LIBERTAS INSTITUTE

Primary Office
2183 W Main St, #A102
Lehi, Utah 84043
(801) 901-0310

March 16, 2023

The Honorable Spencer J. Cox
Governor of the State of Utah
350 N. State Street, Suite 200
P.O. Box 142220
Salt Lake City, UT 84114-2220

Re: Investigative Genetic Genealogy Modifications, SB 156 – Veto Request

Dear Governor Cox,

Libertas Institute requests your veto of Senate Bill 156.

This bill purports to enact "guardrails" for how and when law enforcement officers can search through third-party DNA databases in search of suspects. But these guardrails are inadequate and, in the process, a problematic practice would be codified into law.

Proponents of this legislation have understandable and noble intentions. Victims of heinous crimes seek justice, and law enforcement wants to solve cold cases. We all want criminals held accountable, but this cannot come at the expense of balancing the privacy interests of the people of Utah.

Supporters of SB 156 point out that, under the bill, law enforcement may only do these DNA searches for violent felonies or to identify missing or unknown individuals. While true, that is hardly a guardrail since these are the only cases we are aware of in which this technology is being used currently.

The real "guardrail" when it comes to privacy is an independent review by the judiciary—something this bill completely omits. In fact, this bill allows law enforcement to conduct searches as long as the officer and prosecutor agree that the search would be an "appropriate and necessary step" to solve their case. One branch of the government agreeing with itself is no guardrail.

Codifying this legislation inappropriately tips the scale between public safety and privacy, placing Utah on the wrong side of a national discussion regarding the appropriate use of DNA. An individual's DNA contains the most sensitive information about a person. Therefore, allowing law enforcement to obtain this data with no judicial oversight is a mistake. Other states—such as Maryland and Montana—have moved to place restrictions on police access to DNA. In both examples, policymakers recognized the importance of ensuring genetic

material is handled with utmost care and therefore require judicial review before a search can be conducted.

This bill moves in the opposite direction and fails to address the importance of handling DNA data with the respect it deserves. Instead, SB 156 enables constitutionally questionable searches by allowing law enforcement to search through DNA data without any judicial oversight. A related bill that failed last year required officers to get a warrant before covertly taking the DNA of a relative of a suspect (e.g., from their trash can). SB 156 eliminated even that minimal judicial oversight; the bill now has none.

SB 156 proponents argue that a warrant is not needed because users have consented to have their DNA information shared with law enforcement. But by its very nature, DNA is shared information. If you are privacy conscious and want to be excluded from the government's prying eyes, any of your family members or distant cousins can override your privacy concern and submit your (shared) DNA to these databases. Current data shows that enough people have added their DNA to these third-party databases that law enforcement can identify any Caucasian American (whether they personally consented or not).

In rebuttal, proponents argue that this is not unlike a person allowing law enforcement to access their family member’s bedroom in a shared home—even if that other individual was unaware of the request or objected to it. This example fails because in this example, the search is particularized (as required by the Fourth Amendment to the US Constitution) to that specific room or home. DNA database searches, by contrast, are not particularized at all. In fact, the entire reason these searches are being done at all is because law enforcement lacks a particular suspect; they desire to broadly search through everyone’s DNA connections and find people who they can turn into a suspect. DNA must be treated differently, as traditional “consent” doesn’t work—and claiming it does radically empowers the government to identify and investigate people in new ways.

The Fourth Amendment protects individuals from unreasonable searches and seizures. Reasonable searches must be based on probable cause and be narrowly tailored to a particular person. SB 156 permits searches that meet neither of these requirements. This places the government’s convenience over an individual’s constitutional rights.

Allowing law enforcement to access anyone’s DNA without any judicial oversight sets a bad precedent. And, if signed into law, SB 156 would stick out like a sore thumb in the national landscape; Utah would be the only state to codify warrantless DNA searches.

The unintended consequences of this precedent could go far beyond what is known today, negatively impacting the rights of generations to come. Human DNA is among the most powerful data to ever be collected, and scientists have only cracked the tip of the iceberg in relation to what this information may hold. Unfettered access to such powerful data must come with substantive guardrails—including judicial oversight, despite people supposedly

“consenting” to law enforcement access—to ensure the public has reason to trust there are sound procedures in place to prevent abuse.

SB 156 does not properly balance the interests of public safety and privacy. For these reasons, Libertas urges you to veto the bill. Doing so means that law enforcement will continue using this technology without any “guardrails” (superficial or substantive), but the veto would send a signal that we need to strike a better balance for privacy and encourage stakeholders to negotiate in good faith to find that balance in the interim or in a special session.

That negotiation is something we offered toward the end of the session, but the proponents decided to press forward. Over the last year they didn’t approach us about the bill, despite our active legislative involvement in the issue for three years. We had to initiate contact with them after the bill was numbered with repeated requests for a meeting. While our past position was a full ban of this practice, we offered to come off that position and find a balance in the middle during the interim, but that offer was not accepted.

We reiterate the good intentions of the bill sponsors, and law enforcement more broadly. Solving crimes is obviously important. But this cannot come at the expense of privacy and judicial oversight, and DNA presents too complicated an issue to legislate in the manner that SB 156 does. We are eager to find a better balance between these interests and ask you to veto this bill to facilitate that outcome.

Sincerely,

Connor Boyack
President, Libertas Institute