

# Can the Police Access My Newborn’s Blood Sample? In Iowa, There Is No Clear Answer

Jackson H. King\*

*ABSTRACT: Every state’s newborn screening program helps detect early, life-threatening disorders. It is important to catch these disorders immediately upon birth because they can irreparably harm the baby if left untreated. In 2022, New Jersey police made news after they issued a subpoena to New Jersey’s newborn screening laboratory to access a newborn blood sample while investigating a crime. The New Jersey police department did not abide by traditional Fourth Amendment requirements—even though many viewed their act as an illegal search. The New Jersey Office of the Public Defender sued them, alleging that the department committed an illegal search. States differ in how they regulate their newborn screening programs, and the federal government largely defers to them. However, it is unclear whether—and to what extent—federal healthcare privacy laws regulate newborn screening samples because they are not equipped to regulate how healthcare data (and newborn screening data) is stored presently. Iowa’s current newborn screening law is itself contradictory and vague in whether it precludes police access or invites it. Iowa’s Department of Public Health should amend and clarify its rules and account for the growing trend of police attempting to access newborn blood samples without traditional Fourth Amendment protections.*

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\* J.D. Candidate, The University of Iowa College of Law, 2025; B.A., University of Michigan – Ann Arbor, 2022. I would like to thank Halle Kissell and Sydney Wagner for serving as my primary editors during the preparation of this Note. I would also like to thank the editors and student writers of the *Iowa Law Review* for their immeasurable help in helping put together this piece. Finally, I would like to thank Adam Rusnak and the rest of the incredible attorneys at the Capital Habeas Unit for the Southern District of Ohio for introducing this legal topic to me and encouraging me to write a Note about it.

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## INTRODUCTION

Newborn screening programs serve essential roles in the country's healthcare system: They allow medical personnel and experts to detect life-threatening conditions in a baby at the moment of birth.<sup>1</sup> The programs primarily detect "serious but treatable congenital diseases" and test for hearing loss and potential heart health issues before the baby is discharged from the hospital.<sup>2</sup>

In 2022, the New Jersey Office of the Public Defender ("OPD") made news after they filed a lawsuit alleging that the New Jersey State Police violated the Fourth Amendment after subpoenaing the New Jersey Newborn Screening Laboratory,<sup>3</sup> and OPD claimed the police thus avoided a probable cause

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1. *About Newborn Screening*, CTNS. FOR DISEASE CONTROL & PREVENTION: NEWBORN SCREENING (May 13, 2024), <https://www.cdc.gov/newborn-screening/about/index.html> [<https://perma.cc/WPV5-7WHP>].

2. *Id.*

3. Corin Faife, *NJ Police Used Baby DNA to Investigate Crimes, Lawsuit Claims*, VERGE (July 29, 2022, 11:25 AM), <https://www.theverge.com/2022/7/29/23283837/nj-police-baby-dna-crimes-lawsuit-public-defender> [<https://perma.cc/92DS-UH8Q>] ("[T]he practice came to light after a case in which New Jersey State Police successfully subpoenaed a testing lab for a blood sample drawn from a child. Police then performed DNA analysis on the blood sample that reportedly linked the child's father to a crime committed more than [twenty-five] years ago.")

evidentiary threshold requirement. The implications of these allegations are far-reaching and undermine the original purpose of the program because “[t]he blood samples are not directly shared with law enforcement agencies. But if police are able to reliably obtain the samples through subpoena, then effectively, the disease screening process is entering all babies born in the state into a DNA database with no ability to opt out.”<sup>4</sup>

Newborn screening programs differ across states in how they regulate police access to their blood labs.<sup>5</sup> Some states, such as Connecticut, preclude the disclosure or use of genetic data in court proceedings.<sup>6</sup> Similarly, Illinois expressly prohibits disclosure of genetic data in court proceedings.<sup>7</sup> Conversely, some states, like Ohio, have no discernible policy or regulation in place governing their newborn blood samples.<sup>8</sup>

Iowa serves as a middle-ground state—its administrative code both invites access to newborn blood samples from law enforcement and bars access to them.<sup>9</sup> The result is complete ambiguity surrounding who may access the newborn samples and by what means. This is particularly alarming given the developments in New Jersey, where police are increasingly using DNA investigatory techniques in their line of work.<sup>10</sup> Iowa is ill-prepared for the type of behavior exhibited by the New Jersey State Police because its newborn screening code does not definitively bar police access to blood samples.

This Note argues that Iowa’s regulatory scheme concerning its newborn blood screening program does not provide adequate, clear privacy protection for the countless Iowans who have had their blood taken at birth. The Iowa Department of Public Health should amend its rules to mirror states like Connecticut<sup>11</sup> or Illinois<sup>12</sup> and provide clear, proper protection. Part I will explore the history of newborn screening programs in the United States and explain how, and to what extent, states and the federal government regulate police access to newborn blood samples. Part II will examine Iowa Administrative Rule 641-4.3 (“Rule 641-4.3”), Iowa’s contradictory newborn screening regulation, and show that it does not answer whether police may access newborn blood samples. Part III will offer concrete suggestions on how to amend Rule 641-4.3’s contradictory language and look to states with clearer rules in place. A failure to do so leaves Iowans vulnerable to Fourth Amendment-

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4. *Id.*

5. See U.S. GEN. ACCT. OFF., GAO-03-449, NEWBORN SCREENING: CHARACTERISTICS OF STATE PROGRAMS 24–25 tbl.6 (2003), <https://www.gao.gov/new.items/do3449.pdf> [<https://perma.cc/59E4-M5L6>] (showing the wide discrepancies across states in how they choose to regulate their respective newborn screening program).

6. CONN. GEN. STAT. ANN. § 19a-25 (West 2021).

7. 410 ILL. COMP. STAT. ANN. 513/30 (LexisNexis 2018).

8. See, e.g., U.S. GEN. ACCT. OFF., *supra* note 5, at 24–25 tbl.6 (showing that Ohio is a state where there appears to be no regulation or policy governing newborn blood samples).

9. See IOWA ADMIN. CODE r. 641-4.3(7)(b)(3), (8)(c) (2024).

10. Faife, *supra* note 3.

11. CONN. GEN. STAT. ANN. § 19a-25.

12. 410 ILL. COMP. STAT. ANN. 513/30.

circumvented privacy breaches and undermines trust in an important, life-saving healthcare practice. Amending Rule 641-4.3 eliminates both these threats.

## I. THE DEVELOPMENT OF REGULATORY AMBIGUITY SURROUNDING NEWBORN BLOOD SAMPLES

To properly analyze Iowa's vague and contradictory regulatory scheme concerning newborn blood samples, this Part will begin with the history of the newborn screening program in the United States. Next, this Part will contextualize Iowa's newborn screening program, highlighting the vastly different legal treatment newborn blood sampling programs receive in each state. Then, this Part will explore the Health Insurance Portability and Accountability Act's ("HIPAA") language concerning newborn blood samples to highlight another layer of added confusion considering the federal government's role in regulating newborn blood samples. Finally, this Part will provide a brief survey of police-DNA investigatory techniques in Iowa and around the United States, illustrating the growing trend of police units accessing personal DNA in their line of work, as well as the fierce policy debates that accompany these practices.

### A. OVERVIEW AND HISTORY OF THE NEWBORN BLOOD SAMPLE PROGRAM

The idea of a newborn blood sample program "began in Buffalo, New York in 1960," led by Robert Guthrie, M.D., Ph.D.<sup>13</sup> Medical specialists at the time realized that certain medical conditions could be prevented if treatment was implemented as early in life as possible.<sup>14</sup> Shortly thereafter, Guthrie created a blood test for newborn children, which eventually led to "millions of babies [being] tested and thousands of babies [being] identified" for a myriad of life-threatening diseases across the United States.<sup>15</sup>

Subjecting a newborn baby to intensive medical testing the moment they are born, as well as the anxiety surrounding what the tests will reveal, has caused some medical professionals and parents to contemplate the benefits of such rigorous testing.<sup>16</sup> But overall, the consensus among the medical community is that newborn blood screening is one of the most important medical innovations in the last century because it saves countless lives every year.<sup>17</sup> Without detection

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13. *Newborn Screening - History*, N.Y. ST. DEP'T HEALTH, WADSWORTH CTR., <https://www.wadsworth.org/programs/newborn/screening/history> [<https://perma.cc/7MAD-G92B>].

14. *See id.* (discussing how Dr. Horst Bickel, at the time a medical specialist from New York, began suggesting that early diet therapy had the potential to prevent some of the adverse effects of Phenylketonuria ("PKU")).

15. *See id.*

16. *See, e.g.*, Ariel Bleicher, *Perils of Newborn Screening*, SCI. AM. (July 1, 2012), <https://www.scientificamerican.com/article/perils-of-newborn-screening> [<https://perma.cc/FP5N-UBMZ>] ("Doctors who have recently started screening for Krabbe and similar rare diseases are swiftly realizing that, in many cases, the results of such mandatory tests unnecessarily frighten parents and fail to help the children the tests were designed to save.").

17. *See* Giridhar Guntreddi, *Newborn Screenings: Why Do Them? What's the Benefit?*, SANFORD HEALTH (June 30, 2020), <https://news.sanfordhealth.org/childrens/reasons-benefits-getting-new>

at birth, some diseases can cause irreversible damage to the baby, such as “lifelong nervous system damage; intellectual, developmental, and physical disabilities; and even death.”<sup>18</sup> This is why it is key that the blood is obtained immediately at birth.

This Section will begin by discussing the main features of most newborn screening programs. Next, it will analyze the federal government’s role in regulating newborn screening programs. Additionally, it will discuss states’ varying approaches to regulating and administering their newborn screening programs. Finally, this Section will explore the ambiguity surrounding whether current federal legislation regulates these programs or their blood samples.

### 1. The Newborn Screening Program’s Components

Generally speaking, there are three main components in newborn screening programs across the country.<sup>19</sup> The first component, the main focus of this Note, is the blood test. The blood test occurs when a medical specialist pricks the newborn baby’s heel to get drops of blood collected on a special paper—this blood sample is then sent to a designated laboratory in the state where the baby was born.<sup>20</sup> While blood test results are “usually ready by the time [the] baby is [five] to [seven] days old,” time frames vary depending on where the baby was born and where the blood was sent.<sup>21</sup> The second component is the hearing test, which “checks for hearing loss.”<sup>22</sup> There are two separate elements of the hearing test.<sup>23</sup> One “tests whether some parts of the [baby’s] ear respond to sound,” and this is done by inserting a soft earphone into the baby’s ear canal to see if the baby can receive sound properly.<sup>24</sup> The other “tests how the auditory nerve and brain stem . . . respond to sound,” which is evaluated by placing soft electrodes around the baby’s head.<sup>25</sup> The third component is a

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born-screenings [<https://perma.cc/G9GW-V5AJ>] (“Many of the diseases included in newborn screenings can be successfully treated, preventing the development of intellectual and physical disabilities.”); INST. OF MED., NAT’L ACADS., CHALLENGES AND OPPORTUNITIES IN USING RESIDUAL NEWBORN SCREENING SAMPLES FOR TRANSLATIONAL RESEARCH 5–7 (2010), [https://www.ncbi.nlm.nih.gov/books/NBK52737/pdf/Bookshelf\\_NBK52737.pdf](https://www.ncbi.nlm.nih.gov/books/NBK52737/pdf/Bookshelf_NBK52737.pdf) [<https://perma.cc/S8JV-VWDD>].

18. *What Is the Purpose of Newborn Screening?*, NAT’L INST. CHILD HEALTH & HUM. DEV. (Sept. 1, 2017), <https://www.nichd.nih.gov/health/topics/newborn/conditioninfo/purpose> [<https://perma.cc/F3RZ-G6VJ>].

19. *See, e.g., Newborn Screening Tests for Your Baby*, MARCH DIMES (July 2020), <https://www.marchofdimes.org/find-support/topics/parenthood/newborn-screening-tests-your-baby> [<https://perma.cc/Q427-UTTG>] (explaining the three main components: the blood test, the hearing screening, and the heart screening).

20. *See id.*

21. *Id.* (“To find out more about the timeframes for sending blood samples to lab and getting test results back, ask your baby’s provider or the hospital staff.”).

22. *Id.*

23. *See Your Baby’s Hearing Screening and Next Steps*, NAT’L INST. ON DEAFNESS & OTHER COMMUNICATIVE DISORDERS (June 10, 2024), <https://www.nidcd.nih.gov/health/your-babys-hearing-screening-and-next-steps> [<https://perma.cc/7JR7-3C5E>].

24. *Id.*

25. *Id.*

heart screening using a test called a pulse oximetry.<sup>26</sup> The pulse oximetry test “checks the amount of oxygen in [a] baby’s blood,” which is paramount in determining whether the baby may have critical congenital heart defects.<sup>27</sup> All three components of newborn screening are essential in helping medical specialists uncover life-threatening dangers to the baby as early as possible.<sup>28</sup>

## 2. The Federal Government’s Role in Regulating Newborn Screening Programs

The federal government actively regulates newborn screening programs across the country, but it remains deferential to state healthcare systems for a number of things, including implementing their program, requiring additional tests that are not included in any federal guidelines, and determining how long the state wants to hold onto the blood samples.<sup>29</sup> In 2008, Congress passed the Newborn Screening Saves Lives Act to amend the previously enacted heritable disorders program legislation.<sup>30</sup> The Act’s purpose is “[t]o amend the Public Health Service Act to establish grant programs to provide for education and outreach on newborn screening and coordinated follow up care once newborn screening has been conducted.”<sup>31</sup> In 2021, the House of Representatives passed a similar amendment-oriented statute titled the Newborn Screening Saves Lives Reauthorization Act of 2021, which would have renewed federal programs that provided assistance to state newborn screening programs, but the provision did not pass the Senate.<sup>32</sup>

Importantly, neither the statute nor the bill required states to administer their newborn screening program in a particular fashion. The passage of the Act led to nearly all states adopting a newborn screening program soon thereafter,<sup>33</sup> but states look to the Secretary of the Department of Health and Human Services (“HHS”) for how states ought to administer their newborn screening programs, as well as which disorders they should test for.<sup>34</sup> HHS recommends that states

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26. *Newborn Screening Tests for Your Baby*, *supra* note 19.

27. *Id.*

28. *See id.*; Guntreddi, *supra* note 17.

29. *See* MARCH OF DIMES, NEWBORN SCREENING SAVES LIVES REAUTHORIZATION ACT OF 2021 (2020), <https://www.marchofdimes.org/sites/default/files/2022-11/Newborn-screening-2021-Fact-Sheet.pdf> [<https://perma.cc/V8NK-4CSZ>].

30. Newborn Screening Saves Lives Act of 2007, Pub. L. No. 110-204, § 2, 122 Stat. 705, 705 (codified at 42 U.S.C. § 300b-8 (2018)).

31. *Id.*

32. *See* Newborn Screening Saves Lives Reauthorization Act of 2021, H.R. 482, 117th Cong. (2021); MARCH OF DIMES, *supra* note 29 (outlining key features and effects of the proposed bill).

33. *See* MARCH OF DIMES, *supra* note 29 (“In 2007, only [ten] states and the District of Columbia required infants to be screened for all the recommended disorders. Today, all states . . . screen for at least [thirty] of the [thirty-five] recommended disorders.”).

34. *See Recommended Uniform Screening Panel*, HEALTH RES. & SERVS. ADMIN. (July 2024), <https://www.hrsa.gov/advisory-committees/heritable-disorders/rusp> [<https://perma.cc/FUK3-6PFY>].

test for disorders such as 3-hydroxy-3-methylglutaric aciduria,<sup>35</sup> beta-ketothiolase deficiency,<sup>36</sup> glutaric acidemia type I,<sup>37</sup> holocarboxylase synthetase deficiency,<sup>38</sup> and long-chain 3-hydroxyacyl-CoA dehydrogenase deficiency.<sup>39</sup> The list of recommended disorders to test for is devised through consultation with and approval from the Advisory Committee on Heritable Disorders in Newborns and Children.<sup>40</sup>

Additionally, the Centers for Medicare & Medicaid Services (“CMS”) maintains an active role in regulating the storage of newborn blood samples, according to its Clinical Laboratory Improvement Amendments of 1988 (“CLIA”) program.<sup>41</sup> CLIA requires that laboratories “comply with quality requirements in five major areas: personnel qualifications and responsibilities, quality control, patient test management, quality assurance, and proficiency testing.”<sup>42</sup> Failure of state laboratories to comply with these standards may result in sanctions, “including [the] denial of Medicaid payments.”<sup>43</sup> Overall, the federal government takes an active role by providing guidelines/recommendations for how states ought to administer their newborn screening program, but in practical terms, they are hands-off when states decide to handle their individual newborn screening programs. The federal government provides

35. *3-Hydroxy-3-methylglutaryl-CoA Lyase Deficiency*, HEALTH RES. & SERVS. ADMIN. (Sept. 2024), <https://newbornscreening.hrsa.gov/conditions/3-hydroxy-3-methylglutaryl-coa-lyase-deficiency> [<https://perma.cc/U7WG-TEGX>] (“If your baby’s HMG-CoA lyase enzyme does not work well, their body has trouble breaking down leucine and making energy. . . . If untreated, this damage . . . can result in coma or death unless treated early.”).

36. *Beta-ketothiolase Deficiency*, HEALTH RES. & SERVS. ADMIN. (Sept. 2024), <https://newbornscreening.hrsa.gov/conditions/beta-ketothiolase-deficiency> [<https://perma.cc/A3XA-23DX>] (“Beta-ketothiolase deficiency is an inherited (genetic) condition that prevents the body from breaking down certain proteins and fats. . . . Waste, including toxins, can build up. These toxins can damage your baby’s . . . brain.”).

37. *Glutaric Acidemia Type I*, HEALTH RES. & SERVS. ADMIN. (Sept. 2024), <https://newbornscreening.hrsa.gov/conditions/glutaric-acidemia-type-i> [<https://perma.cc/9VWV-CKNH>] (“Glutaric acidemia type I is an inherited (genetic) condition that prevents the body from breaking down certain proteins properly.”).

38. *Holocarboxylase Synthetase Deficiency*, HEALTH RES. & SERVS. ADMIN. (Sept. 2024), <https://newbornscreening.hrsa.gov/conditions/holocarboxylase-synthetase-deficiency> [<https://perma.cc/5648-2GKJ>] (“Holocarboxylase synthetase deficiency is an inherited (genetic) condition that prevents the body from breaking down certain proteins, carbohydrates, and fats. Holocarboxylase synthetase is an enzyme in your body that adds the vitamin biotin to other enzymes.”). If this condition is not caught early via a newborn screening program, the baby could suffer from “brain damage or coma,” which makes it paramount this condition is caught as early as possible. *See id.*

39. *Long-Chain 3-Hydroxyacyl-CoA Dehydrogenase Deficiency*, HEALTH RES. & SERVS. ADMIN. (Sept. 2024), <https://newbornscreening.hrsa.gov/conditions/long-chain-3-hydroxyacyl-coa-dehydrogenase-deficiency> [<https://perma.cc/V5PE-X89Y>] (“Long-chain 3-hydroxyacyl-CoA dehydrogenase (LCHAD) deficiency is an inherited (genetic) condition that prevents the body from breaking down certain fats and turning them into energy.”). If this condition is not detected early, a baby is susceptible to damage targeted at their “heart, muscles, and eyes.” *See id.*

40. *Recommended Uniform Screening Panel*, *supra* note 34.

41. *See* U.S. GEN. ACCT. OFF., *supra* note 5, at 6–7.

42. *Id.* at 7.

43. *Id.*

funding for states to operate their newborn screening, but it is ultimately up to the states to decide which diseases to test and how to store the samples.

### 3. Differences in Newborn Screening Programs Across States

While all states across the country have a newborn screening program, they vary tremendously across nearly every aspect of the program, including what diseases and disorders the state tests for, how long the blood is stored in a state-sponsored laboratory, and what happens to the baby's blood after it is stored.<sup>44</sup> For example, each state has a different governing body that decides which disorders or diseases the state will test for as a part of its newborn screening program.<sup>45</sup> Instead of having one federal entity prescribe and require what tests states must perform, “[e]ach state public health department decides which conditions are coded on its panel.”<sup>46</sup> In Iowa, the state health department decided to test for disorders such as amino acidemias and organic acidemias.<sup>47</sup> Additionally, each state's public health department is responsible for developing and managing its newborn screening program, which increases in program differences because they design systems that best fit the needs and preferences of their state.<sup>48</sup>

Furthermore, states vary in how long they keep the newborn blood stored in a laboratory.<sup>49</sup> The timelines vary dramatically; some states hold onto the blood for less than a year while others hold on to it indefinitely.<sup>50</sup> Most states hold on to it for at least over a year.<sup>51</sup> For example, in Michigan, baby blood samples are “stored for up to [one hundred] years” after the newborn's blood is collected.<sup>52</sup> In Iowa, the baby blood samples are kept in a “secure facility at the State Hygienic Laboratory in Ankeny, Iowa,” for five years, after which they are permanently destroyed.<sup>53</sup> Depending on what state a baby is born

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44. See Natalie Ram, *America's Hidden National DNA Database*, 100 TEX. L. REV. 1253, 1276–98 (2022) (outlining the wide discrepancies across states in how they grant access to information gathered by their newborn screening programs).

45. See *Conditions Screened by State*, BABY'S FIRST TEST, <https://www.babysfirsttest.org/newborn-screening/states> [<https://perma.cc/CR79-9KGQ>].

46. *Id.*

47. *Blood Spot Screening Information*, IOWA DEP'T HEALTH & HUM. SERVS., <https://hhs.iowa.gov/programs/programs-and-services/family-health/congenital-inherited-disorders/iowa-newborn-screening-program/iowa-newborn-screening-education/blood-spot-screening-information> [<https://perma.cc/6UJS-QTZJ>].

48. See *Conditions Screened by State*, *supra* note 45.

49. See, e.g., *What Happens to the Blood Sample*, BABY'S FIRST TEST (Oct. 12, 2018), <https://babysfirsttest.org/newborn-screening/what-happens-to-the-blood-sample> [<https://perma.cc/HX6S-FT2X>].

50. *Id.*

51. *Id.*

52. See Michelle Andrews, *Newborns Get Routine Heel Blood Tests, but Should States Keep Those Samples?*, KFF HEALTH NEWS (Sept. 14, 2022), <https://kffhealthnews.org/news/article/newborn-s-heel-blood-tests-states-samples-lawsuits> [<https://perma.cc/4B23-QH7Z>].

53. See *Blood Spot Screening Information*, *supra* note 47.



in determines whether their blood sample is kept indefinitely, or for only a couple of years.

States also vary considerably in whether they allow parents to refuse a test for their newborn, as well as what procedures are available for parents to access their baby's blood sample after it has been tested and stored (if they consent to the test).<sup>54</sup> For example, Iowa's Administrative Code says, "Should a parent or guardian refuse the screening, said refusal shall be documented in the infant's medical record, and the parent or guardian shall sign the refusal of screening form."<sup>55</sup> However, this practice is not the norm, as most states do not allow the parent or guardian to refuse afterbirth screening procedures.<sup>56</sup> Overall, states have more autonomy in deciding what to do, which has resulted in little to no uniformity regarding the ability of parents and guardians to refuse a test for their newborn.

#### 4. Murkiness Surrounding the Health Insurance Portability and Accountability Act

Passed in 1996, HIPAA requires the creation of certain national standards to protect special categories of patient health information from being disclosed to third parties without the patient's consent or knowledge.<sup>57</sup> The law functions by applying its standards to individuals and organizations that fall under its "covered entities" language—facilities that are tasked with storing patient health information.<sup>58</sup> Importantly, it remains unclear whether HIPAA's "covered entities" language applies to laboratories where newborn screening samples are stored.<sup>59</sup> Professor Natalie Ram, the leading scholar on the intersection between state newborn screening regulations and police access to newborn blood sample centers,<sup>60</sup> provides helpful insight on HIPAA's unknown scope. As Professor Ram noted, it is not clear whether the "covered entities" language covers newborn screening resources because "[a] 'covered entity'

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54. See Andrews, *supra* note 52 (explaining that "[m]ost [states] do not" ask for parental consent to store the baby blood samples after newborn screening has taken place).

55. IOWA ADMIN. CODE r. 641-4.3(2)(b) (2024).

56. See Andrews, *supra* note 52 (recognizing that it is the norm for states to not allow parents or guardians the choice to refuse newborn screening protocols).

57. See, e.g., *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, PUB. HEALTH L. (Sept. 10, 2024), <https://www.cdc.gov/php/php/resources/health-insurance-portability-and-accountability-act-of-1996-hipaa.html> [<https://perma.cc/2A9N-5NZU>].

58. *Id.*

59. Ram, *supra* note 44, at 1295.

60. Natalie Ram, JD, GREENWALL FOUND., <https://greenwall.org/faculty-scholars-program/our-faculty-scholars/natalie-ram-abjd> [<https://perma.cc/RK9S-YJDY>] ("Natalie Ram is a Professor of Law at the University of Maryland Carey School of Law. Professor Ram is an expert on the intersection of genetic privacy and the law, with a particular interest in criminal justice and forensic science."). Professor Ram is highly reputable and has been sought by several prominent media outlets to discuss her thoughts on pressing legal issues related to her research and expertise, including "CNN, national radio broadcasts Science Friday and Hear & Now, and has been quoted in the *Wall Street Journal*, *Washington Post* and *Buzzfeed News*." *Id.*

. . . is limited to a health plan, health care clearinghouse, health care provider, and those entities' business associates."<sup>61</sup> HIPAA does not contemplate whether newborn screening resources would fall under this language, nor does it provide any indication that it covers newborn screening databases or centers.<sup>62</sup>

Furthermore, while HIPAA may have covered more than a majority of medically stored information at the time of its passage, its language is better suited for how sensitive medical information was stored in the past, not the present.<sup>63</sup> The protections HIPAA offers are outdated. "When Congress enacted HIPAA in 1996, it envisioned a regime in which most health data would be held in health records . . . . In the big-data world, the type of data sources covered by HIPAA are but a small part of a larger health data ecosystem."<sup>64</sup> Also, it is important to emphasize that when HIPAA was passed, less than a quarter of the states across the United States required routine newborn screening programs.<sup>65</sup> The Newborn Screening Program Saves Lives Act of 2008 increased the rate at which newborn screening occurs,<sup>66</sup> which was passed over a decade after HIPAA. Overall, HIPAA's applicability to the regulation and access of newborn blood samples remains unclear; therefore, HIPAA is unequipped to deal with modern-day newborn screening programs.

#### B. POLICE USE OF DNA AND OTHER HEALTH INFORMATION

Police use of DNA in investigatory work originated in the 1980s when officers in the United Kingdom requested that a professor from the University of Leicester give DNA to verify a suspect's confession to sexually assaulting and murdering two people.<sup>67</sup> This novel concept turned into a routine investigatory tactic and a means to convict those charged with crimes.<sup>68</sup> This transformation rendered DNA evidence a focal point in the criminal justice system.<sup>69</sup> Using DNA evidence to obtain a conviction in criminal trials has

61. Ram, *supra* note 44, at 1295; *see also Covered Entities and Business Associates*, U.S. DEP'T HEALTH & HUM. SERVS. (Aug. 21, 2024), <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html> (on file with the *Iowa Law Review*) (discussing what all is encompassed under the "covered entities" and "business associates" within the language and scope of HIPAA).

62. *See* 45 C.F.R. § 160.103 (2024).

63. *See, e.g.*, W. Nicholson Price II & I. Glenn Cohen, *Privacy in the Age of Medical Big Data*, 25 NATURE MED. 37, 39 (2019) ("But the more fundamental problem is that the majority of health data is not covered by HIPAA at all.").

64. *Id.*

65. *See id.*; MARCH OF DIMES, *supra* note 29.

66. *See* MARCH OF DIMES, *supra* note 29.

67. S. Panneerchelvam & M.N. Norazmi, *Forensic DNA Profiling and Database*, MALAY. J. MED. SCI., July 2003, at 20, 22.

68. *Admissible DNA Testing*, NAT'L INST. JUST. (June 12, 2023), <https://nij.ojp.gov/nij-hosted-online-training-courses/what-every-investigator-and-evidence-technician-should-know/dna-evidence-overview/admissible-dna-testing> [<https://perma.cc/JD2C-QMEH>] ("DNA testing has become an established part of criminal justice procedures, and the admissibility of DNA in court is routine. DNA evidence is now admitted in every state.").

69. *Id.*

become so ingrained in American culture that a notable number of jurors expect some kind forensic science to appear during trial, especially DNA evidence.<sup>70</sup>

This Section will examine the history of the Iowa police using DNA evidence in their line of work. Next, it will track the rise of police and state actors accessing newborn blood samples across the country. Finally, this Section will discuss the policy debates surrounding law enforcement's use of DNA investigatory techniques.

### 1. Police Use of DNA Evidence in Iowa

Iowa's police units have been at the forefront of using DNA evidence to solve cold cases, with some seeing it as pushing the boundary of what is considered ethical.<sup>71</sup> An example of this is the case of Michelle Martinko.<sup>72</sup> In 1979, someone violently murdered Martinko in her parents' car outside of a mall near Cedar Rapids, Iowa.<sup>73</sup> With no suspects and no leads, police were left to analyze DNA with no match, which ultimately led to the case going cold for years.<sup>74</sup> But in 2018, Iowa police used GEDmatch to investigate the case.<sup>75</sup> GEDmatch allows people to submit their DNA, wait for GEDmatch to process and analyze the DNA, and uncover relatives they may not have known.<sup>76</sup> The website can also build a family tree for whoever submitted their DNA sample.<sup>77</sup> GEDmatch is a public site that anyone can use to submit their DNA and learn more about their family line.<sup>78</sup> In the Martinko case, police submitted blood left behind by the murderer to GEDmatch, which the FBI was unable to match back in the 1980s. Submitting the blood allowed law enforcement to uncover an individual who lived in Washington state and was related to a potential suspect.<sup>79</sup> This information ultimately led to the conviction of Martinko's murderer.<sup>80</sup>

Iowa's state legislature has actively assisted police in accessing larger pools of DNA by passing laws that require more people to submit their DNA to the

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70. See Donald E. Shelton, *The 'CSI Effect': Does It Really Exist?*, NAT'L INST. JUST. (Mar. 16, 2008), <https://nij.ojp.gov/topics/articles/csi-effect-does-it-really-exist> [<https://perma.cc/8ZHH-WNVU>].

71. See Kate Payne, *Police Used a Genealogy Website to Crack an Iowa Cold Case. The Tool Is Raising Concerns Elsewhere.*, IOWA PUB. RADIO (Mar. 7, 2020, 9:52 AM), <https://www.iowapublicradio.org/courts/2020-03-07/police-used-a-genealogy-website-to-crack-an-iowa-cold-case-the-tool-is-raisin-g-concerns-elsewhere> [<https://perma.cc/2GLJ-MV4H>].

72. *Id.*

73. *Id.*

74. *Id.*

75. *See id.*

76. *See How It Works: Find Family Members from Around the World Using DNA Matching*, GEDMATCH, <https://www.gedmatch.com/how-it-works> (on file with the *Iowa Law Review*).

77. *Id.*

78. *See id.*

79. *See Payne, supra* note 71.

80. *See id.*

police.<sup>81</sup> In 2013, Iowa passed a new law that required DNA collection from individuals with low-level offenses.<sup>82</sup> The DNA pool was expected to grow to include one thousand more samples of DNA in the first year of the law's implementation.<sup>83</sup> As DNA investigatory techniques evolve and push the boundaries of what used to be possible, major ambiguity surrounds how police will develop their practice using DNA to solve crimes. The U.S. Department of Justice recently issued guidelines for appropriate uses of DNA investigatory work, but these are unenforceable guidelines, not enforceable regulations.<sup>84</sup> It is unclear if Iowa will follow these guidelines and implement them into their practices.

## 2. Police Use of Newborn Blood Samples

In the past year, New Jersey State Police made headlines when the New Jersey OPD uncovered that the department had used blood samples from the state's newborn screening program to investigate a 1996 sexual assault.<sup>85</sup> After the New Jersey State Police used the blood spot of a suspect's child to link him to the crime, the state's public defender's office quickly issued a public records request to determine how often the State Police were accessing newborn blood samples.<sup>86</sup> Eventually, New Jersey state officials disclosed that they had received numerous subpoenas for blood samples and, most importantly, had enabled New Jersey police to access the blood samples without obtaining a search warrant based on probable cause, a basic requirement for a Fourth Amendment search (where exigency does not exist).<sup>87</sup>

New Jersey is not the only state where there have been privacy and constitutional concerns surrounding the state's access to newborn blood samples. Recently, in Michigan, U.S. District Judge Thomas Ludington ordered the State of Michigan to destroy blood samples from nine newborns if it did not obtain approval from the parents to keep them, noting major Fourth

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81. See Joel Aschbrenner, *Investigators See Promise in Iowa's New DNA Law*, DES MOINES REG. (Sept. 23, 2013, 2:00 PM), <https://www.desmoinesregister.com/story/news/1/01/01/investigators-see-promise-in-iowas-new-dna-law/2856031> (on file with the *Iowa Law Review*).

82. *Id.*

83. *See id.*

84. *See generally* U.S. DEP'T OF JUST., INTERIM POLICY: FORENSIC GENETIC GENEALOGICAL DNA ANALYSIS AND SEARCHING (2019), <https://www.justice.gov/olp/page/file/1204386/dl> [https://perma.cc/8EVF-RQLS] (outlining guidelines for how DNA should be used in criminal investigatory work in order to "promote the reasoned exercise of investigative, scientific, and prosecutorial discretion").

85. *See, e.g.*, Dana Difilippo, *Judge Orders State to Release Information About Police Use of Baby Blood Spots*, N.J. MONITOR (Jan. 4, 2023, 11:41 AM), <https://newjerseymonitor.com/2023/01/04/judge-orders-state-to-release-information-about-police-use-of-baby-blood-spots> [https://perma.cc/499P-479Q].

86. *See id.*

87. *See id.*

Amendment concerns.<sup>88</sup> In Texas, health officials were sued to turn over newborn blood samples they had kept without parental consent.<sup>89</sup> There, it was uncovered that Texas officials had turned over newborn blood samples to the federal government to help expand the DNA database that it uses to solve cold cases and identify missing persons.<sup>90</sup> Police across the country, specifically in New Jersey<sup>91</sup> and Texas,<sup>92</sup> have demonstrated that they are willing and capable of pushing the boundaries of privacy ethics in the pursuit of solving crime. Granting DNA access to police, especially without consent, only “undermine[s] trust in newborn screening all together, and perhaps drive[s] some parents to decline or evade screening entirely.”<sup>93</sup>

### 3. Policy Debates Surrounding Police Access to Newborn Samples

Many have labeled allowing police access to newborn blood samples as a disastrous invasion of privacy.<sup>94</sup> Some argue that besides the dangers of traditionally marginalized individuals being subjected to worsened privacy conditions, there is also the danger that police access to newborn screening resources would decrease public confidence in newborn screening, leading to underutilization of newborn screening programs.<sup>95</sup>

There are some benefits to police accessing newborn blood samples. It is arguable that many cold cases would never have been solved without police accessing DNA in creative ways. Furthermore, police access to newborn blood samples represents a cheaper and more cost-effective means for police to use DNA because it is a pool of DNA that is already in the hands of state officials.<sup>96</sup>

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88. See Ed White, *Judge's Decision Could Force Change in Michigan's Handling of Newborn Blood Samples*, MICH. PUB. (Aug. 4, 2023, 1:53 PM), <https://www.michiganpublic.org/criminal-justice-legal-system/2023-08-04/judges-decision-could-force-change-in-michigans-handling-of-newborn-blood-samples> [https://perma.cc/ZT5H-A22U].

89. See Emily Ramshaw, *DNA Deception*, TEX. TRIB. (Feb. 22, 2010, 5:00 AM), <https://www.texastribune.org/2010/02/22/dshs-turned-over-hundreds-of-dna-samples-to-feds> (on file with the *Iowa Law Review*).

90. *Id.*

91. Emma Camp, *New Jersey Secretly Stores Your Newborn's Blood for Decades*, REASON (Nov. 8, 2023, 2:55 PM), <https://reason.com/2023/11/08/new-jersey-secretly-stores-your-newborns-blood-for-decades> [https://perma.cc/LRZ7-AR5P] (“According to a new lawsuit, New Jersey has handed over leftover blood from newborn genetic testing to law enforcement and sold it to third parties.”).

92. Ramshaw, *supra* note 89 (“[Texas state health officials] never said they were turning over hundreds of dried blood samples to the federal government to help build a vast DNA database—a forensics tool designed to identify missing persons and crack cold cases.”).

93. Ram, *supra* note 44, at 1308–09.

94. See Crystal Grant, *Widespread Newborn DNA Sequencing Will Worsen Risks to Genetic Privacy*, ACLU (Apr. 19, 2023), <https://www.aclu.org/news/privacy-technology/widespread-newborn-dna-sequencing-will-worsen-risks-to-genetic-privacy> [https://perma.cc/7QPv-4NYG] (“It doesn't take much imagination to guess how this full genome sequencing could be abused.”).

95. *See id.*

96. *See* Ram, *supra* note 44, at 1275.

Newborn screening DNA pools are also more comprehensive than other investigative genetic genealogy.<sup>97</sup>

Overall, states vary widely in how they regulate and implement newborn screening programs. At most, the federal government provides passive suggestions for how states should run their programs, and its major healthcare privacy statute, HIPAA, is not equipped to regulate the healthcare data world of the present. All of this is occurring with the backdrop of police increasingly gaining access to healthcare data across the country, even in Iowa.

## II. IOWA'S CONTRADICTORY NEWBORN SCREENING RULE

To explain how and why Rule 641-4.3 presents a major problem in regulating Iowa's newborn screening program, this Part lays out and analyzes Rule 641-4.3's contradictory language and contextualizes that language by fitting it into the broader regulatory scheme of newborn blood samples. First, this Part focuses on how one part of Rule 641-4.3 appears to invite third-party access without traditional Fourth Amendment safeguards in place, while another part seems to foreclose access from third parties. Next, this Part places Rule 641-4.3 in the context of the broader regulatory scheme of newborn blood samples and lays out why it does not guarantee sound privacy protection. Then, this Part explains the Fourth Amendment concerns stemming from Rule 641-4.3 and how police access to newborn screening programs via a subpoena sidesteps constitutional protections. Finally, this Part explains how Iowa's newborn screening program rule would be interpreted by conservative-leaning justices who may be inclined to interpret the Rule's privacy protections narrowly, given the makeup of both the Iowa Supreme Court and the U.S. Supreme Court.

### A. THE LANGUAGE OF IOWA ADMINISTRATIVE RULE 641-4.3

Rule 641-4.3 “provides comprehensive newborn screening services for hereditary and congenital disorders for the state.”<sup>98</sup> Most of this rule addresses important healthcare information and how it relates to the program: It lays out how parental consent works with the newborn screening program; it explains how long the samples will be retained; and it details the responsibilities attached to the medical specialists who administer the newborn screening.<sup>99</sup> The Rule fails to address most privacy concerns, including who may access the newborn blood samples and by what means.<sup>100</sup> But when it does address privacy, the Rule raises more questions than answers.

Rule 641-4.3 states that “[r]eports, records, and other information collected by or provided to the Iowa newborn screening program” may be released to “[a] representative of a state or federal agency, to the extent that the information

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97. See *id.* (“[G]enetic genealogy . . . is comprehensive only through deducing distant genetic relationships.”).

98. IOWA ADMIN. CODE r. 641-4.3 (2024).

99. See *id.*

100. See *id.*

is necessary to perform a legally authorized function of that agency or the department.”<sup>101</sup> This is vague language, and it does not provide clear guidance as to what could be defined as “a legally authorized function” of a state agency or department in Iowa. However, later in Rule 641-4.3, there appears to be express protection for newborn blood samples under a section titled “[p]rohibited uses,” where the Rule states, “A residual newborn screening specimen shall not be released to any person or entity for commercial purposes or law enforcement purposes or to establish a database for forensic identification.”<sup>102</sup> Rule 641-4.3 has provisions seemingly at odds with one another and lacks guidance on how these provisions ought to be understood when read together.<sup>103</sup> The express privacy protection granted to Iowa’s newborns appears fragile in light of the Rule’s contradictory language.

Even though the provision from Iowa’s newborn screening rule that bars access contemplates law enforcement, it is unclear whether this would actually stop law enforcement access. As Professor Ram noted in her article regarding Iowa’s contradictory administrative code, “Although [Iowa’s] provision does not identify law enforcement specifically, law enforcement investigators, as representatives of a state or federal agency, might invoke it in seeking to access newborn screening data.”<sup>104</sup> Iowa’s Administrative Code does not contemplate police invoking the code to access newborn blood samples, which is why Professor Ram rightfully pointed out that it does not provide adequate protection.<sup>105</sup> “The juxtaposition of this provision with the law enforcement-specific prohibition governing newborn screening samples suggests that the access-to-data provision should be construed narrowly,”<sup>106</sup> but there is no judicial or statutory guidance in Iowa that would guarantee a narrow construction.

*B. ACCESS TO NEWBORN BLOOD SAMPLES IN OTHER STATES ACROSS  
THE COUNTRY AND WHY IOWA MAY BE SUSCEPTIBLE*

As mentioned earlier in Section I.B.2, the State of New Jersey received national attention after the New Jersey OPD alleged that a New Jersey police department unlawfully obtained newborn blood samples to charge someone

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101. *Id.* r. 641-4.3(7)(b)(3).

102. *Id.* r. 641-4.3(8)(e).

103. *See id.* r. 641-4.3.

104. Ram, *supra* note 44, at 1288 (referencing IOWA ADMIN. CODE r. 641-4.3(7)(b)(3)).

105. *See id.*

106. *Id.* at 1288–89. It is important to note that while Professor Ram is correct in offering a plausible way of interpreting the Rule, she is adamantly against allowing police access to newborn blood samples without first obtaining a warrant. *Id.* at 1303. Proponents of allowing Iowa police departments to access Iowa’s newborn blood sample bank may argue her interpretation is wrong because that would undermine the provision that appears to invite state-sponsored access to the newborn blood samples. *See* IOWA ADMIN. CODE r. 641-4.3(7)(b)(3). It is unclear how a judge would weigh these arguments because Iowa’s newborn screening program rule has not been extensively litigated or contemplated within the context of police access. There are more questions than answers.

with a crime.<sup>107</sup> It is still unknown how often the New Jersey police department issued these kinds of subpoenas to the New Jersey newborn blood sample bank because state officials have uniformly refused to comment on the pending litigation.<sup>108</sup>

This is particularly alarming for Iowa because nowhere in Rule 641-4.3 does it contemplate police obtaining and carrying out subpoenas to access newborn blood samples.<sup>109</sup> Arguably, if one is to view a police department issuing and carrying out a subpoena as a “legally authorized function” of the department, this would mean that issuing subpoenas would be interpreted under the Rule’s provision as seemingly granting access to the newborn blood samples. Again, it is unclear what interpretation a court or state agency would implement. As Iowa’s newborn screening rule stands, it raises far more questions than protections, which is why it needs amending.

Similar events have occurred in Michigan. Recently, parents concerned over Michigan’s storage of their children’s newborn blood samples secured a judge’s order to destroy stored samples.<sup>110</sup> The judge’s order, however, did not stem from the court identifying any improper subpoena issuances, but it instead resulted from Michigan’s failure to obtain the consent of the parents to keep their children’s blood indefinitely.<sup>111</sup> The parents in this case never gave their consent to the state of Michigan to retain their children’s blood indefinitely, which was the key component that resulted in the decision to have the blood samples destroyed without immediate consent from the parents.<sup>112</sup> This litigation outcome—while promising in that it alleviates the concern that states can hold onto a newborn’s blood samples without affirmative consent from the parents—does not mean a state like Iowa has adequate protections from breaches of privacy.

In fact, Iowa’s newborn screening administrative rule explicitly lays out the consent requirements under its “[n]ewborn blood spot screening procedure

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107. See *supra* Section I.B.2 (explaining the context behind the recent uproar accompanying the New Jersey police accessing newborn blood samples from New Jersey’s newborn blood bank).

108. See, e.g., Jake Epstein & Haven Orecchio-Egresitz, *Police Used a NJ Baby’s Mandatory Blood Sample to Pursue a Criminal Case. Public Defenders and a Newspaper Are Now Teaming Up to Sue Over Privacy Concerns.*, BUS. INSIDER (Aug. 16, 2022, 2:30 PM), <https://www.insider.com/new-jersey-police-baby-blood-sample-criminal-case-lawsuit-2022-8> (on file with the *Iowa Law Review*).

109. See IOWA ADMIN. CODE r. 641-4.3. The only way the Rule could plausibly have contemplated police issuing subpoenas to access the state’s newborn blood bank is under the Rule’s “legally authorized function” language. See *id.* r. 641-4.3(7)(b)(3). But importantly, this lies within the provision that invites access; it is unclear how this would be interpreted if Iowa police tried using a subpoena to access the newborn blood samples.

110. Kevin Koeninger, *Michigan Ordered to Get Parental Consent to Store Babies’ Blood Samples*, COURTHOUSE NEWS SERV. (July 31, 2023), <https://www.courthousenews.com/michigan-ordered-to-get-parental-consent-to-store-babies-blood-samples> (on file with the *Iowa Law Review*) (“The parents of nine Michigan children prevailed in their bid to prevent the state from keeping blood samples taken at birth for medical testing.”).

111. *Id.* (“Michigan will be required to destroy any remaining copies of the nine children’s blood samples within one year if it has not received informed consent from the parents.”).

112. *Id.*



for facilities and providers” section, which states that “[b]efore a specimen from an infant is obtained, a parent or guardian shall be informed of the type of specimen, how it is obtained . . . and the retention, use[,] and disposition of residual specimens.”<sup>113</sup> The same section goes on to state that “[s]hould a parent or guardian refuse the screening, said refusal shall be documented in the infant’s medical record, and the parent or guardian shall sign the refusal of screening form.”<sup>114</sup> So, although a lack of parental consent was the key factor in restoring privacy rights of Michigan parents, it would not be a factor in Iowa because Rule 641-4.3 adequately addresses consent.<sup>115</sup> While the developments in Michigan provide a helpful parallel to Iowa’s regulatory scheme of newborn blood samples, the victory for Michigan parents should not signal that Iowa’s current administrative rule would provide similar safeguards because of how consent is properly addressed in Rule 641-4.3.

Overall, developments in other states revolving around police and third-party access to newborn blood samples provide helpful insight into the strength of Iowa’s privacy safeguards, but these developments also raise more alarms. Iowa’s administrative rule does not explicitly address police issuing subpoenas to newborn blood banks,<sup>116</sup> which is what caused the crisis in New Jersey.<sup>117</sup> Furthermore, because Rule 641-4.3 adequately addresses the consent concerns for their newborn screening program,<sup>118</sup> the sort of relief seen in Michigan<sup>119</sup> is likely not realistic in Iowa unless Iowa health professionals commit an egregious violation of parental consent.

### C. WHY WARRANTLESS POLICE ACCESS TO NEWBORN BLOOD SAMPLES PRESENTS A GRAVE THREAT TO THE FOURTH AMENDMENT

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>120</sup> One of the most important parts of the Fourth Amendment is the warrant requirement. This means that a police officer conducting a legal search must have a warrant based on probable cause<sup>121</sup> unless an exception exists.<sup>122</sup>

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113. IOWA ADMIN. CODE r. 641-4.3(2)(a).

114. *Id.* r. 641-4.3(2)(b).

115. *What Conditions Are Screened for in Iowa?*, BABY’S FIRST TEST, <https://www.babysfirsttest.org/newborn-screening/states/iowa> [<https://perma.cc/6R6V-N5PA>] (“Iowa law requires information to be given to all parents regarding the retention, use and disposition of their child’s residual dried blood spots.”).

116. *See* IOWA ADMIN. CODE r. 641-4.3.

117. Epstein & Orecchio-Egresitz, *supra* note 108.

118. *See* IOWA ADMIN. CODE r. 641-4.3(2).

119. Koeninger, *supra* note 110.

120. U.S. CONST. amend. IV.

121. *See id.*

122. *Kentucky v. King*, 563 U.S. 452, 455 (2011) (“It is well established that ‘exigent circumstances,’ including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant.”).

The U.S. Supreme Court came close to contemplating the topic of this Note—police access to DNA—when it decided *Maryland v. King*.<sup>123</sup> In that case, the defendant, after being booked in jail and “charged with first- and second-degree assault,” had his DNA swabbed pursuant to a jail booking procedure, which ultimately connected him to a previously unsolved sexual assault.<sup>124</sup> The Supreme Court held that the routine DNA swab did not violate the Fourth Amendment, largely because it fell under a legal search incident to a lawful arrest and because the government’s interest in properly identifying individuals booked in jail outweighed any privacy interests at stake.<sup>125</sup> Other Supreme Court case law provides some guidance as well, especially *Ferguson v. City of Charleston*.<sup>126</sup> In *Ferguson*, the Court held that when a state hospital obtains a blood sample from a patient in order to hand it over to law enforcement, it must first obtain consent.<sup>127</sup>

According to Professor Ram, “[T]here can be no dispute that newborn sampling itself is a search subject to the Fourth Amendment.”<sup>128</sup> “The blood samples used in newborn screening, like the [blood sample obtained via a urine screening] in *Ferguson*, are obtained . . . as part of ordinary care,”<sup>129</sup> which makes it a straightforward legal analysis, rendering police access of newborn blood samples without consent or a warrant as a legally recognized search within the meaning of the Fourth Amendment to the U.S Constitution.<sup>130</sup>

It is important to note the special needs doctrine, an exception to the general requirement of a warrant or consent in order to conduct a legal search, which allows the government to bypass the Fourth Amendment in special circumstances.<sup>131</sup> A court will engage in a balancing test to decide whether the special-needs doctrine applies.<sup>132</sup> Courts weigh the interests of the program that conducted the search against the privacy interests of the individual and decide whether or not the search implicates the Fourth Amendment.<sup>133</sup> A factor in favoring applying the special needs doctrine is that the search cannot be “divorced from the State’s general interest in law enforcement,”<sup>134</sup> which would imply that “if law enforcement comes to make habitual or routine use of newborn screening resources for crime-detection

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123. *Maryland v. King*, 569 U.S. 435, 445–46 (2013).

124. *Id.* at 440.

125. *Id.* at 450–66.

126. *See generally* *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

127. *Id.* at 84–86.

128. Ram, *supra* note 44, at 1313.

129. *Id.* at 1308.

130. *See* U.S. CONST. amend. IV.

131. *Ferguson*, 532 U.S. at 78 (describing the special needs doctrine as “a balancing test that weigh[s] the intrusion on the individual’s interest in privacy against the ‘special needs’ that supported the program” that resulted in the search having taken place).

132. *Id.*

133. *Id.*

134. *Id.* at 79.

purposes, that would disrupt the application of the special needs doctrine.”<sup>135</sup> In other words, the more commonplace improper police access previously discussed and seen in New Jersey<sup>136</sup> and Texas<sup>137</sup> becomes, the more likely that the conduct would not fall under the protection of the Fourth Amendment.<sup>138</sup>

D. IOWA’S NEWBORN SCREENING PROGRAM ADMINISTRATIVE  
CODE’S INTERPRETERS

Recently, after then-Justice Brent Appel, “the court’s last Democrat appointee,”<sup>139</sup> retired from the Iowa Supreme Court, the court became only Republican-appointed justices.<sup>140</sup> Even though Professor Ram notes there are plausible legal reasons for why police access to newborn blood sample banks would be a search under the Fourth Amendment,<sup>141</sup> in Iowa, it would be tested as a novel legal theory by a fully Republican-appointed state supreme court. The personal political ideology of a judge does not always dictate how they will decide a case, but proponents of legal realism, a belief that those applying the law rely on their personal preferences in applying it, certainly think it plays a strong part.<sup>142</sup>

Furthermore, the country’s highest court, the U.S. Supreme Court, has become a vehicle for implementing conservative policies, and it has been quite effective.<sup>143</sup> The majority of conservative policy thinkers favor police having greater access to information and greater leeway with what they can and cannot do.<sup>144</sup> According to a research report from Washington University in St. Louis and the University of Michigan, “the [U.S. Supreme] Court

135. Ram, *supra* note 44, at 1315.

136. Camp, *supra* note 91.

137. Ramshaw, *supra* note 89.

138. See U.S. CONST. amend. IV.

139. William Morris, *Three-Quarters of Rulings Unanimous in First Term of 7-0 Conservative Iowa Supreme Court*, DES MOINES REG. (Aug. 24, 2023, 6:00 AM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2023/08/24/iowa-supreme-court-unanimous-conservative-2022-23-analysis/70498340007> (on file with the *Iowa Law Review*).

140. *Id.*

141. See Ram, *supra* note 44, at 1314–24.

142. Walter B. Kennedy, *A Review of Legal Realism*, 9 FORDHAM L. REV. 362, 364 (1940).

143. See Joan Biskupic, *Supreme Court Justices Are Showing Their Willingness to Boost Conservative Causes*, CNN (Jan. 18, 2023, 5:01 AM), <https://www.cnn.com/2023/01/18/politics/supreme-court-conservative-politics-analysis/index.html> [<https://perma.cc/9QNS-YJD6>] (“[The U.S. Supreme Court’s] actions in a series of pending cases, reaching out for issues before they’ve been aired in lower courts and taking precipitous steps on culture war dilemmas, demonstrate that they will continue to defy norms and the usual judicial bounds.”); Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> [<https://perma.cc/RZ8S-SVDA>] (“There is simply no way to overstate what the Supreme Court did this term. No journalist or scholar alive can remember a term with so many earthquakes in the law.”).

144. Joshua Tait, *Conservatives Love Limited Government – and Aggressive Policing*, WASH. POST (June 3, 2020, 1:46 PM), <https://www.washingtonpost.com/outlook/2020/06/03/conservative-police-limited-government> (on file with the *Iowa Law Review*).

produced more conservative decisions this term than at any time since 1931.”<sup>145</sup> This current conservative Supreme Court has also demonstrated it is likely to side with police on key issues, with many believing the Court empowers police officers to operate at the fringes of the Constitution.<sup>146</sup> Some observers have gone so far as to say that the current makeup of the Supreme Court presents a threat to the progress forged by civil rights activists and advances “their own extreme ideological vision that is out of step with most Americans.”<sup>147</sup> Any hope of a state court or federal court interpreting Iowa’s Administrative Code in a way that would exclude police from access newborn blood samples without traditional Fourth Amendment safeguards<sup>148</sup> would be with a very conservative-leaning U.S. Supreme Court that has shown it is willing to upset precedent in its aim of achieving conservative policy outcomes, including ones involving the police.

### III. IOWA NEEDS TO ERASE AMBIGUITY IN RULE 641-4.3

First, this Part argues that Iowa should amend Rule 641-4.3 and add clarity following the example of other states. Next, this Part suggests other unaddressed areas in Iowa’s Administrative Code that ought to be included in any amended versions of Rule 641-4.3 in order to preserve newborn blood sample privacy protections.

One way the Iowa Department of Public Health could amend its newborn screening rules could be to follow other state legislatures that have granted explicit privacy protection for newborn blood samples. Although Connecticut’s newborn screening statute does not explicitly name law enforcement, it uses broad language, stating that “data [from newborn screening] shall not be admissible as evidence in any action of any kind in any court or before any other tribunal.”<sup>149</sup> Although this is not perfect since it does not explicitly outlaw police access to newborn blood samples via a subpoena,<sup>150</sup> it would have certainly curbed that behavior because it does not allow data to be used in any sort of court proceeding, thus making it useless for police. Illinois similarly targets court proceedings in its newborn screening statute by precluding newborn blood samples from “any action of any kind in any court or before

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145. Totenberg, *supra* note 143.

146. Joanna Schwartz, *How the Supreme Court Protects Police Officers*, ATLANTIC (Jan. 31, 2023), <https://www.theatlantic.com/ideas/archive/2023/01/police-misconduct-consequences-qualified-immunity/672899> (on file with the *Iowa Law Review*).

147. Ben Olinsky & Grace Oyenubi, *The Supreme Court’s Extreme Majority Risks Turning Back the Clock on Decades of Progress and Undermining Our Democracy*, CAP20 (June 13, 2022), <https://www.americanprogress.org/article/the-supreme-courts-extreme-majority-risks-turning-back-the-clock-on-decades-of-progress> [<https://perma.cc/gTVL-DMQB>].

148. See U.S. CONST. amend. IV.

149. CONN. GEN. STAT. ANN. § 19a-25 (West 2021).

150. See Camp, *supra* note 91.

any tribunal, board, agency, or person.”<sup>151</sup> Iowa ought to follow the trend of these other state legislatures.

Iowa’s Department of Public Health could also explicitly target the police methods seen in New Jersey<sup>152</sup> by limiting the use of subpoenas to access newborn blood samples when ordinary Fourth Amendment protocols have been followed, such as a showing of probable cause. This way, the concerns seen in New Jersey—police side-stepping any probable cause evidentiary requirement—could be avoided.

Police access to DNA from blood samples has helped them solve previously unsolvable crimes, but greater access to people’s health data presents a major threat to not only privacy interests but also the public’s confidence in the police and our healthcare system. Prioritizing open access to DNA for the police will ultimately lead to more loss of life because it will undermine the public’s trust in this necessary, life-saving process for newborns.

### CONCLUSION

News of police accessing newborn blood samples without probable cause has exposed the lack of necessary regulation required in states’ legislative schemes.<sup>153</sup> It is likely that “[m]any parents . . . would probably be surprised to learn that their children’s blood samples are being accessed by law enforcement agencies.”<sup>154</sup> It is time for Iowa to amend its Code and exercise reasonable foresight to prevent what happened in New Jersey.

The newborn screening program is one of the most important ways that people can survive life-threatening disorders and conditions that need early detection. In turn, the success of the newborn screening program depends on parents maintaining trust in the healthcare officials who administer the program. If police are able to access the samples without parent consent or traditional Fourth Amendment procedural requirements, parents will not trust the programs, and they will definitely not trust police.

The only way to ensure that Iowa is able to provide proper privacy to participants in its newborn screening program is for the Iowa Department of Public Health to amend Rule 641-4.3 and erase its contradictory and vague language. A failure to amend results in Rule 641-4.3 being read and interpreted by conservative justices who have demonstrated that they can achieve optimal conservative police-policy outcomes through their decisions. The Iowa Department of Public Health needs to amend its newborn screening rule and grant explicit privacy protection against the police to preserve the privacy rights of Iowans and ensure the Iowa police have to abide by legal safeguards to access DNA from newborn blood samples.

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151. 410 ILL. COMP. STAT. ANN. 513/30(b) (LexisNexis 2018).

152. Camp, *supra* note 91.

153. Grant, *supra* note 94.

154. Tad Pacholczyk, *Genetic Privacy: Should Law Enforcement Have Access to Your Newborn’s Blood?*, N. TEX. CATH. (Oct. 23, 2023), <https://northtexascatholic.org/news/genetic-privacy-should-law-enforcement-have-access-to-your-newborn-s-blood> [<https://perma.cc/KF5Y-B2RS>].