To be argued by:
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15 minutes requested

Supreme Court of the State of New York
Appellate Division – First Department

Nos. 2020-03746, 2021-00560

In the Matter of the Application of

TERRENCE STEVENS, BENJAMIN JOSEPH,

Petitioners-Appellants,

v.

NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, NEW YORK STATE COMMISSION ON FORENSIC SCIENCE, MICHAEL C. GREEN, NEW YORK STATE COMMISSION ON FORENSIC SCIENCE DNA SUBCOMMITTEE,

Respondents-Respondents,

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

BRIEF FOR RESPONDENTS

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PRELIMINARY STATEMENT

The DNA Databank Act of 1994 created a statewide database of DNA records from convicted criminals. In the Act, the Legislature delegated to the Commission on Forensic Science the task of determining how the Databank should be structured and operated. In particular, the Legislature left to the Commission—advised by scientists whose expertise spans a number of disciplines relating to forensic DNA analysis—the discretion to determine what would constitute a "match" when crime-scene evidence is compared to the profiles in the Databank. And the Act requires the Commission to continually study DNA technology and, where appropriate, adopt additional methodologies for searching the Databank.

Relying on its expertise, and exercising its delegated statutory authority, the Commission promulgated a rule providing for "familial searching," a process that matches crime-scene evidence from an otherwise unidentifiable source with a close blood relative whose profile is in the Databank. Familial searching has been the subject of intense study and has been adopted by several other States as a

reliable and valuable method of providing investigative leads in cases where more traditional methods have failed.

In this C.P.L.R. article 78 proceeding, two individuals whose DNA data are not in the Databank—but who are siblings to individuals whose information is in the Databank—sought to invalidate the Commission's familial search rule. Supreme Court, New York County (Hagler, J.) upheld the rule. This Court should either dismiss petitioners' claims or affirm the order below.

As a threshold matter, petitioners lack standing to challenge the Commission's rule, and their claims should be dismissed on that basis alone. Because petitioners' information is not in the DNA Databank, there is no possibility that any search of that Databank will uncover their personal information or result in the disclosure of their names. And petitioners' fears that they may be the suspect of a police investigation after a familial search, due to their siblings' criminal history, are too speculative to confer standing. A chain of contingent events would have to happen before petitioners would be subject to any such investigation. And even beyond that speculation, the chances that either petitioner will ever be harmed are

remote, given the limited circumstances in which familial searching is permitted, the few searches that have been authorized to date, and the thousands of names in the Databank.

On the merits, petitioners fail to show that the Commission exceeded its statutory authority. As Supreme Court rightly concluded, the familial search rule is an appropriate exercise of the Commission's longstanding authority to study and adopt evolving methods for identifying appropriate matches to serve the Act's underlying law-enforcement purposes. Numerous provisions in the text of the Act make clear that the Legislature intended the Commission to have broad authority to adapt the Databank to new developments in forensic DNA technology.

The meritless nature of petitioners' claims is highlighted by their concession that the Commission had statutory authority to allow what are known as "partial matches"—i.e., matches to possible family members that are discovered during the course of a search for a full match to a particular individual. There is no material difference between a partial match and the familial searching that the rule at issue authorizes: both of these methods report the names

of potential close family members based on crime-scene DNA evidence that is otherwise unidentifiable. Given this equivalence, Supreme Court correctly concluded that there is no rational basis for finding that the Commission has authority to allow partial matches but not familial searches.

Supreme Court also rightly concluded that the familial search rule has a rational basis. The Commission adopted the rule after forming an extensive administrative record showing that familial searching will both generate leads to solve crimes and help to exonerate the innocent. Although petitioners contend that the Commission failed to consider the effect of the rule on Black and Hispanic New Yorkers, the record reflects that the Commission expressly addressed such concerns. Finally, petitioners are wrong to contend that the rule is arbitrary and capricious because familial searches only rarely produce successful leads. The Commission has only authorized familial searches a handful of times, and only in a small category of cases where other investigative tools have failed—crimes that, by their nature, are hard to solve. The Commission

rationally concluded that providing an additional tool to generate leads in such cases is appropriate.

QUESTIONS PRESENTED

1. Whether Supreme Court incorrectly held that petitioners Terrence Stevens and Benjamin Joseph have standing to bring this C.P.L.R. article 78 proceeding.

2. Whether Supreme Court correctly held that the Commission on Forensic Science had statutory authority to adopt a regulation authorizing familial searching of the State DNA Databank.

3. Whether Supreme Court correctly held that the familial search rule is rational, and not arbitrary and capricious.

STATEMENT OF THE CASE

A. Statutory Background

In 1994, the Legislature enacted the DNA Databank Act ("Act"), which requires the creation of a statewide database of DNA records ("DNA Databank") based on samples collected from people convicted of crimes. *See* Ch. 737, 1994 N.Y. Laws 3709 (codified at Executive Law § 995 et seq). The Act also created the Commission

on Forensic Science ("Commission") and, within the Commission, a Subcommittee on Forensic DNA Laboratories and Forensic DNA Testing ("DNA Subcommittee"). *See* Exec. Law §§ 995(9)-(10); 995-a(1); 995-b(13)(a).[1] The Commission is an independent agency within the executive branch, supported by the resources of the Department of Criminal Justice Services (DCJS). *See* Exec. Law § 995-a.

The DNA Databank is a statewide index of DNA profiles. *Id.* § 995-c(1)-(3). Any federal, state, or local law enforcement agency or district attorney's office may enter into a written agreement with DCJS to use the Databank. *Id.* § 995-c(6). Any agency or office that enters into such an agreement may thereafter submit DNA evidence taken from crime scenes to be compared to the profiles in the

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[1] The Commissioner of the New York State Division of Criminal Justice Services is the chair of the Commission. Exec. Law § 995-a(1). Other mandatory members of the Commission include: scientists; prosecutors; law enforcement officials; criminal defense attorneys from both the public and private defense bars; and an attorney or judge with expertise in privacy and biomedical ethics. *Id.* § 995-a(2). The DNA Subcommittee must include representatives from each of the following scientific disciplines: molecular biology; population genetics; laboratory standards and quality assurance regulation; and forensic science. *Id.* § 995-b(13)(a).

Databank, in order to generate leads "in connection with the investigation of the commission of one or more crimes." *Id.*

The Legislature chose not to dictate specifics in the Act about how the DNA Databank should be structured or searched. Instead, the Act delegates to the Commission, acting on recommendations of the DNA Subcommittee, the authority and obligation to "promulgate a policy for the establishment and operation of a DNA identification index consistent with the operational requirements and capabilities of [DCJS]." *Id.* § 995-b(9).

To aid the Commission's performance of that authorized function, the DNA Subcommittee first "shall evaluate and assess all DNA methodologies proposed to be used for forensic analysis, and make reports and recommendations to the commission as it deems necessary." *Id.* § 995-b(13)(b). The DNA Subcommittee makes "binding recommendations" to the Commission regarding "minimum scientific standards to be utilized in conducting forensic DNA analysis including, but not limited to, examination of specimens, population studies and methods employed to determine probabilities and interpret test results." *Id.*

Either the Commission or the DNA Subcommittee may establish "as many advisory councils as it deems necessary to provide specialized expertise to the commission with respect to new forensic technologies including DNA testing methodologies." *Id.* § 995-b(7). Based on recommendations from the DNA Subcommittee, the commission "shall designate one or more approved methodologies for the performance of forensic DNA testing," *id.* § 995-b(11), and "[p]romulgate standards for a determination of a match between the DNA records contained in the state DNA identification index and a DNA record of a person submitted for comparison therewith," *id.* § 995-b(12).

The Act provides that DCJS shall establish the DNA Databank in accordance with the Commission's promulgated policy. *Id.* § 995-c(1). Any "designated offender" must, after conviction and sentencing, provide a DNA sample for inclusion in the Databank. *Id.* § 995-c(3)(a). The original version of the Act defined a designated offender as someone convicted of any of a list of specified crimes; in 2012, the Legislature amended the Act to define "designated offender" to mean anyone convicted of any felony or any

misdemeanor under the Penal Law. *See id.* § 995(7); *see also* Ch. 19, § 5, 2012 McKinney's N.Y. Laws 291, 294-96; Ch. 92, § 30, 2021 N.Y. Laws, p. 96.

B. Regulatory Background

After the Act's adoption, the Commission created the DNA Databank Implementation Plan required by Executive Law § 995-b(9). (*See* Record on Appeal (R.) 468.) The Commission also promulgated a set of regulations, Part 6192, that governs the establishment and operation of a state identification index. *See* 9 N.Y.C.R.R. pt. 6192. Over the years, the Commission has amended the Implementation Plan and Part 6192 in accordance with the DNA Subcommittee's recommendations, which in turn are based on developments in the field of forensic DNA science.

DNA profiling works by storing information in the Databank about the particular "alleles" that appear on a person's chromosomes. 9 N.Y.C.R.R. § 6192.1(a). Human chromosomes have physical positions on them known as loci, and an allele is defined as "one of the alternative forms of the DNA at a particular genetic locus." *Id.* § 6192.1(a), (s). In general, a DNA profile is "the list of alleles

carried by a particular person at a specific set of genetic loci." *Id.* § 6192.1(i). The more alleles that two profiles have in common, the more likely it is that the two profiles come from the same person or from two biologically related people—and because some alleles are less common than others, a shared rare allele is more statistically significant than a shared common allele in suggesting an association between two profiles. (R. 215-216, 222.)

1. The partial match rule

a. The Commission on Forensic Science's initial study of partial match and familial search policies

The initial Implementation Plan and original version of Part 6192 adopted by the Commission permitted only a direct search for a full match between crime-scene evidence and the profiles in the Databank. (R. 456.) In 2006, the Commission and DCJS reviewed an update from the Federal Bureau of Investigation's Combined DNA Index System (CODIS) that discussed "partial matches" and "familial searches," additional methods of searching DNA databanks. (*See* R. 466.) Partial matches and familial searches are ways to identify potential biological family relationships between an

offender in a DNA database and a person who left evidence at the scene of another crime. (R. 466.)

A partial match occurs when a law enforcement agency asks the Databank to perform a direct search for a full match between a crime-scene profile and a Databank profile, and during the process of that direct search the laboratory discovers that the DNA profile obtained from a crime scene is similar to—but not a full match with—a DNA profile in the Databank. The partial match may be evidence that the crime-scene sample came from a close biological relative of the person whose DNA is in the database. (R. 456, 466.)

A familial search occurs when a law enforcement agency asks the Databank to compare a DNA profile derived from crime-scene evidence to the DNA profiles in the Databank, to determine the likelihood of a biological family relationship between the crime-scene profile and a Databank profile. (R. 466.) In other words, in a partial match a law enforcement agency requests a search for a full match and the Databank finds a potential family relationship instead; and in a familial search the law enforcement agency specifically asks the Databank to look for a potential family relationship.

In 2008, after a period of initial review, DCJS and the Commission determined that the Implementation Plan and Part 6192 the Commission had adopted did not then permit the Databank to disclose partial matches or to perform familial searches. (*See* R. 457, 470.) But the agencies concluded that, via the Act, the Legislature had delegated to the Commission the statutory authority to amend the Implementation Plan and Part 6192 to facilitate partial matches, familial searches, or both. (R. 470-471.)

In 2010—in a rulemaking that served as a precursor to the rulemaking at issue in this case—the Commission voted to expand the Implementation Plan and Part 6192 to allow partial matches to be reported to law enforcement. (R. 456.) The Commission explained that its prior rules, which had barred laboratory officials from revealing anything other than a full match to law enforcement who had requested the search, were too restrictive. *See* Partial Match Policy for the DNA Databank, 32 N.Y. Reg. 2, 5 (July 21, 2010). The restriction to full matches had unreasonably prohibited a scientist from telling law enforcement or prosecutors about a near match

that the scientist had reason to believe could be vital to catching a serious criminal or exonerating an innocent suspect. *Id.*

The Commission explained that it was proposing to amend its rules only after the DNA Subcommittee had solicited and reviewed "technical information from top scientists," including multiple renowned human geneticists and forensic scientists. *Id.* The new regulation was based on recommendations by the FBI's Scientific Working Group on DNA Analysis Methods, and was designed "to ensure that the new policy is applied fairly and in accordance with accepted scientific procedures." *Id.*

b. How the partial match rule works

A "partial match"—also known as an "indirect association"—occurs when, during a direct search for a full match, a laboratory scientist finds that the DNA profile formed from a sample taken from a crime scene is similar to a DNA profile of an offender in the Databank, "and a comparison reveals that the offender or subject may be a relative" of the person whose DNA was left at the crime scene. *Id.* at 4. Under the regulations promulgated by the Commission, a partial match may be disclosed to the investigators who

requested the direct search only if the crime-scene sample contains at least ten of the core loci recognized by CODIS. *Id.* at 4, 5. Furthermore, the agency submitting the sample must have confirmed that the sample came from a single source, and the relevant prosecutor must have committed to pursuing further investigation of the case if a name is released. *Id.* at 4.

If the data from a partial match does not meet statistical thresholds set by the DNA Subcommittee, the DNA Databank may test additional loci of the sample, including using Y-STR analysis or mitochondrial DNA (mtDNA) analysis if feasible. *Id.*[2] If after such additional analysis the statistical thresholds still are not met, the name cannot be released. *Id.* When the thresholds are met and a name is released, the laboratory must instruct the investigating

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[2] Y-STR and mtDNA analyses can be used to refine a search and exclude candidates when certain circumstances are met. *See* 9 N.Y.C.R.R. § 6192.3(e), (f), (g)(1)(iii), (j)(3). Because Y-STR loci exist only on the Y chromosome, which is passed exclusively from fathers to sons, Y-STR analysis can be used to compare DNA profiles only if all the samples involved are from biological males in the same male line. *See id.* §§ 6192.1(x); 6192.3(j)(3). By contrast, children of both sexes inherit mtDNA exclusively from their mothers, and thus mtDNA can be used to indicate or exclude relationship only through the female line. *See generally id.* § 6192.1(t).

agency that the match is partial, that the information provided is only a lead for further investigation, and that the source of the crime scene evidence is potentially a relative of the named offender but that the partial match is not conclusive evidence of the same. *Id.*

c. Adoption of the partial match rule

One organization submitted comments to the Commission regarding the proposed partial match regulation. The commenter argued that DCJS and the Commission lacked statutory authority to adopt a partial match policy. Partial Match Policy for the DNA Databank, 32 N.Y. Reg. 5, 5 (Oct. 13, 2010). In response, the Commission explained that Executive Law § 995-b(12) delegates to the Commission the authority to set "standards for a determination of a match" between crime-scene samples and records in the database. *Id.* at 6 (quotation marks omitted). The Commission also pointed to its authority under Executive Law § 995-b(11) to "designate one or more approved methodologies for the performance of forensic DNA testing." *Id.* (quotation marks omitted).

The Commission concluded that the partial match regulation was an appropriate exercise of its technical expertise within these

and other broad delegations of statutory authority. Because the DNA Databank "was created so that law enforcement officials can identify the perpetrators of crimes when DNA evidence is found at a crime scene," adopting a system for the release of indirect matches would serve the purposes of the statute by "afford[ing] law enforcement officials more opportunity to solve crimes, prevent additional ones from occurring, and prevent innocent people from being wrongfully accused." *Id.*

In the 2010 rulemaking notice finalizing the partial match rule, the Commission observed that familial searching had by then been adopted in California and Colorado. *Id.* However, the Commission at that time chose not to allow investigators to submit requests for familial searches, electing for the time being to permit only the disclosure of partial matches discovered indirectly during the course of searches for direct matches. *Id.*

The Commission's partial match rule became effective in October 2010. *Id.* at 5. Between 2010 and 2018, there were 92 occasions in which a potential partial match was identified in a New York DNA laboratory. Of those 92 potential partial matches, 48

were determined to meet or exceed the required statistical threshold. In those 48 instances, offender information was disclosed to law enforcement, with the caveats described above. (R. 456.)

2. The familial search rule

a. The Commission and DNA Subcommittee renew their study of familial searching

The regulation that petitioners challenge here—the familial search rule—is closely connected to the earlier partial match rule. In December 2016, the Commission voted to direct the DNA Subcommittee to study familial searching. (R. 457.) Throughout the spring of 2017, the DNA Subcommittee studied familial search practices in other States and heard comments and public statements from numerous experts and stakeholders. (R. 458-459.) By that time, the States using familial searching had come to include California, Colorado, Florida, Michigan, Ohio, Texas, Utah, and Virginia. (R. 459.) The Commission worked through multiple draft regulations created as bases for discussion. (R. 458-460.)

In May 2017, the DNA Subcommittee voted to recommend a familial search regulation that would allow for familial searching

only in cases where other searches have yielded no other leads. (R. 460-461.) The DNA Subcommittee made a binding recommendation to the Commission regarding the kinship threshold—the likelihood of a familial relationship—that would have to be satisfied before the DNA Databank could disclose the results of any familial search. (R. 461.) The binding recommendation called for New York to conduct familial searches by using a computer program known as the Denver Software, which incorporates the kinship thresholds the DNA Subcommittee found appropriate. (R. 461-462, 855.) In addition to updating Part 6192, the DNA Subcommittee approved an updated version of the Implementation Plan. (*See* R. 804-826.)

b. How familial searching works

Under the Commission's regulation, a familial search is "a targeted evaluation of offenders' DNA profiles in the DNA databank which generates a list of candidate profiles based on kinship indices to indicate potential biologically related individuals to one or more sources of evidence." 9 N.Y.C.R.R. § 6192.1(ab). (*See also* R. 462.)

A familial search may be attempted only if all of the following conditions are met: (1) the crime under investigation is murder,

sexual assault, arson, terrorism, or a crime that involves a "significant public safety threat"; (2) the DNA profile derived from the crime-scene evidence did not result in either a full match or a partial match and "appear[s] to have a direct connection with the putative perpetrator of the crime"; and (3) the investigating agency and applicable prosecutor certify that "reasonable investigative efforts have been taken in the case" or that "exigent circumstances exist warranting a familial search." 9 N.Y.C.R.R. § 6192.3(h). (*See also* R. 463.)

The request for a familial search must be made jointly by the relevant jurisdiction's law enforcement agency and prosecuting authority. *See* 9 N.Y.C.R.R. § 6192.3(i). The request then goes through multiple levels of review: first, DCJS and the State Databank administrator must confirm that the above requirements are met; and second, the DCJS commissioner must review the complete application. *Id.* § 6192.3(i)(1)-(2). If the commissioner finds any case requirement or sample requirement lacking, the requesters will be notified in writing. *Id.* § 6192.3(i)(2)(i). (*See also* R. 463.)

If the commissioner approves a familial search request, the New York State Police crime laboratory will use the "validated software" (i.e., the Denver Software) to perform a familial search of the DNA Databank, generate a candidate list, and apply the kinship threshold values set by the DNA Subcommittee. 9 N.Y.C.R.R. § 6192.3(j)(1)-(2).

The kinship thresholds set by the DNA Subcommittee require a likelihood ratio of either 5,000 or 10,000, depending on which DNA testing kit is used. (R. 855). A likelihood ratio is a number representing the likelihood of observing an event given that one fact is true relative to a contrary fact. *See, e.g., People v. Herskovic*, 165 A.D.3d 835, 837 (2d Dep't 2018). In the familial searching context, setting a kinship threshold at a likelihood ratio of 10,000 means that an association between two profiles is 10,000 times more likely to be observed if they are profiles of related individuals than if they are of unrelated individuals.

Even if the kinship threshold is met, the State Police must also use Y-STR testing to refine results whenever it is feasible—that is, whenever the crime-scene evidence comes from a male

individual and there is an adequate sample for testing—and may attempt exclusions via other testing (such as mtDNA testing) where appropriate. 9 N.Y.C.R.R. § 6192.3(j)(3)-(4). See *supra* at 14 n.2.

If a familial search returns any candidate profiles that exceed the kinship threshold, and those candidates are not excluded by any of the additional testing that is feasible under the circumstances, then the State Police will release the relevant names from the Databank to the requesters. *Id.* § 6192.3(k)(1). The results are provided in writing and must inform the requesters that: (1) the information is for law enforcement purposes only; (2) the named offender could not have been the source of the crime-scene evidence; (3) the information provided is not a definitive statement of a biological relationship; and (4) the information must be treated "only as an investigative lead." *Id.*

If no candidate profiles exceed the kinship threshold, no name will be released and the requesters will be notified in writing that no candidate profiles were found. *Id.* § 6192.3(k)(3). The State Police can perform the family search anew every six months from the date on which the notification was sent, if the law enforcement agency

that initially requested the familial search so requests. *Id.* § 6192.3(k)(4).

Any law enforcement officer or prosecutor who will receive offender names as the result of a familial search must undergo live training regarding "how a familial search is conducted, including the limitations of the method"; how to best evaluate leads from a familial search; confidentiality requirements; the requirement to withdraw a familial search request if a suspect is identified through any other means; and the requirement to inform DCJS at regular intervals of the status of the follow-up investigation. *Id.* § 6192.3(k)(2).

c. Adoption of the familial search rule

The Commission published the familial search rule as a final rule in October 2017. *See* Familial Search Policy, 39 N.Y. Reg. 3, 3-6 (Oct. 18, 2017) (*reprinted at* R. 858-861).

During the notice-and-comment period, some commenters had argued that the Commission lacked statutory authority to authorize familial searching. In the notice of adoption, the Commission explained—as it had in adopting the partial match rule (see

supra at 15)—that the Act broadly delegates to the Commission the responsibility to set policy for the operation of the DNA Databank. The Commission noted that no provision in the Act prohibits a familial search policy. (R. 859.)

The Commission also addressed some commenters' concerns that the familial search policy would have a disproportionate effect on people of color, including Black and Hispanic New Yorkers. (R. 860.) The Commission explained that because familial searching is "very limited in scope" and can be used only in specific circumstances where other investigatory leads have failed and specific case and sample requirements are met, no racial or ethnic group will be singled out. (R. 860.)

Finally, the Commission responded to comments arguing that any familial search policy must have a "'rigorous system of oversight and accountability.'" (R. 860.) The Commission explained that "[t]he necessary oversight provisions are provided in the proposed rule" via the scientific and technical expertise of the Commission and DNA Subcommittee, and additional advisory groups authorized by the statute and regulation. (R. 860-861.) The very limited

circumstances under which familial searching is permitted also strictly constrain discretion. (*See* R. 861.)

The familial search policy became effective in October 2017. (R. 858.) As of April 2018, twelve completed applications for familial searches had been submitted to the Commissioner of DCJS, and the Commissioner had approved nine of those applications. (R. 464.)

C. This C.P.L.R. Article 78 Proceeding

In February 2018, petitioners Terrence Stevens and Benjamin Joseph brought this C.P.L.R. article 78 proceeding against DCJS, the Commission, DCJS Executive Deputy Commissioner and Commission Chairman Michael C. Green, and the DNA Subcommittee. (R. 42-90.) Each petitioner alleges that he has never been convicted of a crime, and thus is not subject to having his DNA in the DNA Databank, but that he has a brother who is a convicted offender with a record in the DNA Databank. (R. 45-46.)

The petition asks the courts to annul the familial search rule. (R. 82-83.) The petitioners allege that the Commission lacked statutory authority to promulgate the familial search policy, and violated the separation of powers in the New York State Constitu-

tion by doing so. (R. 62-70.) Petitioners also argue that the familial search rule is arbitrary and capricious because it burdens minority populations for little investigatory benefit.[3] (R. 75-78.) Respondents filed a verified answer opposing the petition (R. 439-465), supported by the extensive administrative record the Commission assembled as it developed the familial search rule (R. 466-861).

In March 2020, Supreme Court, New York County (Hagler, J.) denied the petition. (R. 4-20.) The court concluded that the Act provided a "vast delegation of duties to the Commission and DNA Subcommittee to establish, operate, and maintain the Databank." (R. 14.) The court held that the familial search rule fell within the Commission's broad authority to "'[p]romulgate standards for a determination of a match'" under Executive Law § 995-b(12), and rejected petitioners' contention that only "a full match of genetic markers" could fall within the meaning of the statute. (R. 14-16.)

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[3] Below, petitioners also argued that the familial search rule is unconstitutional under the federal Constitution because it authorizes suspicionless searches in violation of the Fourth Amendment (R. 70-75), and that the rule was adopted in violation of New York's Open Meetings Law (R. 78-81). Petitioners have abandoned those arguments on appeal.

"In essence," the court concluded, "the familial search Regulations are a deliberate partial match program." (R. 15.)

The court also found no support for "petitioners' prediction of widespread abuse and usage," noting that only twelve applications for familial searches had been made of which only nine were approved. (R. 15.) "The more accurate description," the court held, "is that the Regulations represent incremental changes in methodology" of searching the statutorily authorized DNA Databank. (R. 15) (quotation marks omitted.) The court noted that the familial search rule "do[es] not add a single user to the Databank" but is "another delegated method of testing permissibly collected records in the pre-existing Databank, and is rooted in the enabling legislation" for the statutory purpose of solving crimes. (R. 16.)

Addressing petitioners' separation-of-powers challenge, the court held that the "coalescing circumstances" set forth in *Boreali v. Axelrod*, 71 N.Y.2d 1, 11-14 (1987) supported the Commission's authority to adopt the rule. (R. 16-19.) The court found that three of the four *Boreali* circumstances strongly supported the Commission: (1) the Legislature set the basic policy goal of using a DNA

database to solve crimes, and the Commission acted within a broad delegation of authority to implement that goal; (2) the Commission filled in the details of an existing policy by incrementally developing the DNA Databank without subsequent legislative intervention for over a quarter-century; and (3) the agency exercised extensive scientific and technical expertise when it developed the requirements for performing familial searches and releasing names. With respect to the remaining *Boreali* circumstance, the court acknowledged that several bills had been introduced in the Legislature to authorize familial searching and most had died in committee; the court found this consideration insignificant in comparison to the other *Boreali* circumstances and the Legislature's longstanding practice of deference to the Commission's regulations. (R. 17-19.)

Finally, Supreme Court held that the familial search rule is not arbitrary and capricious. (R. 19-20.) The court found that no targeting of people of color is possible due to the nature of the familial search process, and that the regulations are less intrusive than other approaches to solving unsolved crimes (*See* R. 19.) The

court also found that any impact on communities of color would be minimal because of the limited use of familial searching. (R. 20.)

ARGUMENT

POINT I

BECAUSE PETITIONERS LACK STANDING, THIS COURT SHOULD DISMISS THE PETITION

As a threshold matter, Supreme Court erred in holding that petitioners have standing to bring this proceeding. There is a "well-established, two-part test for determining standing to challenge governmental action." *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 318 (1st Dep't 2011) (citing *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004)). First, "a petitioner must demonstrate injury in fact, meaning that he or she will actually be harmed by the challenged administrative action." *Id.* (quotation marks omitted). Second, the petitioner's injury in fact, if any, "must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." *Id.* (quotation marks omitted). Petitioners here satisfy neither requirement.

A. Petitioners' Sole Allegation in Support of Standing Is Mistaken, and in Any Event Their Injuries Are Too Speculative for Standing.

Petitioners' claim of injury in fact is based on a mistaken description of how the familial search rule works. Petitioners also cannot satisfy the injury-in-fact requirement because their claim of harm "is contingent upon events which may not come to pass," rendering their petition "nonjusticiable as wholly speculative and abstract." *See Cubas v. Martinez*, 33 A.D.3d 96, 103 (1st Dep't 2006) (quotation marks omitted); *see also Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 812 (2003) ("abstract or speculative injury" does not confer standing).

Neither petitioner alleges that he has been required to provide a DNA sample or has been directly affected in any way by the familial search rule. Instead, petitioners merely allege that they *might* be adversely affected in the future by a familial search. But petitioners' speculation of future harm is based on a fundamentally mistaken understanding of how familial searches operate. According to petitioners, because each one has a brother whose DNA is in the Databank, petitioners are at risk of "suspicionless searches"

that are "directed to their DNA and personal genetic makeup." (R. 81.)

Nothing about this statement is true. As a factual matter, petitioners' "DNA and personal genetic makeup" are not subject to search, suspicionless or otherwise. In a familial search, DNA evidence taken from a crime scene is searched against the entire statewide DNA Databank. Neither the crime-scene evidence nor the database contents would include petitioners' genetic material. If a name were returned by such a search, it would be the name of a person in the Databank, not the name of one of the petitioners, and the name would be provided to police only as an investigative lead for follow-up investigation. In other words, because petitioners' information does not appear at all in the DNA Databank, no familial search—even one based on their brothers' DNA—will touch on petitioners' (nonexistent) DNA information, and no familial search will return their names.

Because petitioners are thus not directly affected at all by familial searches, their objection to "suspicionless" searches (*see* R. 81) does not change the analysis, particularly when they have

abandoned their Fourth Amendment claim on appeal (*compare* R. 70-75 *with* Br. for Pet'rs-Appellants (Br.)). In any event, petitioners have no reasonable expectation of privacy that would have supported the Fourth Amendment standing claim asserted in the petition. A person cannot assert the Fourth Amendment based on the privacy rights of others or "in the abstract"; instead, to have standing to invoke the Fourth Amendment, a person must show that a challenged search implicates his or her own personal "reasonable expectation of privacy." *People v. Cheatham*, 54 A.D.3d 297, 302 (1st Dep't 2008); *see Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Petitioners fail to make that showing given that any familial search would involve either another person's DNA taken from a crime scene, or another person's DNA stored in the Databank.

Petitioners independently have failed to establish any injury-in-fact because any risk of harm to petitioners as a result of a future familial search is far too speculative and hypothetical to support standing. For petitioners to experience any harm, a lengthy chain of events would have to occur: (1) a crime scene would need to have a suitable sample of (another person's) DNA for testing; (2) investi-

gators would have to request a familial search and satisfy the many criteria that are prerequisites to conducting such a search; (3) the search would have to generate candidates who would not be petitioners themselves, but who would be related to petitioners (such as their brothers); and (4) police would then contact petitioners themselves to follow up on those leads, even though petitioners' names would not have been reported and there may be other reasons for police not to investigate them. The risk that all of these events will occur and injure these particular petitioners is remote—especially considering that the record below shows that the Commissioner has approved only nine familial searches statewide as of April 2018. (R. 464.) That attenuated risk is exactly the type of "speculative and abstract" possible future injury that is insufficient for standing. *Cubas,* 33 A.D.3d at 102-03 (quotation marks omitted); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (rejecting standing where there was "no more than speculation" that the plaintiff himself would be affected).

B. Petitioners, Whose DNA Has Not Been and Will Not Be Collected, Are Outside the Zone of Interests Protected by the Act.

Petitioners also fail to show that they are within the zone of interests of the Act. The statute requires the collection of DNA from those convicted of crimes, *see* Exec. Law §§ 995(7), 995-c(3)(a), while providing procedures for expunging the Databank records of those who are acquitted of crimes or who obtain reversals of their convictions, *id.* § 995-c(9). Petitioners, by contrast, have no DNA in the Databank, and nothing in the familial search rule would require them to submit their DNA in the future. Petitioners' relationship to their brothers, whose DNA is in the Databank, does not bring petitioners within the zone of interests the Legislature outlined in the statute.

In concluding that petitioners fall within the zone of interests, Supreme Court relied on a case where, unlike here, the plaintiffs identified a particular provision in the statute that conferred a statutory right on them. (R. 7-8.) In the case the court cited, the plaintiffs had been arrested and issued summonses that were ultimately dismissed, and the relevant statutory scheme expressly

granted any person whose criminal case ended favorably the right to have the case record sealed. *See Lino v. City of New York*, 101 A.D.3d 552, 555 (1st Dep't 2012) (citing Criminal Procedure Law §§ 160.50, 160.55). Because the *Lino* plaintiffs were members of "the class for whose particular benefit the statute was enacted"—namely, those whose "criminal proceedings ended in either favorable dispositions or noncriminal violation convictions"—this Court held that the plaintiffs fell into the zone of interests of the statute. *Id.* at 556.

Here, by contrast, petitioners identify no language in the statute protecting those whose DNA is not in the Databank from forensic uses of DNA profiles from other people that are properly retained in the Databank. To the contrary, the Legislature intended the Commission to study and act upon new and useful trends in forensic DNA analysis. See *infra* at 37-39. Petitioners thus fall outside the applicable zone of interests.

Finally, Supreme Court erred in concluding that if it did not find in favor of standing for petitioners, the familial search rule would be insulated from judicial review. (R. 8.) In the event that a

future familial search results in a lead that culminates in a criminal proceeding, the defendant would be able to challenge the use of the familial search in the context of that proceeding.

POINT II

THE FAMILIAL SEARCH RULE IS A PROPER EXERCISE OF THE DNA DATABANK ACT'S BROAD DELEGATION OF AUTHORITY TO THE COMMISSION ON FORENSIC SCIENCE

Although Supreme Court should have dismissed the petition for lack of standing, its analysis of the merits was correct. Supreme Court rightly held that the Commission had authority, under the Act, to adopt the familial search rule. The Legislature chose to delegate to the Commission the authority and responsibility to develop the capacity of the DNA Databank. The familial search rule falls well within the Commission's statutory responsibility to study new developments in DNA technology and, where science supports it, to build on the Databank's capabilities.

Given the breadth of the statutory delegation of authority, petitioners miss the mark in arguing that the Commission cannot adopt a familial search policy without a new legislative enactment. "[A]n agency can adopt regulations that go beyond the text of [its

enabling] legislation, provided they are not inconsistent with the statutory language or its underlying purposes." *Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn.*, 25 N.Y.3d 600, 608 (2015) (quotation marks omitted). "As long as the legislature makes the basic policy choices, the legislation need not be detailed or precise as to the agency's role." *Id.* at 609.

Here, the Legislature made the basic policy choice of creating a DNA Databank for the purpose of solving crimes, and delegated to the Commission and DNA Subcommittee the task of using their forensic science expertise to determine how that Databank should operate and what should constitute a match. The familial search rule—which allows a law enforcement agency to request a search for a family relationship in rare cases where a serious crime has occurred, other investigative methods have been unsuccessful, and a high likelihood ratio is required to establish a potential association between DNA profiles, *see* 9 N.Y.C.R.R. § 6192.3(h)-(k)—is an appropriate exercise of the Commission's delegated authority.

A. The Familial Search Rule Is a Valid Exercise of the Commission's Delegated Authority to Determine What Types of DNA Searches Should Be Conducted, Based on Evolving Science.

1. The text of the Act contains numerous provisions that support the Commission's authority to develop the familial search rule.

Multiple provisions in the Act's text support the familial search rule. Contrary to petitioners' characterization, the Act was never intended to freeze in place the DNA Databank as it originally existed under the regulations and Implementation Plan that the Commission first adopted. Instead, the Legislature expressly delegated to the Commission the authority to administer the Databank flexibly, and in particular to respond to evolving scientific research and forensic methods.

This broad delegation of authority is explicit in the Act's foundational directive that "the commission, in consultation with the DNA subcommittee, shall promulgate a policy for the establishment and operation of a DNA identification index consistent with the operational requirements and capabilities of" DCJS. Exec. Law § 995-b(9). The Act requires the *creation* of the DNA Databank, but assigns to the Commission—assisted by the DNA Subcommittee's

scientific expertise—to determine the *structure* of the Databank and how it may be searched. Moreover, by specifying that the Databank shall operate consistent with DCJS's "requirements and capabilities," the Legislature has provided that the Databank's uses may develop as the agency's technical ability allows and investigative needs warrant, rather than freezing the Databank in the form first established by the Commission immediately after the Act's adoption.

Numerous other provisions in the Act reinforce that the Commission should continue to study new technologies as they evolv e and develop regulations to implement those technologies. For example, the Legislature provided that "[n]othing in [the Act] shall be deemed to preclude forensic laboratories from performing research and validation studies on new methodologies and technologies which may not yet be approved by the commission at that time." Exec. Law § 995-b(1). The first part of this provision endorses ongoing research into new ways to use DNA science, and the second part—via the phrases "not yet" and "at that time"—shows that the Legislature expected the Commission to approve new technologies

and methodologies as it determines that they have become appropriate.

Indeed, the very existence of the DNA Subcommittee, which was created by the Act, underscores the Commission's authority and responsibility to keep pace with evolving research and adjust the structure of the DNA Databank accordingly. The DNA Subcommittee "shall evaluate and assess all DNA methodologies proposed to be used for forensic analysis" and makes "binding recommendations" to the Commission regarding "minimum scientific standards," *id.* § 995-b(13)(b)—an ongoing duty that keeps the Commission abreast of recent developments.

Furthermore, either the Commission or the DNA Subcommittee may establish "as many advisory councils as it deems necessary to provide specialized expertise to the commission with respect to new forensic technologies including DNA testing methodologies." *Id.* § 995-b(7). That the Legislature would empower the agency to seek input on "new forensic technologies" demonstrates that it intended the agency to continually monitor developments in the field and adjust policy accordingly.

Consistent with these statutory provisions, the Commission has gradually amended the DNA Databank's capabilities through careful study of new advancements in forensic DNA technology used at the national level and in other States. As the Commission found when it adopted the familial search rule, familial searching is supported by both new scientific research and the experience of other States; moreover, it furthers the Act's core purposes of public safety and crime prevention by providing a tool to "increase the pool of potential suspects" for otherwise unsolved crimes. (R. 859.)

Nothing in the Act supports the assumption—which runs throughout petitioners' brief—that the Act authorizes searches only for a *full* match between crime-scene DNA evidence and a single profile in the Databank. *Cf.* Br. at 5, 23-24, 28-30. The Act assigns to the Commission the responsibility to "[p]romulgate standards for a determination of a match between the DNA records contained in the state DNA identification index and a DNA record of a person submitted for comparison therewith." Exec. Law § 995-b(12). But the Act does not define the word "match," and that term is not unambiguously limited to full matches.

The word "match" commonly means "a person or thing equal or similar to another," or "a pair suitably associated." *Match*, *Merriam-Webster's Online Dictionary* (last visited Sept. 24, 2021) (internet).[4] "Match" does not connote that two things share an identity, but that there is a significant association between two things. The purpose of the Act is to provide law enforcement with leads "in connection with the investigation of one or more crimes." Exec. Law § 995-c(6)(a). When the Commission exercises its responsibility to "[p]romulgate standards for the determination of a match" between profiles in the Databank and records "submitted for comparison therewith," the agency's role is to determine when the association between a submitted profile and a databank profile is sufficiently meaningful to warrant disclosure to law enforcement as a lead.

The Legislature's choice of the word "standards" further reinforces the flexibility granted to the Commission. A "standard" is defined as "[a] criterion for measuring acceptability, quality, or

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[4] For internet sources, URLs are provided in the Table of Authorities.

accuracy." *Black's Law Dictionary*, s.v. *standard* (11th ed. 2019) (Westlaw). Here, the word "standards" authorizes the Commission to develop criteria for determining when the association between two profiles is sufficiently accurate, or sufficiently acceptable, to justify treating it as a lead. By contrast, no text in the statute suggests that the Legislature intended to restrict the Databank to proving that a sample came from the exact same person as a particular profile in the Databank.

The Commission's authority to recognize more than full matches is supported by other provisions of the Act as well. In particular, provisions of the Act recognize that the Commission might approve more than one search methodology: for example, the Act requires the Commission to specify "the forensic DNA methodology *or methodologies* to be utilized in compiling the index," Exec. Law § 995-b(9)(a) (emphasis added), and to "designate *one or more* approved methodologies for the performance of forensic DNA testing," *id.* § 995-b(11) (emphasis added).

Here, the Commission has reasonably interpreted its broad authority under the Act to allow the reporting not only of full

matches between crime-scene DNA evidence and a profile in the Databank, but also matches to a close family member, provided that the statistical likelihood of a relationship is sufficiently high. Such a match serves the underlying purposes of the Act by giving law enforcement a reasonable lead for further investigation of particularly serious crimes when other investigative tools have failed. 9 N.Y.C.R.R. § 6192.3(h). And the Commission's strict standards for familial searches ensure that there will be a meaningful correspondence between the crime-scene evidence in any reported name: no name can be released from a familial search unless the required likelihood ratios are met and mandatory follow-up Y-STR testing is used to exclude candidates. See *supra* at 20-21. 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."

2. The familial search rule is consistent with the Act's legislative history, the Commission's past improvements to the Databank, and the evolving practices of other States.

The familial search rule also comports with the legislative history of the Act and the Commission's role. Governor Mario Cuomo, in his 1994 memorandum approving the Act, stated that the Commission "ensures a reasoned approach to the implementation of forensic DNA technology in New York." Approval Mem. (Aug. 2, 1994), *in* Bill Jacket to ch. 737 (1994), at 6.

In particular, the Governor's memorandum focused on the Commission's and DNA Subcommittee's scientific expertise as the safeguard that would ensure appropriate forensic DNA policies. *Id.* at 5-6. The Governor emphasized the "extraordinary investigative potential" of forensic DNA analysis, and called on the Commission to "study and evaluate this long overlooked but critical component of our criminal justice system." *Id.* at 5. This signing statement confirms that the Commission was understood at the outset as an agency that would continuously study and develop the role of the database. Over the years, following that mandate, the DNA Subcommittee has reviewed and authorized multiple advances in DNA

technology and methodology, and made appropriate recommendations to the Commission: it has approved Y-STR analysis, reviewed and selected specific analysis software, and approved specific testing. (R. 457.)

The Legislature itself has long deferred to the Commission's technical expertise in developing the functionality of the Databank. The Commission has implemented the emerging practices of partial matching and familial searching gradually over the course of a decade, first determining in 2008 that it had authority to adopt both, then adopting partial matching in 2010, and finally adopting familial searching in 2017. As Supreme Court rightly concluded (see *supra* at 26), these "incremental" amendments to the Plan and Part 6192 are consistent with the Commission's institutional responsibility.

Notably, just two years after the Commission adopted the partial match rule in 2010, the Legislature substantially revised the Act to require anyone convicted of a felony or a misdemeanor to provide a sample for inclusion in the Databank. *See* Ch. 19, §§ 5-6, 2012 McKinney's N.Y. Laws at 294-96. See *supra* at 8-9. The

Legislature's decision to make significant changes to the Act without overruling or otherwise criticizing the Commission's adoption of partial matching is further evidence that the Legislature approves of the agency's administration of the statute and intends to defer to the agency's expertise. "Where an agency has promulgated regulations in a particular area for an extended time without any interference from the legislative body, we can infer, to some degree, that the legislature approves of the agency's interpretation or action." *Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 614 (2018) (quotation marks omitted).

Finally, the Commission's implementation of its familial search rule is consistent with the development of familial searches through administrative action in other States based on comparable underlying statutory authority. By 2017, at least eight highly populated States had adopted familial searching. See *supra* at 17. And, like New York, those States have done so via administrative action based on existing DNA database laws, rather than via new statutory enactment. For example, the first State to adopt familial searching, California, did so in 2008 at the direction of that State's

Attorney General. Press Release, California Off. of the Att'y Gen., *California's Familial DNA Search Program Identifies Suspected "Grim Sleeper" Serial Killer* (July 7, 2010) (internet). Similar to New York, California allows familial searching only for major crimes with significant public safety implications, and only after other investigative strategies—including searches for direct DNA profile matches—have failed. *See* California Off. of the Att'y Gen., *Memorandum of Understanding: DOJ Familial Searching Protocol* 1 (June 7, 2019) (internet).

The statutory authority other States have relied on to adopt familial search policies is comparable to New York's DNA Databank Act. For example, Virginia's DNA database statute directs the Commonwealth's Department of Forensic Science to create a DNA data bank and "adopt regulations . . . governing the methods of obtaining information from the data bank," Va. Code Ann. § 19.2-310.5(B) (2021), and entrusts oversight of the data bank to a Forensic Science Board and a Scientific Advisory Committee within the Department, *see id.* §§ 9.1-1100, 1101, 1109, 1110, 1111. Relying on these broad delegations of authority, the Virginia agency created

Virginia's familial search policy, which allows a familial search "in conformance with departmental scientific protocols" if a case "involves an active investigation of an unsolved violent crime against a person" and "other investigative leads have been exhausted and critical public safety concerns remain." Va. Dept. of Forensic Science, *Policy Relating to Acceptance of Cases for Performance of Familial DNA Searching* 2 (Dec. 17, 2019) (internet). As these examples show, the Commission acted well within the mainstream in adopting familial searching as an exercise of its general statutory authority to administer a DNA database.

B. Contrary to Petitioners' Contention, There Is No Meaningful Distinction to Be Drawn Between So-Called "Intentional" and "Inadvertent" Searches.

Petitioners do not dispute that the Commission has the authority to adopt regulations governing the release of both full matches and partial matches, *see* Br. at 23, and that the "partial match regulations immediately follow from the Legislature's directive," Br. at 31. Petitioners also acknowledged below that they "are not challenging the police work that comes out of" a familial search (R. 943). Instead, petitioners argue that "[t]he inadvertent nature

of a partial match" is necessary to make a partial search lawful "because that inadvertency tethers it to Respondents' enabling statute." Br. at 29. Petitioners are mistaken.

According to petitioners, it is acceptable to disclose a partial match if such a match is discovered during a search for a full match—but it is forbidden for a law enforcement agency to request a search for the same match. Nothing in the statute requires that counterintuitive result. As Supreme Court rightly concluded, a match obtained through a familial search *is* a partial match, and there is no reason to preclude law enforcement from requesting a search for such matches. (*See* R. 15.)

Petitioners' argument is based on the mistaken premise that the Act authorizes a search of the DNA Databank only for a full match between crime-scene evidence and a specific person in the Databank. No such restriction appears in the text, for reasons already explained. See *supra* at 40-43. To the contrary, the Commission reasonably interpreted the statute in finding that a "match" also occurs when there is a sufficiently strong likelihood of a family relationship between crime-scene evidence and a profile in

the Databank, and in concluding that allowing intentional searches for such matches will give law enforcement "a better opportunity to solve crimes and prevent additional ones from occurring" (R. 859).

The Commission's judgment warrants deference. This Court will "defer to the governmental agency charged with the responsibility for administration of the statute" in cases "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom." *Matter of Committee for Environmentally Sound Dev. v. Amsterdam Ave. Redevelopment Assocs. LLC*, 194 A.D.3d 1, 10 (1st Dep't) (quotation marks omitted), *lv. denied* 2021 N.Y. Slip Op. 71198 (2021).

This familiar deference principle is of particular force here, for two reasons. First, the Commission's determination was based on the DNA Subcommittee's knowledge of forensic operational practices and its technical expertise, exercised after long deliberation and careful study of developing science and practices in other jurisdictions. See *supra* at 17-18. Second, the Legislature did not

merely leave the term "match" undefined, but also specifically instructed the Commission to develop "standards" for determining when a match exists. *See* Exec. Law § 995-b(12). Deference here appropriately respects the Legislature's choice to expressly assign the task of filling in the gaps in the statute to an agency with scientific and technical expertise.

Petitioners attempt to portray the familial search rule as a deviation from what they perceive to be the Act's original purpose. *See* Br. at 19-20, 31-32. But to the extent that the Commission previously disclosed only direct matches from the Act's adoption in 1994 until the adoption of the partial match rule in 2010, that policy was the result of the Commission's *own regulations*, which initially provided only for full matches. The Commission itself recognized as much as early as 2008, when it determined that its regulations—Part 6192 and the Implementation Plan—did not then permit partial matching or familial searching. (R. 470-471.) As the Commission reasonably determined at the time, however, it had authority to amend its regulations; and the Commission then proceeded carefully, first approving partial matching and, several

years after that successful amendment, approving familial searching.

In addition to the lack of statutory support, petitioners also lack any compelling policy argument for allowing partial matching while forbidding familial searches. The notion of a bright-line distinction between intentional and inadvertent searches is false and outdated. A recent study on familial searches acknowledged that all partial matches can be described as intentional searches because a laboratory must make a conscious choice to *pursue* partial matches when they appear. *See* Emily Niedzwiecki et al., *Understanding Familial DNA Searching: Coming to a Consensus on Terminology* 7, Off. of Justice Programs, Natl. Criminal Justice Reference Serv. (Apr. 2016) (internet). Indeed, the Innocence Project acknowledged during the notice-and-comment process of the rulemaking at issue here that there is no "substantive distinction" between partial matching and familial searching. (R. 710.)

As a prominent bioethics scholar has observed in rejecting a distinction among searches based on the intent of the searcher, "[n]early all states permitting partial matching impose some condi-

tions that must be met before a partial match is released to investigators." Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751, 796 (2011). New York follows this rule as well: even after a partial match is discovered, further testing (such as Y-STR or mtDNA testing) is required before any name can be disclosed. *See* 9 N.Y.C.R.R. § 6192.3(e), (f), (g)(1)(iii). See *supra* at 20-21.

Because "[o]nly the first step in the process of partial matching occurs fortuitously" and the process otherwise requires deliberate pursuit, it makes no sense to draw a distinction between searches by classifying some as intentional and others as inadvertent. *See* Ram, *supra*, at 797-99. Allowing law enforcement to request familial searches makes the system fairer, more accurate, and less arbitrary or random. *See id.* at 798-804.

C. The Separation-of-Powers Doctrine Provides No Basis to Annul the Commission's Lawful Action.

Because the Commission acted well within its delegated statutory authority, petitioners' challenge based on the separation-of-powers doctrine set forth in the *Boreali* line of cases is meritless. As

Supreme Court correctly held, review of *Boreali*'s "coalescing circumstances" reaffirms that the Commission had statutory authority to adopt the familial search rule. (*See* R. 16-19.)

The *Boreali* doctrine considers four circumstances that provide some guidance as to whether an agency has intruded on the Legislature's policymaking authority: (1) whether the agency "made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems"; (2) whether the agency filled in details of a broad legislative policy or instead "wrote on a clean slate . . . without benefit of legislative guidance"; (3) whether the legislature has persistently and unsuccessfully tried to reach agreement on the issue; and (4) whether the agency used "special expertise or competence in the field to develop the challenged regulation." *Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.,* 27 N.Y.3d 174, 179-80 (2016) (quotation and alteration marks omitted).

The Court of Appeals has emphasized that *Boreali* does not provide "criteria that should be rigidly applied in every case in which an agency is accused of crossing the line into legislative territory."

Garcia, 31 N.Y.3d at 609 (quotation marks omitted). "[T]he factors enumerated in *Boreali* are not designed to second-guess agency regulations that properly fall within the agency's purview," but "only to aid courts in determining whether an agency has usurped the legislature's power by regulating in an area in which it has not been delegated rule-making authority." *Id.* at 616; *see also Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 180 (*Boreali* factors are "overlapping" and "closely related" to one another (quotation marks omitted)). *Boreali* is not a tool for a challenger to litigate "the efficacy or wisdom of the means chosen by the agency to accomplish the ends identified by the legislature." *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 261 (2018); *see also Matter of Acevedo v. New York State Dep't of Motor Vehs.*, 29 N.Y.3d 202, 226 (2017) ("*Boreali* is not an escape hatch for those . . . who are unhappy with a regulation." (quotation marks omitted)).

Here, all four *Boreali* factors weigh in the Commission's favor. The first factor considers whether the agency has usurped the Legislature's role by balancing competing policy goals. *See Garcia*, 31 N.Y.3d at 611. The Commission has not done so here. To the contrary,

the familial search rule advances the Legislature's policy goals. In the Act, the Legislature made the core policy choice to mandate creation of a DNA Databank for the purpose of providing leads to solve crimes, and directed the Commission to set the standards (based on the DNA Subcommittee's guidance) for identifying and releasing matches that would support this purpose. The Commission's evaluation of the costs and benefits of familial searching was entirely appropriate as part of its effort to execute the Legislature's directive that the Commission make judgments about when a DNA Databank search is sufficiently reliable to warrant disclosure of a name.

This case is thus a far cry from cases in which the first *Boreali* factor has been found to weigh against an agency. For example, no statute specifically directed the New York City Board of Health to regulate sugary sodas in *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 in *Boreali* itself, no statute specifically directed the State Board of Health to regulate public smoking. *See* 71 N.Y.2d at 11-12. But here, the Legislature specifically assigned to the Commission the task of building a

DNA Databank and told the Commission to use its expertise to decide how it should be structured and searched.

The Court of Appeals has made clear that an agency not only can, but must, consider the costs and benefits of particular approaches to filling in the details of a direct delegation of statutory authority. "[T]he promulgation of regulations *necessarily* involves an analysis of societal costs and benefits," and *Boreali* does not prohibit an agency from engaging in balancing where the Legislature has made the core policy choice and instructed the agency to make that policy effective. *See Garcia*, 31 N.Y.3d at 611 (emphasis added) (quotation marks omitted). In judging that the familial search policy would provide an important public-safety tool if adopted with certain safeguards, the Commission appropriately weighed costs and benefits within the scope of its delegated role.

The second *Boreali* factor considers the closely related question of whether "the legislature has delegated significant power" to the agency over the subject matter at hand, or if the agency instead "wrote on a clean slate" without legislative guidance. *See id.* at 613, 614 (quotation marks omitted). The "legislature may enact a general

statute that reflects its policy choice and grants authority to an executive agency to adopt and enforce regulations that expand upon the statutory text by filling in details consistent with that enabling legislation." *Matter of LeadingAge*, 32 N.Y.3d at 260.

Here, the creation of a "commission on forensic science" specifically "to establish the DNA identification index" was a "large scale delegation of authority to the executive branch" in which the Legislature specifically contemplated that the Commission would add new functionality, "without which the utility of the DNA database would be severely hampered." *Gallo v. Pataki*, 15 Misc. 3d 824, 826 (Sup. Ct. Kings County 2007) (upholding Commission's authority to create additional profile indices in the DNA Databank). Petitioners miss the mark in arguing (Br. at 36) that the Commission violated the separation of powers by setting kinship threshold values or determining what investigative efforts a police department must take before requesting a familial search. The Court of Appeals has regularly upheld such detailed regulations where the Legislature has expressly tasked an agency to oversee a public program in an area where science continually evolves.

For example, the Legislature delegated lawfully when it designated certain vaccinations that schoolchildren must receive, while allowing agencies to decide whether there are additional vaccinations that should be administered. *See Garcia*, 31 N.Y.3d at 612-13. In light of the Legislature's longstanding "awareness that the [New York City Board of Health] continued to mandate vaccinations beyond the confines of" the statute, and passage of amendments to the statute without overriding those agency choices, "there can be no serious claim" that the agency acted without legislative guidance. *Id.* at 614. The same principles apply here. The Legislature set certain core requirements for the DNA Databank, specifying which DNA profiles must be included and requiring that matches be disclosed to law enforcement for the purpose of solving crimes, but assigned to the Commission the responsibility to determine what constitutes a match and when matches are sufficiently reliable to be disclosed.

The third *Boreali* factor considers whether the Legislature has repeatedly tried and failed to reach consensus on an issue. *See Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 183. The burden a

challenger faces in establishing this factor is especially steep: "Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences." *Id.* at 184 (quotation marks omitted).

When a bill is introduced but fails to pass, it is often because legislators conclude that existing agency authority is sufficient to adopt the desired policy, and no new delegation is necessary. *See id.* (defeat of pending legislation deserves little weight where existing statute "already delegates . . . the authority to designate no-smoking areas."). Thus, in the decades since *Boreali* was decided, the Court of Appeals has declined to weigh the third factor against an agency absent deep and protracted legislative gridlock at least on par with what occurred in *Boreali* itself. *Compare id.* at 183-84, *with Boreali*, 71 N.Y.2d at 7 (noting the failure of forty bills on the disputed issue over a period of a dozen years).

Here, petitioners point to Assembly bills regarding familial searching that failed to pass the Governmental Operations Committee in 2014, 2015, and 2017. *See* A. 9247, 237th Sess. (2014); A. 1515, 238th Sess. (2015); A. 683, 240th Sess. (2017). A Senate

bill in 2016 similarly failed to pass the Senate Rules Committee. *See* S. 8216, 239th Sess. (2016). Bills that are introduced but that die in committee—and thus are never reviewed by a full chamber, let alone the full Legislature—receive little to no weight in the *Boreali* analysis. *See Matter of LeadingAge*, 32 N.Y.3d at 265-66; *see also Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 183 (when bills do not progress to a chamber vote, "it is unclear if the [bills] were subject to any real legislative debate"). Given the volume of legislative proposals that are made each year but receive little action, if the mere introduction and non-passage of a bill by a committee were sufficient to trigger *Boreali*'s third factor, broad swathes of agency rulemaking would be obstructed even where an agency has been delegated substantial authority by past enactments.

Petitioners identify a single bill—a 2017 Senate bill—that passed that chamber and then died in an Assembly committee. S. 2956, 240th Sess. (2017). This Court has held that the passage of one bill by a single chamber falls short of establishing that the third *Boreali* factor weighs against the validity of an agency regulation

on the same issue. *Matter of New York State Land Tit. Assn., Inc. v. New York State Dept. of Fin. Servs.*, 169 A.D.3d 18, 34 (1st Dep't 2019). Indeed, even where the Legislature considered twenty-four bills and three of them passed one chamber, the Court of Appeals held that the third *Boreali* factor did not weigh against an agency. *Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 183-84.

Petitioners thus fall far short of showing that legislative debate has closed the door to the Commission's reliance on its existing, broad statutory authority to adopt the familial search rule. To the contrary, as Supreme Court rightly noted, the fact that the Commission has been developing the DNA Databank over the course of nearly thirty years (R. 19), and the Legislature "has done nothing to curb the [Commission]'s authority or otherwise signal disapproval," weighs heavily in the Commission's favor because it shows "the legislature's ongoing reliance on [the Commission's] expertise," *see Matter of Acevedo*, 29 N.Y.3d at 225.

Finally, the fourth *Boreali* factor "looks to whether the agency used special expertise or competence in the field to develop the challenged regulations." *Garcia*, 31 N.Y.3d at 615 (quotation marks

omitted). This factor strongly favors the Commission, which relied on the scientific expertise of its DNA Subcommittee to develop the familial matching rule—exactly as the Legislature intended. The DNA Subcommittee's members are experts in a broad array of scientific fields including molecular biology, population genetics, laboratory standards, and forensic science. Exec. Law § 995-b(13)(a). As the administrative record shows, the DNA Subcommittee reviewed extensive scientific research on familial searching (R. 506-587) and the efficacy of familial searching in other States and nations, including a nationwide familial search program in the United Kingdom (R. 459, 600-664).

The DNA Subcommittee used its core competencies to set the kinship thresholds at which a familial search is sufficiently reliable to merit disclosure. (*See* R. 855). This fourth *Boreali* factor favors the Commission because the agency "compiled data and research" on a scientific question directly within the agency's delegated responsibilities, and the agency's "expertise was essential to its determination." *See Garcia*, 31 N.Y.3d at 615-16.

Contrary to petitioners' contention (Br. at 41-44), the Commission did not violate the separation of powers when, in the course of exercising its scientific judgment, it also responsibly included certain safeguards in the regulation to ensure police oversight, personal privacy, and other considerations. The fourth *Boreali* factor asks whether an agency relied significantly on its technical expertise but does not limit an agency *solely* to technical judgments. To the contrary, an agency must give appropriate weight to "the most expeditious, effective and fair means of addressing" a problem. *Matter of Acevedo*, 29 N.Y.3d at 223 (quotation marks omitted).

Here, the core of the familial search rule was based on agency expertise, and it would have been irrational for the Commission to have adopted the rule *without* considering social costs alongside other factors. *See id.* As the Court of Appeals has recognized, development of a comprehensive regulatory scheme frequently involves a combination of core technical competencies and other judgments "less reliant on [the agency's] technical competence." *Garcia*, 31 N.Y.3d at 616.

POINT III

THE FAMILIAL SEARCH RULE HAS A RATIONAL BASIS AND IS NOT ARBITRARY AND CAPRICIOUS

"The standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious." *Matter of Acevedo*, 29 N.Y.3d at 226 (quotation marks omitted). A challenger cannot meet this "heavy burden" except by showing that "[r]egulations are so lacking in reason that they are essentially arbitrary." *Id.* at 227 (quotations marks omitted). The familial search rule at issue here is rational, and petitioners fail to show otherwise.

A rule has a rational basis if it "echoes and further defines the legislative intent behind" the statute it implements. *Matter of New York State Land Tit. Assn.*, 169 A.D.3d at 22. The DNA Databank's statutorily defined purpose is to make DNA records available to law enforcement "in connection with the investigation of the commission of one or more crimes." Exec. Law § 995-c(6)(a). The notice adopting the familial search rule found, based on the Commission's review of relevant science and practices in other jurisdictions, that familial searching "generates a list of candidates based on kinship

statistics to indicate potential biologically related individuals," and therefore can "increase the pool of potential suspects, thereby increasing the number of crimes solved." (R. 859.) The familial search rule thus has a factual basis rationally tied to the purpose of the statute. *See Matter of Acevedo*, 29 N.Y.3d at 227-28 (upholding public safety regulation based on agency's "collection of empirical data, including statistics").

When an agency adopts a regulation implementing a public-safety statute, the courts owe "substantial deference" to "line-drawing determination[s]" that weigh "the degree of danger" to the public against other considerations. *Id.* at 227. Here, the Commission limited familial searching to cases where police are investigating specific serious violent crimes that pose a significant public safety threat, 9 N.Y.C.R.R. § 6192.3(h)(1); other reasonable investigative efforts have already been taken, *id.* § 6192.3(h)(2)(i); kinship threshold values set by the Commission and DNA Subcommittee have been satisfied, *id.* § 6192.3(i)(2), (k)(1); additional Y-STR and other testing have been performed to the extent possible to exclude candidates, *id.* § 6192.3(j)(3)-(4), (k)(1); any name disclosed may be

treated only as a lead for further investigation, *id.* § 6192.3(k)(1)(iv); and any person receiving a name participates in training on how familial searching works, including its limitations, *id.* § 6192.3(k)(2). Each of these safeguards is rationally related to ensuring that familial searching provides reliable information, and is an "informed and reasonable determination, made pursuant to an express delegation of authority and falling well within [the Commission]'s unique area of expertise." *See Matter of Acevedo*, 29 N.Y.3d at 228.

Notwithstanding the Commission's deliberative process, extensive fact-finding, and statutory authority, petitioners offer two reasons that this Court should hold the familial search rule to be arbitrary and capricious. Neither has merit.

First, petitioners assert (Br. at 46-47, 49) that the Commission gave no consideration to the familial search rule's effects on Black and Hispanic New Yorkers. They are incorrect. The Commission, in a rulemaking notice, directly addressed public comments arguing that people of color will be disproportionately affected. The Commission explained that the familial search rule is a neutral

regulation serving a legitimate government interest in public safety. (R. 860.)

The Commission's reasoning is correct. A familial search does not target any racial group; nor is it the case that the familial search regulation has a disparate impact on New Yorkers of color because they are disproportionately represented in the DNA Databank itself (*cf.* Br. at 49). A familial search forms a profile from crime-scene evidence left by an unknown perpetrator who has not been otherwise identified, and compares that profile to the entire DNA Databank, without regard to race. As the Office of Forensic Services noted during the Commission's rulemaking process, "[t]he F[amilial] S[earch] process itself is race blind," because "[a]ny investigative lead is based on genetic and familial relatedness, not on race." (R. 502.)

Furthermore, adoption of familial searching brings with it affirmative benefits for all communities. The administrative record supports a finding that familial searching helps to exonerate the

innocent as well as convict the guilty.[5] (*See* R. 520, 606, 634, 741.) Familial searching can also reduce the need for police to rely on DNA dragnets—i.e., asking large numbers of people to provide samples—which are more time consuming, expensive, and intrusive than familial searching. (R. 502.) Familial searching also is very sparingly used: as of April 2018—when the answer in this article 78 proceeding was filed—the DCJS Commissioner had approved only nine applications for familial searches. (R. 464.) As Supreme Court correctly reasoned, the negative impact on any community from familial searching on any group will be "minimal." (R. 20.)

Second, petitioners are mistaken in arguing that the familial search rule is arbitrary and capricious because it will generate few investigative leads, such that the costs of the rule outweigh its benefits. Given the types of the cases in which familial searching is permitted, it is unremarkable if the rate of return is modest. The

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[5] For example, in the United Kingdom—which has nationwide familial searching—a familial search exonerated a man who had wrongfully served twenty-seven years in prison for a rape and murder he did not commit, and led police to determine that the actual perpetrator was a different man who had committed suicide in the intervening years. (R. 634.)

familial search rule is designed for use in only a small class of unsolved violent crimes in which other investigative leads have failed. 9 N.Y.C.R.R. § 6192.3(h)(1), (2)(i). Indeed, a familial search request must be withdrawn if at any time a suspect is identified by other means before the familial search process is complete. *Id.* § 6192.3(k)(2)(iv).

By definition, a case that meets the regulation's criteria will be a challenging investigation in which it has already proven difficult to identify a suspect. Given the types of crimes at issue, it is rational for the Commission to authorize one additional tool to search for suspects in such cases, even if only a small number of searches will be fruitful. Because familial searching can be used only for extremely serious crimes that carry serious penalties—murder, sexual assault, arson, terrorism, and other crimes that pose a comparable public safety threat—the value of each individual successful lead (or exoneration) is enormous, even if the cases are few.

Petitioners also challenge the efficacy of familial searching by alluding to a case in New Orleans that they say led to false accusa-

tions. Br. at 47-48 (citing R. 57-58). The administrative record shows that the Commission was aware of what happened in the New Orleans case, and that the incident in question involved a police tactic that would not remotely qualify as a familial search as defined in New York's regulation. The investigators in the New Orleans incident simply compared a crime-scene sample to a genealogical research database, took the sample that had the highest degree of correlation, and performed no lineage testing to confirm relatedness. (R. 588-589.)

By contrast, the two-step process used in New York—a search and likelihood ranking of potential close relatives, followed by Y-STR and other lineage testing to confirm or exclude candidates meeting the likelihood threshold—is "designed to only produce true close relatives, not false leads" (R. 589). A report funded by the U.S. Department of Justice in 2015 determined that "there have been no known cases where a false association has been made following the two-step process." (R. 520.) The same report noted that familial search is also valuable because identification of the correct suspect will "help exonerate wrongfully convicted individuals." (R. 520.)

New York's regulation, which will give investigators an additional tool to ensure accurate results, is rational.

CONCLUSION

The decision and order of Supreme Court should be affirmed.

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September 24, 2021

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