No. 14-10427

In the Supreme Court of the United States

MANUEL ARZOLA,

Petitioner,

v.

MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR *AMICUS CURIAE* MARYLAND PUBLIC DEFENDER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae the Maryland Public Defender is an independent state agency created by the Maryland General Assembly in 1971.[1] The mission of the Maryland Public Defender is to ensure enforcement of the right to effective assistance of counsel for eligible clients in state court. With over 900 employees (570 attorneys) across 52 offices located in twelve districts and seven specialized divisions, the Public Defender is the largest legal services organization in the state, providing representation in over 230,000 matters a year to more than 70,000 clients.

Attorneys employed by the Public Defender regularly represent clients who are subject to the state's ever-widening DNA collection schemes that increasingly do not involve a physical touch to collect a biological sample for DNA analysis. It has become all the more important for the Public Defender to be heard on the question whether that the collection and analysis of DNA from lawfully seized evidence is a search, because the lower court's decision that a search did not occur deepens the conflict between Maryland's highest court and the Fourth Circuit over the application of the Fourth Amendment to cases within Maryland.

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[1] *See*, Maryland Public Defender Act, Md. Code Ann., Crim. Proc., § 16-201, *et seq*. (2014). No counsel for a party authored this brief in whole or in part, and no counsel made a monetary contribution in whole or in part to fund the preparation of this brief. Pursuant to S. Ct. R. 37.2(a), counsel of record for Petitioner and Respondent have consented to the filing of this brief.

The Public Defender is particularly concerned about the effect of the federal/state split on cases within Maryland. In state court, the extraction of DNA from lawfully seized evidence and its analysis to create a DNA profile is a *not* search. But in a federal court in Maryland, the extraction of DNA from lawfully seized evidence *is* a search. The lack of constitutional constraints on the state side creates opportunities for the government to exploit searches of local DNA databases—particularly in Baltimore City and Prince George's County where crime victim DNA and other non-offender DNA samples are routinely retained and searched. These non-offender samples are not permitted in the national CODIS database. The Public Defender reasonably anticipates the government may seek out the more favorable Fourth Amendment forum within Maryland for prosecution of cases involving the extraction and analysis of DNA from lawfully seized evidence.

It is the experience of the Public Defender that without constitutional limitations of the government's discretion to collect and analyze DNA, it will be our clients—frequently judged to be the "usual suspects"—who will suffer the greatest harm to their dignitary and privacy interests. This is precisely the type of government activity that threatens the privacy of our clients and *all* citizens. The Public Defender has a strong interest in the issue presented in the Petition.

SUMMARY OF ARGUMENT

The decision of the lower court that a Fourth Amendment search did not occur when the government extracted DNA from a blood sample on Petitioner's lawfully seized shirt, and analyzed it to generate a

DNA profile, deepens the divide between federal and state authorities on an important question with alarming implications for the future of law enforcement's DNA collection practices. *Commonwealth v. Manuel Arzola*, 26 N.E.3d 185 (Mass. 2015). The Court should grant the writ of certiorari to resolve the dispute and answer the important question about whether law enforcement's DNA collection, retention, and distribution practices intrude upon reasonable expectations of privacy in our society.

The decision of the court below and a sharply divided 4-3 decision of the Maryland Court of Appeals in *Raynor v. State*, 99 A.3d 753 (Md. 2014), concluded that a person does not have a reasonable expectation of privacy in the extraction of DNA from a lawfully seized item and its subsequent analysis to create a DNA profile. In *Raynor*, Maryland's highest court acknowledged and disagreed with the conclusion of the Fourth Circuit in *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012), that the extraction of DNA from lawfully seized evidence and its testing to create a DNA profile constitutes a search.

The question whether a search occurs when law enforcement extracts DNA from lawfully seized evidence is important because every person leaves a trail of DNA, creating the opportunity for law enforcement to employ technology for targeting individuals on the mere suspicion of crime, without any arrest, charge, or judicial warrant. There are few practical protections to safeguard against the government's exploitation of DNA technology. As the dissent in *Raynor* presciently observed, "short of

searching a person via touch or entering her home, the State may collect any person's DNA, create a genetic profile, and add it to the CODIS database." *Raynor*, 99 A.3d at 768 (Adkins, J., dissenting).[2]

The decision of the court below and the Maryland Court of Appeals to impose the condition of a physical intrusion for the Fourth Amendment to apply to the collection, retention, and distribution of DNA, invites the government to use technology to intrude upon individual autonomy and privacy without a touch. The Petition should be granted to resolve the disagreement in the lower courts over this important question.

REASONS FOR GRANTING THE WRIT

I. The Petition Should Be Granted To Resolve The Federal/State Split In Maryland Over An Important Question.

In Maryland, the question whether the Fourth Amendment applies to the extraction of DNA and its subsequent analysis to create a DNA profile, turns on whether a case is prosecuted in state or federal court. The analysis and permanent retention of DNA with minimal safeguards to prevent later misuse constitutes a significant invasion of individual privacy, dignity, and autonomy that extends far beyond any legitimate governmental purpose. The government should not be in a position to choose the version of the Fourth

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[2] CODIS (the Combined DNA Index System) is the network of police DNA databases at the national, state, and local levels that manage DNA identification records with software developed by the FBI. *See generally*, *CODIS and NDIS Factsheet*, FED. BUREAU OF INVESTIGATION, (available at http://tinyurl.com/ckvencj).

Amendment safeguards it prefers to be applicable in Maryland.

In the face of the Maryland courts unwillingness to vigorously enforce Fourth Amendment protections, state officials have engaged in a relentless expansion of DNA collection practices since 1994. More recently, loosely regulated databases of DNA have emerged at the state and local levels of CODIS that contain DNA of ordinary citizens.

The Fourth Amendment is the principle constitutional barrier standing between the citizenry and incremental evolution toward the kind of total surveillance society that would result from widespread DNA data collection and profiling. Maryland's history of DNA collection practices underscores the need for the Court to resolve the disagreement within Maryland that the decision of the court below has deepened.

The Maryland DNA collection statute was originally enacted by the General Assembly in 1994 to create a statewide DNA database collection system and repository for access by law enforcement agencies investigating past and future crimes. Act of 1995, Art. 88B, § 12A, *codified* at Md. Code Ann., Public Safety Art., §§ 2-501 to 2-514 (2014). As originally enacted, the statute limited qualifying crimes to convictions for child sexual abuse, rape in any degree, or a sexual offense in the first, second, or third degrees. Act of 1995, Art. 88B, § 12A(a)(8)(i)(ii)(iii). In 1999, the offenses of murder, robbery or robbery with a deadly weapon, first degree assault, or attempts to commit these offenses were added to the categories of qualifying offenses. Act of 1999, Art. 88B, § 12A(a) 2(8)(iv)-(vii). In 2002, the list of qualifying offenses was

broadened beyond violent crimes to include convictions for all felonies and certain misdemeanor burglary charges. Md. Code Ann., Public Safety Art., § 2-504(2) (including as qualifying offenses convictions for such charges as willfully filing false income tax return, injuring a racehorse, election offenses, and other nonviolent crimes). In 2008, the General Assembly expanded the statute to cover individuals who had been charged with, but not yet convicted of, crimes of violence and burglaries. Md. Code Ann., Pub. Safety § 2-504(a)(3); 2008 Md. Laws 337. *See generally*, *Maryland v. King*, 133 S.Ct. 358 (2013) (upholding constitutionality of Maryland DNA Collection statute).

In 2011, repositories of ordinary citizen DNA emerged at the state and local levels of CODIS in Maryland that cannot be uploaded to the national level.[3] *See, e.g.*, *Varriale v. State*, 96 A.3d 793, 795–96 (Md. Ct. Spec. App. 2014) *cert. granted*, 105 A.3d 489 (Md. 2014) (stating that Varriale had been cleared of suspicion by the Anne Arundel County Police Department during a prior investigation in which his DNA had been sampled, but that his DNA profile was uploaded into the "suspect index" anyway); *see also*, *United States v. Davis*, 657 F. Supp. 2d 630, 634–35 (D. Md. 2009) (describing unregulated operation of Prince

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[3] 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); *see also*, D.H. Kaye, THE RETENTION AND SUBSEQUENT USE OF SUSPECT, ELIMINATION, AND VICTIM DNA SAMPLES OR RECORDS: A REPORT TO THE NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, NOVEMBER 13, 2000 (with Cecelia Crouse) (available at http://tinyurl.com/mnypbt7).

George's County's local DNA database), *aff'd*, 690 F.3d 226 (4th Cir. 2012).[4]

Because the Maryland classifies these repositories of ordinary citizen DNA as crime scene evidence, *see* MD. CODE REGS. 29.05.01.01(B)(7) (2014), it does not have to comply with important statutory safeguards, including:

- Whose profiles may or may not be included in the database;
- Restrictions on the use of DNA samples included in the database;
- Whether DNA databases may be used to conduct familial searches (*i.e.*, exploiting the inherited nature of DNA to place relatives of persons in the database under genetic surveillance);

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[4] In 2000, The National Commission on the Future of DNA Evidence surveyed participating CODIS laboratories regarding retention practices for "nonoffender samples" such as crime victim, elimination samples, or suspect samples. Of the nineteen laboratories that responded, "[h]alf . . . determined that DNA profiles would be entered into [local] and [state] databases based on court opinions and 'analyst discretion' (defined as 'we import what we're comfortable importing')." KAYE, *supra*, n. 3. Seven laboratories did not have guidelines for analyst discretion. Over two-thirds of the laboratories had no written definition of what samples constitute an elimination sample or a suspect sample. Two of the laboratories entered a victim sample into the database if police notified the laboratory that the victim "is known to be associated with criminal activity." These two laboratories also offered a quality assurance rationale to justify the inclusion of victims' samples. *Id.*

- And most importantly, the expungement provisions of current law.

Of the five local police DNA laboratories with the capacity to operate unregulated DNA databases, at least two are presently exploiting their unregulated status. In Baltimore City and Prince George's County, law enforcement agencies routinely collect and maintain the DNA of crime victims in local DNA databases.[5]

The expansion of repositories of DNA profiles from ordinary citizens in Maryland's state and local databanks that federal law does not permit in the national CODIS databank, gives the government great leeway to compile DNA profiles from crime victims, individuals who voluntarily provide police a DNA sample to assist with an ongoing investigation, individuals who provide a sample to be cleared of any suspicion of wrongdoing, and any other DNA sample that police may lawfully collect.

Also, tension mounts on racial justice issues when government officials exploit the regulatory gap in Maryland for DNA extraction, analysis, and retention. DNA databases inevitably reflect the race, class and

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[5] *See*, Joseph Goldstein, *Police Are Assembling Records of DNA* (New York Times, June 12, 2013) (available at http://tinyurl.com/p3duw36); *see also*, Ian Duncan, *Police in Maryland Holding DNA on People Not Convicted of Crimes* (Baltimore Sun, February 28, 2013) (available at http://tinyurl.com/o338wjn); *see generally*, Ben Finely, *Bensalem DNA Database Helps Nab Low-Level Criminals* (Philadelphia Inquirer, June 24, 2013) (available at http://tinyurl.com/nanbuwf); *see also*, Mercer & Gabel, *supra* n. 3, *Shadow Dwellers*.

geographic biases imbedded in police and judicial practices," Simon Cole, *Fingerprint Identification in the Criminal Justice System: Historical Lessons for the DNA Debate*, DNA and the Criminal Justice System: The Technology of Justice, 61, 83 (David Lazer ed. 2004), and as the former dean of the University of Maryland's law school has noted, "[f]rom 1990 to 2004, blacks were five times more likely than whites to be incarcerated, and in 2000, blacks and Latinos comprised 63% of incarcerated adults, even through together they represented 25% of the total population"—trends that are attributable to "racial profiling, discriminatory sentencing, and general racial bias in the criminal justice system…." Karen Rothenberg & Alice Wang, *The Scarlet Gene: Behavioral Genetics, Criminal Law, and Racial and Ethnic Stigma*, 78 L. & CONTEMPT. PROBS. 344, 352 (2006) (footnotes omitted).

Exactly because of the disproportionate representation of African Americans in the criminal justice system, African Americans are also disproportionately represented in governmental DNA databanks. In the first three years that Maryland began collecting data about racial demographics of arrestees from whom DNA samples were seized, minorities have consistently represented approximately 60% of the total number of individuals subject to the compelled collection of DNA merely upon being charged. *See*, Maryland State Police Annual Statewide DNA Database Report (2011) (http://tinyurl.com/marylandreport). This practice has a disproportionate impact on minorities because the inclusion of unconvicted minorities and, through familial searching techniques, their unsuspecting

relatives in a law enforcement database increases the likelihood that they will experience unwarranted law enforcement surveillance and societal stigmatization in the future.

II. The Petition Should Be Granted Because The Decision Of The Lower Court And The Maryland Court Of Appeals Wrongly Decided An Important Question.

The petition provides an excellent vehicle for the Court to resolve the disagreement in the lower courts over the application of the Fourth Amendment to government intrusions facilitated by new technology. The crux of the disagreement in the lower courts is whether to focus on the technology itself, or to focus on the government's activity that is being facilitated by the technology.

In *Davis*, the Fourth Circuit acknowledged the "general issue of a person's reasonable expectation of privacy in his DNA is a developing and unsettled area of the law…." *Davis*, 690 F.3d at 240. *Davis* focused on the government's activity of "the extraction of DNA and the creation of a DNA profile" that intruded on a person's "privacy interest in his or her DNA material." *Id.* Primarily on that basis, it reasoned the Fourth Amendment applied, and went on to address the reasonableness of the search. Conversely, the lower court became focused on the technology of DNA profiling itself, and got distracted by the "limited information provided by a DNA profile and the limited purpose of identification" in predicting how this Court would answer the question. *Arzola*, 26 N.E.3d at 194.

It is important to consider the government activity facilitated by the technology, because the confidentiality and security of DNA-related identification information are especially important and challenging issues. Extraordinary advances in molecular biology, computer technology, and big data mining, are removing barriers that once, as a practical matter, protected the autonomy of ordinary citizens from governmental intrusions in the pre-information era. *See generally*, *United States v. Jones*, __ U.S. __, 132 S.Ct. 945, 963 (2012) (Alito J., concurring) (citing difficulty and cost of long-term monitoring of citizenry as effective safeguards before new surveillance technology). The explosion of knowledge at the intersection of these fields shows no signs of receding, which creates opportunities for law enforcement to keep moving towards investigative methods that do not involve a physical search or seizure, but that diminish personal autonomy and privacy nonetheless.

DNA is not simply an improved fingerprinting technique. Unlike the ridges and whorls of a fingerprint—which reveal nothing about a person other than identity—DNA carries within it information that can provide insights into the most intimate workings of the human body. Beyond that, there already are scientists who predict that DNA genetic markers will soon be decoded for sexual preference, substance abuse, and other personality traits, and it is quite likely that the emerging discipline of behavioral genetics will eventually assert the capability to predict, through DNA analysis, the likelihood of future violent or otherwise antisocial conduct. *See generally Genetics and Criminal Behavior* (David Wasserman & Robert Wachbroit, eds., 2001). When that claim is someday

made, it will inevitably trigger proposals to identify potential offenders through use of widespread genetic screening, and to preventively isolate them *before* they commit criminal acts. One commentator—one who assumes that such genetic tests will be developed, and that "[s]ociety will simply not ignore the reality of being able to predict and thereby prevent harm to its innocent members" — observes that:

> Perhaps more serious problems than whether individuals should be genetically screened are posed when we try to decide *when* in an individual's life he or she is to be tested for genetic aberration. Should children be subjected to such tests? If a six-year-old child is found to carry a dangerous genetic characteristic, is he to be taken away immediately and committed? ... Do we go further back and test newborn babies, requiring by law that the infants not be permitted to live — much as done in more primitive cultures with babies displaying such defects as Downs' Syndrome or malformed limbs? Will we go even further back and test the unborn fetus in every pregnancy? If the fetus is found to have "bad" genes, are we to require an abortion by law?

Lawrence E. Taylor, *Genetically Influenced Antisocial Conduct and the Criminal Justice System*, 31 Clev. St. L. Rev. 61, 74-75 (1982). It is essential, in light of such predictions about the future of DNA testing, to pay close attention to the history of relentlessly expanding law enforcement collection, retention, and distribution practices for DNA. A highly expansive decision—like the court's below, and Maryland's highest court in

Raynor—that *no* reasonable expectation of privacy exists in the extraction and analysis of DNA to create a DNA profile—is an invitation to future expansions with unintended consequences.

CONCLUSION

The Petition should, respectfully, be granted, to resolve the disagreement between the lower courts and answer the important question of the applicability of the Fourth Amendment to law enforcement's collection, retention, and distribution practices for DNA.

Respectfully submitted,

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