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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

CASE NOS.
2020-03746
2021-00560

In the Matter of the Application of

TERRENCE STEVENS and BENJAMIN JOSEPH,

Petitioners-Appellants,

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

—against—

THE NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, THE NEW YORK STATE COMMISSION ON FORENSIC SCIENCE, MICHAEL C. GREEN, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DEPUTY COMMISSIONER OF THE DIVISION CRIMINAL JUSTICE SERVICES AND CHAIRMAN OF THE COMMISSION OF FORENSIC SCIENCE, and THE NEW YORK STATE COMMISSION ON FORENSIC SCIENCE DNA SUBCOMMITTEE,

Respondents-Respondents.

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QUESTIONS PRESENTED

In 1994, the New York State Legislature enacted the New York DNA Statute, which authorized the creation of a DNA identification index (the "DNA Databank") to store the private genetic information of a specified group of New Yorkers convicted of certain crimes. The Statute enumerated the narrow purposes for which the stored information could be used. And the Statute delegated to Respondents—three executive agencies—the responsibility to develop technical standards for collecting and processing DNA samples, and for extracting and storing genetic information from the collected samples.

In the years after enacting the 1994 Statute, the Legislature incrementally expanded the population of New Yorkers whose genetic information could be collected for, and stored in, the Databank. The Legislature also debated, but did not enact, bills that would permit a new, additional use of the information in the Databank—namely, "familial searching." In "familial searches," police do not seek to determine whether a DNA sample obtained from a crime scene might belong to an individual whose genetic information is stored in the Databank; instead, they seek to determine whether a DNA sample obtained from a crime scene might belong to a close biological relative of an individual whose genetic information is stored in the Databank. While the Legislature declined to permit such searching, which would target only the family members of convicted criminals and other individuals whose

genetic information had been collected and stored, Respondents took it upon themselves to enact the "FDS Amendment," 9 NYCRR §§ 6192.1, 6192.3, and permit such searches in New York. The questions presented are:

1. Did Respondents have the authority to implement the FDS Amendment, even though all four factors articulated in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), compel the conclusion that they did not?

Supreme Court denied Appellants' Article 78 Petition on the ground that the promulgation of the FDS Amendment did not violate separation of powers under *Boreali*.

2. Is the FDS Amendment arbitrary and capricious, given its disproportionate impact on New Yorkers of color and the limited efficacy of familial searching, factors that the Respondents were ill-equipped to consider or weigh, and did not properly consider or weigh, in any event?

Supreme Court held that the FDS Amendment had a rational basis and was not arbitrary and capricious.

NATURE OF THE CASE

The New York Legislature determined which New Yorkers should have their genetic information collected by the State and stored in the State's DNA Databank, to be used by the police in determining whether some future crime scene might contain DNA that one of those individuals left behind. As befits the most profoundly

personal and intimate individual information, the Legislature specified the narrow uses to which such involuntarily-collected genetic information could be put.

Beginning in 2014, the Legislature repeatedly considered whether to permit the DNA Databank to be used for another purpose: familial searching. In a familial search, the police do not seek to determine whether DNA found at a crime scene might belong to one of the individuals whose genetic information was collected and stored in the Databank, but instead seek to determine whether that DNA might belong to a close biological relative of someone whose genetic information was collected and stored in the Databank. Familial searching is thus a tool aimed exclusively at individuals with family members who were convicted of crimes (or otherwise subject to the DNA Statute). As such, it is a tool that disproportionately points to people of color within the state. Each time the Legislature considered whether to permit familial searching, it declined to do so. Against that backdrop, Respondents arrogated the decision to themselves, and decided not only that familial searching would be permitted in New York, but how, in what circumstances, and with what oversight (their own).

Respondents had neither the authority nor the expertise to make the complex policy-based decisions reflected in their FDS Amendment, which authorizes familial searching in New York. The FDS Amendment is unlawful for those reasons alone. Moreover, by disproportionately and unnecessarily burdening New Yorkers of color

who themselves have never committed a crime, the FDS Amendment is also arbitrary and capricious.

Appellants commenced an Article 78 proceeding to set aside the FDS Amendment. Supreme Court dismissed the Petition, after conflating familial searching with the Databank uses permitted by the Legislature, and misapplying the controlling law on separation-of-powers and delegation. The Petition should be granted, and the FDS Amendment vacated.

STATEMENT OF FACTS

A. New York State's DNA Databank

The New York State DNA identification index ("DNA Databank" or "Databank") contains the genetic profiles, stored as "DNA Records," of certain individuals in New York State ("Databanked Individuals"). By statute, the genetic information contained in the DNA Databank is, for each Databanked Individual, "DNA identification information prepared by a forensic DNA laboratory . . . for purposes of establishing identification in connection with law enforcement investigations." Exec. Law § 995(8).

When blood, semen, saliva, or similar biological matter is discovered at a crime scene and collected by the police, it may contain the DNA of a person who was present there. If a DNA laboratory can extract the genetic information from such a "forensic DNA sample," that information may be compared with the

individual genetic profiles stored in the DNA Databank. If the genetic information from the forensic DNA sample "matches" the genetic profile of a Databanked Individual, it may be posited that the forensic DNA sample came from that Databanked Individual—i.e., that the Databanked Individual's blood, semen, saliva, or similar biological matter was present at the crime scene.

Defining what constitutes a "match" between the genetic information obtained from a forensic DNA sample and the genetic profile of a particular Databanked Individual implicates numerous technical and scientific issues relating to collecting and analyzing DNA samples and the genetic information that they contain. The Legislature delegated to Respondents, who include scientific experts in DNA technology, the responsibility for formulating that definition. *See* Exec. Law § 995-b(12) (authorizing Respondents to "[p]romulgate standards for a determination of a match between the DNA records contained in the [DNA Databank] and a DNA record of a person submitted for comparison therewith"). If a search results in a match meeting the scientific thresholds set by Respondents, the Databanked Individual's name is provided to the police, who may investigate whether the Databanked Individual was, in fact, the source of the forensic DNA obtained from the crime scene. *See* Exec. Law § 995-c(6).

In the year leading up to Respondents' promulgation of the FDS Amendment, there were eight times as many Black New Yorkers in the state's prisons as there

were white New Yorkers. R.355. There were three times as many Hispanic New Yorkers incarcerated as non-Hispanic white New Yorkers. R.355, 357. Because the DNA records of all New Yorkers convicted of a felony and all those convicted of a misdemeanor are subject to inclusion in the DNA Databank, *see* Exec. Law §§ 995(7), 995-c(3), the database itself disproportionately represents New Yorkers of color as compared to the overall population. Other DNA Databanks are similarly non-representative, and therefore present the same obvious risk: "One scholar has estimated that four times as many African Americans will be 'findable' through such searches as will Caucasians, and other estimates produce still more dramatic numbers." R.435.

B. Parties

Appellant Terrence Stevens is a resident of Brooklyn, New York. R.45–46 ¶ 9. He has never been arrested or convicted of any crime, and he therefore is not subject to having his personal genetic information entered into New York State's DNA Databank under Exec. Law § 995-c. *Id.* His brother, T. Stevens, however, is a convicted offender in New York State (for Criminal Possession of a Firearm in the Third Degree) whose genetic information has been entered into the DNA Databank. *Id.* Both Terrence and his brother are Black Americans. *Id.*

Appellant Benjamin Joseph is a resident of Mount Vernon, New York. R.46 ¶ 10. He has never been arrested or convicted of any crime, and therefore is not

subject to having his personal genetic information entered into New York State's DNA Databank under Exec. Law § 995-c. *Id.* His brother, B. Joseph, however, is a convicted offender in New York State (for Assault in the Third Degree) whose genetic information has been entered into the DNA Databank. *Id.* Both Benjamin and his brother are Black Americans. *Id.*

Respondent New York State Division of Criminal Justice Services (the "Division") is a New York State executive department constituted under Exec. Law § 837. R.46 ¶ 11. It provides direct training to law enforcement, oversees law enforcement accreditation, maintains criminal history records, and administers the State's DNA Databank. *Id.*; *see also* Exec. Law § 995-c.

Respondent New York State Commission on Forensic Science (the "Commission") is a New York State executive commission constituted under the New York DNA Statute. Exec. Law §§ 995-a, 995-b; R.46 ¶ 12. It is responsible for administrative oversight of the New York State DNA Databank. *See* Exec. Law § 995-b.

Respondent Michael C. Green (the "Commissioner") is the Executive Deputy Commissioner of the Division, as well as the Chairman of the Commission. R.46 ¶ 13.

Respondent New York State Commission on Forensic Science DNA Subcommittee (the "DNA Subcommittee") is a New York State executive

commission constituted under the New York DNA Statute. Exec. Law § 995-b(13); R.46–47 ¶ 14. By law, it is comprised of seven scientists who serve for three-year terms, *see* Exec. Law § 995-b(13)(a); at all relevant times, no member was an attorney or judge. *See* R.454–55 ¶ 16. It is responsible for assessing all DNA methodologies proposed to be used for forensic analysis, and for making recommendations to the Commission. *See* Exec. Law § 995-b(13). The chair of the DNA Subcommittee appoints the remaining six members, who must collectively "represent" the following disciplines: population genetics, laboratory standards and quality assurance regulation, and forensic science. *Id.* The DNA Subcommittee need not (and does not) have expertise in privacy or constitutional law and policy, nor in racial or social justice policy.

C. The New York State Legislature Specified Whose Genetic Information May Be Included In The DNA Databank, And How It May Be Used

In authorizing the creation of the DNA Databank, the New York State Legislature specified that the Databank could only include the DNA information of a narrowly defined class of individuals—persons convicted of enumerated felonies, which included certain homicide, assault, and sexual offenses. *See* Exec. Law §§ 995(7), 995-c(3) (McKinney 1994). Since then, the Legislature has authorized discrete additions to the list of crimes for which, if convicted, individuals may have their genetic information added to the Databank—including felonies such as drug dealing and robbery in 2000 (Exec. Law § 995, as amended by L. 2000, ch. 8),

terrorism offenses in 2004 (Exec. Law § 995, as amended by L. 2004, ch. 1), all remaining felony offenses and some misdemeanor offenses in 2006 (Exec. Law § 995, as amended by L. 2006, chs. 2, 91, 320), and eventually all misdemeanor offenses (Exec. Law § 995, as amended by L. 2012, ch. 19; Exec. Law § 995, as amended by L. 2021, ch. 92).

The most recent expansion of the DNA Database is notable. On March 14, 2012, Assemblyman Joseph R. Lentol—the first sponsor of the legislation in 1994 that created the DNA Databank and chair of the Committee on Codes—sponsored a bill that would require anyone convicted of any felony or almost any penal law misdemeanor to provide a sample of genetic material for the Databank. *See* Exec. Law § 995, as amended by L. 2012, ch. 19. The bill was heavily debated and drew significant public attention. *See* R.336–37. Opponents voiced concern that the proposed expansion would be another step toward creating a universal DNA database, containing DNA information for all New Yorkers. *See* R.414–18. Members of the defense bar warned that "expansion of New York's DNA database is bringing the state closer to the point where all citizens may someday have to submit a sample, whether they have committed crimes or not." R.418.

Legislators articulated similar concerns. But Assemblyman Lentol himself assured fellow lawmakers articulating those concerns that the 2012 expansion would be the last:

> [ASSEMBLYMAN] MR. REILLY: . . . I do see this as the last incremental step before we collect everybody's DNA using the same rationale that now we can catch the criminals. And law officers, all those in the judicial system, of course, would love to have everybody's DNA, and I've heard that suggested in this very Chamber. . . . [W]e've seen a steady incremental expansion of the database over the last seven years and, I believe, that collecting everybody's DNA is a very, very serious violation of our privacy rights.
>
> MR. LENTOL: Well, if what you mean by "collecting everybody's DNA" you're talking about those people who are convicted of crimes, you are correct. That's not everybody in my world. It's everybody [who has] been convicted of a crime.
>
> * * *
>
> MR. REILLY: My question is would you make a definitive statement here that you, as the sponsor of this legislation and, really, the father of this concept, that you will adamantly oppose any further expansion of the database?
>
> MR. LENTOL: Yes.

R.269–71.

After extensive debate, the Legislature passed Assemblyman Lentol's bill. Governor Cuomo signed it into law, codifying the Legislature's intent to require only those convicted of a crime to have their identity and genetic information included in the DNA Databank. *See* Exec. Law §§ 995(7), 995-c(3).

The law authorizing the DNA Databank has been on the books for more than twenty years. During that time, the Legislature has not only precisely delineated

whose genetic information may be included in the Databank, it has also carefully specified the limited purposes for which the DNA Databank could be used. In addition to permitting the Databank to be used for certain research projects and for the exoneration of defendants, the Legislature has authorized DNA records of Databanked Individuals to be released to law enforcement agencies only "for law enforcement identification purposes upon submission of a DNA record in connection with the investigation of the commission of one or more crimes . . . ." Exec. Law § 995-c(6)(a).[1] And the Legislature has never delegated away what it recognizes—as the floor debates cited above demonstrate—to be its primary responsibility: balancing the putative interests of law enforcement with New Yorkers' rights to privacy and to be free from unwarranted police intrusion into their lives.

D. The Legislature Repeatedly Considered Authorizing Familial Searching, But Did Not Do So

1. Familial Searching Creates A Class Of Potential Suspects In All Investigations Defined Solely By Their Biological Relationship To Convicted Felons and Others In The NYS Databank

A familial search, as defined by Respondents in the FDS Amendment at issue

[1] The statute also permits DNA records to be used to assist in the recovery or identification of specified human remains, provided that the Division and the agency execute a written agreement governing the use of the DNA records; to create a population statistics database; and to support research towards the development of protocols for forensic DNA analysis and for quality control. *See* Exec. Law § 995-c(6). None of those permitted uses encompasses familial searching.

here (and as described further below), is a targeted search of Databanked DNA that specifically seeks to determine whether a Databanked Individual is a biological relative of the person whose DNA is uncovered at a crime scene. *See* 9 NYCRR § 6192.1(ab) (defining a familial search as "a targeted evaluation of [Databanked Individuals'] DNA profiles in the DNA [D]atabank which generates a list of candidate profiles based on kinship indices to indicate potential biologically related individuals to one or more sources of evidence").

Law enforcement officers may regard familial searching as an attractive tool for identifying potential persons of interest—i.e., such a search might suggest that certain Databanked Individuals could be biological relatives of the individual who was the source of the forensic DNA. Armed with that information, law enforcement might investigate family members of the Databanked Individuals identified through the familial search. In short, a familial DNA search is a search for potential criminal suspects from a pool consisting only of the close biological relatives of convicted offenders.

2. Before Respondents Created A Familial Search Program, The Legislature Repeatedly Considered Authorizing Such Searches—But Declined To Do So

During the years before Respondents created a familial search program, the New York Legislature repeatedly considered whether to grant Respondents authority to do so—and repeatedly declined to do so.

On the Assembly side, bills that would amend the New York DNA Statute to permit familial searching were proposed and submitted to the Governmental Operations Committee in 2014, 2015, 2016, 2017, and 2018. *See* 2014 N.Y. Assembly Bill A-9247 (referred Apr. 2, 2014); 2015 N.Y. Assembly Bill A-1515 (referred Jan. 12, 2015 and Jan. 6, 2016); 2017 N.Y. Assembly Bill A-683 (referred Jan. 9, 2017 and Jan. 3, 2018). None of those bills ever made it out of committee.

In the New York Senate, on December 9, 2016, Senator Phil Boyle introduced a bill that would "authorize familial DNA searching in New York and authorize the DNA Subcommittee to create a report on familial searching." 2016 N.Y. Senate Bill S-8216. That bill never made it out of the Senate Rules Committee.

A substantially identical bill was introduced in early 2017, *see* 2017 N.Y. Senate Bill S-2956, to "allow the [C]ommission and the DNA [S]ubcommittee to determine the best practices for implementing familial searching in New York by establishing a NYS Familial Search Policy." *Senate Bill S2956A*, N.Y. State Senate, https://www.nysenate.gov/legislation/bills/2017/S2956 (last visited May 2, 2021). That bill would only allow for "limited circumstances" in which familial DNA searches could be conducted, including when "all other investigative leads have been exhausted." *Id.*; 2017 N.Y. Senate Bill S-2956, § 1. The bill would have explicitly provided the DNA Subcommittee with "the powers of a legislative committee pursuant to the legislative law" so that it could provide "nonbinding

recommendations for a New York state familial search policy." 2017 N.Y. Senate Bill S-2956, § 1. The Senate Rules Committee voted 17–1 in favor of Senate bill S-2956 on February 6, 2017, and it passed 49–11 that same day during a full Senate vote. *Senate Bill S2956A*, N.Y. State Senate, https://www.nysenate.gov/legislation/bills/2017/S2956 (last visited May 2, 2021). The bill was referred to the Assembly, where it languished in the Governmental Operations Committee, until January 3, 2018, when it was deemed to have "died in Assembly." *Id*. It was therefore returned to the Senate and referred to the Senate Finance Committee, where it sits today. *Id*.

The bills themselves reflected some of the significant policy questions that must be addressed in fashioning a familial DNA search program: When should the police be permitted to subject New Yorkers to greater scrutiny (and police interactions) solely because they are genetically related to convicted offenders or Databanked Individuals? What degree of kinship with a convicted offender should be required before a New Yorker is faced with such additional scrutiny? What crimes might warrant this scrutiny of family members? What procedural safeguards should protect New Yorkers against prosecutorial overreach through such a powerful and intrusive search regime? What level of judicial oversight, if any, should be afforded to a request for a familial search? *See, e.g.,* 2015 N.Y. Assembly Bill A-1515, § 2 (providing that "a local court" would determine whether law enforcement sufficiently showed that there is "reasonable cause" to believe that a familial search

may generate a lead, the crime is unsolved and "all practicable investigative leads have been exhausted," and an attempt to find an exact match has proven unsuccessful); 2017 N.Y. Senate Bill S-2956, § 1 (providing that the DNA Subcommittee would recommend "parameters for familial DNA searching" and "procedures for when familial searches should and should not be used").

E. Respondents Enacted The FDS Amendment In The Absence Of Legislative Authorization

At the same time that the Legislature debated the policy questions underlying whether to permit familial searching of the NYS Databank, Respondents took the matter into their own hands, made their own policy choices, and enacted the FDS Amendment at issue here.

The Commission began its own work on a familial DNA search policy on December 20, 2016, by inviting public comment on that subject. *See* R.290. On February 10, 2017, the Commission formally requested that the DNA Subcommittee consider whether New York State should deploy familial searching and, if so, under what circumstances. R.864–65. Largely through non-public meetings, with no public record of the discussion or voting, the DNA Subcommittee developed what would become the FDS Amendment. *Id*.

On May 19, 2017, the DNA Subcommittee submitted its binding recommendation that the Commission adopt its proposed familial search policy. R.246. The Commission formally adopted the policy on June 16, 2017, and on

October 18, 2017, after notice and comment, the Division promulgated the policy in the New York State register as an amendment to 9 NYCRR § 6192—less than ten months after the Commission first announced its intent to study the issue. *See* R.243, 246.

F. The FDS Amendment Reflects A Series Of Policy Choices Made By Respondents

The FDS Amendment permits familial searching of the DNA Databank when certain conditions are met. Those conditions reflect Respondents' decisions on a broad range of policy concerns.

First, Respondents determined the threshold for familial searching, specifying that law enforcement agencies may only request a familial search of the DNA Databank after it has been determined that "there is not a match or a partial match to a sample in the DNA [D]atabank." 9 NYCRR § 6192.3(h).

Second, Respondents determined the penological standard for implementing a familial search—specifying that a familial DNA search may only be conducted if the forensic DNA is associated with certain crimes or "a crime presenting a significant public safety threat." *Id.* § 6192.3(h)(1)(iv).

Third, Respondents defined the societal need that would justify a familial DNA search in a particular case—specifying that familial searching may only be done if "reasonable investigative efforts have been taken in the case, or exigent

circumstances exist." *Id.* § 6192.3(h)(2) (requiring certification by the agency and "appropriate prosecutor" to one of the foregoing).

Fourth, Respondents made the policy determination of which biological relatives of a Databanked Individual should be subject to the scrutiny and targeting resulting from a familial search. Respondents decided that they themselves would set the "kinship threshold values" to be used to determine when there is a "hit" in the DNA Databank, *Id.* § 6192.3(j)—i.e., how similar the genetic information of any Databanked Individual needs to be to the genetic information in the forensic DNA sample to warrant further action. Thus, Respondents themselves would determine how large a population of potential "relatives" of Databanked Individuals should be swept within the familial search.

Fifth, Respondents decided that they would not require that biological relatives identified through familial searching be informed that they had been identified, or be given a chance to challenge the search results, before the police could begin to investigate them.

And sixth, Respondents made the political determination that it would be the executive branch—and more specifically the Commissioner—who would decide, after balancing all interests in a particular case, whether a particular familial DNA search is warranted. *Id.* § 6192.3(i)(2)(ii).

G. Appellants Commenced This Article 78 Proceeding And Supreme Court Dismissed The Petition

On February 16, 2018, Appellants filed an Article 78 Petition, challenging Respondents' authority to implement the FDS Amendment on the ground that Respondents did so in violation of separation of powers. R.62–70. Appellants further challenged the FDS Amendment as unconstitutional, because it authorizes unreasonable suspicionless searches of New Yorkers, and as arbitrary and capricious, because it burdens New Yorkers of color while providing little investigatory benefit. R.70–78. Finally, Appellants challenged the FDS Amendment as having been promulgated without proper consideration of public commentary, in violation of New York's Open Meetings Law. R.78–81. Respondents denied all counts, and asserted that Appellants lacked standing to bring the action. R.446–47.

On March 26, 2020, Supreme Court issued a decision and order finding that Appellants had standing to bring the Article 78 Petition, but otherwise denied the Petition in its entirety. R.4–20.

STANDARD OF REVIEW

This Court reviews Supreme Court decisions *de novo*. *See Matter of Indus. Liaison Comm. of Niagara Falls Area Chamber of Com. v. Williams*, 72 N.Y.2d 137, 144 (1988). In reviewing an Article 78 proceeding, questions of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent," require no deference to the agency because "there is little basis to rely on any special

competence or expertise of the administrative agency." *Kurcsics v. Merchs. Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980); *see also Matter of Gruber*, 89 N.Y.2d 225, 231–32 (1996) ("judiciary need not accord any deference to the agency's determination" for questions of statutory interpretation); *Lewis Family Farm, Inc. v. N.Y. State Adirondack Park Agency*, 64 A.D.3d 1009, 1013 (3d Dep't 2009) (questions of "[p]ure legal interpretation . . . require[] no . . . deference" to the agency (citation omitted)); *Adirondack Wild: Friends of the Forest Pres. v. N.Y. State Adirondack Park Agency*, 34 N.Y.3d 184, 199 (2019) ("The judicial standard of review for an administrative agency decision, while deferential, does not require the Court to act as a rubber stamp.").

"[B]oth [the Appellate Division] and Supreme Court have jurisdiction to determine whether, on the record presented, a given result would be arbitrary or capricious." *Pantelidis v. N.Y.C. Bd. of Standards & Appeals*, 43 A.D.3d 314, 318 (1st Dep't 2007), *aff'd*, 10 N.Y.3d 846 (2008); *see also N. Westchester Prof'l Park Ass'n v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983) (holding that the Appellate Division's "authority is as broad as that of the trial court and . . . it may render the judgment it finds warranted by the facts").

ARGUMENT

From the time that it created the DNA Databank, through each incremental revision to the laws that govern it, the Legislature has meticulously specified whose

private genetic information may be taken and stored by the State, and the use to which that information may be put. In making the decision to permit the new familial-searching use at issue here—a use the Legislature wrestled with repeatedly but declined to permit—Respondents arrogated to themselves authority they did not have, including the authority to make numerous policy decisions regarding the availability and operation of the new type of searching. The resulting regulation should therefore be struck.

The regulation should be vacated for the additional, independently sufficient reason that it is arbitrary and capricious, targeting New Yorkers—disproportionately New Yorkers of color—as criminal suspects simply because they have family members who have had encounters with the criminal justice system. Targeting individuals as criminal suspects simply because they have close relatives in jail is not only arbitrary and capricious and contrary to principles of equality, but it represents a law enforcement policy decision so profound that only the Legislature can make it.

I. The FDS Amendment Should Be Vacated Because Respondents Lacked The Authority To Promulgate It

Separation of powers "is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions." *Matter of Maron v. Silver*, 14 N.Y.3d 230, 258 (2010). The responsibility for "mak[ing] the primary policy decisions" is

vested in one branch: "the legislature." *LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018). Administrative agencies, "possess[ed of] technical expertise," *id.*, are authorized only "to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." *Matter of Gen. Elec. Capital Corp. v. N.Y. State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004). Such agencies may only "flesh out" the policies set by the Legislature, not create new policies themselves. *Shah*, 32 N.Y.3d at 298. Where, as here, an agency promulgates regulations that cross the "line between administrative rule-making and legislative policy-making," the agency has acted outside of its limited powers and those regulations must be annulled. *Id.* at 260 (citation omitted).

In *Boreali v. Axelrod*, 71 N.Y.2d 1, 11 (1987), the Court of Appeals articulated four factors that should guide New York courts in considering whether "the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed." They are:

> "whether (1) the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the [L]egislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged

regulation."

Matter of N.Y.C. C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Pres., 27 N.Y.3d 174, 179–80 (2016) (internal quotation marks and citations omitted). But these factors are not "discrete, necessary conditions that define improper policymaking by an agency." *N.Y. Statewide Coal. of Hispanic Chambers of Com. v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 696 (2014). Rather, they are "overlapping, closely related factors that, taken together," indicate whether an agency has "cross[ed] the line into legislative territory." *Id.* at 696.

Proper consideration of each of the *Boreali* factors compels the conclusion that Respondents acted outside of their delegated authority, and impermissibly intruded into the Legislature's policy-making domain, when they issued the FDS Amendment permitting familial searching. Supreme Court's finding to the contrary was erroneous.

A. Factor I: In Promulgating the FDS Amendment, Respondents Made Policy Decisions That Were Outside Of Their Bailiwick

The first *Boreali* factor looks to whether, in promulgating a regulation, the agency merely "balance[d] costs and benefits according to preexisting guidelines," (i.e., acted within the confines of its rulemaking authority), or instead made "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems," (i.e., impermissibly intruded into legislative territory). *See N.Y.C. C.L.A.S.H.*, 27 N.Y.3d at 179–180. Regulations that embody "a distinct value

judgment" that is "not clearly connected to the objectives outlined by the legislature" are the unlawful product of a usurpation of legislative authority. *Shah*, 32 N.Y.3d at 268–69. Likewise, an agency exceeds its authority when it makes value judgments in order to decide between complex, competing policy goals. *See id.*

Here, the FDS Amendment implemented regulations that are "out of harmony with the applicable statute"—i.e., the New York DNA Statute, Exec. Law §§ 995–995-f. *Weiss v. City of New York*, 95 N.Y.2d 1, 5 (2000). And promulgating the regulations required Respondents to make a series of profound value judgments that only the Legislature was authorized to make.

1. The FDS Amendment Is Outside The Scope Of The Agency's Enabling Statute

The Legislature delegated to Respondents the responsibility to "[p]romulgate standards for a determination of a match between the DNA records contained in the [DNA Databank] and a DNA record of a person submitted for comparison therewith." Exec. Law. § 995-b(12). That means the Legislature delegated to Respondents the authority to determine how similar the forensic DNA must be to the DNA of the Databanked Individual in order for there to be a "match." *Id*.

The FDS Amendment does something entirely different: it defines an entirely new use of Databanked DNA when the conditions specified by the Legislature for agency rulemaking—a match or partial match to forensic DNA—are absent. *See* 9 NYCRR § 6192.3(h) (authorizing Respondents to conduct a familial search "[w]hen

there is not a match or a partial match to a sample in the DNA databank"). The familial searches created by the FDS Amendment are not a creature of Respondents' enabling statute. Instead, the Amendment implements a new type of search to be applied—when the circumstances defined by the enabling statute are not present. And that new type of search implements a choice between two profoundly different and competing policies.

2. The FDS Amendment Implemented Complex Policy Decisions

The decision to create familial searching, and the decisions about when it should be available, all reflect the very kind of "choice between competing public policy interests" that impermissibly crosses the line into legislative territory. *Shah*, 32 N.Y.3d at 269. These policy considerations are profound—where to draw the line between providing the police with investigative tools they claim they need and protecting the rights of New Yorkers of color; determining how much power executive agents should have to use genetic material to target citizens; how to appropriately balance New Yorkers' privacy interests in their genetic information; and what restraints, if any, should be placed on the police in investigating crimes.

These "value judgments" cannot be made by an agency such as the Commission. In *Boreali*, the Public Health Council implemented anti-smoking regulations that reflected the "balance . . . between safeguarding citizens from involuntary exposure to secondhand smoke on the one hand, and minimizing

governmental intrusion into the affairs of its citizens on the other." 71 N.Y.2d at 12. Because the agency had "built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it was acting solely on its own ideas of sound public policy and was therefore operating outside of its proper sphere of authority." *Id.*

Similarly, in *Hispanic Chambers of Commerce*, the City Board of Health's regulations restricting restaurants from selling sugary drinks reflected a choice "between ends, including public health, the economic consequences associated with restricting profits by beverage companies and vendors, tax implications for small business owners, and personal autonomy with respect to the choices of New York City residents concerning what they consume." 23 N.Y.3d at 698. Thus, "[b]y choosing between public policy ends in these ways, the Board of Health engaged in law-making beyond its regulatory authority." *Id.* at 699.

So, too, here. The familial search regulations likewise reflect complex choices between the privacy interests of New Yorkers and the interests of law enforcement in generating investigative leads; whether the biological relatives of convicted offenders should become the subjects of police investigation, based solely on their genetic similarity to convicted offenders; and, if so, about how similar forensic DNA must be to that of a Databanked Individual in order to sweep into a criminal investigation the biological relatives of a Databanked Individual—i.e., how many

such relatives should be targeted, and how closely related they must be.

The burdens involved, and the balancing that must be done, reach such profound questions of privacy, freedom from investigation, and police power and scrutiny, that they even implicate constitutional norms. *See United States v. Kincade*, 379 F.3d 813, 851, 869 (9th Cir. 2004) (Reinhardt, J., dissenting) (noting that each expanding use of DNA profiles "represents an alarming trend whereby the privacy and dignity of our citizens [are] being whittled away by [ ] imperceptible steps" and endangers "all of our interests in privacy and personal liberty" (alterations in original) (citation omitted)).

Likewise, Respondents' decision to vest in the Commissioner the final authority to determine when a familial search can be made represents a policy determination as to how to balance the powers and interests of the three branches of government. And vesting such power in the Executive branch flies in the face of established norms. *See Missouri v. McNeely*, 569 U.S. 141, 148 (2013) ("[T]he importance of requiring authorization by a neutral and detached magistrate before allowing a law enforcement officer to [search for] evidence of guilt is indisputable and great." (citation omitted)); *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) ("This Court long has insisted that inferences of probable cause be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (citation omitted)).

Respondents' decision not to provide a neutral arbiter to make final determinations, and not to provide a bulwark against potential police overreach, is the kind of "difficult, intricate and controversial issue[] of social policy" that falls within the arena of "policymaking, not rulemaking." *See Shah*, 23 N.Y.3d at 699.

Indeed, nearly every component of the FDS Amendment reflects a policy decision balancing that Respondents were neither authorized, nor qualified, to make. Respondents determined that the risk to privacy inherent in familial searching would be worthwhile. They decided that the balance tipped from one side to the other, for crimes that they specified, including "a crime presenting a significant public safety threat"—itself a determination that they ultimately chose to assign to the Commissioner. 9 NYCRR § 6192.3(h)(1), (3). They decided that the privacy implications of familial searching are acceptable to New Yorkers so long as "reasonable investigative efforts have been taken in the case," and also where there are unspecified "exigent circumstances"—a determination they again allocated to the Commissioner. *Id.* § 6192.3(h)(2). And they decided that the Commissioner—not a judge—would be the ultimate one who weighed all of the competing considerations, and applied all the undefined terms of the regulation. *Id.* § 6192.3(i)(2)(ii).

The Commission had no authority to decide that the Databank could be used for familial searching—and none to decide when the concomitant risks to New Yorkers merited whatever value they decided such searching would have.

3. Supreme Court Erred When It Equated "Familial Searching" With "Partial Matches"

Supreme Court largely avoided the crucial question of policy-making by concluding that the FDS Amendment was authorized by the enabling statute. To do so, Supreme Court shoehorned this entirely new use of the database into the category of "partial matches." *See* R.15 (finding that "the familial search Regulations are a deliberate partial match program"); R.19 (holding that the FDS Amendment "is an expansion of the Partial Match Program utilizing the pre-existing Databank," such that Respondents "properly regulated areas under [their] jurisdiction"). That was in error.

The familial search regulations define a new use for Databanked DNA when the circumstances defined by the enabling statute are absent. By contrast, partial matches arise from the Commission's lawful authority to promulgate standards for a match between forensic DNA and Databanked DNA. Familial searching is a different bird entirely.

The Partial Match Program, authorized by Respondents in 2010, applies in circumstances where a search is made for an exact match between Databanked DNA and forensic DNA—but rather than an exact match, the searching apparatus

inadvertently identifies a partial match. *See* 9 NYCRR § 6192.1(q) (explaining that a partial match is an "indirect association" that results from "the CODIS candidate match confirmation process," i.e., the regular process by which a forensic DNA sample is compared against the Databanked DNA); *id.* § 6192.3(f)-(g). The inadvertent nature of a partial match identified pursuant to the 2010 program is critical because that inadvertency tethers it to Respondents' enabling statute—which authorized Respondents to "[p]romulgate standards for a determination of a match" between forensic DNA and Databanked DNA. Exec. Law § 995-b(12). With the delegated authority to define "standards for . . . a match," Respondents could permit the disclosure of partial matches that arise in the search for an exact match.

The familial search regulations are different. A familial search is unrelated to the permitted search for an exact match. To the contrary, it is an intentional search that is conducted exclusively "[w]hen there is not a match or a partial match to a sample in the DNA databank"—i.e., when the statutorily-permitted search for an exact match fails. 9 NYCRR § 6192.3(h).[2]

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[2] The FBI's own definitions of a partial match and familial search reflect this key distinction. The FBI defines a partial match as "the spontaneous product of a routine database search where a candidate offender profile is not identical to the forensic profile but because of a similarity in the number of alleles shared between the forensic profile and the candidate profile, the offender may be a close biological relative of the source of the forensic profile." R.629. By contrast, the FBI defines a familial search as "an intentional or deliberate search of the database conducted after a routine search for the purpose of potentially identifying close biological relatives of the unknown forensic sample associated with the crime scene profile." *Id.*

Supreme Court overlooked this fundamental distinction, summarily concluding that the familial search regulations were simply the "latest extension of the Partial Match Program" and thus "consistent with the statutory language of Executive Law 995." R.16 (citation and alterations omitted). But Supreme Court did not—and could not—address how regulations that permit searching only where an authorized search fails could be consistent with the statute.

An analogous shortcoming doomed the "soft cap" regulations challenged in *Shah*. The government sought to justify those "soft cap" regulations as within the ambit of the Department of Health's (DOH) Public Health Law Statute, which permitted "hard cap" regulations. The relevant Public Health Law authorized DOH to "regulate the financial assistance granted by the state in connection with all public health activities," and to "receive and expend funds made available for public health purposes pursuant to law." 32 N.Y.3d at 262 (quoting Pub. Health Law § 201(1)(o)-(p)). Because DOH's "hard cap" regulations limited the amount of such funding that could be used for administrative expenses and executive compensation, they regulated "only the manner in which state health care funding is expended" by covered providers and therefore fell within DOH's enabling statute. To the Court of Appeals, those "hard cap" regulations reflected "the legislature's policy directive that DOH oversee the efficient expenditure of state health care funds." *Id.* at 262–63.

The "soft cap" regulations, however, restricted "the total amount or percentage of funding a covered provider use[d] on administrative expenses or executive compensation"—"regardless of the funding source." *Id.* at 268. The "soft cap" regulations "impose[d] a restriction on management of the health care industry," *id.*, that advanced a policy of limited executive compensation and thereby ventured beyond the Legislature's directives. That policy was, accordingly, "not sufficiently tethered to the enabling legislation identified by DOH." *Id.*

As with the "hard cap" regulations in *Shah*, Respondents' 2010 partial match regulations immediately follow from the Legislature's directive. In this case, the Legislature had directed Respondents to "promulgate a policy for the establishment and operation of a DNA identification index," and to "[p]romulgate standards for a determination of a match between the DNA [Database] . . . and a DNA record of a person submitted for comparison therewith." Exec. Law § 995-b(9), (12). The partial match regulations do precisely that: define technical standards for determining a match between a sample of forensic DNA and Databanked DNA.

The familial search regulations, on the other hand, stray from the enabling legislation, just as the "soft cap" regulations did in *Shah*. By their own terms, the familial search rules govern the use of the Databank only when there is no match or partial match between the forensic DNA and the Databanked DNA—in other words, when the predicate for the agency's regulatory authority is missing. The familial

search rules are—like the soft cap regulations in *Shah*—"not sufficiently tethered to the enabling legislation identified by [Respondents]." *Shah*, 32 N.Y.3d at 268.

4. Supreme Court Also Erred In Overlooking The Complex Policy Choices Underlying The FDS Amendment

Supreme Court ignored the policy-making that Respondents undertook, finding only that Respondents merely "balanced the costs and benefits of the Regulations" within its "delegation of authority" under the enabling statute to "[p]romulgate *standards* for a determination of a match between the DNA records of a person submitted for comparison therewith." R.18 (quoting Exec. Law § 995-b(12)).

Respondents did not "balance [the] costs and benefits" of familial searching "according to preexisting guidelines" provided by the Legislature because no such "preexisting guidelines" existed. R.66. That the Legislature authorized Respondents to promulgate standards for a determination of a match between forensic DNA and a Databanked Individual provides no direction whatsoever—much less "guidelines"—with respect to when or how to implement a framework for using Databanked DNA when no match or partial match to forensic DNA is present in the first place: i.e., when and how Databanked DNA should be used as a tool to investigate potential family members of those individuals whose DNA is not in the Databank.

Respondents of their own accord decided to provide the Commissioner with

the authority to determine when such a familial search can be made, such as when "reasonable investigative efforts" have been used, or if "exigent circumstances" justify the familial search. 9 NYCRR § 6192.3(h)(2)(i)-(ii). Respondents also decided that the Amendment would not provide for judicial review at any point in the application process for a familial search. And they further decided not to provide any basis for citizens to object to a familial search request—or even to learn that it had been conducted, let alone approved—before receiving law enforcement's knock at the door. These decisions have no mooring in the agency's enabling legislation, yet Respondents empowered the Commission to make them. At bottom, the FDS Amendment was implemented in the absence of any legislative guidance whatsoever.

Contrary to what Supreme Court held, the profound policy choices underlying a familial search cannot be minimized as merely representing an incremental expansion of the Partial Match Program. Indeed, relying on information arising from the inadvertent creation of a partial match in the search for an exact match in no way raises the same policy issues unique to those underlying a familial search. The decision to disclose the results of a partial match—which by definition arises inadvertently in the search for an exact match—does not involve considering the circumstances, if any, that would justify conducting a deliberate search for Databanked Individuals whose DNA has a "kinship threshold value" that suggests that DNA of a potential biological relative may be present in the forensic DNA in

question.

Thus, although Supreme Court correctly recognized that a familial search is "deliberate" in comparison to an inadvertent partial match, it failed to apprehend the significance of this distinction. That was error, as the deliberate nature of a familial search—occurring only when the statutorily permitted search for an exact match or partial match fails—is what opens the proverbial Pandora's box, inviting the array of competing policy choices that must be made in deciding how, when, and to what degree such a policy should be implemented. And because those competing policy choices reflect value judgments that constitute legislative policymaking—not executive rulemaking—the first *Boreali* factor demonstrates that the FDS Amendment was implemented outside the scope of Respondents' authority.

B. Factor II: Respondents Created Their Own Set Of Rules In Drafting The FDS Amendment Without The Benefit Of Legislative Guidance

The second *Boreali* factor looks to whether the agency "did not merely fill in the details of broad legislation describing the over-all policies to be implemented [but] [i]nstead wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." *Boreali*, 71 N.Y.2d at 13. Far from merely "fill[ing] in the details" of prior legislation, the FDS Amendment created a fundamental departure from the prior permitted uses of the Databank, stretching beyond those contemplated by the New York DNA Statute. Authorizing this entirely

new use of the Databank required Respondents to answer specific, complex policy questions, with no guidance from the Legislature.

As an initial matter, the fact that the FDS Amendment purports to give power to Respondents to authorize and regulate familial searches "when there is not a match or a partial match to a sample in the DNA databank," itself demonstrates that Respondents were drafting on a clean state. 9 NYCRR § 6192.3(h). An agency does not "fill in the details" of legislation when it regulates only in the absence of conditions required by the legislation. *See Matter of Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989) ("An agency cannot create rules, through its own interstitial declaration, that were not contemplated or authorized by the Legislature and thus, in effect, empower themselves to rewrite or add substantially to the administrative charter itself.").

That is why the court in *Tze Chun Liao* annulled the New York State Banking Department's decision to deny a check casher license to a store owner. *Id.* at 507, 510. The Department had denied the license to avoid "destructive competition," but the Legislature had "explicitly enumerated the factors to be considered by the Superintendent for check casher license qualification" and there was "not a word about 'destructive competition.'" *Id.* Because the agency "implement[ed] . . . its powers" to deny the license application on a ground that the enabling statute did not contemplate, the agency violated "the clear enablement of the statute." *Id.* at 510–

12.

The same is true with respect to the New York DNA Statute: its plain text does not encompass the circumstances under which the FDS Amendment applies. Worse, the circumstances in which the FDS Amendment applies are expressly the opposite of those contemplated by the DNA Statute. Respondents necessarily drafted the FDS Amendment on a clean slate as a result.

Further, in implementing the FDS Amendment, Respondents created an entirely new search regime, crafted an intricate set of rules to govern that regime, and put themselves in charge of interpreting those rules. The FDS Amendment requires, for example, that "the investigating agency and appropriate prosecutor must certify, in the form and manner required by the division," that "(i) reasonable investigative efforts have been taken in the case; or (ii) exigent circumstances exist warranting a familial search." 9 NYCRR § 6192.3(h)(2). None of these requirements (or even terms) appears in the New York DNA Statute. In promulgating the FDS Amendment, Respondents created standards entirely absent from the legislation (e.g., "reasonable investigative efforts," "exigent circumstances," and "established kinship threshold value(s)") and gave themselves the power to implement and interpret them. *See id.* § 6192.3(h)(2), (j)(2). Still more glaring, Respondents provided the Commissioner with unilateral authority to assess compliance with those standards and approve or deny applications for familial

searching. *See id.* § 6192.3(i)(2).

Supreme Court accordingly misapplied this factor. Noting that Respondents had promulgated regulations concerning the Databank for twenty-five years, including as to the Partial Match Program, Supreme Court concluded that Respondents once again "filled in details of a broad policy" in adopting the familial search regulations. R.18. But the fact that Respondents previously implemented regulations within their delegated authority is simply unrelated to whether they had guidance in creating an entirely new use and the regulations governing it. Whatever "broad policy" Respondents implemented, the Legislature was strict about the use of the Databank—and it did not include familial searching among the permitted uses. As in *Boreali*, Respondents drafted the FDS Amendment on a "clean slate, creating [their] own comprehensive set of rules without benefit of legislative guidance." *Boreali*, 71 N.Y.2d at 13. The second *Boreali* factor, too, supports the conclusion that Respondents exceeded the scope of their authority in promulgating the familial search regulations.

C. Factor III: The Legislature Considered Enacting Laws Permitting Familial Searching But Declined To Do So

The third *Boreali* factor looks to whether the Legislature has considered acting on the subject issue. *See id.* That is because when the "[L]egislature has unsuccessfully tried to reach agreement on the issue, [that] would indicate that the matter is a policy consideration for the elected body to resolve." *See N.Y.C.*

C.L.A.S.H., 27 N.Y.3d at 180 (quoting *Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 611–12 (2015)). Accordingly, "repeated failures by the Legislature to arrive at such an agreement do not . . . entitle an administrative agency to take it upon itself to fill the vacuum and impose a solution of its own." *Boreali*, 71 N.Y.2d at 13. But that is precisely what Respondents did here: in the face of the Legislature's repeated efforts to enact a familial search policy through the legislative branch, the Division effectuated that policy through its own rulemaking, flagrantly stepping out of its lane.

Bills permitting familial searching were introduced in the Legislature repeatedly before Respondents acted on their own. *See supra* at 13 (describing bills referred to the Assembly's Governmental Operations Committee in 2014, 2015, 2016, 2017, and 2018); *id.* at 13–14 (describing bills introduced in the Senate, one of which passed the Senate in February 2017—just months before Respondents enacted the FDS Amendment). The proposal—and failure—of these bills evidences that the Legislature grappled with whether to permit familial searching, and belies the conclusion that it delegated that power when it first created the DNA Databank in 1994. This was not lost on a member of the very Commission that created the familial searching scheme. R.301, 304 (recognizing that a legislative proposal introduced in the Senate in 2016 was evidence that legislators "do[] not view the DNA Subcommittee as having the power to create at this time under [Exec. Law §]

995 any of the powers it is currently claiming to have in drafting a Plan or any other rules and regulations regarding familial searching").

The Legislature's attention to familial searching, and its failure to act, echo the developments that preceded the doomed anti-smoking regulations in *Boreali*. In the decade leading up to the 1986 enactment of those regulations, the Legislature had introduced multiple bills that would curb public smoking, yet "none ha[d] passed both houses." 71 N.Y.2d at 7. In the wake of those legislative failures, the Public Health Council agency "took action of its own" and adopted regulations that prohibited smoking in multiple indoor venues. *Id.* The Court of Appeals held that "[u]nlike the cases in which [the Court] ha[s] been asked to consider the Legislature's failure to act as some indirect proof of its actual intentions, in this case it is appropriate . . . to consider the significance of legislative inaction as evidence that the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving a society-wide health problem." *Id.* at 13 (citation omitted). The Legislature's inability to reach agreement indicated that the Public Health Council had "exceeded the scope of the authority properly delegated to it by the Legislature." *Id.*

As in *Boreali*, legislative inaction is not being used "as some indirect proof of its actual intentions"—i.e., this Court need not conclude from the Legislature's inaction that the Legislature was opposed to familial searching. *See id.* Rather, the

Legislature's failure to enact a familial search policy "in the face of substantial public debate" on this issue simply demonstrates that it is a "difficult" issue involving profound policy choices—supporting the conclusion that the Division exceeded its delegated authority in taking the matter into its own hands. *Id.*

Supreme Court's analysis of this factor was riddled with error. First, Supreme Court recognized that "the Legislature attempted on several occasions to enact familial searching, but failed to do so either because the bill did not move beyond committee or it 'died in the Assembly.'" R.19. Yet Supreme Court gave those facts no weight. Second, Supreme Court drew conclusions from the Legislature's failure to correct other rule-making by the Division. *See id.* ("[S]ince the Division has been promulgating regulations for more than 25 years without much interference from the Legislature, an inference may be made that the Legislature approves of the Division's actions or its interpretation of the enabling legislation."). That inference is unwarranted: even if legislative inaction in the face of other rulemaking could be deemed to evince approval of that rulemaking (a dubious proposition itself), it has nothing to do with legislative sanction for this rulemaking.

Supreme Court's reliance on *Greater N.Y. Taxi Association v. N.Y.C. Taxi & Limousine Commission*, 25 N.Y.3d 600 (2015), is misplaced. In that case, the Taxi and Limousine Commission promulgated a rule that a particular car model would become the City's official taxicab. *Id.* at 604. The Court of Appeals concluded that

the regulation did not interfere with any legislative efforts directed to that issue, because the legislature had never specifically debated what model the City's official taxicab should be. *Id.* at 611–12. Instead, the Legislature had debated other types of concerns, such as whether taxis should be "hybrids or wheelchair accessible." *Id.* Here, by contrast, the Legislature did debate the precise issues presented by the FDS Amendment—i.e., whether to permit the very type of searching that Respondents chose to implement on their own terms. *See supra* at 13–15. Nothing in *Greater N.Y. Taxi Association* invites an inference that the Legislature approved Respondents' action here. And the third *Boreali* factor supports the conclusion that the FDS Amendment violates separation of powers.

D. Factor IV: Respondents Have No Expertise Relevant To The Choices They Needed to Make On Complex Social Policy Issues

Under the fourth *Boreali* factor, a reviewing court must consider whether the challenged action required determinations outside the Respondents' area of expertise. *Boreali*, 71 N.Y.2d at 13–14. This factor weighs against the agency unless its "technical competence was necessary to flesh out details of the broadly stated legislative policies" embodied in the law under which the regulation was enacted. *Id.* at 14. That was not at all the case here.

The seven members of the DNA Subcommittee, at the time of the FDS Amendment, were predominantly non-New Yorkers whose purported expertise lie

in technical areas such as molecular biology. *See* Exec. Law § 995-b(13)(a).[3] Although useful for formulating the sample-preparation and sample-analysis rules delegated to them by the Legislature, their technical expertise in biology and genetics is wholly irrelevant to the value judgments undergirding the FDS Amendment—balancing interests in privacy, law enforcement, civil rights and liberties, and other criminal justice concerns particular to New York. Indeed, the FDS Amendment implements at least the following decisions outside the Committee's expertise:

1. The determination that the law enforcement interest in familial searching outweighs the privacy deprivations and intrusions of such searches, and that such searches are warranted, in circumstances where "there is not a match or a partial match to a sample in the DNA [D]atabank." 9 NYCRR § 6192.3(h).
2. The determination that the law enforcement interest in familial searching outweighs the policy costs of such searches for certain crimes or for any crime "presenting a significant public safety threat." *Id.* § 6192.3(h)(1), (3).

[3] Of the six academic and genetic-sciences institutions represented on the DNA Subcommittee at the time of the FDS Amendment, only one was based in New York. *See* R.864–65. One member of the DNA Subcommittee, Eric Buel, had no officially affiliated institution but also appears to be resident at a university outside the state. *See id.*

3. The determination that law enforcement should be permitted to use familial searching, despite the concomitant intrusion on privacy interests, as long as "reasonable investigative efforts have been taken in the case" or "exigent circumstances exist." *Id.* § 6192.3(h)(2).
4. The determination that Respondents should be able to choose the degree of biological relatedness at which law enforcement interests outweigh New Yorkers' interest in the privacy of "unknown family relationships" and in the other intrusions of familial searching. *See id.* § 6192.3(j)(2), (k)(1), (k)(2)(ii).
5. What mechanisms for police oversight, objections, and notifications are appropriate to protect privacy interests of New Yorkers. *See, e.g.*, *id.* § 6192.3 (h)(2), (i), (k)(2)(ii).
6. That no judicial review is needed to protect New Yorkers' privacy rights by ensuring that the criteria for a familial DNA search have been met prior to the authorization of a search. *See id.* § 6192.3(i)(2), (j).
7. When law enforcement's interest in familial searching justifies the disproportionate burden that such searches place on Black and Hispanic New Yorkers, including the potential for disproportionately increased encounters with the police.

Respondents plainly had no expertise in any of the foregoing areas in which they

needed to make crucial policy decisions.

Supreme Court erred in disregarding Respondents' lack of relevant expertise, and in seeking to offset it by touting their technical expertise in biotechnology: "The record reflects that [Respondents] exercised unique expertise to develop the technical requirements of the familial DNA searching Regulations." R.19. No amount of technical, scientific expertise can compensate for the Committee's complete lack of expertise in deciding the thorny social issues they necessarily needed to weigh. The FDS Amendment was improper under this *Boreali* factor, too. *See Boreali*, 71 N.Y.2d at 14.

Although *Boreali* does not require a challenger to show all four factors in order to demonstrate that an agency "transgressed" the line between rule-making and legislative policy-making, Respondents' transgression in promulgating the FDS Amendment was so severe that all four factors weigh against them. Even if this Court decides that fewer than four factors have been shown, however, the circumstances under which the FDS Amendment was promulgated are sufficient to show that it violated separation of powers.

II. The FDS Amendment Is Arbitrary And Capricious

A regulation "will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious." *N.Y. State Ass'n of Cntys. v. Axelrod*, 78 N.Y.2d 158, 166 (1991). The FDS Amendment was enacted without appropriate

consideration of its impact on Black and Hispanic New Yorkers, the minimal investigatory benefit of familial searching, or the appropriate balancing between the impact and the putative benefit of familial searching.

Because the New York Databank holds DNA data about New Yorkers who have been convicted of crimes in New York State, or who have had similar interactions with the State's criminal justice system, the Databanked Individuals are disproportionately New Yorkers of color. Moreover, even if that fact was unknown to Respondents at the time of the FDS Amendment, the Commission should have presumed as much given how the State had defined the population whose DNA would be included—black Americans are incarcerated in New York State prisons at a rate that is eight times the imprisonment of white New Yorkers, and Hispanic Americans are incarcerated in New York State prisons at a rate that is three times the imprisonment of non-Hispanic white New Yorkers. R.355, 357. The composition of the DNA Databank thus ensures that the New Yorkers who would be identified as criminal suspects or at least the target of investigations as a consequence of familial searching—i.e., biological relatives of Databanked Individuals—would disproportionately be New Yorkers of color. *See* R.323–24 ("[S]ocial groups [that] both share genetic relationships and are over-represented in the database would experience a disproportionate increase in genetic surveillance if familial searching were routinely implemented.").

Respondents failed to give adequate consideration to the likely racial impact of the familial search regulations, and certainly failed to ensure that such analysis was undertaken by experts in the appropriate areas. Nor did they adequately consider what assumptions were reflected in permitting a search that could only return close biological relatives of convicted felons (and others in the Databank)—because, upon closer inspection, the underlying assumption is that criminal propensity or activity runs in families. In reality, measures of past "criminal activity" are heavily infected with racialized policing that lead to the disparate criminalization of Black families. *See, e.g.*, *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("[I]t is no secret that people of color are disproportionate victims of [police] scrutiny."); *United States v. Curry*, 965 F.3d 313, 345 (4th Cir. 2020) (Thacker, J., concurring) ("[H]istorical crime data . . . can be infected with years of racial bias."); Michelle Alexander & Cornel West, *The New Jim Crow* 123 (2d ed. 2012). There is no other logical reason for permitting searches that can only turn up suspects if they are biological relatives of such individuals. *Cf. United States v. Herron*, 215 F.3d 812, 814 & n.2 (8th Cir. 2000) (holding that a search warrant resting primarily on a "familial relation" was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984))).

Yet the meeting minutes from the Commission and DNA Subcommittee

provide no indication that Respondents ever made any effort to provide a rational basis as to why familial searching is warranted in light of its disproportionate impact on Black and Hispanic populations. *See generally* R.473–77, 788–92, 827–33, 853–57; *cf. N.Y. State Ass'n of Cntys*., 78 N.Y.2d at 167–68 (finding arbitrary and capricious a regulation adjusting a Medicaid reimbursement calculation in light of its "disparate impact" on certain homes). The FDS Amendment is arbitrary and capricious as a result.

The FDS Amendment is also arbitrary and capricious because it was enacted without adequate consideration of the limited efficacy of familial searching as a tool for solving crimes—especially when weighed against the disproportionate impact of familial searching on New Yorkers of color. *See generally* R.473–77, 788–92, 827–33, 853–57. The Commission and DNA Subcommittee meeting minutes indicate that these unelected officials did not actually discuss the effectiveness of familial searching or whether the effectiveness outweighs the fact that Black and Hispanic populations will be disproportionately impacted. In fact, Respondents denied "knowledge or information sufficient to form a belief" as to key facts about both the effectiveness of familial searching and the disproportionate impact on Black and Hispanic populations. *See* R.56 ¶ 39 (noting the fact that Databanked Individuals are disproportionately New Yorkers of color); R.445 ¶ 39 (denying knowledge as to that fact); R.57–58 ¶ 41 (describing high-profile false accusations that resulted from

familial searching in Louisiana); R.445 ¶ 41 (denying knowledge as to those "instances"). The failure to consider these critical facts when promulgating the regulations demonstrate that they are arbitrary and capricious.

Further, the details of the familial searching program created through the FDS Amendment are also entirely arbitrary. This includes the determination of how close the biological relation must be between the Databanked Individual and the forensic DNA, for the search to generate a "hit"; the decision not to have any judicial review, or the opportunity to object, or even be notified about being the target of the search (which would, at a minimum, permit someone to avoid the burden of being disrupted in the workplace); and what, if any, precautions are taken to avoid having the DNA of the familial targets added to the Databank once they are interviewed. None of this is surprising, given that the DNA Subcommittee—which formulated the rules—is a scientific body charged with developing the rules for handling the DNA samples and certifying labs, and not a group with the expertise or mandate to address challenging issues of public policy.

Based on the foregoing, Supreme Court plainly erred in holding that nothing in the regulations fosters disparate treatment of New Yorkers of color. Supreme Court found that "the respondents and investigative agency cannot select DNA profiles of people of color in a familial DNA search." R.19. But that finding overlooks entirely the undisputed fact that the majority of Databanked Individuals—

and consequently their close biological relatives—are New Yorkers of color.

The government has asserted that there is no problem here because Databank searches cannot be tuned so that they only return New Yorkers of color. But that ignores the composition of the Databank, and who is being searched. Because New Yorkers of color are vastly overrepresented in the Databank, the FDS Amendment necessarily enhances potential police scrutiny and investigation of people of color disproportionately. In any event, the government cannot dispute that the Commission and DNA Subcommittee meeting minutes establish that Respondents gave this issue no attention while drafting the regulations. *See generally* R.473–77, 788–92, 827–33, 853–57. And failing to critically consider a problem does not provide a "rational basis" for exacerbating it.

Finally, Supreme Court's suggestion that it "appears there may be minimal impact due to the limited use of familial DNA searching," R.20, provides no cognizable ground to conclude that the regulations have a rational basis. To the extent familial searching may have limited use, that is because it is not effective at generating investigative leads—a fact that Respondents ignored, and that independently demonstrates why the regulations are arbitrary, as explained above.

In short, a regulation that permits searching a database that consists only of convicted individuals, with the goal of targeting only their close biological relatives, is inherently unreasonable and lacks any rational basis. Even if did not, the failure

to consider that impact and balance the utility of searching only for relatives of convicted individuals is certainly a fatal omission—and, moreover, involves policy analysis and balancing that Respondents were neither equipped nor authorized to do. The FDS Amendment "is so lacking in reason for its promulgation that it is essentially arbitrary." *See N.Y. State Ass'n of Cntys.*, 78 N.Y.2d at 166. It should therefore be annulled.

CONCLUSION

For the foregoing reasons, this Court should reinstate Appellants' Article 78 Petition, and grant the relief requested therein, annulling and vacating the FDS Amendment in its entirety.

Dated: New York, New York
May 3, 2021

Respectfully submitted,

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STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of

Terrence Stevens and Benjamin Joseph,

Petitioners-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

—against—

The New York State Division of Criminal Justice Services, the New York State Commission on Forensic Science, Michael C. Green, in his official capacity as Executive Deputy Commissioner of the Division Criminal Justice Services and Chairman of the Commission of Forensic Science, and the New York State Commission on Forensic Science DNA Subcommittee,

Respondents-Respondents.

New York County Clerk's Index No. 151522/18

Appellate Division Case Nos. 2020-03746 2021-00560

1. The index number of the case is 151522/18.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on February 16, 2018 by the filing of the verified petition. The respondents served their answer on April 25, 2018.

5. The nature and object of the action is to annul the familial DNA Search Regulations.

6. This appeal is from (i) a decision and order of the Honorable Shlomo S. Hagler, entered on March 27, 2020, and (ii) a judgment of the Honorable Shlomo S. Hagler, entered on October 20, 2020, which denied the Petition and dismissed the proceeding.

7. The appeal is on a full reproduced record.