No. APL-2019-00182

To be argued by:
OWEN DEMUTH
15 minutes requested

State of New York
Court of Appeals

IN THE MATTER OF THE APPLICATION OF
WENCESLAO JUAREZ, SERAFIN RODRIGUEZ, MICHELLE SORIANO,
DANIEL VELEZ, AND GORDON, JACKSON & SIMON, ESQS.,

Petitioners-Respondents,

-AGAINST-

NEW YORK STATE OFFICE OF VICTIM SERVICES, ELIZABETH CRONIN,
VIRGINIA MILLER, JOHN WATSON, AND MAUREEN FAHY, SUED IN THEIR
OFFICIAL CAPACITIES AS MEMBERS OF THE NEW YORK STATE OFFICE OF
VICTIM SERVICES,

Respondents-Appellants.

For a Judgment Pursuant to Article 78
of the Civil Practice Law & Rules.

BRIEF FOR APPELLANTS

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
VICTOR PALADINO
Senior Assistant
Solicitor General
OWEN DEMUTH
Assistant Solicitor General
of Counsel

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224
(518) 776-2053
(518) 915-7723 (*f*)
Owen.Demuth@ag.ny.gov

Dated: December 12, 2019

Supreme Court, Albany County, Index No. 7770-16
Third Department No. 526699

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 3

QUESTION PRESENTED 4

STATEMENT OF THE CASE 5

A. Statutory and Regulatory Background 5

B. The Claims Process 6

C. The Office Amends its Regulations 8

D. Victim Assistance Programs 11

E. Petitioners' Applications for Awards Under Executive Law Article 22 13

F. This Proceeding 14

1. The Petition and Complaint 14

2. The Office's Motion for Summary Judgment 15

3. Supreme Court's Judgment 16

4. The Third Department's Decision 17

ARGUMENT

THE OFFICE'S AMENDED REGULATIONS GOVERNING ATTORNEYS' FEES ARE A LAWFUL AND RATIONAL EXERCISE OF THE OFFICE'S STATUTORY AUTHORITY 19

TABLE OF CONTENTS (Cont'd)

PAGE

ARGUMENT (Cont'd)

A. The Amended Regulations Are Consistent with the Statutory Language 19

B. The Amended Regulations Do Not Conflict with the Statute or with Any Other Office Regulation 25

C. The Office Rationally Precluded Attorneys' Fees for Preparing Claims Forms, Particularly in Light of Widespread Free Assistance 28

D. The Amended Regulations Reflect the Spirit and Purpose of Executive Law Article 22 33

CONCLUSION 35

AFFIRMATION OF COMPLIANCE

TABLE OF AUTHORITIES

Cases **Page(s)**

Andryeyeva v. New York Health Care, Inc.,
33 N.Y.3d 152 (2019) 26, 28

Consolation Nursing Home v. Commissioner of N.Y. State Dep't of Health,
85 N.Y.2d 326 (1995) 30

Hernandez v. Barrios-Paoli,
93 N.Y.2d 781 (1999) 33

Kuppersmith v. Dowling,
93 N.Y.2d 90 (1999) 19

Matter of Acevedo v. New York State Dept. of Motor Vehs.,
29 N.Y.3d 202 (2017) 20, 21, 22, 30

Matter of Bernstein v. Toia,
43 N.Y.2d 437 (1977) 21, 22, 24

Matter of Chemical Specialties Manufacturers Ass'n v. Jorling,
85 N.Y.2d 382 (1995) 30

Matter of City of New York v. State of N.Y. Commn. on Cable Tel.,
47 N.Y.2d 89 (1979) 19

Matter of F. J. Zeronda, Inc. v. Town Bd.,
37 N.Y.2d 198 (1975) 4

Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib.,
2 N.Y.3d 249 (2004) 20

Matter of Juarez v. New York State Office of Victim Servs.,
169 A.D.3d 52 (3d Dep't 2019) 2

TABLE OF AUTHORITIES (Cont'd)

Cases (Cont'd) **Page(s)**

Matter of Kigin v. State of New York Workers' Comp. Bd.,
24 N.Y.3d 459 (2014) 22

Matter of Medical Soc'y of State of New York v. Serio,
100 N.Y.2d 854 (2003) 24, 31

Matter of Mercy Hosp. of Watertown v. New York State Dept. of Social Services,
79 N.Y.2d 197 (1992) 4

Matter of Old Republic Life Ins. Co. v. Wikler,
9 N.Y.2d 524 (1961) 32

Matter of the Power Authority of the State of New York v. Williams,
60 N.Y.2d 315 (1983) 4

Matter of Regan v. Crime Victims Compensation Bd.,
57 N.Y.2d 190 (1982) 20

Matter of Sigety v. Ingraham,
29 N.Y.2d 110 (1971) 32

New York Ass'n of Counties v. Axelrod,
78 N.Y.2d 158 (1991) 31

NEW YORK STATE STATUTES

C.P.L.R.
article 78 ..... 3, 14
5602(a)(2) 3, 4

TABLE OF AUTHORITIES (Cont'd)

NEW YORK STATE STATUTES (Cont'd) **PAGE(S)**

Executive Law
- Article 22 ..... *passim*
- § 620 ..... 5, 33
- § 621(8) 6
- § 623(3) 5, 10, 17, 21
- § 623(5) 5
- § 626 23
- § 626(1) ..... *passim*
- § 627(1)(a)-(g) 27
- § 627(2) 7, 9
- § 629 9
- § 631(9) 6

State Administrative Procedure Act
- § 202 10
- § 322 9

NEW YORK STATE RULES AND REGULATIONS

9 N.Y.C.R.R 8, 9
- § 525.3 ..... 4, 19
- § 525.3(h) 1, 9, 27
- § 525.4 7
- § 525.5 7
- § 525.6(b) 7
- § 525.9 ..... 1, 3, 4, 19
- § 525.9(a) 9, 27
- § 525.9(c) 8
- § 525.9(d) ..... *passim*
- § 525.11(b) 8
- § 525.13 7
- § 525.13(b) 8
- § 525.13(e) 7

TABLE OF AUTHORITIES (Cont'd)

FEDERAL STATUTES **PAGE(S)**

42 U.S.C.
§ 10602 11

MISCELLANEOUS AUTHORITIES

https://ovs.ny.gov/sites/default/files/advocate-guidelines-compensation/emergency-awards.pdf 8

https://ovs.ny.gov/sites/default/files/annual-report/revised-vap-award-amounts-2016-17-annual-report.pdf..... 12

https://ovs.ny.gov/sites/default/files/general-form/2013ovsclaimapplication.pdf..... 7

https://ovs.ny.gov/victim-assistance-program..... 11

https://ovs.ny.gov/victim-compensation 7, 29

https://ovs.ny.gov/sites/default/files/annual-report/final-ovs-17-18-annual-report.pdf..... 12

PRELIMINARY STATEMENT

Crime victims in New York may be eligible for government compensation for losses resulting from the crime, under a program administered by the New York State Office of Victim Services. Among the expenses that may be compensated are "reasonable attorneys' fees for representation before the [O]ffice and/or before the appellate division upon judicial review." Executive Law § 626(1).

This appeal concerns the validity of regulations promulgated by the Office identifying the attorneys' fees that it considers reasonable and therefore eligible for compensation. The regulations at issue here limit a crime victim's compensable attorneys' fees to those incurred on a successful application for administrative reconsideration or on judicial review of final Office decisions, and specifically exclude fees for performing certain simple tasks, such as the filling out of claim forms. *See* 9 N.Y.C.R.R. §§ 525.3(h), 525.9.

The Office's rationale for this limitation was that assistance in completing the claim forms and performing other simple tasks is available free-of-charge through its federally and state-funded Victim Assistance Programs located throughout the State. Limiting fee awards

in this fashion preserves the Office's limited resources for making more and greater awards to crime victims for other harms suffered by them, rather than paying attorneys to perform clerical tasks.

Supreme Court upheld the regulations as a rational and legitimate exercise of the Office's statutorily delegated authority, but the Appellate Division reversed and declared the regulations invalid. *Matter of Juarez v. New York State Office of Victim Servs.*, 169 A.D.3d 52 (3d Dep't 2019). The Third Department held that the regulations exceeded the Office's statutory authority because, in its view, the statute mandated that the Office consider requests for attorneys' fees on a case-by-case basis for all stages of the claims process, including assisting claimants with simple application forms.

The Appellate Division's ruling invalidates a sensible rule that promotes consistent decision-making and helps conserve the Office's limited resources, which could be better used compensating crime victims rather than reimbursing attorneys for performing clerical tasks. The Appellate Division misinterpreted the Office's enabling statute, which authorizes compensation for reasonable attorneys' fees for representation before the Office, but does not specify what fees are reasonable or

mandate fees for all phases of the claims process. Nor does the statute require a case-by-case examination of whether fees should be awarded for help with basic forms. This Court should accordingly reverse the Third Department's order and reinstate Supreme Court's judgment upholding the regulations.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under C.P.L.R. 5602(a)(2). This combined article 78 proceeding and declaratory judgment action originated in the Supreme Court. In its opinion and order, the Appellate Division, Third Department granted the petition/complaint in part by declaring invalid and annulling 9 N.Y.C.R.R. § 525.9 to the extent it limits counsel fees awarded by the Office to those incurred in administrative appeals and/or judicial review (Record on Appeal ["R"] 29, 31). The Appellate Division's order remitted the matter to the Office to reconsider the counsel fee applications for two petitioners on a case-by-case basis (R. 29, 31).

In directing the Office on remittal to reevaluate the fee applications on a case-by-case basis, the Appellate Division's order requires the Office to take non-ministerial, quasi-judicial administrative action;

consequently, the Appellate Division's order is non-final. However, because the order requires the Office to act in an adjudicatory capacity on remittal, this Court has jurisdiction over the appeal under C.P.L.R. 5602(a)(2). *See Matter of Mercy Hosp. of Watertown v. New York State Dept. of Social Services,* 79 N.Y.2d 197, 203 n.3 (1992); *Matter of the Power Authority of the State of New York v. Williams*, 60 N.Y.2d 315, 323 (1983); *Matter of F. J. Zeronda, Inc. v. Town Bd.*, 37 N.Y.2d 198, 201 (1975).

The issues presented are preserved. The Office asserted in Supreme Court (R. 475, 487) and in its Appellate Division brief (pp. 12-22) that the Office's regulations were a lawful and rational exercise of the agency's statutory authority. These are pure questions of law.

QUESTION PRESENTED

The Office's amended regulations (9 N.Y.C.R.R. §§ 525.3, 525.9) limit attorneys' fee awards for crime victim claimants to the costs incurred on applications for administrative reconsideration and on judicial review. The question presented is whether those regulations are rational and consistent with the Office's statutory authority to determine a claimant's eligibility for reasonable attorneys' fees.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Article 22 of the Executive Law authorizes the Office to provide financial assistance to persons who can demonstrate that they are victims of a crime. Executive Law § 620; *see id.* § 623(5) (the Board has the authority to "hear and determine all claims for awards filed with the board pursuant to this article, and to reinvestigate or reopen cases as the board deems necessary"). The Office's determination to provide such assistance is "a matter of grace." Executive Law § 620 (declaration of policy and legislative intent).

The Office's enabling statutes provide that the agency, in its discretion, may make awards to crime victims for "out-of-pocket loss," which includes "the cost of reasonable attorneys' fees for representation before the office and/or before the appellate division upon judicial review." Executive Law § 626(1). No attorneys' fees award may "exceed one thousand dollars." *Id.* Executive Law § 623(3) authorizes the Office to promulgate "rules for the approval of attorneys' fees for representation before the office and/or before the appellate division upon judicial review."

When the Office receives an application for attorneys' fees, it determines its reasonableness by examining the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the fee customarily charged in the locality for similar legal services;
> (3) the amount involved and the results obtained;
> (4) the time limitations imposed by the client or by the circumstances;
> (5) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (6) whether any part of the cost of the legal service provided to the claimant has been paid or is payable by a third party.

9 N.Y.C.R.R. § 525.9(d).

Claimants may also be eligible for an award of "essential personal property" (EPP), defined as "articles of personal property necessary and essential to the health, welfare or safety of the victim." Executive Law § 621(8). EPP awards are capped at $500, with certain exceptions not relevant here. *Id.* § 631(9).

B. The Claims Process

An administrative claim for financial assistance generally consists of two stages. In the first, the claimant files an initial claim for compensation by completing a four-page pre-printed form; following the

instructions provided, the claimant provides basic information about the crime, and expenses incurred as a result of it. 9 N.Y.C.R.R. § 525.4. This form is available on the Office's website and the claim may also be uploaded to the Office's online Victim Services Portal, as petitioner Velez did (R. 376-385).[1] The claimant may also monitor the claim and upload additional supporting documentation through the Victim Services Portal.[2]

Upon filing the claim, the Office investigates it and then issues a decision "either granting an award or denying the claim." 9 N.Y.C.R.R. § 525.6(b); *see* 9 N.Y.C.R.R. § 525.5. If the Office denies the claim, the claimant may request to proceed to the second administrative stage by moving for reconsideration of the Office's initial decision. Executive Law § 627(2); 9 N.Y.C.R.R. § 525.13. The Office has the discretion to "reinvestigate or reopen cases at any time, as the office deems necessary," 9 N.Y.C.R.R. § 525.13(e), obviating the need for an administrative appeal

---

[1] *See* https://ovs.ny.gov/sites/default/files/general-form/2013ovsclaimapplication.pdf

[2] *See* https://ovs.ny.gov/victim-compensation.

if it has what it needs to modify its decision, or the claim can go to appeal. The claimant may request a hearing at this stage, at which the claimant may be represented by counsel. 9 N.Y.C.R.R. § 525.13(b). After reviewing claimant's reconsideration application, the Office issues a decision, "which shall become the final determination." *Id.*

The Office also may issue expedited emergency awards "if it appears that such claim is one with respect to which an award probably will be made and undue hardship will result to the claimant if immediate payment is not made." 9 N.Y.C.R.R. § 525.11(b). The Office's website provides detailed guidance on the procedures and documentation necessary to justify an emergency award.[3]

C. The Office Amends its Regulations

Prior to January 13, 2016, the Office's regulations provided that "[w]henever an award is made to a claimant who is represented by an attorney, the office shall approve a reasonable fee commensurate with the services rendered, up to $1000." 9 N.Y.C.R.R. former § 525.9(c). Such

[3] *See* https://ovs.ny.gov/sites/default/files/advocate-guidelines-compensation/emergency-awards.pdf.

fees, if determined by the office to be reasonable, were available "at all stages of a claim." 9 N.Y.C.R.R. former § 525.9(a).

Effective January 13, 2016, the Office amended this regulation to limit an award of reasonable attorneys' fees to those incurred during: "(1) the administrative review for reconsideration of such decision pursuant to section 627(2) of the Executive Law; and/or (2) the judicial review of the final decision of the office pursuant to section 629 of the Executive Law." 9 N.Y.C.R.R. § 525.9(a); *see id.* § 525.3(h) (defining "reasonable attorneys' fees" as those reasonably incurred by a claimant during the two stages set forth in section 525.9[a]). A claimant whose request for reconsideration is unsuccessful is not entitled to an attorneys' fee award with respect to that request.

Like the old regulations, the new rules capped attorneys' fees awards at $1000—the statutory cap—and required the Office to first consider a statement of services rendered provided by the crime victims' attorney and the six factors in section 525.9(d).

The Office formally promulgated these amendments in accordance with the relevant notice, public comment and publication requirements of the State Administrative Procedure Act (322; see R. 170-172 [notice of

proposed rule-making in New York State Register dated November 10, 2015]). *See generally* SAPA § 202. In a Regulatory Impact Statement published in the State Register in November 2015, the Office stated that its authority to promulgate the new regulations came from Executive Law § 623(3), which authorizes the Office to "adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of Article 22 of the Executive Law" (R. 172).

The purpose of the new regulations was to clarify which fees the Office would consider "reasonable" (R. 172). Under the old rule, the Office noted that "one could assert that attorneys' fees include any assistance during the course of a claim— from assisting victims and/or claimants in completing and submitting the [the Office] claim applications themselves, to making phone calls to check on the status of a claim on a claimant's behalf" (*id.*). In the agency's view, these largely ministerial duties could not be considered "reasonable expenses" and thus the old regulations "far exceed[ed] the scope of the law" (*id.*).

The amended regulations were necessary, the agency explained, because the old regulations "far exceed the plain language of the law and are not what the Legislature intended in [the Office's] enacting statute"

(*id.*). The old regulations covered expenses, including attorneys' fees, that "cannot be considered reasonable expenses, particularly when [the Office] has invested so much in building a statewide network of [federally and state-funded Victim Assistance Programs], serving every county in New York State, to assist in this very matter" (*id.*).

D. Victim Assistance Programs

When the Office promulgated the new regulations, it considered the increasing importance of federally and state-funded Victim Assistance Programs (VAPs) (R. 172). *See* https://ovs.ny.gov/victim-assistance-program. VAPs primarily exist for one purpose: to provide direct assistance to crime victims, including the provision of free, 24-hour assistance to crime victims who wish to file claims for reimbursement under Executive Law article 22. VAPs receive federal funding, with a state match, under the federal Victims of Crime Act ("VOCA"), *see* 42 U.S.C. § 10602, which authorizes the Office to issue grants and contracts to not-for-profit organizations and governmental agencies. There are hundreds of VAPs statewide, at a wide variety of governmental offices and not-for-profit organizations, including hospitals, police stations, district attorney offices, county offices and charitable organizations. *See*

https://ovs.ny.gov/sites/default/files/annual-report/revised-vap-award-amounts-2016-17-annual-report.pdf (noting awards made by the Office to VAPs throughout the State for the 2016-2017 fiscal year). Federal funds made available for VAPs have significantly increased since the Office amended its regulations in January 2016. *See* New York State Office of Victim Services 2017-2018 Annual Report, at 25, *available at* https://ovs.ny.gov/sites/default/files/annual-report/final-ovs-17-18-annual-report.pdf. (noting that the Office received $56 million in federal VOCA grants to VAPs for the 2017-2018 fiscal year, up from approximately $23.9 million in 2014-2015).

Like private attorneys, VAPs are authorized to represent crime victims at every stage of a claim while the matter is before the Office. But unlike private attorneys, VAPs cannot pick their clients or refuse assistance to any crime victim who seeks their help. As noted in the State Register, the Office "funds 228 local [VAPs] across New York State, distributing in excess of $35 million to these programs to assist and advocate on the behalf of victims and claimants" (R. 172). The Office provides training to VAP staff, which are required "to assist victims

and/or claimants in completing and submitting [Office] applications," and to provide assistance "through[out] the claim process" (*id.*).

E. Petitioners' Applications for Awards Under Executive Law Article 22

Petitioners applied for awards from the Office at various times between 2001 and 2016, seeking reimbursement of losses they allegedly suffered from crimes committed against them (R. 366-370, 379-385). Only the applications of Velez and Soriano were affected by the amended regulations, and petitioners do not challenge on appeal Supreme Court's holding that Juarez and Rodriquez lacked standing to contest their attorneys' fees awards based on the old regulations (R. 435).[4] Accordingly, only Velez's and Soriano's applications will be discussed here.

Represented by the Gordon law firm, Velez and Soriano filed their initial applications in March and May 2016, respectively (R. 366-370, 379-385). Soriano listed EPP losses totaling $625, including clothing

[4] The Gordon law firm sought $937.50 in attorneys' fees for Juarez, who received a $315 EPP award (R. 85, 87, 95-97). Additionally, the Gordon law firm sought $1,437.50 in attorneys' fees for assisting Rodriquez, who received an EPP award of $205 (R. 99-100, 108-109). The Office issued attorneys' fees awards of $315 and $205 for Juarez and Rodriquez, respectively (R. 87, 100).

worth $125 and a dining set she valued at $500 (R.366-370). In its decision, the Office issued an award of $125, fully reimbursing Soriano for the clothing, but declined to reimburse her for the dining set because she had not reported this as a loss on the police report detailing the crime committed against her (R. 372-374). Soriano applied for reconsideration, and the Office denied this request (R. 123-124). Based on the $125 award to Soriano, the Gordon law firm applied for $1,250 in attorneys' fees, ten times the size of Soriano's award (R. 131-132).

Velez's initial application claimed $7,000 in losses, an amount he later reduced to $495 for the loss of clothing (R. 377-387). The Office awarded Velez $365 in EPP losses (R. 389). Velez did not request reconsideration. Soriano's and Velez's applications were determined under the amended regulations, so neither award was eligible for attorneys' fees because they did not involve a successful request for administrative reconsideration or judicial review (R. 373, 390).

F. This Proceeding

1. The Petition and Complaint

Petitioners commenced this combined declaratory judgment action and article 78 proceeding in December 2016 (R. 20-39). They alleged that

the Office's amended regulations concerning attorneys' fees were "arbitrary, capricious and ultra vires" because they were "contrary to the plain language of the Executive Law and the stated intent of the Legislature," which—according to petitioners—envisioned that attorneys' fees would be awarded "without restriction" (R. 35-36). Petitioners additionally argued that the denial of their specific applications for attorneys' fees were "arbitrary, capricious, ultra vires and not based on substantial evidence" (R. 36). Petitioners sought a judgment "[d]eclaring null and void" the amended regulations and "[d]irecting Respondents to pay all legitimate and reasonable requests for reimbursement of attorneys' fees" associated with the individual petitioners' applications (R. 37-38).

2. The Office's Motion for Summary Judgment

After issue was joined, the Office moved for summary judgment dismissing the petition (R. 470-488).[5] The agency submitted an affidavit

[5] Before answering the petition (R. 443-450), the Office moved to dismiss it, arguing that Juarez and Rodriquez did not have standing to challenge the amended regulations because their applications were determined under the old ones (R. 317, 328, 331; *see* R. 314-399), and that the Gordon law firm lacked standing to state a claim in its own right (R. 436-437). Supreme Court agreed and dismissed the petition in part on these grounds (R. 434-438, 441-442). Petitioners did not challenge these rulings in its appeal to the Third Department.

from its General Counsel, John Watson, who defended the amended new regulations as best effectuating the Legislature's stated intention that attorneys' fees awards be reasonable. He noted that "[t]he process of preparing and submitting a claim for reimbursement to [the Office] is neither novel nor difficult, nor does it require any specialized, legal services" (R. 483). Indeed, Watson noted that "[m]any thousands of [the Office's] claimants do so without any third-party assistance every year" (R. 483). And the statewide network of local VAPs, to whom the Office distributed "in excess of forty-three (43) million dollars," were always available to claimants needing third-party assistance (R. 483). Watson explained that because the old regulations allowed for attorneys' fees to be awarded based on "any assistance during the course of a claim," including the making of phone calls, perfunctory completion of claim forms and other simple tasks, such fees were not reasonable and thus "far exceeded the scope of the law" (R. 479).

3. Supreme Court's Judgment

Supreme Court rejected petitioners' claims that the Office's amended regulations exceeded its statutory authority. The court first held that "petitioners have failed to establish that [the Office] exceeded

the scope of its rule-making authority by limiting reimbursement for attorneys' fees to those incurred by the claimant during administrative and/or judicial review" (R. 12). The court concluded that the regulations were consistent with the statute, which "expressly granted [the Office] the authority to make "rules for the approval of attorneys' fees for representation before the office and/or before the appellate division" (R. 11, quoting Executive Law § 623[3]). The court also found that the Office could reasonably rely on the statewide presence of VAPs to justify its finding that "it was an unnecessary use of the limited State funds available for the compensation of crime victims to provide reimbursement to private attorneys for providing essentially the same services made available to claimants at no costs through the State-funded VAPs" (R. 12). Because petitioners had "failed to demonstrate any infirmity" in the amended regulations, the court held that none of the petitioners were improperly denied attorneys' fees (R. 13).

4. The Third Department's Decision

The Third Department reversed (R. 498-508), holding that the Office's regulations conflicted with the statute because the statute did not distinguish "among the stages of a victim's representation before [the

Office]" (R. 503). Additionally, that court held that the amended regulations impermissibly conflicted with another Office regulation that required the agency to evaluate attorney's fees awards using certain fact-specific criteria (R. 504). In the Third Department's view, "[t]hese factors necessarily contemplate a case-by-case examination of the circumstances of each claim" (*id.*). The amended regulation, however, "disregards these specified factors and precludes such case-by-case consideration for fees incurred in the early stages of a claim, determining the reasonableness of a fee award based *solely* upon the stage of representation when the fees were incurred—a factor that does not appear in the regulation." (*id.*, citing 9 N.Y.C.R.R. § 525.9[d]) (emphasis in original).

Finally, the Third Department disputed the Office's rationale that crime victim applications for compensation at the preliminary stages were necessarily pro forma, noting that one of the victims had made a request for an emergency award that required the attachment of several additional forms, in addition to the Office's standard application (R. 504). Accordingly, the court annulled the Office's regulations limiting the availability of attorney's fees and remitted the matter to the Office to

reconsider the applications for counsel fee awards on a case-by-case basis, regardless of the stage to which the claim had progressed (R. 506).

ARGUMENT

THE OFFICE'S AMENDED REGULATIONS GOVERNING ATTORNEYS' FEES ARE A LAWFUL AND RATIONAL EXERCISE OF THE OFFICE'S STATUTORY AUTHORITY

A. The Amended Regulations Are Consistent with the Statutory Language

"It is well-settled that a State regulation should be upheld if it has a rational basis and is not unreasonable, arbitrary, capricious or contrary to the statute under which it was promulgated." *Kuppersmith v. Dowling*, 93 N.Y.2d 90, 96 (1999). Contrary to the Third Department's holding, the 2016 amendments to 9 N.Y.C.R.R. §§ 525.3 and 525.9 constitute a lawful and rational exercise of the Office's express authority under article 22 of the Executive Law to adopt rules governing the approval of reasonable attorneys' fees for representation before the Office.

As a "creature of the Legislature," the Office "is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication." *Matter of City of New York v. State of N.Y. Commn. on Cable Tel.*, 47 N.Y.2d 89, 92 (1979). Although an

agency may not adopt rules and regulations contrary to the clear language of the statute that is the source of its authority, *Matter of Regan v. Crime Victims Compensation Bd.*, 57 N.Y.2d 190, 195-196 (1982), "an agency is permitted to adopt regulations that go beyond the text of its enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose." *Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 29 N.Y.3d 202, 221 (2017) (citing *Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 N.Y.3d 249, 254 (2004)).

The amended regulations fit comfortably within the broad authority the Legislature delegated to the Office in article 22 of the Executive Law. In Executive Law § 626(1), the Legislature authorized the Office to compensate crime victims for out-of-pocket losses, but only for those "reasonably incurred" as a result of the crime, including "the cost of reasonable attorneys' fees for representation before the office and/or before the appellate division upon judicial review not to exceed one thousand dollars." The powers and duties of the Office include not only the general authority to adopt rules and regulations "to carry out the provisions and purposes of [article 22]," but also the specific authority

to adopt "rules for the approval of attorneys' fees for representation before the office and/or before the appellate division upon judicial review." Executive Law § 623(3).

Reading section 623(3)'s authorization to the Office to adopt rules governing the approval of attorneys' fees together with section 626(1)'s requirement that attorneys' fees be "reasonable," the Office plainly has the authority to determine that under certain general circumstances, attorneys' fees will not be deemed "reasonable." And contrary to the Third Department's view, nothing in the statute *prohibits* the Office from adopting rules that impose categorical limits on fee awards. Nor does the statute require that the agency determine all aspects of fee applications on a case-by-case basis.

This Court upheld analogous uses of general rules in *Matter of Bernstein v. Toia*, 43 N.Y.2d 437, 440 (1977) and *Acevedo*, 29. N.Y.3d at 220. In *Bernstein*, the Court upheld a Department of Social Services regulation that imposed maximum shelter allowances—referred to as a "flat grant concept"—for families in need of public assistance, without "making provision for exceptions due to circumstances peculiar to individual recipients." *Id.* at 440. In so doing, this Court rejected the

contention that the governing constitutional and statutory provisions "mandate[d] that public assistance must be granted on an individual basis in every instance, thus precluding recourse to the flat grant concept." *Id.* at 448.

Likewise in *Acevedo*, the Court rejected the petitioners' argument that the Commissioner of Motor Vehicles had abdicated her statutory discretion to decide applications for relicensing by setting forth categorical rules to decide such applications in lieu of case-by-case consideration. As the Court said, "[b]y promulgating rules to govern relicensing, the Commissioner ensures that her discretion is exercised consistently and uniformly, such that similarly-situated applicants are treated equally." *Id.* at 220.

A similar conclusion is warranted here. The statute contemplates that the Office has the authority *not* to award attorneys' fees if it determines that an award would not be reasonable under the circumstances. *See Matter of Kigin v. State of New York Workers' Comp. Bd.*, 24 N.Y.3d 459, 467 (2014) (holding that because the Legislature authorized the Workers Compensation's Board to issue a list of pre-authorized medical procedures, "[t]hat determination necessarily meant

that the Board consider what is *not* best practice and what may *not* be medically necessary") (emphasis in original). This authority, as Supreme Court held, "provides a sufficient statutory predicate for excluding attorneys' fees incurred in the preparation and submission of claims as, in the judgment and discretion of [the Office], 'not reasonable expenses'" (R. 11, quoting 172). By enacting general rules on attorneys' fees, the Office simply announced in advance its judgment that fees for certain tasks are not reasonable.

In concluding otherwise, the Third Department held that Executive Law § 626 precludes the Office from making attorneys' fees unavailable at any stage of the compensation claiming process, based on that statute's pronouncement that out-of-pocket loss "shall also include . . . the cost of reasonable attorneys' fees for representation before the office." Executive Law § 626(1). But the court's reading of the statute—focusing on the term "shall" while ignoring the modifier "reasonable"—does not withstand scrutiny. The court overlooks the requirement that attorneys' fee awards must be "reasonable" and that the authority for determining reasonableness rests with the Office.

Although the Office had the statutory authority to treat as reasonable fees for attorney representation "at all stages" in the claims process, as it did under its prior regulations, it was not required by statute to continue that approach. Nor was it barred from excluding fees for services at the initial stage of the claim process by the fact that article 22 of the Executive Law does not expressly authorize the Office to exclude such fees; it is enough that the statute gave the Office broad discretion to determine which fees are reasonable. *Matter of Bernstein v. Toia*, 43 N.Y.2d at 449. Indeed, "[s]ince the statute is silent" as to how the Office is to address fees for the various stages of a claim, "the regulations in no way conflict with the statute." *Matter of Medical Soc'y of State of New York v. Serio*, 100 N.Y.2d 854, 871 (2003).

Thus, the Third Department was wrong to conclude that the statute gave the Office no authority "to conclude that counsel fees are *never* 'reasonable' during the early stages of a claim and, thus, to categorically exclude awards of counsel fees for such representation in *every* instance" (R. 502) (emphasis in original). Rather, the Office has the discretion to determine, based on its experience, that certain tasks performed by attorneys in assisting claimants are not reasonable expenses.

That is exactly what occurred here. The Office's experience with the former regulations led it to conclude that attorneys' fees for tasks such as preparing and submitting claim forms were not reasonable expenses and should not be allowed as a general matter. As the Office's general counsel explained, the former regulations were so open-ended that "one could assert that attorneys' fee includes any assistance during the course of a claim," including such simple tasks as assisting claimants in completing and submitting the claim applications themselves and making phone calls to check on the status of a claim (R. 479; *see* R. 172, 321).

B. The Amended Regulations Do Not Conflict with the Statute or with Any Other Office Regulation

The Appellate Division purported to find a conflict between the new regulations and an earlier regulation, and from that conflict it manufactured a conflict with the authorizing statute. It was mistaken on both counts.

First, there is no necessary conflict between the new regulations, which exclude counsel fees for initial claim preparation, and 9 N.Y.C.R.R. § 525.9[d], which provides for the determination of counsel fees based

upon specified factors. The Appellate Division reasoned that 525.9[d]'s list of factors "contemplate[s] a case-by-case examination of the circumstances of each claim" (R. 504), and precludes a categorical exclusion of fees for services at the earliest stages of a claim. But the Office was entitled to construe its regulations in way that harmonizes them, as it did here. The Office construed the newer regulations as defining services for which fees are not available, and construed the case-specific criteria in section 525.9(d) as applicable only to those stages of the process where attorneys' fees are generally available. Because this is a rational construction of the agency's own regulations, that construction is controlling. *Andryeyeva v. New York Health Care, Inc.*, 33 N.Y.3d 152, 174 (2019).

Second, even if the newer regulations were in tension with section 525.9(d), which they were not, such tension would not establish that the newer regulations were also in conflict with the statute. The Appellate Division reasoned that if the newer regulations were in conflict with existing regulations, they were also in conflict with that statute, which directs the Office to "determine claims in accordance with rules and regulations promulgated by the director," 627(1). But that statutory

directive does not forbid the Office from modifying its regulations, and the Office was entitled to regard the newer regulation as modifying the older one.

Nothing in the statute requires the Office to permit attorneys' fee awards for all stages of the claims process, or to engage in case-by-case examinations of every phase of a fee application. The statute imposes some requirements on the Office's regulatory scheme: it directs that the Office's rules and regulations governing determination of crime victims' compensation claims provide certain notifications and administrative procedures, as well as expedited determination of certain claims, among other things. *Id.* § 627(1)(a)-(g). But the statute gives the Office great latitude in determining attorneys' fee awards: other than saying that, where reasonable, attorneys' fees are eligible for "representation before the office and/or before the appellate division upon judicial review" and may not exceed $1,000, the statute does not dictate the substance and content of the rules and regulations governing fee awards. Executive Law § 626(1).

Thus, the Appellate Division did not identify a conflict between the statute and the challenged regulations, but only a purported conflict

between the challenged regulations (9 N.Y.C.R.R. §§ 525.3(h); 525.9(a)) and an earlier-promulgated Office regulation (9 N.Y.C.R.R. § 525.9(d). To the extent there is tension between the challenged regulations and 9 N.Y.C.R.R. § 525.9(d), however, the Office rationally construed the challenged regulations, as the more specific and recently adopted regulations, as governing fees for the initial claims application. The case-specific criteria in section 525.9(d), in the Office's view, apply for those stages where attorneys' fees are available. Again, this was a rational construction of the Office's own regulations, so that construction is controlling. *Andryeyeva,* 33 N.Y.3d at 174.

For all of these reasons, the Office plainly had the authority to modify its rules and regulations to better carry out its statutory mandate, and nothing in the statute tethers the Office to any particular method for determining reasonable attorneys' fees.

C. The Office Rationally Precluded Attorneys' Fees for Preparing Claims Forms, Particularly in Light of Widespread Free Assistance

In promulgating the challenged regulations, the Office made a categorical judgment that attorneys' fees for the initial claim stage are unreasonable because the filing of a claim is a relatively simple task,

accomplished in most cases by the completion of a four-page form. The form comes with attached instructions and asks for basic information such as the nature of the crime and the resultant expenses incurred.[6] The completion of these forms, the Office reasonably determined, "is neither novel nor difficult, nor do [they] require any specialized, legal services" (R. 483). Indeed, "[m]any thousands of [the Office's] claimants do so without any third-party assistance every year" (R. 483).

In rejecting this sensible rule as an excess of the Office's authority, the Third Department noted that "it is not always true" that "the initial submission of a claim is a relatively simple process" that does not require an attorney's help, citing additional forms that petitioner Soriano filed in support of a request for an emergency award. (R. 504-505.) But, the Third Department's concern about the rare cases where crime victims need assistance to complete the claim forms implicates the *rationality* of the challenged regulations, not the Office's *statutory authority* to promulgate

[6] The claim forms have been available on the Office's website for several years, since before Velez and Soriano filed their claims; indeed, Velez utilized a version of this application (R. 376-385). *See* https://ovs.ny.gov/victim-compensation (providing link to Victim Services Portal, permitting claimants to upload documents in support of their claim and to monitor its progress).

them. And that concern is misplaced because the Office's categorical judgments about attorneys' fees are rational, notwithstanding the possibility that exceptional cases might exist.

Indeed, for the exceptional cases where crime victim claimants might require assistance in completing the form, the Office reasonably determined that the VAPs were available to provide such assistance free-of-charge, rendering unnecessary attorney assistance for the initial stage of the claims process (R. 483). In view of the extensive statewide network of VAPs, the Office concluded that a case-by-case inquiry of all fee applications to determine whether attorney assistance was required to complete the application form was simply not cost effective. Because this determination falls within the Office's area of expertise, it is entitled to deference. *Acevedo*, 29 N.Y.3d at 228; *Consolation Nursing Home v. Commissioner of N.Y. State Dep't of Health*, 85 N.Y.2d 326, 331 (1995).

In summarily dismissing the critical role VAPs play in helping crime victims file claims for compensation, the Third Department improperly substituted its judgment for that of the Office as to the best way to fulfill the Office's statutory mandate. *See Matter of Chemical Specialties Manufacturers Ass'n v. Jorling*, 85 N.Y.2d 382, 396 (1995).

The assistance VAPs provide crime victims underscores the rationality of the Office's conclusion that attorney reimbursement for such tasks was not reasonable; indeed, the Office took into account that hundreds of local VAPs, backed by Office training and millions of dollars in federal and state financial support, are available to provide free assistance to claimants in filing a claim, including assistance in preparing the claim forms (R. 172, 479). The Office determined that reimbursement to private attorneys for these services "cannot be considered reasonable expenses, particularly when the Office itself has invested so much in building a statewide network of VAPs, serving every county in New York State, to assist in this very manner" (R. 172).

Nor was the Office barred from using categorical rules as a general matter. Nothing in this Court's precedents suggests that categorical rules are per se irrational. Although this Court has invalidated across-the-board reductions in Medicaid reimbursement when there was no rational basis for them, *see New York Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 167-168 (1991), it has upheld categorical reimbursement limitations—including for eligible attorneys' fees—when they are supported by the agency's expertise and experience. *See Matter of Medical Soc'y of State*

of New York, 100 N.Y.2d at 871 (upholding the reasonableness of regulations reducing the availability of attorneys' fees for no-fault insurance claims); *Matter of Sigety v. Ingraham*, 29 N.Y.2d 110, 114 (1971) (holding that 50% Medicaid reimbursement standard was rational based on Commissioner's experience that efficiently run nursing homes will have costs below that standard).

Like the Commissioner in *Matter of Sigety v. Ingraham*, here the Office has, based on its expertise and experience, "simply announced in advance that certain . . . cost[s] will be rejected as unreasonable." 29 N.Y.2d at 115; *accord Matter of Old Republic Life Ins. Co. v. Wikler*, 9 N.Y.2d 524, 531 (1961) (upholding Insurance Superintendent's rate standards that declared in advance that certain rates are unreasonable). Requiring the Office to review every fee application on a case-by-case basis to determine whether the costs incurred at the application stage were reasonable would needlessly sap the agency's limited resources and create the risk of inconsistent decisions. And the Office's criteria for evaluating attorneys' fees applications do not "conflict with" or "disregard[]" the amended regulations (R. 504), since the Office would continue to employ these criteria to evaluate applications made upon

administrative reconsideration or judicial review. Accordingly, this Court should uphold the amended regulations as a rational exercise of the Office's rule-making authority.

D. The Amended Regulations Reflect the Spirit and Purpose of Executive Law Article 22

Finally, the Office's regulations are in harmony with the "the general spirit and purpose of the statute," which "is an important aid in understanding the meaning of its words." *Hernandez v. Barrios-Paoli*, 93 N.Y.2d 781, 786 (1999). The primary purpose of Article 22 is "to provide aid, care and support" for crime victims, not to provide economic opportunities or a steady stream of income for attorneys. Executive Law § 620. If the Appellate Division's decision is allowed to stand, there are thousands of claims before the Office that attorneys may seek to reopen in attempts to secure the $1,000 attorney fee award readily available under the former regulations. And the more of these unnecessary attorneys' fee applications the Office is required to examine and potentially pay out, the less money is available to compensate crime victims.

The resulting drain on the Office's limited funds works to the detriment of the very crime victims whom the statute was designed to protect; indeed, the fee applications often exceed the actual compensation sought by the victims. For example, the Gordon law firm sought $937.50 in attorneys' fees for Juarez, who received a $315 award (R. 85, 87, 95-97). Additionally, the Gordon law firm sought $1,437.50 in attorneys' fees for assisting Rodriquez, who received an award of just $205 (R. 99-100, 108-109). And this firm applied for $1,250 in attorneys' fees based on the Office's $125 award to Soriano (R. 131-132). Even after applying the $1,000 limit on fee awards, the fees would be multiple times greater than the victims' awards—even though much of the attorney time was spent on clerical tasks such as completing the form and making simple requests for client information (*see, e.g.* R. 96-97, 108-109, 393-394).

Requiring case-by-case examination of these exorbitant fee requests undermines the Legislature's intent. Because the Third Department's opinion disrupts the reasonable balance the Office sought to strike between the salutary goal of compensating crime victims for their losses and the need to conserve limited program funds, this Court

should uphold the Office's amended regulations as a lawful and rational exercise of its authority.

CONCLUSION

The Third Department's order should be reversed and Supreme Court's judgment reinstated.

Dated: Albany, New York
December 12, 2019

Respectfully submitted,

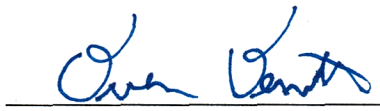
LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants

By: _____
OWEN DEMUTH
Assistant Solicitor General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2053
Owen.Demuth@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
VICTOR PALADINO
Senior Assistant Solicitor General
OWEN DEMUTH
Assistant Solicitor General of Counsel

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Owen Demuth, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,516 words, which complies with the limitations stated in § 500.13(c)(1).



Owen Demuth