To Be Argued By:
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New York Supreme Court

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.

CASE NOS.
2020-03746
2021-00560

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PRELIMINARY STATEMENT

Nothing in Respondents' answering brief saves the FDS Amendment.

First, Respondents challenge Petitioners' standing. Respondents do not dispute that the FDS Amendment puts Petitioners and others like them at an increased risk of investigation as criminal suspects only because they have brothers who were convicted of certain crimes. As Supreme Court correctly found, under New York law these Petitioners therefore have standing to bring this challenge. As Supreme Court also correctly found, a contrary determination would effectively insulate agency regulations such as the FDS Amendment from Article 78 review, and vitiate the important public interests such challenges serve. Respondents' effort to upend New York's standing law and drastically narrow who may bring Article 78 challenges should be rejected.

Second, Respondents claim to derive their power to authorize familial searching from their putative authority under the DNA Statute to define what constitutes a "match." But that position requires Respondents to disregard the FDS Amendment itself, which permits familial searching only in the *absence* of a match—i.e., when "no[. . .] match or a partial match" exists. 9 NYCRR § 6192.3(h). Respondents' position cannot be reconciled with the FDS Amendment's plain language.

Third, Respondents largely ignore Petitioners' arguments that the FDS Amendment violates separation of powers under *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). Instead they proceed as if the decision to institute an entirely new use of New York's DNA Databank—one that disproportionately impacts and targets New Yorkers of color, inviting them to experience additional encounters with the police, solely because they have close relatives who had committed certain crimes—does not even involve profound decisions regarding social policy. That is untenable.

Finally, one important predicate of the decision below denying Petitioners' challenge was Supreme Court's erroneous conflation between "partial matches" and the deliberate, intentional familial searching at issue here. Petitioners and *amicus curiae* debunked that postulate, and Respondents now concede that the two types of searches are distinct. Because it rests on a principal that is incorrect, Supreme Court's decision upholding the FDS Amendment cannot stand.

Respondents' remaining arguments are without merit. The Court should grant the Petition and annul the FDS Amendment.

ARGUMENT

I. Supreme Court Correctly Found That Petitioners Have Standing To Pursue Their Article 78 Petition.

Respondents would have this Court ignore the people immediately threatened and otherwise impacted by a familial search program: Petitioners and the other similarly situated New Yorkers whom the challenged familial searching procedures

are designed to flag as potential criminal suspects. Doing so would be error, because standing under New York law is not so parsimonious.

To have standing to bring an Article 78 challenge to a regulation only requires that a petitioner must be subject to (i) an injury-in-fact that is (ii) within the zone of interest of the relevant statute or regulation. *See Graziano v. County of Albany*, 3 N.Y.3d 475, 479 (2004). The requirements "should not be heavy-handed." *Matter of Ass'n for a Better Long Island v. N.Y. State Dep't of Envt. Conservation*, 23 N.Y.3d 1, 6 (2014). It is enough that "a plaintiff *merely fears the prospect* of an adverse effect." *Lino v. City of New York*, 101 A.D.3d 552, 555 (1st Dep't 2012) (emphasis added). Petitioners readily meet this standard. As Supreme Court correctly noted, a contrary outcome would insulate rules such as the FDS Amendment from any Article 78 challenges, and deprive the public of the important benefit—and check—that such challenges provide. *See also Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 10 (1975) (New York courts have consistently taken an expansive view of "the category of persons entitled to a judicial determination as to the validity of a proposed [administrative] action."); Siegel, N.Y. Prac. § 564 (6th ed. 2018).

A. Petitioners' Injuries-In-Fact Are Sufficient To Confer Article 78 Standing.

Supreme Court correctly recognized that the "peculiar risk" Petitioners bear of being "approached by an investigating agency in connection with an investigation

aided by the [FDS Amendment]" is a cognizable injury-in-fact. R-7. The FDS Amendment exposed Petitioners to the prospect of becoming targets in criminal investigations solely because of their genetics. The heightened risk of police encounters—and the fear and anxiety that naturally follow from that heightened risk—is a cognizable injury giving Petitioners standing to challenge the regulations creating that risk.

Respondents belittle Petitioners' claims as "speculative" and "hypothetical" by ignoring the actual effect of the regulations. Ans. Br. at 29, 31-32. According to Respondents, "[f]or petitioners to experience any harm, a lengthy chain of events would have to occur," beginning with a crime scene yielding forensic DNA, and culminating with the police contacting Petitioners after a familial search ultimately identified them as suspects. *Id.* at 31-32. In suggesting that the claimed injuries result from the police interaction itself, Respondents deflect from the increased *risk* of being investigated and the stigma and fears arising from that heightened risk—the real injury asserted here. That risk precedes Respondents' chain of events, and derives only from Petitioners' genetic relationship to Databanked Individuals. That is the legally cognizable injury here, and the basis for standing recognized by Supreme Court.

Put differently, Respondents posit that Supreme Court erred because, in Respondents' view, police contact is required before Petitioners sustain an injury-

in-fact for standing purposes. But that was never argued by Petitioners, and it was not why Supreme Court found standing. Moreover, as was made clear in *Lino*, petitioners do not need to wait for the specific adverse conduct contemplated by the regulations at issue to occur in order to be injured. *See* 101 A.D.3d at 554 (plaintiffs had standing to challenge the public availability of records of their criminal charges based on the risk of harm to their job prospects; plaintiffs did not need "to wait until their job applications are in the mail or they are about to appear for job interviews before they have standing to bring a cause of action against the effect of the unsealed records"). Respondents made no attempt to distinguish *Lino* on this issue, and could not do so. The increased *risk* of police showing up at Petitioners' homes or their place of work, and the stigma associated with being subject to heightened law enforcement scrutiny, are sufficient injuries-in-fact for standing purposes.

B. Petitioners' Injuries Fall Within The Zones Of Interest Of Both The DNA Statute And The FDS Amendment, Either Of Which Is Sufficient To Confer Standing.

To satisfy the second prong of the standing inquiry, Petitioners need only allege that the injuries they assert are within the zone of interest to be protected by the relevant statute or the zone of interest to be protected by the regulations at issue. *Matter of City of New York v. City Civ. Serv. Comm'n*, 60 N.Y.2d 436, 443 (1983); *see also Via v. Franco*, 223 A.D.2d 479 (1st Dep't 1996) (concluding the petitioners had standing to pursue Article 78 proceeding where they were in the zone of interests

"intended to be protected by the regulations" in dispute). Petitioners satisfy this prong in two distinct ways.

First, as Supreme Court correctly found, Petitioners are within the zone of interest protected by the DNA Statute. Respondents challenge this finding by ignoring the full panoply of interests that the Legislature sought to protect in enacting the statute, and reducing the statute to nothing more than a law enforcement tool. But in creating a scheme for taking, storing, and using genetic information of certain New Yorkers, the Legislature addressed varied interests—including the privacy interests of individuals who did not actually commit the offenses that subject one's DNA information to inclusion in the Databank.

For example, in limiting the class of New Yorkers for whom genetic information can be stored in the Databank, the Legislature sought to protect other New Yorkers—like Petitioners here—without the requisite criminal record. *See, e.g.*, Exec. Law §§ 995(7), 995-c(3)(a) (requiring that only "designated offender[s] subsequent to conviction and sentencing" for specified crimes "be required to provide a sample appropriate for DNA testing," and defining "designated offender" as a "person convicted of any felony" under state law, or specified misdemeanors); *id.* § 995-c(9)(a) (requiring that DNA records must be expunged from the Databank upon reversal or vacatur of a conviction and that results of DNA testing be confidential and not disclosed). The DNA Statute's legislative history likewise

confirms the Legislature's intent to protect the genetic information of individuals with no criminal history, such as Petitioners, by limiting the Databank to repeat offenders. *See* NY Bill Jacket, 1999 Assembly Bill 9037, Ch. 560 ("[O]ffenders profiled in this index have committed serious crimes which have a high correlation with repeat violent criminal activity."). The injuries the FDS Amendment confers on Petitioners, as close biological relatives of Databanked Individuals—the prospect of being vulnerable to targeting through familial searches solely based on their genetic relationship to a convicted offender, and the stigma of becoming the subject of a criminal investigation—fall within this privacy-protective zone of interests embodied in the DNA Statute.

Respondents contend that Petitioners fall outside the DNA Statute's zone of interest because there is "no language in the statute protecting those whose DNA is not in the Databank" from forensic uses of the DNA records that are included in the Databank. Ans. Br. at 34. But that ignores the language specifying the use of the Databanked information—in permitting only certain discrete uses, the Legislature necessarily defined how it could not be used. Moreover, if the failure to name Petitioners and those like them in the statute were sufficient to find them excluded from the DNA Statute's zone of interest, any time an agency enacted a regulation directed to individuals who were outside the defined purview of the enabling statute, then those targeted individuals could never pursue an Article 78 challenge to such

regulations. That result would encourage *ultra vires* actions by agencies, and would certainly run afoul of New York's "liberalized attitude toward recognition of standing." *Matter of Morgenthau v. Cooke*, 56 N.Y.2d 24 (1982) (finding even district attorneys were within zone of interest for statute providing procedure for appointing judges such that they had Article 78 standing to challenge statute); *Grygas v. N.Y. Ethics Comm'n*, 147 Misc. 2d 312, 314 (Sup. Ct. Albany Cty. 1990) (finding petitioner, who was not a state employee, had standing to challenge agency action under statute directed towards state employees). Respondents' cramped position on the zone of interest test is contrary to law.

Second, Petitioners' injuries fall squarely within the zone of interest protected by the FDS Amendment—a separate, independent basis for finding the zone of interest prong of the standing inquiry satisfied—and one which Respondents completely ignore. The "familial DNA search" regulation promulgated by Respondents specifically contemplates that those who are "biologically related" to "offenders" with "DNA profiles in the DNA databank," 9 NYCRR § 6192.1(ab), are at risk of privacy intrusions, *see, e.g., id.* § 6192.1(k)(1)(ii) (risk of disclosure of unknown biological relationships). Petitioners are biological relatives of Databanked Individuals who claim that familial searching subjects them to an increased risk of law enforcement interrogation. That is more than sufficient to show that Petitioners' alleged injuries are within the zone of interest of the FDS

Amendment. *See Cooke Ctr. for Learning & Dev. v. Mills*, 19 A.D.3d 834, 835 (3d Dep't 2005) (alleged injury to private school—the denial of funds—was within the zone of interest because regulation contemplated that private schools would seek approval of such funds).

Finally, Supreme Court recognized that unless Petitioners have standing to challenge the FDS Amendment, it would be insulated from review through an Article 78 proceeding. R.8. Respondents do not dispute that their approach to standing would lead to this outcome. For example, they do not suggest that the supposedly necessary police contact could have occurred within four months of the FDS Amendment. Instead, Respondents argue that the FDS Amendment could be challenged through other mechanisms, such as by an individual defendant in some future criminal proceeding. But that avenue would not vindicate the public's interest in an Article 78 challenge, which is the interest protected in finding that Petitioners have standing here. *See Ass'n for a Better Long Island*, 23 N.Y.3d at 8 (denying standing in Article 78 proceeding would erect "an impenetrable barrier to any review of this facet of the administrative action," a "result that is contrary to the public interest"). Nor would it redress Petitioners' injuries—the risk and stigma associated with the increased likelihood of being subject to police investigation due to their biological relation to a Databanked Individual. Supreme Court's conclusion that

depriving Petitioners of standing would risk insulating the FDS Amendment from Article 78 review altogether was thus correct and should be affirmed.

II. The Legislature Did Not Delegate To Respondents The Authority To Implement The FDS Amendment.

The FDS Amendment was implemented without legislative authorization. Respondents ignore the language of the DNA Statute and the FDS Amendment, and devote their brief to debunking arguments that Petitioners never made.

A. Respondents Ignore the Relevant Text of the DNA Statute.

The Legislature only delegated to Respondents the authority 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). The FDS Amendment does not implement a standard for determining a match. Instead, it authorizes a use of the Databank *"[w]hen there is not a match or a partial match* to a sample in the DNA databank." 9 NYCRR § 6192.3(h) (emphasis added). Because the Commission's authority is limited to circumstances where there is a "match," and the Regulation only applies in circumstances where there is "not a match or a partial match," *id.*, the Regulation is necessarily outside the delegated authority. This alone warrants reversal.

Respondents simply ignore the plain language of the FDS Amendment. Indeed, their brief does not quote from the regulation at all.

B. The DNA Statute Does Not Otherwise Authorize The FDS Amendment.

Governed by a statute that gives them no leeway with respect to new Databank uses such as familial searching, Respondents attempt to shoehorn the FDS Amendment into other general provisions of the Statute that have nothing to do with it. For example, Respondents lean heavily on provisions in the DNA Statute that they claim "reinforce that the Commission should continue to study new technologies as they evolve and develop regulations to implement those technologies." Ans. Br. at 38. To respondents, such "technologies" and "regulations" extend to new uses of the Databank. But that ignores the Legislature's narrow description of permitted uses.

Likewise, Respondents argue that the "very existence" of the DNA Subcommittee, created by the DNA Statute, demonstrates the Commission's authority "to keep pace with evolving research," and that the Commission's power to create advisory councils "to provide specialized expertise with respect to new forensic technologies" demonstrates that the agency was intended to monitor developments in the field. *Id.* at 39. But the leap from "keeping pace" and "provid[ing] expertise" to permitting new uses is, again, inconsistent with the Legislature's decision to delineate the permitted uses.

Simply put, the Commission's authority to "perform[] research and validation studies on new methodologies and technologies," Exec. Law § 995-(b)(1), and to

create a DNA Subcommittee that can appoint advisory councils to provide expertise regarding new "DNA testing methodologies," *id.* § 995-b(13), has *nothing* to do with the Commission's far narrower role with regard to the Databank. The Commission's defined role with respect to DNA testing methodologies is to ensure that forensic laboratories are operating at minimum standards through a program of accreditation. *See id.* § 995(b)(1). And the Commission's role with respect to the Databank (i.e., the "DNA identification index") is even more narrowly circumscribed: to "[p]romulgate standards for a determination of a match." *Id.* § 995-b(12). That authority cannot sweep in what the Commission tried to do here: create a new search regime in circumstances "[w]hen there is not a match or a partial match to a sample in the DNA databank." 9 NYCRR § 6192.3(h).

Respondents try three tacks to bridge the gulf between the Statute's language that specifies Databank uses other than familial searching, and its unrelated language that has nothing to do with creating new Databank uses. Each fails.

First, Respondents underscore that the Commission was authorized "to recognize more than full matches," and that the word "match" in the DNA statute is not limited to a "full match." Ans. Br. at 40-43. But this is a red herring. Petitioners never asserted (and do not assert) that the Commission can only recognize full matches, or that the word "match" in the DNA statute means only a "full match." Indeed, Petitioners' Opening Brief discussed at length the implications of the

Commission's authority to recognize partial—i.e., not full—matches. Opening Br. at 28-32.

Second, Respondents assert that the Commission could, and did, interpret its narrow grant of authority in order "to allow the reporting not only of full matches" between forensic DNA and a DNA sample in the Databank, but "also matches to a close family member." Ans. Br. at 43; *see also id.* ("Given the express standard-setting authority delegated to the Commission, it reasonably determined that its strict familial search kinship threshold satisfied the statutory meaning of a 'match.'"). The premise of this argument—that the Commission determined that a familial search is a statutory "match"—is incorrect. In enacting the FDS Amendment, the Commission did not equate the results of a familial search to the outcome of an authorized search, but took the opposite view: that "[w]hen there is *not a match or a partial match* to a sample in the DNA databank, a familial search may be performed." 9 NYCRR § 6192.3(h) (emphasis added). With this clear language contradicting their argument, it is hardly surprising that Respondents can cite nothing in the administrative record to support their assertion that the Commission believed that in enacting the FDS Amendment, they were merely authorizing another means to determine a "match." *See* Ans. Br. at 43.

Third, Respondents ask the Court to defer to the Commission's determination that a familial search is a "match" within the DNA statute. Ans. Br. at 50. Again,

Respondents' argument fails at its premise; the Commission made no such determination, and decided instead to fashion a search program to identify familial relationships between forensic DNA and that of Databanked Individuals when a "match" within the DNA Statute does not exist. *See* 9 NYCRR § 6192.3(h). Because the Commission never made the determination for which Respondents would seek deference, no deference is due.

C. The Legislative History Does Not Support Respondents.

After ignoring the plain text, and building an elaborate argument on a putative determination that was never made, Respondents turn to legislative history. Respondents embrace Governor Mario Cuomo's 1994 memorandum approving the Act in which the Governor called on the Commission "to study and evaluate" forensic DNA, stating the Commission would "ensure[] a reasoned approach to the implementation of forensic DNA technology in New York." Ans. Br. at 44 (quoting Approval Mem. (Aug. 2, 1994), *in* Bill Jacket to ch. 737 (1994), at 6).

But "a reasoned approach . . . to forensic DNA technology" does not mean it could be used for whatever purposes the Commission decided. The Commission's technical mandate was to "[p]romulgate standards for a determination of a match,"

Exec. Law. § 995-b(12), and that nowhere extends to new uses of the technology.[1]

Further, Respondents ignore the compelling legislative history that undermines their position. In a 1994 memorandum from then-Attorney General G. Oliver Koppell to the Governor, Mr. Koppell described the creation of the Databank as providing a means for law enforcement officers to "be able to take a DNA sample from a crime scene and compare it with DNA data *in the file.*" Mem. (July 20, 1994), *in* Bill Jacket to ch. 737 (1994), at 11) (emphasis added). Mr. Koppell concluded his endorsement by noting that the DNA Statute had been carefully crafted to "enhance law enforcement investigations while not trampling on the rights of innocent individuals." *Id.* This legislative history is consistent with the DNA Statute's text, which narrows the Commission's role with respect to the Databank to "[p]romulgate standards for a determination of a match." Exec. Law § 995-b(12).

[1] With the statute, the Commission's acts, and the New York Legislature's pronouncements clearly against them, Respondents turn outside the State—to Virginia. Virginia's search regulations are not at issue here, and whether they were implemented in accordance with Virginia's entirely different DNA database statute under Virginia's own administrative laws provides no basis to save New York's FDS Regulation. In any event, the Virginia example cuts against Respondents' position. Virginia's DNA database statute is significantly broader than New York's, and the Commonwealth's legislature did what New York's did not: the Virginia DNA database statute directs the relevant agency to "adopt regulations . . . governing the methods of obtaining information from the data bank." Va. Code Ann. § 19.2-310.5(B) (2021). New York's directive to the Commission was far narrower.

D. Supreme Court Erroneously Conflated Familial Matching With Partial Matches.

Supreme Court's denial of the Article 78 Petition was strongly predicated on an erroneous conflation of partial matching and familial matching. But Respondents now concede that they are distinct—and, as explained by *amicus curiae*, this distinction is widely recognized in the relevant fields. *See* Brief of Amicus Curiae Brendan Parent at 2 (noting that the "technical distinction between inadvertent partial matching and intentional [familial] searching conforms to an ethical line" recognized in various fields). That distinction, borne of three significant differences, is material and dooms Supreme Court's decision.

First, that the result of a familial search is materially different than a partial match is apparent from the FDS Amendment itself: a familial search is conducted only in the *absence* of a partial match. *See* 9 NYCRR § 6192.3(h). And the distinction must be material; if it was not, as Respondents assert (Ans. Br. at 51-53), and Supreme Court concluded, R.15, the FDS Amendment would serve no purpose whatsoever.

Second, the searches depend on different types of line-drawing—defining analytical stringency for partial matches, and biological kinship for familial matches. With respect to the former, partial matches reflect the physical reality that samples of forensic DNA collected from a crime scene may be partially degraded, or may contain mixtures of DNA, which can hamper the ability to identify a full match to

the DNA records in the Databank. *See* 9 NYCRR § 6192.3(c). The Commission allows forensic DNA laboratories to request a search using less stringent analytical criteria in order to help identify a full match that has been obscured by sample degradation, impurity, or the like. *See id.*. The results of a familial search, by contrast, depend on the kinship thresholds that are used to define how closely (biologically) related someone must be to a convicted offender to warrant law enforcement's knock on those relatives' doors—and only *after* no full or partial match is found to exist. *See* 9 NYCRR § 6192.3(h). That reflects an entirely different determination, more social science than biological science. *See* Brief of Amicus Curiae Brendan Parent at 3-15.

Third, the familial search regime also reflects policy determinations that are necessarily different in kind and degree than those reflected in the partial match regulations, because in familial searching, there is no intention to find an actual match. The decision to look, intentionally and deliberately, for a family member requires a host of policy determinations: What kind of crimes should justify intentionally using a search regime that expands the pool of suspects to include the family members of convicted offenders? What kinds of familial relationships should be included in the net? What crimes justify the intentional intrusion into the lives of these family members? What level of judicial oversight should exist over a request

to initiate that process? None of these questions arise with respect to a partial match, which occurs organically as part of the normal Databank search process.

The difference in intent is material: familial searching arises from the intentional search for someone other than the individual whose DNA information was collected and stored in the Databank, whereas partial searching arises from an attempt to match the forensic DNA to that Databanked Individual. Respondents would have the Court elide this difference, reasoning that only the "first step in the process of partial matching" (i.e., the identification of the partial match) occurs fortuitously, Ans. Br. at 53, while the second step (i.e., the decision to disclose a partial match to law enforcement in specified circumstances) occurs intentionally. But the intent at the second step—i.e., the intent behind the *disclosure* of the results of a partial match and a familial search—is not the intent that materially distinguishes a partial match from a familial search, and is therefore not the intent that matters insofar as the Commission's authority is concerned.

What matters with respect to the Commission's authority is the intent behind the processes that bring about the partial match and a familial search in the first instance. The former flows from the intent to identify a full match (i.e., the type of match the Commission is authorized to regulate) in the face of a poor sample. *See* 9 NYCRR § 6192.3(c). The latter is specifically defined by intent to identify a potential criminal suspect by using the stored DNA information of his biological

relative. *See id.* § 6192.3(h). *That* intent was beyond the regulatory authority of the Commission.

III. The FDS Amendment Violates Separation Of Powers.

In promulgating the FDS Amendment, the Commission, an executive committee, improperly usurped the legislative sphere. Respondents largely ignore Petitioners' arguments with respect to each of the four *Boreali* factors.

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

The decision to create familial searching, and the decisions about when it should be available, all depart from merely "balanc[ing] costs and benefits according to preexisting guidelines," and cross the line to making a "choice between competing public policy interests" that marks the impermissible intrusion "into legislative territory." *LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 269 (2018).

Confronted with the welter of policy choices and value judgments that the Commission made in implementing the FDS Amendment, Respondents' position is not to deny that they were made, or that they were significant. Instead Respondents seek to save them on the ground that the Commission did them carefully and correctly, and was supposedly authorized to do so.

Respondents moor their policymaking in the Legislature's putative "large scale delegation of authority . . . [to] add new functionality" to the Databank "for the purpose of solving crimes." Ans. Br. at 56. But Respondents do not cite or quote

the DNA Statute in support of this stunningly broad would-be delegation. Nor can they. The DNA Statute delegates limited and defined tasks—directing the Commission to (i) develop "minimum standards and a program of accreditation for all forensic laboratories in New York state," and (ii) "[p]romulgat[e] standards for a determination of a match between the DNA [Databank] . . . and a DNA record of a person submitted for comparison therewith." Exec. Law § 995-b(9), (12). The familial search program begins outside these confines—when "no[. . .] match or a partial match" exists, 9 NYCRR § 6192.3(h)—and neither of these limited delegations sweeps in an overreach such as the familial search. *See supra* 9-13.

Respondents attempt to distinguish cases such as *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*, 23 N.Y.3d 681, 697-98, 700 (2014), and *Boreali*, 71 N.Y.2d at 11-12, on the ground that "no statute specifically directed" the agencies in *Hispanic Chambers of Commerce* or *Boreali* to regulate in the domain at issue. Ans. Br. at 56. Far from a point of distinction, that is a point of similarity, bringing the Commission's actions within the purview of those cases. The first factor favors Petitioners.

B. Factor II: Respondents Crafted Their Own 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.

Once again ignoring the text of the FDS Amendment, Respondents advocate generically that the authority delegated to the Commission was of a "large scale" that permitted the Commission to make the policy judgments underlying the FDS Amendment. Ans. Br. at 58. But no matter how broadly the scope of the Commission's authority under the statute is construed, the FDS Amendment still 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"—i.e., they are regulating in an area outside their delineated authority. Because authorizing this entirely new use of the Databank required Respondents to answer specific, complex policy questions, unique to the familial searching context, these policy decisions were necessarily made on a "clean slate." *See Matter of Tze Chun Liao v. N.Y. State Banking Dep't*, 74 N.Y.2d 505, 510 (1989).

Respondents cite nothing in the statute that could constitute the guidance to make such decisions. None exists. In deciding 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; in deciding what investigative steps should be exhausted before pursuing a familial search; in deciding what mechanisms for police oversight, objections, and

notifications are appropriate to protect privacy interests; and in deciding whether judicial review of the decision to permit a familial search is appropriate, among others, the Commission acted on a clean slate.

Respondents' reliance on *Garcia v. New York City Dept. of Health* is unavailing. 31 N.Y.3d 601 (2018). In *Garcia*, the Legislature designated certain vaccinations that school children must receive, while allowing agencies to decide whether additional vaccinations should be administered. The Legislature's directive empowered the New York City Board of Health to "add necessary additional provisions to the health code in order to most effectively prevent the spread of communicable diseases," and to "take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination." 31 N.Y.3d at 610-611. That broad but specific delegation plainly authorized the Board to determine which flu vaccines should be required for children attending day care programs, and provided appropriate legislative guidance. *Id.*

The contrast with *Garcia* is striking. Here, the Legislature did not delegate to the Commission the power to promulgate regulations to "most effectively solve crime" or "find potential suspects." Rather, the Legislature only empowered the Commission 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). Unlike the Health

Board in *Garcia,* which added vaccines, as it was authorized to do, the Commission here promulgated standards when the circumstances specified in its authorizing statue were absent. And unlike *Garcia*, the regulation at issue was written on a "clean slate," on which Respondents developed their "own comprehensive set of rules without benefit of legislative guidance." *Boreali*, 71 N.Y.2d at 13. The second factor favors Petitioners.

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

For the third *Boreali* factor, Respondents concede, as they must, that Bills permitting familial searching were repeatedly introduced in the Legislature before Respondents acted on their own. Ans. Br. at 60-1; *see also* Opening Br. at 13-14 (describing bills referred to the Assembly's Governmental Operations Committee in 2014, 2015, 2016, 2017, and 2018, and bills introduced in the Senate, one of which passed the Senate in just months before Respondents enacted the FDS Amendment). Respondents dismiss the record as insufficiently robust to tilt the scale on this factor, but base their argument on distinguishable cases.

For example, the failed bills in *Matter of Acevedo v. N.Y. State Dep't of Motor Vehs.*, did not weigh in the petitioners' favor because they did not reflect the same amendments as those subject to the regulatory challenge. 29 N.Y.3d 202, 224-225 (2017). Here, by contrast, the cited bills addressed the precise search scheme created through the FDS Amendment. Similarly, in concluding in *Matter of NYC C.L.A.S.H.*

v. N.Y. State Off. Of Parks that the third factor did not weigh in the petitioners' favor, the court also considered that "many" of the cited bills "sought to ban outdoor smoking on a far larger scale" than did the challenged regulation. 27 N.Y.3d 174, 183-84 (2016). Again, there is no comparable discrepancy between the bills considered here and the FDS Amendment the Commission enacted.

Respondents' cases fail for more reasons than a discrepancy between the scope of the failed bills and that of the challenged regulation. In *Matter of NYC C.L.A.S.H.*, the "legislature's Administrative Regulations Review Commission" actually "endorsed" the challenged regulation, providing affirmative evidence suggesting that the legislature did not disapprove of it. 27 N.Y.3d at 184. Here, by contrast, a respondent in this case who helped to create the familial searching scheme, stated 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." R.301, 304. Considered carefully, the third factor weighs in Petitioners' favor.

At minimum, the third factor surely does not favor Respondents, as they suggest. Respondents echo Supreme Court's conclusion that "[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." R.19. But neither Supreme Court nor Respondents justify that inference. As an initial matter, Respondents themselves acknowledge that "[l]egislative inaction . . . affords the most dubious foundation for drawing positive inferences." Ans. Br. at 59-60 (quoting *Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 183). But putting that aside, the Legislature's inaction for 25 years in response to *other* rulemakings cannot properly be read to infer anything about the Legislature's view of *this* rulemaking—i.e., the FDS Amendment. The third factor does not favor Respondents.

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 pursuant to which the regulation at issue was enacted." *Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 184. That is not the case here: the core of the FDS Amendment is imbued with a litany of social policy concerns regarding balancing interests in privacy, law enforcement, civil rights and liberties, and other criminal and racial justice issues particular to New York—all of which are indisputably outside the realm of the Commission's technical expertise.

Respondents tout the DNA Subcommittee's scientific expertise, which it argues was used to develop the familial search policy. But that misses the point. The fourth *Boreali* factor focuses on the degree to which an agency made decisions outside its expertise. *See Boreali*, 71 N.Y.2d at 13-14.

What makes this factor tilt heavily in Petitioners' favor is the remarkable breadth of decisions the Commission made that have nothing to do with their scientific competencies. In asserting that the "core" of the FDS Amendment was "based on agency expertise," Respondents deride the social policy decisions as mere ancillary "social costs" and "other factors" that always arise, and that Respondents were obligated to consider. But this ignores that the profound and specific social policy determinations undergirding the FDS Amendment are also at its "core," and that the Commission has no cognizable competence or expertise on those issues. The fourth factor thus favors Petitioners.

Even if the Court decides that fewer than four of the *Boreali* factors weigh in Petitioners' favor, the significance of those that do compels the ultimate conclusion that the agency "cross[ed] the line into legislative territory," *Chamber of Commerce*, 23 N.Y.3d at 696, warranting annulment of the FDS Amendment.

IV. 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. Respondents cite no evidence in the administrative record sufficient to demonstrate otherwise.

First, Respondents object to Petitioners' contention that the Commission gave inadequate consideration to the familial search rule's effect on Black and Hispanic New Yorkers, flaunting one paragraph in a rulemaking notice. But that statement merely concedes the FDS Amendment's disparate impact on Black and Hispanic New Yorkers, and then purports to deal with the issue by noting that a law's disparate impact on racial minorities does not make out an Equal Protection claim under the Fourteenth Amendment. Ans. Br. at 68; R.67. If anything, the Commission's attempt to legalistically paper over the acknowledged disparate impact that its regulations would have on New Yorkers of color underscores the profoundly important policy implications and decisions at stake—and the Commission's utter lack of capacity to make them. But that goes back to *Boreali*; for purposes of the issue addressed here, suffice it to say that the statement does not reflect an adequate rational basis for deciding that familial searching is warranted notwithstanding that disparate impact. *See N.Y. State Ass'n 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 where the effect of that disparate impact was not otherwise unconstitutional).

Respondents also assert (despite the Commission's statement, and once again undercutting the Commission's own rulemaking) that no such disparate impact exists at all—because a familial search compares forensic DNA with the DNA of a Databanked Individual without regard to race. But the impact comes about because the search is for *biological relatives* of a group that is disproportionately minority. Such biological relatives will, also, be largely minority, a point that Respondents ignore.

Respondents also cite the Office of Forensic Services' assertion that a familial search is actually a "race blind" process. But this ignores the disparate impact on minorities arising from law enforcement's use of information largely about minorities as a way to find criminal suspects for a crime where the ethnicity of the perpetrator may not be known. That practice, and effect, raises troubling questions; the failure of the Commission to consider them undercuts any claim that their analysis was rational.

Respondents also do not dispute that they lacked "knowledge or information sufficient to form a belief" as to key facts about both the effectiveness of familial searching and its 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"). Respondents' admitted failure that it lacks sufficient information to form a belief about these critical policy implications of the FDS Amendment further supports that Respondents did not adequately consider them in enacting the FDS Amendment.

Second, Respondents claim that Petitioners are "mistaken" to suggest that the FDS Amendment's investigatory benefits do not outweigh its costs. But in support of that argument Respondents merely cite two reports in the record discussing the potential investigatory benefits of familial searching. This does nothing to show how Respondents weighed those purported benefits against the harms of familial searching, including its disparate impact on minorities. The record establishes that they did not. The FDS Amendment is arbitrary and capricious for this reason as well.

Finally, Respondents fail to dispute that the details of the familial searching program created through the FDS Amendment are also entirely arbitrary. They point to no rational basis in the record for the Commission's 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. The FDS Amendment therefore "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.

Respondents' failure to consider the impact of familial searching on racial minorities, failure to balance the utility of familial searching against that impact, and failure to otherwise establish a rational basis for the details of the program, establish that the FDS Amendment is arbitrary and capricious.

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.

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Respectfully submitted,

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