubitante) ("Consistent with this lack of probable cause of murder at the time of arrest, the evidence . . . confirms that police initially arrested him on a misdemeanor charge for failing to appear at court."). After prosecutors refused to seek a warrant to charge Mr. Serges with murder, and while he could therefore be held only on the misdemeanor charges, the police nevertheless seized his clothing as purported evidence of the murder and sent it to a forensic lab for DNA testing. *Id*., slip op at 3–4, 2024 WL 1469924, at *2–3.

"[T]here was nothing coincidental" about the police's conflicting accounts of why they arrested Mr. Serges. *Id*., slip op (concurring) at 1–2; 2024 WL 1469924 at *24 (SWARTZLE, J., concurring dubitante). "From the outset, the police suspected defendant of the victim's murder, but there was little-to-no reliable evidence tying him to the scene"—"no fingerprints, shoe prints, weapons, visible blood, or the like." *Id*. So the police arrested Mr. Serges on an unrelated misdemeanor and conducted a revealing DNA search that they could only have undertaken with a warrant had he not been in jail. Enforcing the strictures of Article I, Section 11 by requiring a warrant for DNA testing would reduce the incidence of "unsettling" fact patterns like this. *Id*.

IV. To provide clear guidance to law enforcement and courts, this Court should articulate a categorical rule requiring a warrant for DNA testing.

For the foregoing reasons, this Court should articulate the rule that the Fourth Amendment and Article I, Section 11 each require a warrant to authorize the extraction and testing of DNA. The Court should do so however it resolves the ultimate ineffective-assistance-of-counsel question in this case because of the importance of "provid[ing] clear guidance to law enforcement through categorical rules." *Riley*, 573 US at 398. As this Court has stated, "[i]f our courts and law

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enforcement officers are to have manageable and workable standards, the . . . balancing of personal and governmental interests 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" *People v Bloyd*, 416 Mich 538, 554 n 12; 331 NW2d 447 (1982), quoting *Dunaway v New York*, 442 US 200, 219–220; 99 S Ct 2248; 60 L Ed 2d 824 (1979) (White, J., concurring).

In a single subclause in a footnote, the State appears to suggest that whether it needs a warrant to conduct DNA testing depends on the results of the testing. See Pl-Appellant's Answer at 11 n 16 ("[S]omeone else's blood DNA does not infringe on an expectation of privacy that society is prepared to recognize as reasonable."). But that puts the cart before the horse. When the government extracts and analyzes DNA, it does not know who it belongs to—that is what the government is trying to find out. Indeed, the government here analyzed multiple blood samples without a warrant. See App'x C to David Serges's Suppl Br (Laboratory Report). While the small sample on the right leg of Mr. Serges's pants was determined to be a likely match to the victim's DNA, analysis of samples taken from the left leg of the pants and from Mr. Serges's boot showed a match to Mr. Serges's own genetic profile. *Id*. at 2. The State would apparently have the constitutional rule turn on the happenstance of what a DNA search turns up. Whether a warrant is required *ex ante* to search DNA on an arrestee's clothing cannot turn on the results of that DNA analysis. "A 'search is not to be made legal by what it turns up.'" *People v LoCicero*, 453 Mich 496, 501; 556 NW2d 498 (1996), quoting *United States v Di Re*, 332 US 581, 595; 68 S Ct 222; 92 L Ed 210 (1948).

CONCLUSION

For the foregoing reasons, this Court should hold under Article I, Section 11 that extraction and testing of DNA from an arrestee's clothing or other items are searches for which a warrant is

required. Should the Court also reach the federal question, it should likewise hold that the Fourth Amendment requires a warrant to authorize the extraction and testing of DNA.

Respectfully submitted,

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WORD COUNT STATEMENT AND ATTESTATION REGARDING AMICI'S TAX EXEMPT STATUS

This brief contains 10,694 words in the sections covered by MCR 7.212(C)(6)-(8). This amicus brief is also filed on behalf of two organizations, both of which are tax exempt organizations under section 501(c)(3) of the Internal Revenue Code. MCR 7.312(H)(2)(f).

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