Case No. 127838

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Petition for Leave to Appeal
	)	from the Appellate Court of Illinois,
Respondent-Appellee,	)	First Judicial District, No. 1-18-0523
	)	
v.	)	There heard on Appeal from the
	)	Circuit Court of Cook County,
ANGELO CLARK,	)	Illinois, No. 13 CR 16035 (02)
	)	
Petitioner-Appellant.	)	The Honorable Nicholas Ford,
	)	Judge Presiding.

BRIEF OF *AMICUS CURIAE* CRIMINAL JUSTICE ADVOCATES IN SUPPORT OF APPELLANT

Alexandra Block
Kevin Fee
ROGER BALDWIN FOUNDATION OF ACLU, INC.
150 N. Michigan Ave. Suite 600
Chicago, IL 60601
(312) 201-9740

Counsel for Amicus ACLU of Illinois

Andrea Lewis Hartung
Jonathan Manes
Phillip Moore
RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER
160 East Grand Avenue, 6th Floor
Chicago, IL 60611
(312) 503-0913
alewishartung@macarthurjustice.org

Counsel for Amici Curiae National Association for Criminal Defense Attorneys, Chicago Appleseed Center, and Chicago Council of Lawyers

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CYNTHIA A. GRANT
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POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amicus Curiae the **ACLU of Illinois ("ACLU-IL")** is a private, nonprofit, nonpartisan organization supported by a membership of approximately 50,000 individuals throughout the State. Its purpose is to protect through litigation, advocacy, and public education the rights and liberties guaranteed to all Illinoisans by the United States and Illinois Constitutions. Among these are the rights to be free from unreasonable searches and seizures and from arrests that are not supported by a proper warrant, rights that are central to the legal question raised in this case. ACLU-IL has been granted permission to appear as *amicus* in numerous cases before this Court. *E.g.*, *People v. Redmond & Molina*, Nos. 129201, 129327 (Consol.); *Rowe v. Raoul,* 2023 IL 129248; *People v. Sneed*, 2023 IL 127968; *People v. McCavitt*, 2021 IL 125550; *People v. Morger*, 2019 IL 123643; *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186; *Perry v. Dep't of Fin. & Pro. Regul.*, 2018 IL 122349; *People v. Releford*, 2017 IL 121094.

Amicus curiae **Chicago Appleseed Center** is a research and advocacy organization that seeks anti-racist solutions that interrupt cycles of poverty, mass incarceration, and racial injustice perpetrated by all aspects of the legal system. *Amicus curiae* **Chicago Council of Lawyers**, the first public interest bar association in Cook County, is dedicated to improving the quality of justice in the legal system by advocating for fair and efficient administration of justice. Chicago Appleseed Center for Fair Courts and the Chicago Council of Lawyers work as the Collaboration for Justice to reduce barriers to courts and improve equity in justice systems with a particular interest in consistency and integrity in the judicial process. The Collaboration for Justice is concerned with the impact of unconstitutional arrests made by relying on a police investigative alert rather than a warrant

issued by a judge, which usurps the judicial process, creating uncertainty and denying persons the protections afforded by the court.

Amicus Curiae **National Association of Criminal Defense Lawyers** (NACDL) is a nonprofit voluntary professional bar association that works on behalf of defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers, with approximately 40,000 members and affiliates throughout the country. NACDL is particularly interested in cases arising from surveillance technologies and programs that pose new constitutional challenges to personal privacy. It operates a dedicated initiative that trains and directly assists defense lawyers handling such cases to help safeguard privacy rights in the digital age. NACDL has filed numerous amicus briefs in this Court and the Supreme Court on issues involving digital privacy rights, including: *People v. Sneed*, 2023 IL 127968; *Carpenter v. United States,* 138 S. Ct. 2206 (2018); *Riley v. California*, 134 S. Ct. 2473 (2014); *United States v. Jones*, 132 S. Ct. 945 (2012).

Together, *amici* are criminal justice advocates who seek to ensure that policing practices in the State of Illinois are lawful and just. Policing practices that violate the Illinois Constitution damage communities and compromise public trust in those who have pledged to keep the community safe. *Amici* urge this Court to ensure that law enforcement adheres to the law by protecting the state constitutional rights of individuals suspected of

unlawful activity—who are presumed innocent—before and at the time of arrest.

INTRODUCTION

Warrantless arrests violate the Illinois Constitution[1], with very few exceptions that are inapplicable to the case at hand. In this situation—where Angelo Clark was arrested without a warrant based solely on an "investigative alert" procedure developed and widely deployed by an in-state police department to arrest individuals within Illinois—the Illinois Constitution provides a sufficient and independent basis to overturn Mr. Clark's conviction. State constitutions are meant to protect individual liberties in a manner that reflects familiarity with local values and issues of local concern. And state courts have an independent duty to enforce those state constitutional rights.

Article I, section 6 of the Illinois Constitution guarantees people in Illinois that if they are arrested, it will be pursuant to a valid warrant issued with probable cause that is *supported by affidavit*. This is in marked contrast to the Fourth Amendment to the U.S. Constitution, which requires only that arrests be supported by "oath or affirmation." The Illinois Constitution's affidavit requirement, like section 6's unique guarantee of personal privacy, was intended to afford protections beyond those of the Fourth Amendment. *See, e.g.*, *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 62 ("[Our] state constitution, by expressly guaranteeing a right of privacy, provides protections which are separate and distinct from those under the federal constitution."). The state constitution's framers embedded an affidavit requirement to ensure neutral decisions on documented

[1] Mr. Clark also raised the unconstitutionality of warrantless arrests based on so-called "investigative alerts" under the Fourth Amendment of the United States Constitution; this brief's analysis is limited to the unconstitutionality of such arrests under the Illinois Constitution.

probable cause before the police are allowed to conduct arrests. This requirement serves to ensure protection of individuals' personal privacy rights from infringement by the police.

Mr. Clark was arrested under a process spelled out in Chicago Police Department ("CPD") Special Order S04-16, which permits the police to create and maintain "investigative alerts." Such alerts are nothing more than a notice entered into a police database that identifies an individual that CPD personnel are trying to locate. CPD Special Order No. S04-16, § II.A (eff. Dec. 18, 2018).[2] But the form of alert upon which Mr. Clark was arrested—titled, "Investigative Alert/Probable Cause to Arrest"—identifies individuals that are wanted for *arrest* by CPD personnel concerning a specific crime. *Id.*, § II.A.1. These so-called "Probable Cause to Arrest" investigative alerts direct any police officer who comes into contact with the subject of an active alert to arrest the individual, *id.*, § V.A.1, absent any warrant and absent any urgency that would prevent the police from obtaining one, *id.*, § II.A.1. Nothing in the policy requires CPD ever to attempt to seek a judicial warrant corresponding to an Investigative Alert/Probable Cause to Arrest, no matter how much time has elapsed since the alleged offense. And once issued, an investigative alert does not expire; it is, as the Seventh Circuit has described it, a "permanent police bulletin." *Taylor v. Hughes*, 26 F.4th 419, 425 (7th Cir. 2022).

The widespread practice of arresting people based solely on police-created "investigative alerts" cannot stand. In a state where police practices have historically done harm when left unchecked, pre-trial constitutional mandates should be strictly enforced. Moreover, in light of technological developments that have increased access to the courts,

[2] *Available at* http://directives.chicagopolice.org/#directive/public/6332 (last visited November 17, 2023).

the constitutional warrant requirements that were meant to add oversight and transparency to the arrest process are easier to adhere to than ever. This Court should hold that warrantless arrests effectuated pursuant to police-created "investigative alerts" that cut courts out of the arrest decision, and lack any exigency that would make obtaining a warrant impracticable, violate article I, section 6 of the state constitution.

ARGUMENT

I. The Court Should Enforce the Illinois Constitution's Independent Protection Against Warrantless Arrests Executed Pursuant To "Investigative Alerts" Issued Unilaterally By Local Police.

Article I, section 6 of the Illinois Constitution is patently broader than the Fourth Amendment to the United States Constitution, and it is well-established that it provides different – and broader – protections against warrantless arrests than its federal counterpart. Section 6's additional requirement that arrests be supported by "affidavit" cannot be satisfied by an internal "investigative alert" issued by the police department. This Court should give the Illinois Constitution's affidavit requirement its full and proper meaning, consistent with its text, history and purpose, and hold that the systematic use of non-judicial, warrantless investigative alerts to effectuate arrests is inconsistent with article I, section 6.

Illinois courts are duty-bound to construe provisions of their constitutions independently from provisions of the United States Constitution, for it is axiomatic that the former are more than mere derivatives of the latter. *See Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1356 (1982) (remarking that state constitutional provisions are not "mere mirrors of federal protections."). Whereas the federal Constitution is a "negative restriction on the states' power to act in certain ways," state constitutions provide an independent source of "rights

and liberties to be effectuated to the fullest." Alan B. Handler, *Expounding the State Constitution*, 35 Rutgers U. L. Rev. 202, 205 (1983). This Court has read Illinois constitutional provisions as distinct from comparable federal claims in the past, prioritizing the intent of the drafters and applying them to matters of local concern. It should do so here where the question at hand involves a widespread practice of substantial local concern, involves state criminal law, and implicates a provision unique to the Illinois Constitution.

A. The text, history, and purpose of article I, section 6 grants broad protection against warrantless arrests that extend beyond those of the Fourth Amendment.

The text of article I, section 6 is clearly broader than the Fourth Amendment; this alone demands that this Court construe the state provision independently. This Court holds that principles of statutory construction apply to constitutional interpretation. *People ex rel. Chicago Bar Ass'n v. State Bd. of Elections*, 136 Ill. 2d 513, 526 (1990) (citing *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 464 (1976)). In other words, the Court looks to the text and "the common meaning of the words used," to give effect to the framers' understanding of the provision. *People v. Rauner*, 2018 IL 122802, ¶ 23. This Court reviews the text through the lens of "the history and condition of the times, the objective to be attained, and the evil to be remedied." *Id.* (citations omitted). It also reviews the whole of the constitution, and it construes provisions consistently with other provisions that relate to the same subject matter. *Id.* (citing *People ex rel. Chicago Bar Ass'n*, 136 Ill. 2d at 527).

Article I, section 6 of the Illinois Constitution provides, in relevant part, that "No warrant shall issue without probable cause, supported by affidavit . . ." The Fourth Amendment, in contrast, states that "No warrant shall issue without probable cause,

supported by oath or affirmation." U.S. Const., amend. IV. That the affidavit requirement is unique to the Illinois Constitution is clear and unambiguous. The common meaning of the word "affidavit," which this Court has long utilized, is "a *sworn statement in writing* made especially under oath or on affirmation *before an authorized magistrate or officer*." Merriam-Webster Dictionary, affidavit."[3] (emphasis added). *See also OneWest Bank, FSB v. Markowicz*, 2012 IL App (1st) 111187, ¶ 45 (defining an affidavit as "a declaration, on oath, *in writing*, sworn to by a party before some person who has authority under the law to administer oaths." (quoting *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493 (2002) which quoted *Harris v. Lester*, 80 Ill. 307, 311 (1875) (emphasis added)).

Accordingly, this Court has found that the affidavit requirement in lieu of a requirement for "oath or affirmation" was meant to be "a step beyond the constitution of the United States. . . . " *Lippman v. People*, 175 Ill. 101, 112 (1898). In *Lippman*, the Court also stressed that constitutional provisions on warrants were designed to "substitute judicial discretion for arbitrary power, so that the citizen in his property shall not be at the mercy of individuals or officers." *Id.* And although *Lippman* addressed search warrants, later this Court affirmed that the warrant requirement of the Illinois Constitution "provides exactly the same protection whether the warrant be for the search of a house and the seizure of property or for the search or seizure of a person." *People v. Elias*, 316 Ill. 376, 382 (1925), overruled on other grounds by *People v. Williams*, 27 Ill. 2d 542, 544 (1963).

Even if the text of the affidavit requirement was ambiguous—which there is not—the constitutional convention debates establish that the delegates, too, intended that the word "affidavit" embody its common meaning. *See Rauner*, 2018 IL 122802, ¶ 23

[3] *See* https://www.merriam-webster.com/dictionary/affidavit.

(explaining, "If ambiguities remain after considering the language of a constitutional provision, a court may look to the debates of the delegates to the constitutional convention."). The "affidavit" language first appeared in the 1870 Constitution. Ill. Const. 1870, art. II, § 6; *People v. Smith*, 2022 IL App (1st) 190691, ¶ 80. Transcripts from the 1869 Constitutional Convention debates reflect that article I, section 6 was meant to require an official to file affidavit in court to establish probable cause for an arrest warrant. 2 Debates and Proceedings of the Constitutional Convention of the State of Illinois ("1870 Debates and Proceedings") 1568 (Apr. 29, 1870)[4] (statements of Delegate Vandeventer).

At that time, the arrests provision of the Illinois Constitution contained the same "oath or affirmation" language present in the Fourth Amendment. *Id.* Delegate Vandeventer proposed striking the phrase "oath or affirmation" and replacing it with the word "affidavit." *Id.* He reasoned that an "oath" alone was "entirely too loose a mode of protecting the rights of persons." *Id.* He continued:

> There can be nothing wrong about requiring a complainant to file an affidavit, stating the facts which constitute the probable cause, and then the justice of the peace will have some record before him to determine whether there is any probable cause, ***for in many of these cases there is none***. If it was put down in writing, the individual claiming this warrant might become responsible at some future time to the party whose house he might require to be searched.

Id. (emphasis added). Delegate Goodhue agreed "heartily" with the amendment, adding his concern over warrants issued without any written record that an oath detailing the basis for the arrest was made. 2 1870 Debates and Proceedings at 1568. (statements of Delegate Goodhue).

Delegate Benjamin questioned the difference between the proposed language and

[4] *Available at* http://www.idaillinois.org/digital/collection/isl2/id/12546/rec/18.

the Fourth Amendment, apparently believing that general court practice was to require an application in writing before issuing a warrant. *Id.* (statements of Delegate Benjamin). Delegate Haines clarified that no such practice of requiring a written warrant application existed at the time. *Id.* (statements of Delegate Haines). Delegate Benjamin also asserted that, "[i]n some cases it is necessary that the warrant be issued without the least possible delay, and justice might be defeated by the delay of writing out the affidavit. Such, however, *would only be exceptional cases*." *Id.* (emphasis added) (statements of Delegate Benjamin).

Following this discussion, Delegate Vandeventer withdrew his amendment for undisclosed reasons. *Id.* But immediately, Delegate William Allen renewed it, moving to "strike out 'oath or affirmation'" and insert "affidavit." *Id.* (statements of Delegate Allen). One dissenter, Delegate Anthony, objected because "the section *as it stands* is precisely the same" as that in the U.S. Constitution. *Id.* (statements of Delegate Anthony) (emphasis added). Over this objection, the specific "affidavit" amendment itself and the section as a whole passed on the floor. *Id.* at 1568-69. In other words, the delegates explicitly rejected the Fourth Amendment's "oath or affirmation" phrase for a change that further protected the interests of Illinois residents by requiring a statement in writing justifying probable cause to a judicial officer.

The most recent convention further solidified the constitutional commitment to the affidavit requirement. In preparation for the 1969 Constitutional Convention, the Bill of Rights Committee ("Committee") devoted "weeks of study" to 50 research memoranda, books, and other materials concerning the Bill of Rights and the previous version of the

constitution. 6 Record of Proceedings, Sixth Illinois Constitutional Convention 3 (1972)[5]. The Committee reviewed each section of the Bill of Rights, and considered—and rejected—a proposed amendment to section 6 that would have changed the text of the warrant requirement. *Id.* at 29, 33. That proposal would have prohibited warrantless arrest or detention "unless there *was* probable cause to believe that the person was committing or had committed an offense." *Id.* at 33 (emphasis added). That proposal, which omitted any reference to affidavit or oath at all, arguably could have justified some arrest procedure like the CPD investigative alert system. But the Committee reaffirmed the vitality of the independent affidavit requirement by refusing that proposed amendment.

B. Because the constitutionality of warrantless arrests based on "investigative alerts" is one of local concern, this Court is duty-bound to interpret and apply article I, section 6 of the Illinois Constitution independently.

The question of warrantless arrests pursuant to police investigative alerts is particularly suited to independent resolution on state constitutional grounds because it reflects matters of local concern in two important ways. First, the question concerns a local police practice, not a national policy. Second, procedures surrounding warrants and arrests are matters of state criminal law.

State courts are best situated to interpret their constitutions in accordance with "local conditions and traditions," as their jurisdiction is limited. Jeffrey Sutton, 51 Imperfect Solutions: States & the Making of American Constitutional Law 17 (2018). Here, the Court has been asked to review an in-state police practice that threatens the rights of people subject to arrest in Illinois. Indeed, the practice of arresting people based on unilateral police action, without a written court record, raises the precise concerns that

[5] *Available at* https://www.idaillinois.org/digital/collection/isl2/id/8984/rec/38.

proponents of the constitutional affidavit requirement sought to address in 1869. The U.S. Constitution, on the other hand, does not (and cannot) account for the type of investigative alert that CPD routinely utilizes to order arrests without a judicial warrant. It cannot speak to the unique constitutional concerns embedded in the text and history of the Illinois Constitution, including its requirement that the police obtain a warrant based on an affidavit that details probable cause before conducting an arrest.

Moreover, Illinois constitutional law should control because this issue implicates state criminal law. Criminal law is "an area of law in which state judges have special experience and expertise," since most criminal prosecutions take place in state courts. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev.1141, 1150 (1985). In this situation, consistency among the courts of this state is more pertinent than consistency with federal law. *See id.*

The drafters of article I, section 6 intended protections against warrantless arrest to extend beyond those afforded under the Fourth Amendment, based on their unique understanding of the needs of Illinois's citizens. As the "protector of the rights guaranteed by . . . the Illinois Constitution," *People v. Bass*, 2021 IL 125434, ¶ 63 (Neville, J. concurring in part and dissenting in part), this Court should embrace the principle that state constitutions were created to expand rights as needed within their respective jurisdictions. Sutton, *supra* p. 175; *see also Jones v. Mississippi*, 593 U.S. ----, 141 S. Ct. 1307, 1322-23 (2021) (differentiating between the Supreme Court's "more limited role" of preserving the restrictions imposed by the U.S. Constitution and the States' rights to afford additional protections); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (stating that the Court's federal jurisprudence did not hinder the state's "sovereign right to adopt in its

own Constitution individual liberties more expansive than those conferred by the Federal Constitution."). Only then can Illinoisans receive the full benefit of their individual rights. *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) (state constitutions are "a font of individual liberties" which extend beyond the floor set by the U.S. Constitution); Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1315 (2017) ("[S]tate courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions independently.").

C. Resolution of this case on an independent reading of article I, section 6 would adhere to this Court's longstanding practice of enforcing provisions of the Illinois Constitution separately when warranted by local circumstances.

Reviewing the Illinois Constitution's requirements independently from their federal counterparts comports with notions of federalism, respect for state sovereignty, and deferral to the wisdom of local authorities on local concerns: if state provisions are simply merged with their federal analogues, those provisions may become a nullity. *See, e.g.*, William W. Berry, III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1249 (2020).

This Court has long appreciated that it may depart from federal constitutional jurisprudence when deciding state constitutional questions, especially when objective evidence suggests that a different interpretation of the state provision is warranted. *E.g.*, *People v. DiGuida*, 152 Ill.2d 104, 118, (Ill. 1992) (stating that the Court has not always found itself bound by the U.S. Supreme Court's interpretation of similar federal constitutional provisions). Interpretation of the positive rights granted by the Illinois Constitution is a wholly different project than the U.S. Supreme Court's attempts to extend the U.S. Constitution's protections nationwide. *See* Sutton, *supra* p. 175 (noting that the

U.S. Supreme Court must account for a "larger, far larger, jurisdiction," and thus might underenforce constitutional protections that state courts choose to protect based on their own local conditions).

The Court has frequently recognized additional protections provided by state constitutional provisions that differ from their federal counterparts. This Court has held, for example, that the focus on rehabilitation embedded in article I, section 11's proportionate penalties clause "went beyond the framers' understanding of the eighth amendment and is not synonymous with that provision." *People v. Clemons*, 2012 IL 107821, ¶ 40. It has announced that the removal clause in article V, section 10 differs from article II, section 4 of the U.S. Constitution based on distinctions between the Illinois government and the federal government. *Gregg v. Rauner*, 2018 IL 122802, ¶¶ 40-41. It rejected a lockstep interpretation of Illinois' confrontation clause with that of the U.S. Constitution on textual grounds, stating, "[u]nlike its Federal counterpart, . . . article I, section 8, of the Illinois Constitution clearly, emphatically and unambiguously requires a "face to face" confrontation. *People v. Fitzpatrick*, 158 Ill. 2d 360, 367 (1994). And the Court has long recognized that the language of article II, section 6 is broader than that of the Fourth Amendment. *Supra* § I.A.

Consistent with the view of the state Supreme Court as an independent guarantor of the rights of Illinoisans, this Court has gone a step further and departed from the U.S. Supreme Court's interpretations of even *identical* state constitutional provisions. For example, it has interpreted the due process clause of the Illinois Constitution more broadly than the identically-worded Fourteenth Amendment, holding that an actual innocence claim is cognizable under the Illinois Constitution even if it is not under the U.S.

Constitution. *People v. Washington*, 171 Ill. 2d 475, 481 (1996). This Court also has recognized that article I, section 10 provides protections against self-incrimination beyond those afforded by the Fifth Amendment. *People v. McCauley*, 645 N.E.2d 923 (Ill. 1994). In doing so, this Court noted that while federal precedents guide the interpretation of state law, "final conclusions on construction of State guarantee[s] are for this court to decide." *Id.* at 935. *See also People v. Lindsey*, 199 Ill. 2d 460, 467-68 (2002) (affirming, "rather than 'blindly follow the reasoning of a United States Supreme Court decision at all costs,' this court should rely on its own case law, wisdom and reason to construe our state constitutional provisions.") (quoting *McCauley*, 163 Ill. 2d at 439).

This Court should take the same action here. Decades ago, Justice Clark identified a relevant pitfall of reading of article I, section 6 in mechanical lockstep with the Supreme Court's Fourth Amendment jurisprudence. Though acknowledging that this Court had looked to the Supreme Court "to make sure that [its] citizens have been afforded at least the minimum Federal requirements under the Constitution," Justice Clark also recognized that strict adherence to interpretations of U.S. constitutional provisions precedent would "preclude this court from protecting the individual liberties of Illinois citizens should such protections become essential in the future." *People v. Tisler*, 103 Ill. 2d 226, 259 (1984) (Clark, J., specially concurring). Those individual liberties cannot receive full expression without interpreting and applying the patently broadened protections of article I Section 6.

While this Court ruled that it did not need to address the application of the Illinois affidavit requirement in the investigative alerts case of *People v. Bass*, 2019 IL App (1st) 160640, vacated in part by *Bass*, 2021 IL 125434, it should do so now. Guidance from this Court will provide needed guidance to police departments on a currently widespread (and

harmful) practice, and ensure uniformity in the law throughout the state. An affirmation of the independent force of article I, section 6 would also be particularly timely in light of the shifting methodological foundations of Fourth Amendment jurisprudence at the U.S. Supreme Court. *See, e.g.*, Danielle D'Onfro & Daniel Epps, *Fourth Amendment and General Law*, 132 Yale Law Journal 910, 913 (2023) ("Recent cases have revealed interest among some originalist Justices in restoring a supposed pre-*Katz* regime under which Fourth Amendment protections turn on concepts of property and trespass rather than amorphous notions of privacy."); *People v. Sneed*, 2023 IL 127968, ¶ 159 (Neville, J. dissenting) (noting that the modern U.S. Supreme Court "has especially expanded government power in the context of the fourth amendment [ ]."") (citing cases).

II. This Court Should Mandate Enforcement Of The Arrest Mandate of Article I, Section 6 Of The Illinois Constitution, Especially When There Is Time To Obtain A Judicial Warrant.

The CPD's system of issuing investigative alerts ordering people's arrest, with no court involvement, in order to arrest people is "entirely too loose a mode of protecting the rights of persons." 2 1870 Debates and Proceedings at 1568. It allows the CPD to assume for itself the power to arrest regardless of whether or not probable cause exists, thereby replacing the "detached scrutiny" of the judge with the "hurried judgment" of the officer and eliminating a critical protection against the arbitrary exercise of police power. *U.S. v. Leon*, 468 U.S. 897, 914 (1984). Arrests based solely on investigative alerts eschew the framers' intention to provide a check for police and require a written affirmation and transparency in the process of determining probable cause to arrest.

A. CPD's investigative alert system brazenly disregards the protections of article I, section 6, frustrating the purpose of section 6 entirely.

CPD's investigative alert system flouts the constitutional mandate in article I,

section 6 by attaching the term "probable cause" to an internal alert ordering officers to arrest someone, thereby suggesting that such an arrest would meet constitutional requirements if examined by a judge. But this police pronouncement of "probable cause" turns the Illinois Constitution on its head. In reality, such investigative alerts are a mechanism to unilaterally *circumvent* the judicial warrant process and the requirements in article I, section 6.

Special Order S04-16 requires, with no further instruction, that a request for an investigative alert include the "justification for the investigative alert requested." Special Order S04-16, § 3.F.6. It gives no guidance for what details must be provided or what constitutes "probable cause." And it contains no information whatsoever on when or under what circumstances the alert demanding a person's arrest should be approved. The directive certainly contains no requirement that an officer complete an affidavit detailing probable cause, a clear mandate of the Illinois Constitution. *Cf.* Ill. Const. 1970 art. I, § 6.

Nonetheless, Special Order S04-16 permits the police to issue orders to arrest without even *considering* seeking a warrant. These warrantless "probable cause" alerts can sit in the system for weeks or months, and any officer who encounters the subject of such an alert is directed to conduct the arrest regardless whether they have personal knowledge that a crime has occurred and with no requirement to check the underlying reason for the investigative alert. Special Order S04-16, § V.A. Such investigative alerts thus allow the police to "self-authorize" arrests without any of the constitutional safeguards the Illinois Constitution requires.

The express purpose of adding the affidavit requirement to the state constitution was to curb this type of unchecked police action. Delegates to the 1870 convention called

for police to appear on the record before a judge who has "some record before him to determine whether there is any probable cause," expressing a concern that "in many of these cases there is none." 2 1870 Debates and Proceedings at 1568 (statements of Delegate Vandeventer).

The CPD's continued reliance on investigative alerts without the check of a detached decisionmaker has had widespread ramifications for the constitutional rights of people subject to arrest in this state. Accordingly, arrests stemming from investigative reports have rightfully faced public criticism in this state. By one estimate, at any given time there are at least 2,000 active alerts calling for arrests. *See* Joe Mahr & Steve Schmadeke, *Chicago police criticized for bypassing warrant process to make arrests using 'investigative alerts'*, THE CHICAGO TRIBUNE (March 3, 2013, 12:00 AM)[6]. And the First District—which presides over criminal appeals stemming from cases in the Chicagoland area—has repeatedly denounced this practice as a mechanism for arrests. *E.g., Smith*, 2022 IL App (1st) 190691*; Bass,* 2019 IL App (1st) 160640; *People v. Hyland*, 2012 IL App (1st) 110966, ¶ 44 (Salone, J, specially concurring).

Evidence of the deleterious effects posed by investigative alert arrests is readily available. For example, a March 2013 Chicago Tribune story covered the false arrest in 2006 of Frank Craig pursuant to a warrantless arrest based on an investigative alert. The offense for which he was arrested had occurred four months earlier—certainly more than enough time to have sought a warrant upon a judicial determination of "probable cause" if

[6]https://www.chicagotribune.com/news/ct-xpm-2013-03-03-ct-met-investigative-alerts-20130303-story.html

there was any. Mahr & Schmadeke, *supra*.

And in 2019, the Chicago Reporter identified at least eleven settled lawsuits involving investigative alerts that led to improper arrests on the South and West sides of Chicago. Adam Mahoney, *Cook County to appeal ruling finding Chicago police investigative alerts unconstitutional*, THE CHICAGO REPORTER (July 26, 2019)[7] One woman, Kristina Brown, was arrested pursuant to an investigative alert for an alleged misdemeanor offense whose statute of limitations had expired over a year prior. *Id.* However, the investigative alert was still in the system because of the lack of internal processes at the time for removing alerts. *Id*. In another case, Robert Taylor was arrested on a months-old investigative alert despite the fact that a judge had acquitted Mr. Taylor of the same charges following a prior arrest for the very same investigative alert. *Taylor v. Hughes*, 26 F. 4th 419, 425 (7th Cir. 2022).

At bottom, investigative alerts subject people in Illinois to the ongoing threat of arrest for reasons that are unclear to the arresting officer, and in some cases based on outdated information. But unmonitored police practices like the CPD's "investigative alert" system also are emblematic of other CPD system failures and abuses of discretion.

The long history of CPD's failures to follow appropriate policies underscores the necessity in Illinois of judicial oversight. To take one example, Chicago's former gang database, which CPD similarly unilaterally administered, was riddled with significant data

[7] https://www.chicagoreporter.com/cook-county-to-appeal-ruling-finding-chicago-police-investigative-alerts-unconstitutional/#:~:text=The%20Cook%20County%20state%E2%80%99s%20attorney%E2%80%99s%20office%20plans%20to,in%20use%20since%202001%2C%20according%20to%20the%20decision

quality issues due to lack of supervisory review and reliance on poor data. *See* City of Chicago Office of Inspector General, Review of the Chicago Police Department's Gang Database (2019). [8]

The City of Chicago Office of Inspector General has made similar findings and leveled similar criticisms with respect to CPD's search warrant policies, warning that CPD's lack of adequate process and failures to verify information had led to the execution of search warrants at the wrong addresses. City of Chicago Office of Inspector General, Urgent Recommendations on The Chicago Police Department's Search Warrant Policies (2021)[9]; City of Chicago Office of Inspector General, Final Report: Chicago Police Department's Search Warrant Process (2023)[10]. Among other problems, these reports flagged that CPD personnel failed to document critical investigative steps prior to the execution of a search warrant. *Id.* CPD's failures in properly seeking search warrants underscore the danger of permitting CPD to use unilateral investigative alerts *without* warrants to pursue arrests with no judicial oversight.

B. Relaxation of the warrant requirement for arrests based on investigative alerts is unnecessary because barriers to obtaining judicial warrants have been lowered.

The current over-reliance on "investigative alerts" is not justified given that Illinois police today have easier access to courts than ever before, obviating the need to make a warrantless arrest under many circumstances. Gone are the days when an officer needed to prepare a paper-based warrant application, file it with a judge by hand, and then face a

[8] https://igchicago.org/wp-content/uploads/2023/08/OIG-CPD-Gang-Database-Review.pdf
[9] https://igchicago.org/wp-content/uploads/2023/08/OIG-Urgent-Recommendations-on-Search-Warrant-Policies-1.pdf
[10] https://igchicago.org/wp-content/uploads/2023/08/Final-Report-Chicago-Police-Departments-Search-Warrant-Process.pdf

sometimes extended wait for the issuance of that warrant. Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U.L. Rev. 1609, 1672 (2012).

It is now commonplace for police to use electronic communications that facilitate access to judges in order to obtain warrants. *Id*. at 1615. The essential steps required to get a warrant today can be completed in some instances in minutes, if not seconds. *Id*. at 1672; *see also* Tracy Hresko Pearl, *On Warrants and Waiting: Electronic Warrants and the Fourth Amendment*, (Mar. 7, 2023)[11] (collecting news stories from various jurisdictions about length of time needed to obtain a warrant). The warrant process has become increasingly digitized over the years. Video technology such as Zoom or FaceTime can facilitate an affiant providing an oral oath to supplement a written affidavit—Illinois police have been permitted to seek warrants via video and audio transmission since as far back as 2015. Pub. Act 098-0905, adding 725 ILCS 5/108-4(c) (eff. Jan. 1, 2015). Officers can submit warrant applications electronically, and judges can review them and issue electronic warrants. Pearl, *supra* pp. 2-3; *see also* 725 ILCS 5/107-9(h) (permitting the issuance of electronic warrants via e-mail or fax in Illinois). In other words, over the last decade CPD has had increasing access to technology-assisted methods to obtain warrants that are as fast as, or perhaps faster than, issuing a "probable cause" investigative alert.

To be sure, there may be situations where police encounter an exigent, fast-moving circumstance that does not permit officers to apply for and obtain a warrant before alerting other officers to execute an arrest of a suspect against whom they believe they have probable cause to arrest. But such circumstances will be rare and will typically only arise in the throes of a rapidly-unfolding investigation where there appears to be a narrow

[11] *Available at* SSRN: https://ssrn.com/abstract=4381730.

window to apprehend a suspect. In investigations that remain open for days or weeks, like the one here, there is no such exigency and no basis to evade judicial scrutiny of the police's basis for probable cause. In order to respect the text, history, and purpose of article I, section 6—and in particular its requirement to obtain warrants by filing an affidavit that shows probable cause--this Court should make clear that police must follow that constitutionally-required procedure before seizing citizens' bodies when, as here, they have time and opportunity obtain a warrant from a judge.

CONCLUSION

For these reasons, this Court should hold that warrantless arrests that are based merely on investigative alerts violate article I, section 6 of the Illinois Constitution.

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Respectfully submitted,

s/ Andrea Lewis Hartung
Andrea Lewis Hartung
Jonathan Manes
Phillip Moore
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
160 East Grand Avenue, 6th Floor
Chicago, IL 60611
(312) 503-0913

s/ Alexandra K. Block
Alexandra K. Block (ARDC No. 6285766)
Kevin Fee (ARDC No. 6277453)
ROGER BALDWIN FOUNDATION OF ACLU, INC.
150 N. Michigan Ave. Suite 600
Chicago, IL 60601
(312) 201-9740 ext. 340
ablock@aclu-il.org
kfee@aclu-il.org

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

s/ Andrea Lewis Hartung
Andrea Lewis Hartung
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
160 East Grand Avenue, 6th Floor
Chicago, IL 60611
(312) 503-0913
alewishartung@macarthurjustice.org

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

I certify that on November 17, 2023, the foregoing BRIEF OF *AMICUS CURIAE National Association for Criminal Defense Attorneys, ACLU of Illinois, Chicago Appleseed Center, and Chicago Council of Lawyers* IN SUPPORT OF APPELLANT was filed by electronic means with the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701. I further certify that the same were served by electronic transmission on:

Kwame Raoul, Attorney General
100 W. Randolph St., 12th Floor
Chicago, IL 60601,
eserve.criminalappeals@ilag.gov

Ms. Kimberly M. Foxx, State's Attorney
Cook County State's Attorney Office
300 Daley Center
Chicago, IL 60602
eserve.criminalappeals@cookcountyil.gov

Todd T. McHenry
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
1stdistrict.eserve@osad.state.il.us

s/ Andrea Lewis Hartung

Andrea Lewis Hartung
RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER
160 East Grand Avenue, 6th Floor
Chicago, IL 60611
(312) 503-0913
alewishartung@macarthurjustice.org