ACLU Pennsylvania

MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: June 26, 2024

RE: OPPOSITION TO SB 988 P.N. 1776 (FARRY)

Pennsylvania currently collects DNA samples from people convicted of hundreds of different crimes. SB 988 (PN 1776) would expand DNA collection to require anyone ***arrested*** for one of those offenses, many of which are non-violent crimes, to submit a DNA sample to police—*including samples from juveniles*.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 988.

SB 988 threatens the protections afforded by the Constitution and flagrantly ignores the need for heightened vigilance whenever law enforcement expands its investigatory arsenal.[1] The dangers of the massive expansion of DNA collection proposed under SB 988 fall roughly into three categories: (1) constitutional threats; (2) privacy and surveillance invasions; and (3) sprawling scope.

1 | CONSTITUTIONAL THREATS

a | SB 988 would undermine the presumption of innocence by collapsing distinctions between pre- and post-conviction.

It is a cardinal principle of our criminal legal system that every person accused of a crime is presumed to be innocent unless and until guilt is established beyond a reasonable doubt. This presumption is not a mere formality, it is a "basic component of a fair trial under our system of criminal justice"[2] guaranteed by the right to due process under the Fifth and Fourteenth Amendments.

Putting arrestees in criminal DNA databases turns the presumption of innocence on its head by making individuals who haven't been convicted of any crime into permanent suspects. It erases one of the most meaningful bright line distinctions in our system of justice—conviction—and would instead treat anyone arrested as presumptively guilty of "something" and therefore subject to compulsory genetic surveillance.

b | SB 988 would establish a system of suspicionless and warrantless searches of people's genetic data.

Since *Maryland v. King*, in which the Supreme Court held that police may collect DNA from people who have been arrested for—but not yet convicted of—a crime,[3] police have had free reign to collect DNA from arrestees, while enjoying unconstrained latitude to warrantlessly collect DNA from any member of the public.

The Fourth Amendment requires a warrant, supported by probable cause, in order for a search to be legitimate.[4] Probable cause requires a police officer's reasonable belief that either "an offense has been or is

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[1] *See*, e.g., *Olmstead v. United States*, 277 U.S. 438, 479 (1928) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.…The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").
[2] *Estelle v. Williams*, 425 U. S. 501, 425 U. S. 503 (1976).
[3] *Maryland v. King*, 569 U.S. 435, 465–66 (2013).
[4] U.S. Const. amend. IV.

being committed,"[5] or that evidence of a crime will be found in the place searched,[6] and particularity with respect to "the place to be searched, and the persons or things to be seized."[7]

Proponents of expanding DNA collection argue that society's interest in criminal investigations is paramount and therefore justifies a maximalist approach to DNA collection. Undoubtedly, crime victims and the public at large have a high interest in solving crimes and protecting public safety. But the Fourth Amendment has always demanded a balancing of this interest against civil liberties, ever since the Founders recognized and "reviled" the "evils" of unconstrained government searches and surveillance.[8]

DNA collection at arrest allows the government (1) to take DNA from people arrested, (2) often for crimes where no DNA is present, to (3) query whether it matches DNA connected to a separate crime in the database for which (4) law enforcement has *no probable cause* to suspect the arrestee of committing. Pre-conviction DNA collection is therefore **baseless**—it neither requires suspicion nor a warrant to run a sample through a database in the hopes of discovering a "hit" (or match) to another crime.

If enacted, SB 988 would permit the government to use a single arrest as blanket "probable cause" to investigate the arrestee for a multitude of other crimes, past and future, without any showing of individualized suspicion or exigent (emergency) circumstances.

2 | PRIVACY & SURVEILLANCE INVASIONS

a | DNA is NOT like a fingerprint.

Defenders of pre-conviction DNA collection often frame privacy concerns in terms of the *method* of collection, arguing that a cheek swab is minimally invasive and not much different from fingerprinting, justifications echoed by the sponsor of SB 988. However, the privacy invasion at issue is the *content* of the collection, not the method. DNA contains your genetic code—the most intimate, private information about you and your family. Like DNA, a fingerprint can identify a person, but unlike DNA, a fingerprint says nothing about the person's health, their race and gender characteristics, predisposition for particular disease, and perhaps even their propensity for certain conduct.

b | DNA is inherently relational, so any invasion of genetic privacy implicates innumerable others.

Unlike fingerprints, DNA is relational. Invasions of genetic privacy are not limited to the individual. The relational nature of the data contained in our DNA means that an intrusion on one person's privacy may facilitate the intrusion of another person's privacy,[9] such that those whose DNA has not been collected may nevertheless be identified through relatives as distant as third cousins whose genetic information has been collected[10]—a harm most apparent in investigative genetic genealogy.[11]

c | DNA data breaches are unique in that they are irretrievable.

A single breach of a biometric database is an exceptionally catastrophic breach. Not only does it spill the most sensitive information about you *and* your family to anyone able to access it, but it's also irretrievable—because while you can change a password, you can't change your DNA.

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[5] *Brinegar v. United States*, 338 U.S. 175-76 (1949).
[6] *Texas v. Brown*, 460 U.S. 730, 742 (1983).
[7] U.S. Const. amend. IV.
[8] *Riley v. California*, 573 U.S. 373, 403 (2014) ("[T]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.").
[9] *See, e.g.*, Danielle Keats Citron, The Fight for Privacy 859–61 (2022).
[10] Heather Murphy, *Most White Americans' DNA Can Be Identified Through Genealogy Databases*, N.Y. Times (Oct. 11, 2018).
[11] *See* Jocelyn Kaiser, *A Judge Said Police Can Search the DNA of 1 Million Americans Without Their Consent. What's Next?*, Science (Nov. 7, 2019).

3 | SPRAWLING SCOPE

a | SB 988 would allow DNA to be seized from people arrested for an unjustifiably broad list of offenses.

Perhaps the most misleading statistic repeated by supporters of pre-conviction DNA collection is the reference to the number of other states that permit it. While that generally may be true, Pennsylvania would stand alone in the staggering number of offenses subject to DNA seizure.

SB 988 reaches far beyond taking DNA from people arrested for "violent crimes" to include: all felonies, criminal homicide, sex offenses, and all first-degree misdemeanor offenses in Title 18—***hundreds of offenses***, most of which are non-violent crimes. If that wasn't enough, SB 988 goes even further to include inchoate offenses—the "attempt, conspiracy or solicitation to commit" any of the hundreds of offenses—to post-conviction **and** pre-conviction collection. This will capture the vast majority of people arrested in PA—a breathtakingly brazen genetic surveillance program fed by a dragnet collection requirement.

b | The failure to provide automatic expungements will bolster an indefinite surveillance apparatus.

Not only is genetic surveillance often baseless, it is also often indefinite, because local law enforcement is free to set their own parameters for retention and expungement.[12] And SB 988's expungement provisions would all but guarantee the greatest number of DNA samples languish indefinitely in the state's databases. Unlike many other states, Pennsylvania would not offer automatic expungement (odd, given the broad bipartisan support for automatic record clearing under Clean Slate). SB 988 allows expungement, but the burden falls on individuals to petition the court to remove their DNA, including those who were arrested but not charged, charged but acquitted, had charges dismissed, filed outside the statute of limitations, or declined for prosecution, had DNA collected for an unauthorized charge, or even had police take their DNA "by mistake".

Indefinite surveillance is a harm in itself, but is further compounded by the harm flowing from suspicionless collection. Law enforcement and private actors have embraced genetic data maximalism, assembling vast, interconnected troves of intimate genetic information that may be searched and used indefinitely, even in ways completely attenuated from the initial DNA collection. And the stakes of indefinite, suspicionless surveillance are high—surveillance "can chill the exercise of civil liberties," and impose a "power dynamic between the watcher and the watched" which "creates the risk of a variety of harms, such as discrimination, coercion, and the threat of selective enforcement."[13]

c | Expanded DNA collection puts communities of color under heightened genetic surveillance.

The expansion of forensic DNA collection under SB 988 will exacerbate the biases and structural racial inequalities embedded in our criminal legal system. People of color are disproportionately represented at every phase of the criminal legal system—they are routinely suspected, stopped, searched, arrested, and convicted at disproportionately higher rates than their white counterparts. And because law enforcement has been given wide latitude to decide who to target for sample collection and inclusion, "police [often] seek[] out the 'usual suspects'—poor people of color—to secure DNA samples for these databases,"[14] thus subjecting them to a higher degree of surveillance.

Finally, SB 988 amounts to a massive unfunded mandate that will bloat state DNA databases.

Heedless expansion of DNA databases overwhelms crime labs and diverts time and other resources away from proven investigative techniques. Pennsylvania DNA databases are already backlogged and crime victims are often forced to wait too long for evidence from their crime to be processed. From 2014-2023,

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[12] *See* Jason Kreag, *Going Local: The Fragmentation of Genetic Surveillance*, 95 B.U. L. Rev. 1503 (2015). ("[L]ocal law enforcement is free to set its own protocols for including and searching partial DNA profiles in their databases and for expunging DNA records.")
[13] *See* Neil M. Richards, *The Dangers of Surveillance*, 126 Harv. L. Rev. 1934, 1935 (2013).
[14] *See* Jason Kreag, *Going Local: The Fragmentation of Genetic Surveillance*, 95 B.U. L. Rev. 1497 (2015).

Pennsylvania agencies have received millions in federal funding to tackle their existing *post-conviction* DNA backlogs, totaling over $12.5 million to the Pennsylvania State Police, over $9.8 million to the city of Philadelphia, and nearly $3 million to Allegheny County.

Moreover, the decentralized assemblage of DNA databases, combined with variations in the quality of collection, search, and storage methods may compound backlogs, exacerbate instances of missing evidence, and increase the chances of wrongful convictions.[15] In other words, to the extent SB 988 aims to solve crimes, help victims, and maintain conviction integrity, it would likely do the opposite.

And to pay for all this, SB 988 comes up woefully short. SB 988 would expand the current mandatory $250 fee imposed on those *convicted* of a covered offense, but is silent on how the state will pay to analyze and store samples from the tens of thousands of people arrested every year. This would leave the state with only two options:

1. Impose the mandatory $250 fee on everyone arrested, which would have catastrophic consequences for those unable to pay, while compounding the disproportionate effects on defendants of color; or
2. Appropriate money to the DNA Detection Fund[16] from the General Fund. In 2022, the DNA Detection Fund had a balance of approximately $6 million[17] provided by the mandatory fees imposed on people convicted. This amount does not adequately cover DNA-related expenses, so the legislature should expect to appropriate many millions more to fund collection at arrest.

SB 988 proposes a massive expansion of genetic surveillance—seizing DNA from people who are presumed innocent under the law, turning them into permanent suspects. Authorizing law enforcement to accumulate genetic data from people—without a warrant—flies in the face of our most foundational constitutional principles. People who have been arrested but not convicted are innocent until proven guilty. They have the right to due process of law. They have a right to be free from unreasonable searches and seizures. They have a reasonable expectation of privacy. And when it comes to privacy, there isn't anything more personal than our genetic information. DNA is not the same as a fingerprint. It contains your genetic code, which reveals the most intimate, private information about you and your family. It is not the kind of data the government should be cavalierly compiling and indefinitely storing. And since Black and brown people are overpoliced and disproportionately arrested, mass DNA collection will put communities of color under heightened genetic surveillance. Finally, pre-conviction DNA collection is not only costly, but would overwhelm Pennsylvania's forensic DNA caseload and add to existing backlogs—hardly a plan to bring "closure to victims" or keep Pennsylvanians safer.

For these reasons, we urge you to oppose Senate Bill 988.

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[15] *See* Erin E. Murphy, Inside the Cell: The Dark Side of Forensic DNA 266–82 (2015) (describing how lack of regulation surrounding forensic DNA collection and use has led to myriad inefficiencies in crime solving and criminal justice).
[16] 44 Pa.C.S. § 2335.
[17] PA House Appropriations Committee, Pennsylvania State Police—2022 Budget Hearing Follow-up Questions.