

No. APL-2022-00075

To be argued by:  
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15 minutes requested

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**State of New York**  
**Court of Appeals**

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In the Matter of the Application of

TERRENCE STEVENS, et al.,

*Petitioners-Respondents,*

v.

THE NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, et al.,

*Respondents-Appellants,*

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

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**BRIEF FOR APPELLANTS**

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## PRELIMINARY STATEMENT

In the DNA Databank Act, Executive Law § 995 et seq., the Legislature assigned to the Commission on Forensic Science the task of designating the forensic DNA testing methodologies for searching the State DNA Databank. To assist the Commission, the Act also created within the Commission a DNA Subcommittee made up of expert scientists.

Relying on the DNA Subcommittee's expertise and exercising its delegated statutory authority, the Commission promulgated the familial search rule. *See* Familial Search Policy, 39 N.Y. Reg. 3, 3-6 (Oct. 18, 2017) (*reprinted at* Record on Appeal (R.) 858-861). The rule allows the use of DNA under carefully limited circumstances to identify persons as likely relatives of the perpetrators of serious unsolved crimes. In this C.P.L.R. article 78 proceeding, two individuals whose DNA data are not in the Databank—but who are brothers to men whose information is in the Databank—challenged the familial search rule, claiming that it was beyond the authority of the Commission, and also that it was arbitrary and capricious. Supreme Court, New York County (Hagler, J.) upheld the rule. The

Appellate Division, First Department reversed by a 3-2 vote and invalidated the rule.

In striking down the rule, the court below not only deprived law enforcement of a tool that has enormous potential to help investigators solve a small number of serious crimes, but also made substantial errors of law, both in finding that petitioners had standing to sue and in holding that the rule exceeded the authority delegated to the Commission. If allowed to stand, those rulings will have substantial negative consequences for future cases.

First, this Court should reverse the First Department's decision and dismiss the petition because petitioners lack standing. Contrary to the First Department's reasoning, the risk that either petitioner will ever be investigated because of a familial search is extremely remote. Neither petitioner's name is in the Databank, neither petitioner will be required to provide a sample to the Databank, and neither petitioner has been or is likely to be investigated. Rather, as the dissent below rightly concluded, an unlikely chain of events would have to occur before petitioners could ever be affected by the familial search rule. The contrary conclusion of the majority

below is based on misperceptions about the scope and effect of the familial search rule.

Second, if the Court reaches the merits, it should reverse the First Department's decision and deny the petition. The familial search rule falls squarely within the Commission's longstanding statutory authority to regulate the Databank's operations, designate the approved forensic DNA testing methods, and set standards for identifying appropriate matches—based on evolving science. Because the rule is a proper exercise of specific authority delegated to the Commission, the First Department erred in analyzing this case under separation-of-powers principles. *See Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). And even if the *Boreali* test applies, it merely confirms that the Commission acted within its statutory authority by applying its technical expertise to promulgate a tailored regulation that serves the Act's purposes.

## QUESTIONS PRESENTED

1. Whether the Appellate Division erred in holding—over the dissent of two justices—that petitioners have standing to bring this C.P.L.R. article 78 proceeding.

2. Whether the Appellate Division further erred in holding that the Commission on Forensic Science lacks statutory authority to adopt a regulation that authorizes familial searching of the State DNA Databank. *See* 39 N.Y. Reg. at 3-6.

## STATEMENT OF THE CASE

### A. Forensic Deoxyribonucleic Acid (DNA) Testing

In 1994, this Court held that forensic DNA evidence had come to be generally accepted as reliable by the scientific community and is thus admissible in New York courts. *See People v. Wesley*, 83 N.Y.2d 417, 425 (1994). DNA forensic analysis is based on a comparison of the particular “alleles” that appear on an individual’s chromosome, which comprises the person’s genes. *See id.* at 430-32. “The physical site of a gene on a chromosome is the locus,” “[e]ach gene is situated at a specific locus on a specific chromosome, and each chromosome contains many loci occupied by different genes.”

*Id.* at 431. The alternative forms of genes that exist for any locus are called alleles, and “many different alleles can exist for the same locus.” *Id.* at 431-32.

Forensic DNA analysis works by comparing alleles detected in a DNA sample from a crime scene and a DNA sample from a known individual. *Id.* at 433-34. Forensic DNA analysis examines a specific set of loci on the human chromosome, commonly referred to as the CODIS Core Loci, to identify matches. CODIS is the Combined DNA Index System, a federally supported program and software package for criminal justice DNA databases administered by the Federal Bureau of Investigation (FBI). *See* FBI, *Frequently Asked Questions on CODIS and NDIS* (internet). The FBI has identified a set of core loci which are known as non-coding DNA because they do not determine or predict the donor’s physical or genetic traits—and thus cannot be used to predict phenotypic characteristics other than sex, such as race or appearance—but can identify a specific individual with “near certainty.” *Maryland v. King*, 569 U.S. 435, 442-43 (2013).

Search methodologies used in New York are based on the scientific principle that the more alleles that two DNA profiles have in common across the core loci, the more likely it is that the two profiles come from the same person or from two biologically related people. (R. 215-216, 222.) Three search methodologies bear mention here. First, direct searches are conducted by using eligible forensic DNA profiles (derived from evidence that was taken from crime scenes and submitted by law enforcement agencies) to search against offender DNA profiles (stored in the state-run Databank) to look for DNA matches. If alleles at the core loci in the two DNA samples are the same, a direct match occurs—i.e., the two samples are likely to be from the same individual (or from his or her identical twin). *See* FBI, *supra*.

Second, when a laboratory conducts a direct search, the laboratory will occasionally observe a partial or indirect match in which the crime-scene DNA profile and a profile in the Databank exhibit a high number of shared alleles. Such a partial match may suggest that a potential close relative of the person whose profile is in the Databank may be the source of the crime-scene DNA profile.

In that circumstance, the DNA laboratory may request additional testing to determine if the partial match should be pursued further. If statistical thresholds have been met and additional testing confirms the indirect association, the laboratory may release the partial match information to law enforcement as an investigative lead. (R. 456, 466.) *See* 9 N.Y.C.R.R. § 6192.3(e)-(g).

Third, if a forensic DNA profile formed from a crime-scene sample does not generate a direct or partial match, a law enforcement agency and its corresponding prosecuting authority may jointly ask the Division of Criminal Justice Services (DCJS) and the State CODIS laboratory to conduct a familial search—the only method that petitioners challenge in this case. In a familial search, the state laboratory compares the alleles of the crime-scene DNA profile and the offender profiles in the DNA Databank using familial search software approved by the Commission. The software performs statistical calculations called likelihood ratios to evaluate and rank candidate offender profiles, in order to look for a close partial match, i.e., a high likelihood that the crime-scene DNA profile came from a person whose DNA profile is in the Databank.

Additional testing is then done to further confirm the potential close family relationship. (R. 462-463, 466, 813-814, 858.)

Thus, partial matches and familial searches are similar. In a partial match, a direct search of a crime-scene DNA profile against the Databank generates an inadvertent partial match to a potential biological relative. In a familial search, the law enforcement agency asks the State CODIS laboratory to search the crime-scene DNA profile against the profiles in the DNA Databank using familial search software to look for a potential biological relative.

## **B. Statutory Background**

A few months after *Wesley* was decided, the New York State Legislature enacted the DNA Databank Act to create the State DNA Databank and Commission on Forensic Science. *See* Ch. 737, 1994 N.Y. Laws 3709 (codified at Executive Law § 995 et seq.). In his statement approving the bill, then Governor Mario Cuomo noted that the Court in *Wesley* had decided that forensic DNA evidence is generally permissible, and that a “lack of regulation” meant that the use of DNA evidence continued to be “decided on a case-by-case



basis.” Approval Mem. (Aug. 2, 1994), *in* Bill Jacket for ch. 737 (1994), at 5.

Accordingly, the Act created the Commission on Forensic Science and delegated to it the broad responsibility for developing and implementing a regulatory framework for analyzing DNA forensic evidence—a “long overlooked but critical component of our criminal justice system.” *Id.* As the statute and legislative history make clear, the Legislature created the Databank to use DNA testing to assist law enforcement in identifying the true perpetrators of crimes and exonerating the innocent, Executive Law § 995-c(6)(a)-(b); *see also* Bill Jacket, *supra*, at 26, 31, 35 (stakeholders’ comments urging approval of the Act based on the joint functions of investigation and exoneration).

The Act requires the creation of the DNA Databank as a statewide index of DNA profiles. *Id.* § 995-c(1)-(3). The Legislature provided that 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 expand the definition of “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 N.Y. Laws 285, 288-90; Ch. 92, § 30, 2021 N.Y. Laws, p. 96.

Although the Act expressly sets forth who must provide samples for inclusion in the Databank, it does not specify how the DNA Databank should be structured, which forensic search methodologies should be used, or what qualifies as a match between a DNA profile in the Databank and a DNA profile from a crime scene. Instead, the Legislature created the Commission—comprising fourteen members who represent such fields as forensic science, law enforcement, and criminal defense—and delegated to it the responsibility for determining how the Databank should be searched and analyzed for the purpose of investigating crimes. *See* Executive Law § 995-a.

Specifically, the Legislature broadly directed the Commission to “promulgate a policy for the establishment and operation” of the Databank “consistent with the operational requirements and capabilities of” DCJS. Executive Law § 995-b(9). The Act also

provides that the Commission, on the recommendation of the scientific subcommittee described below, “shall designate one or more approved methodologies for the performance of forensic DNA testing.” *Id.* § 995-b(11). The Act broadly defines such “forensic DNA testing” that the Commission may approve as including “any test that employs techniques to examine deoxyribonucleic acid (DNA) derived from the human body for the purpose of providing information to resolve issues of identification,” *id.* § 995(2). It further defines “DNA testing methodology” to mean both “procedures used to extract and analyze DNA material” and “the methods, procedures, assumptions, and studies used to draw statistical inferences from the test results.” *Id.* § 995(3). And the Act requires the Commission to “[p]romulgate standards for a determination of a match between the DNA records contained” in the Databank “and a DNA record of a person submitted for comparison therewith.” *Id.* § 995-b(12).

To advise the Commission on these responsibilities, the Act requires the Commission to create “a subcommittee on forensic DNA laboratories and forensic DNA testing” (“DNA Subcommittee”). *Id.* § 995-b(13)(a). The DNA Subcommittee is made up of scientists

trained in the fields of molecular biology, population genetics, forensic science, and laboratory standards. *Id.* The Act provides that “[t]he DNA subcommittee shall assess and evaluate 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 also makes “binding recommendations” to the Commission regarding “minimum scientific standards to be utilized in conducting forensic DNA analysis including . . . methods employed to determine probabilities and interpret test results.” *Id.*

### **C. Regulatory Background**

After the Act’s adoption, the Commission created the DNA Databank Implementation Plan required by Executive Law § 995-b(9). (R. 468.) The Commission also promulgated a set of regulations, Part 6192, that governs the use of the Databank. *See* 9 N.Y.C.R.R. pt. 6192. The original Implementation Plan and regulations adopted by the Commission allowed the New York State Police laboratory to disclose to investigators only a direct match between a crime-scene sample and a profile in the Databank. (*See* R. 456.) When the

original regulations were issued in 1994, direct searching was the primary form of scientifically accepted forensic DNA testing. *See Wesley*, 83 N.Y.2d at 425-26.

### **1. The partial match rule**

In 2006, the Commission and DCJS began considering whether to revise the Implementation Plan and regulations based on evolving science. In particular, the FBI's CODIS unit had issued an update discussing the forensic DNA search methodologies of partial matches and familial searches. (*See R. 466.*)

In 2008, after initial review, DCJS observed that the FBI had identified partial matching and familial searching as potential forensic methodologies. (*See R. 466, 470.*) Relying on its statutory authority, the Commission promulgated a partial match rule in 2010. *See Partial Match Policy for the DNA Databank*, 32 N.Y. Reg. 2, 5-6 (July 21, 2010). The rule allowed the State Police laboratory to disclose a partial match resulting from a direct search to investigators when the crime-scene DNA sample contains at least ten of the core loci recognized by CODIS and meets statistical thresholds. *Id.* at 4, 5. Thus, when a partial match occurs, DCJS releases to the

investigators the name of the person whose Databank profile partially matches the DNA profile from the crime scene and who is potentially a close biological relative of the person whose DNA was found at the crime scene. *See* 9 N.Y.C.R.R. § 6192.1(q); *id.* § 6192.3(g). When the name from a partial match is provided, the laboratory must indicate, among other things, that the match is partial and that the “information provided is an investigative lead.” *Id.* § 6192.3(g)(2).

Additional testing, including Y-STR analysis if feasible, may be performed in an evaluation of a partial match.<sup>1</sup> If the evaluation does not meet the statistical thresholds approved by the DNA Subcommittee, the process ends and the name will not be released. Upon review of additional testing, as applicable, if the statistical thresholds approved by the DNA Subcommittee is met, then the name can be released. *Id.* § 6192.3(g)(2)-(3).

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<sup>1</sup> “The term STR refers to Short Tandem Repeat. STR analysis is a form of testing which provides DNA profiles for loci which contain simple DNA unit repeats.” 9 N.Y.C.R.R. 6192.1(x). The STR loci that appear specifically on the Y chromosome—which is present in only half of the population—are referred to as “Y-STRs.” *Id.*

In promulgating the partial match rule, the Commission explained that 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.” (R. 244.) The Commission explained that a system for releasing partial matches serves that purpose by giving “law enforcement officials more opportunity to solve crimes, prevent additional ones from occurring, and prevent innocent people from being wrongfully accused.” Partial Match Policy for the DNA Databank, 32 N.Y. Reg. 5, 6 (Oct. 13, 2010).

## **2. The familial search rule**

The regulation that petitioners challenge here—the familial search rule—is closely related to the earlier partial match rule.

In December 2016, the Commission voted to direct the DNA Subcommittee to study familial searching. (R. 457.) The DNA Subcommittee then studied the prevailing science, heard comments from experts and stakeholders, and reviewed the familial search methods used in other States—which by that time included

California, Colorado, Florida, Michigan, Ohio, Texas, Utah, and Virginia.<sup>2</sup> (R. 458-459.)

In May 2017, the DNA Subcommittee voted to recommend that familial searching be allowed in certain cases. (R. 460-461.) The DNA Subcommittee made a binding recommendation to the Commission regarding the likelihood ratio threshold—that is, the likelihood ratio above which most true pairs of relatives will be found—that should be satisfied before DCJS may disclose the results of any familial search. (R. 461.) 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). For example, in the familial searching context, setting the likelihood ratio threshold at a value of 10,000 means that when a pair of individuals has a likelihood ratio greater than 10,000, it is at least 10,000 times more likely to observe the shared alleles between the two profiles if they are from

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<sup>2</sup> Today, according to the FBI, familial searching is additionally performed in Arkansas, Wisconsin, and Wyoming. *See* FBI, *supra*.



related individuals rather than if they are from unrelated individuals.

Here, the likelihood ratio thresholds set by the DNA Subcommittee require a value of either 5,000 or 10,000, depending on which DNA testing kit is used, to have a potential familial match. (R. 855.) The subcommittee's binding recommendation called for New York to conduct familial searches by using a computer program known as the Denver Familial Search Software, which incorporates the foregoing likelihood ratio thresholds. (R. 461-462, 855.)

In most cases, if a relationship exists between a crime-scene sample and a name released as the result of a familial search, the relationship between the two will be a "first order" relationship, meaning a father/son relationship, or a full-blooded brother/brother relationship. New York State Police, *DNA Databank/State CODIS Unit – Familial Searching*, 3 (Aug. 31, 2021) (internet). "[I]t is unlikely for a familial search to miss a first order relative." *Id.* Moreover, although possible, it is "highly unlikely" that a non-first order relative (such as a half-brother, uncle, grandfather, grandson,

or any other more distant relative) would be returned as the result of a familial search. *See id.* at 2.

Based on the DNA Subcommittee's recommendations, the Commission published the familial search rule as a final rule in October 2017. *See* 39 N.Y. Reg. at 3-6. In the notice of adoption, the Commission explained—as it had in adopting the partial match rule—that the Databank's purpose is to assist with the investigation of crimes. The Commission further explained that the familial search rule ensures that “law enforcement officials will have a better opportunity to solve crimes and prevent additional ones from occurring.” (R. 859.)

The rule provides that 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 the person whose DNA profile was found at a crime scene. 9 N.Y.C.R.R. § 6192.1(ab). (*See also* R. 462.) The search, using the Denver Software, calculates a likelihood ratio for every profile in the Databank to rank the candidacy of profiles as potential first order

relatives of the person who left the crime-scene sample; in other words, a likelihood ratio threshold beyond which release of a name as an investigative lead is appropriate.<sup>3</sup> Furthermore, even when the likelihood ratio threshold is met, the regulations require the State Police laboratory to also use Y-STR testing to refine the results. 9 N.Y.C.R.R. § 6192.3(j)(3)-(4).<sup>4</sup>

Under the regulations, 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

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<sup>3</sup> Currently, a likelihood ratio of 5,000 threshold is used when a familial search is based on the original thirteen CODIS core loci, and a likelihood ratio threshold of 10,000 is used if testing the thirteen CODIS core loci plus two additional loci. (R. 855.)

<sup>4</sup> Y-STR loci exist only on the Y chromosome, and Y-STR analysis can be used to compare two DNA profiles only if both samples are from individuals who have a Y chromosome. *See* N.Y.C.R.R. §§ 6192.1(x); 6192.3(j)(3). Accordingly, familial searching cannot be performed under the parameters currently approved by the DNA Subcommittee when any of the samples or profiles involved are from individuals without Y chromosomes. (R. 849.) *See* New York State Police, *supra*, at 3.

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* R. 463.)

The application 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 application then goes through two levels of review. First, DCJS and a state CODIS administrator confirm that the above requirements are met. Second, the DCJS commissioner reviews the application to make sure that all requirements are satisfied. *Id.* § 6192.3(i)(1)-(2).

If the commissioner approves a familial search request, the New York State Police crime laboratory will use the Denver Software to perform a familial search of the DNA Databank, generate a candidate list, using the likelihood ratio threshold values. 9 N.Y.C.R.R. § 6192.3(j)(1)-(2).

If a familial search returns any candidate profiles that exceed the likelihood ratio threshold, and those candidates are not excluded

by additional testing, then the relevant names from the Databank will be released to the requesters. *Id.* § 6192.3(k)(1). DCJS must provide the results in writing to the requesters and must inform the requesters that: (1) the information is for law enforcement purposes only; (2) the named person whose profile is in the Databank 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 reliability standards, no name will be released, and the requesters will be notified in writing that no candidate profiles were found. *Id.* § 6192.3(k)(3). Before any results are released, the requesting police and prosecutors must attend mandatory training from DCJS that explains how familial searches are conducted and how to pursue investigative leads. *Id.* § 6192.3(k)(2).

In its notice of adoption, the Commission also addressed some commenters’ contentions 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 rare circumstances when stringent case and sample requirements are met, “[p]articular families or ethnic groups will not be targeted or singled out.” (R. 860.) Moreover, the DNA loci that are used in the Databank for familial searching are the same loci as those used in direct matches and partial matches, and “do not indicate phenotypic traits,” meaning that “race, ethnicity, or health conditions cannot be discerned through a familial search.” (R. 461.)

The familial search rule became effective in October 2017. (R. 858.) In the five years since the familial search rule became effective, the Commissioner has received fifty-three applications for familial searches—forty-three unique applications and ten reapplications or resubmissions of prior requests—of which thirty-seven searches have been approved, thirty searches have been completed, and two searches have led to arrests.<sup>5</sup>

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<sup>5</sup> Search statistics are taken from meetings of the Commission on Forensic Science (meeting held June 3, 2022) and the DNA Subcommittee (meeting held May 13, 2022). Full videos of all meetings of both the Commission and the DNA Subcommittee are publicly available on the NYS Public Safety channel on YouTube. See <https://www.youtube.com/user/nyspublicsafety/videos>.

One of the familial searches that resulted in a name being released allowed law enforcement to make an arrest in the murder of a thirteen-year-old girl living in the Bronx—a crime that had gone unsolved for twenty-two years. The Databank search performed under the familial search rule demonstrated that the source of a semen sample left on the victim’s clothing was likely a first order relative of a deceased man whose DNA profile was in the Databank. *See* Press Release, Bronx County Dist. Att’y, *Westchester Man Indicted for 1999 Cold Case Murder of 13-Year-Old Bronx Girl* (Nov. 30, 2021) (internet). That investigative lead resulted in the arrest of a son of the person whose profile was in the Databank; that son had lived downstairs from the murdered girl. Peter Senzamici et al., *Sex Crime DNA Sample Leads to Cold Case Arrest of Amateur Astronomer for 1999 Murder of Bronx Schoolgirl*, N.Y. Daily News (Nov. 30, 2021) (internet).

The familial search rule also led to an arrest in a cold case in Monroe County, in which a fourteen-year-old girl had been raped and murdered in 1984. *See* Anna Sturla, *DNA Leads to Arrest in the Killing of a New York Teenager 35 Years Ago*, CNN (Sept. 11, 2020)

(internet). The case remained cold for thirty-five years—despite a search for a direct match—until a July 2020 familial search generated investigative leads and an arrest followed. *Id.*

#### **D. 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 his DNA is not in the DNA Databank. Each alleges 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.) Petitioners allege that the Commission lacked statutory authority to promulgate the familial search policy and thus violated the separation of powers under the New York State Constitution. (R. 62-70.)



## 1. Supreme Court's Decision and Order

In March 2020, Supreme Court, New York County (Hagler, J.) denied the petition (R. 4-20.)

Supreme Court determined that petitioners had standing to challenge the regulation. The court reached that ruling despite acknowledging that petitioners' DNA is not in the Databank; that the DNA of petitioners' brothers had been lawfully maintained in the Databank; and that petitioners had not been investigated as a result of the familial search rule. (R. 7; *see also* R. 10.) Supreme Court found standing based on an anticipated risk that petitioners might be "approached by an investigating agency" because of a familial search—a risk that Supreme Court said would be shared by anyone with close relatives profiled in the Databank. (R. 7.)

On the merits, Supreme Court upheld the familial search rule as a proper exercise of the Commission's statutory authority. (R. 13-19.) Supreme Court explained that the rule fell within the Commission's broad statutory authority, including to promulgate a policy for operating the Databank, to designate approved methodologies for forensic DNA testing, and to decide the standards for

determining a match. (R. 14-16.) As the court explained, the familial search rule represents only “incremental changes in methodology regarding how that Databank is utilized for law enforcement purposes” because it is “in essence . . . a deliberate partial match program” with “limited applicability.” (R. 15) (quotation marks omitted.)

## **2. The Appellate Division’s Divided Decision**

Petitioners appealed, and a divided First Department panel reversed. (R. 963-995.) The three-justice majority concluded that petitioners had standing because they face a “heightened risk of police encounters” and “resulting fear and anxiety.” (R. 975-976.)

On the merits, the majority concluded that the Commission acted outside of its authority in promulgating the familial search rule, granted the petition, and vacated the familial search regulations. (R. 986-987.) The majority focused on the Commission’s authority to “promulgate standards for a determination of a match,” and reasoned that this provision did not authorize the Commission “to decide any and all scientific uses” for which the Databank may be used. (R. 981-982.) The majority further reasoned that the

Commission’s proper roles under the Act are limited to accrediting forensic laboratories and providing “quality control” for the Databank. (R. 982.) And applying factors set forth in this Court’s *Boreali* line of cases, the majority held that allowing familial searching “is an inherently legislative function.”<sup>6</sup> (R. 986.)

Two dissenting justices voted to dismiss the petition on the grounds that petitioners lack standing. (R. 988-995.) The dissent explained that neither petitioner had suffered any injury from the familial search rule because neither petitioner is profiled in the Databank, neither petitioner’s name could ever be disclosed as the result of a familial search, and neither petitioner has been investigated. Given these undisputed facts, the dissent explained, petitioners’ claim of standing was based solely on a fear that “they may, at some time in the future, be adversely affected by a search.” (R. 988.) The dissent reasoned that such fear of a future search and investigation—which required many events, none of which had yet

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<sup>6</sup> The First Department expressly declined to reach petitioners’ alternative argument that the familial search rule is arbitrary and capricious. (R. 986-987.)

occurred, to transpire—was “too speculative and hypothetical to support standing.” (R. 989.)

## ARGUMENT

### POINT I

#### PETITIONERS LACK STANDING TO CHALLENGE THE FAMILIAL SEARCH RULE

##### A. **Petitioners’ Alleged Fear and Anxiety Are Far Too Speculative to Provide Standing.**

##### 1. **The remote chain of events that would need to occur for petitioners to be affected by the familial search rule does not confer standing.**

The First Department erred in concluding that petitioners have standing based on the remote and theoretical possibility that the familial search regulation might one day affect them. “[A] court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected.” *Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 (2019) (quotation marks omitted). “[P]ersonal disagreement” with governmental action is “insufficient to confer standing,” *Roulan v. County of Onondaga*, 21 N.Y.3d 902, 905 (2013), because the standing requirement

prevents the courts from deciding “generalized grievances more appropriately addressed by the representative branches,” *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991).

Petitioners failed to meet their threshold burden of establishing that they have suffered an injury in fact from the familial search rule. An injury in fact is “a cognizable harm that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention.” *Daniels*, 33 N.Y.3d at 50 (quotation marks omitted). Because an injury in fact “must be more than conjectural,” a plaintiff’s “speculation about the future course” of events “cannot . . . supply the missing ingredient of in-fact injury.” *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211, 214 (2004).

Here, neither petitioner has been affected by the familial search rule. For example, neither petitioner’s DNA profile is in the Databank. Neither petitioner has been required to provide a DNA sample to the Databank or alleged that they are likely to be required to do so. Accordingly, no familial search could result in either petitioner’s name being released to investigators. Petitioners also

did not allege that the Databank has conducted a familial search that resulted in either of their brother's names being returned as a match or being released. And petitioners did not allege that they have any reason to think that they are under investigation at all, let alone that a familial search resulted in such an investigation. (See R. 45-46; *see also* R. 10-12.)

Contrary to the First Department's conclusion (R. 975-978), petitioners' theory that they might be investigated after a future search reveals another person's name is precisely the sort of "tenuous, ephemeral, or conjectural" harm that does not confer standing. *See Daniels*, 33 N.Y.3d at 50. As the dissent below correctly understood (R. 988-989), a lengthy chain of events would have to occur before petitioners could suffer any injury.

First, a crime scene would need to have a suitable sample of (another person's) DNA for testing. Then, investigators would have to request a familial search and satisfy the many criteria that are prerequisites to conducting such a search (see *supra* at 19-20). Next, the search would have to generate a partial match with someone in the state Databank that meets the stringent likelihood

ratio thresholds and satisfies Y-STR testing to confirm the likelihood of a close biological relationship. Once investigators received the name of one of the petitioner's brothers, investigators would need to identify close relatives of the named person, and then select the relevant petitioner as a close relative worth investigating.

The risk that *all* of these events will occur and ultimately injure either of petitioners is extraordinarily remote and thus does not confer standing. *Cf. New York State Assn. of Nurse Anesthetists*, 2 N.Y.3d at 214. *See also Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 518 (1986) (no standing where "harm sought to be enjoined [is] contingent upon events which may not come to pass" (quotation marks omitted)). Indeed, only thirty-seven applications have been approved statewide during the five years since the familial search rule went into effect. *See supra* at 22.

Despite the remote nature of any injury, the First Department majority concluded that petitioners had standing based solely on petitioners' purported fear and anxiety about being investigated as the result of a familial search. (R. 976.) But to have an injury that is more than mere conjecture, petitioners must allege facts from

which a court could plausibly conclude that they have a *reasonable* fear of being investigated. *See, e.g., Bravo v. State*, 129 A.D.3d 488, 489 (1st Dep’t 2015); *see also Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (pre-enforcement facial challenge requires “an actual and *well-founded* fear” of enforcement (emphasis added) (quotation marks omitted)). Petitioners failed make that showing here.

**2. The Appellate Division’s standing ruling rests on misunderstandings about the scope and effects of the familial search rule.**

The majority’s standing ruling is based on three errors about the scope and effect of the familial search rule.

First, the majority erroneously relied on examples of police using investigative tools that are different from familial searching, not authorized under the familial search rule, and irrelevant here. (*See* R. 969-970.) For example, referencing “anecdotal examples” from newspaper articles (R. 969-970 & n.4), the majority pointed to the conviction of the Golden State Killer, a murderer who was identified through forensic genealogy rather than familial



searching.<sup>7</sup> But forensic genealogy is a distinct investigative approach in which police search consumer-oriented, for-profit DNA databases for distant relatives of a perpetrator, using much broader portions of the DNA chain than the core loci used by the Databank.<sup>8</sup> And the majority pointed to a case in Kansas where law enforcement did not use any DNA database or familial searching. Instead, they confirmed their preexisting suspicion about the perpetrator by subpoenaing a hospital for the DNA sample of the suspect's daughter and comparing it to a crime-scene DNA sample.<sup>9</sup>

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<sup>7</sup> See Paige St. John, *The Untold Story of How the Golden State Killer Was Found: A Covert Operation and Private DNA*, Los Angeles Times (Dec. 8, 2020) (internet).

<sup>8</sup> Unlike familial searching, forensic genealogy does not rely on a state-run DNA database. Instead, it involves searching privately run, public-access databases containing DNA samples from consumers researching their ancestry. Ray A. Wickenheiser, *Expanding DNA Database Effectiveness*, 4 Forensic Science Intl.: Synergy, at 7 (Apr. 5, 2022) (internet). Furthermore, forensic genealogy uses SNP (single nucleotide polymorphism) testing to compare a much broader portion of the DNA chain than familial searching does. *Id.* Because of these major differences in data and science, police use forensic genealogy to hunt for relationships far more distant than in familial searching, such as starting with fourth and fifth cousins. *Id.*

<sup>9</sup> See Ari Shapiro, *Police Use DNA to Track Suspects Through Family*, Natl. Pub. Radio (Dec. 12, 2007) (internet).

The majority’s mistaken reliance on these irrelevant cases appears to have caused it to misperceive petitioners as experiencing “heightened risk of police encounters” from investigatory tactics not at issue here. (*See* R. 976.) But nothing in this case implicates forensic genealogy or the collection of DNA from anyone other than a designated offender under the Act and an unknown perpetrator of a crime. Rather, the familial search rule relies on scientifically validated forensic DNA testing methods to search the state-run Databank for immediate relatives of a person who left DNA at a crime scene. *See* New York State Police, *supra*. And the rule’s strict standards, including the likelihood ratio thresholds and Y-STR testing, ensure that there will be a likely familial relationship between the crime-scene DNA and the DNA profile of any reported name. *Id.* Indeed, familial searching relies on the same basic science that is used for direct and partial matches—familial search considers the same alleles, at the same core loci, as those earlier methodologies. (*See* R. 849.)

Second, the majority below erred in reasoning that the familial search rule imposes on people of color, including petitioners, a

“peculiar risk” of being investigated. (*See* R. 975.) The rule cannot be used to target any racial group or build a physical profile of a suspect. Just as in direct and partial matches, familial searches rely on non-coding DNA (R. 919), which does not determine any known genetic traits or observable human characteristics such as skin tone, hair color, or eye color. *See King*, 569 U.S. at 442-43, 445. (*See* R. 461.) As the Office of Forensic Services noted during the Commission’s rulemaking process, the familial search process “is race blind” because “[a]ny investigative lead is based on genetic and familial relatedness, not on race.” (R. 502.)

The majority below nevertheless found standing based on the Databank containing a disproportionate number of profiles of people of color. (R. 976.) But any heightened risk to petitioners from the Databank profiles arises from the Act’s definition of the designated offenders who must provide a DNA sample, *see* Executive Law § 995-c(3)(a)—not from the familial search rule. Such a risk is the same no matter which forensic testing method is used. Indeed, it exists for direct and partial matches as well. Accordingly, this generalized risk does not provide petitioners standing. *See Matter of*

*Transactive Corp. v. New York State Dept. of Social Servs.*, 92 N.Y.2d 579, 587 (1998) (no standing where injury arose from decision to create new payment program rather than from procurement process for that program).

**B. Petitioners Are Not Within the Zone of Interests of the DNA Databank Act.**

Even if petitioners had shown an injury in fact, they still failed to establish standing because their purported injury does not fall “within the ‘zone of interests’ sought to be protected” by the DNA Databank Act. *See Daniels*, 33 N.Y.3d at 51. “[G]reat weight is placed on the zone of interests inquiry in challenges to administrative agency actions,” in which the petitioner must show that the injury he seeks to redress is an injury that the Legislature intended to prevent. *See Rudder v. Pataki*, 93 N.Y.2d 273, 280 (1999). “This prerequisite ensures that a group or an individual whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes.” *Matter of Transactive Corp.*, 92 N.Y.2d at 587 (quotation marks omitted).

Here, the fundamental purpose of the Act is to assist in the investigation of crimes, including the potential exoneration of innocent individuals, through forensic DNA methodologies approved by the Commission. *See* Executive Law §§ 995(7), 995-c(3)(a), (6). The statute also protects individuals required to produce samples for the Databank by providing procedures for expunging the Databank records of those individuals who are acquitted or get their convictions reversed. *See id.* § 995-c(9).

Petitioners—who have no DNA in the Databank and who are not required to provide their DNA to the Databank—are outside the Act’s zone of interests. Although the statute protects against improper inclusion of a person’s name in the Databank, it does not protect any person against the possibility of being investigated based on forensic tests of DNA profiles that belong to other people and that are properly in the Databank. To the contrary, petitioners’ asserted interest in avoiding any scrutiny that might someday result from a familial search directly undermines the statute’s core purpose to facilitate investigations and exonerate the innocent through forensic DNA testing.

The majority below erred in reasoning that petitioners fell within the zone of interests because the Legislature had “weighed and balanced” “privacy concerns” in initially enacting and then “incrementally expanding” the DNA Databank Act. (*See* R. 974.) The privacy concerns that the Legislature protected were those of individuals whose DNA profiles should be removed from the Databank in cases of acquittal or reversal of conviction. But the Legislature has never expanded the Act’s privacy protections to individuals whose DNA is indisputably not in the Databank—let alone shielded them from potentially being investigated based on leads generated from names that are properly in the Databank.

Despite the lack of protections for individuals whose DNA profiles are not in the Databank, the majority below assumed that the familial search rule balanced those individuals’ interests against law enforcement needs, and that petitioners thus fell within the zone of interests of the familial search rule. (*See* R. 975.) But as the dissenting justices correctly understood (R. 993), the zone-of-interests test looks to the “concerns sought to be promoted or protected by the *statutory provision* under which the agency has

acted,” *New York State Assn. of Nurse Anesthetists*, 2 N.Y.3d at 211 (emphases added), not the agency action itself. Here, the Commission acted under the DNA Databank Act, and the majority erred in bypassing the Legislature’s interests underlying that Act: to provide an investigatory tool for solving crimes. Indeed, the majority allowed petitioners to advance an interest that undermines the Act—the problem the zone-of-interest test is designed to avert. *See Matter of Transactive Corp.*, 92 N.Y.2d at 587.

In any event, the majority incorrectly assumed that familial searching is limited to certain serious crimes solely because the Commission “decided that family members should be insulated from investigations concerning lesser crimes.” (*See R. 975.*) The Commission had significant reasons that further the Act’s goals for selecting the crimes eligible for familial searching. Processing each familial search requires substantial time and resources, including a lengthy application process, examination of the crime-scene sample for suitability, and performance of the test itself. *See* 9 N.Y.C.R.R. § 6192.3(h)(2)-(3), (i); *see also* DCJS, *Application to Request a Familial Search of the NYS DNA Databank* (Nov. 2, 2018) (internet).

Focusing searches on major violent crimes thus allows the State to allocate resources and operate the Databank in a fashion that is “consistent with the operational requirements and capabilities” of DCJS, *see* Executive Law § 995-b(9), while best serving the statute’s core purpose to assist in investigating crimes. The violent crimes for which familial searching is permitted are also the types of crimes in which blood, semen, or other physical evidence that provides DNA clearly associated with a perpetrator—a prerequisite for any familial search—is most likely to be left at the crime scene and retained by police for future cold-case investigation.

**C. The Majority Below Erred in Disregarding the Standing Requirement Based on Concerns That the Rule Would Otherwise Go Unreviewed.**

The First Department majority also erred in excusing petitioners’ lack of standing on the grounds that the validity of the familial search rule would otherwise go unchallenged in court. (*See* R. 976-978.) That is not correct. The four-month statute of limitations applicable to article 78 proceedings might preclude a petitioner from later bringing civil claims challenging the rule. *See* C.P.L.R. 217(1). But the regulation can still be challenged in a future



criminal case, where the four-month statute of limitations does not apply. And in any event, this Court has never held that a petitioner who lacks an injury in fact nevertheless has standing based solely on the value of judicial review.

The majority reasoned that a criminal defendant might not be able to challenge the familial search rule through a motion to suppress the results of a familial search (or other evidence gained through the search results) because that criminal defendant may not have a valid Fourth Amendment claim. (*See* R. 978.) But this Court has held that a criminal defendant may seek to suppress evidence by challenging the statute or regulation allowing a search as unconstitutional on grounds other than the Fourth Amendment. *See People v. Bright*, 71 N.Y.2d 376, 387-88 (1988); *see also People v. Stephens*, 28 N.Y.3d 307, 311 (2016) (criminal defendant moved to suppress evidence obtained during traffic stop on grounds that ordinance supporting stop was unconstitutionally vague). As the dissent correctly argued, the validity of the familial search rule “should be addressed in the context of an actual dispute and not

based on a hypothetical, wholly speculative harm that is unlikely to occur.” (R. 995.)

The First Department also misplaced its reliance (R. 976) on cases in which this Court noted the general importance of judicial review. *See Matter of Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 310-11 (2015); *Matter of Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 10-11 (1975). None of those cases relaxed the requirement that standing requires an injury to the plaintiff. To the contrary, in each case, this Court reiterated that an injury in fact is a minimum requirement for standing. Indeed, the Court found that lower courts had erred by *failing* to focus on the injury requirement. *See Village of Painted Post*, 26 N.Y.3d at 310-11; *Dairylea*, 38 N.Y.2d at 11.

For example, in *Village of Painted Post*, it was undisputed that the village’s approval of a new loading facility subjected the petitioner to a direct injury, i.e., train noise so loud that it woke him up at night and damaged his quality of life. Emphasizing that the proper focus was on whether the plaintiff was “*directly* impacted,” this Court held that the Fourth Department had erred in denying

standing simply because other village residents were also directly harmed. 26 N.Y.3d at 308, 310 (emphasis in original). Similarly, in *Dairylea*, there was no dispute that the petitioner corporation had been directly injured when a rival milk company expanded into the petitioner's sales area. 38 N.Y.2d at 11-12.<sup>10</sup>

There is no similar injury here. An interest in judicial review does not “obviate the need for standing,” including the foundational requirement of an injury in fact. (R. 993-994 & n.11.) The standing doctrine “is not merely a question of judicial preference or restraint,” but “a constitutional command.” (R. 990 (dissenting op.) (quoting *New York PIRG v. Carey*, 42 N.Y.2d 527, 529 (1977)).) Accordingly, the Court should dismiss the petition.

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<sup>10</sup> The First Department majority also cited *Saratoga County Chamber of Commerce v. Pataki*, but that case is wholly inapposite. *Saratoga County* involved the scope of the citizen-taxpayer statute, see State Finance Law § 123-b(1), a special statutory basis for standing that expressly excuses compliance with the injury-in-fact requirement. See 100 N.Y.2d 801, 813 (2003). Petitioners here do not sue as citizen-taxpayers.

## POINT II

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

If the Court does not dismiss the petition for lack of standing, it should reverse the Appellate Division's ruling on the merits and deny the petition.<sup>11</sup> The familial search rule is a proper exercise of the Commission's statutorily delegated authority under the Act.

#### **A. The DNA Databank Act Gives the Commission Authority to Determine the Permissible DNA Search Methods, Based on Developments in Forensic Science.**

“In matters of statutory interpretation, legislative intent is the great and controlling principle.” *Matter of Peyton v. New York City Bd. of Stds. & Appeals*, 36 N.Y.3d 271, 279 (2020) (quotation marks omitted). “Because the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation

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<sup>11</sup> The appellants may properly raise the merits before this Court even though the two dissenting justices in the Appellate Division discussed only standing in their opinion. See Arthur Karger, *The Powers of the New York Court of Appeals*, § 6:6 (Sept. 2021 update) (Westlaw).

must always be the language itself, giving effect to the plain meaning thereof.” *Id.* (quotation marks omitted).

Here, the Legislature plainly delegated to the Commission and the expert DNA Subcommittee the responsibility to select the forensic DNA testing methods that may be used to search the Databank, and to update those permissible methods based on evolving science. The DNA Databank Act requires “that forensic analyses, including forensic DNA testing, are performed in accordance with the highest scientific standards practicable,” Executive Law § 995-b(2)(b), but otherwise does not specify the types of DNA testing to be used. Instead, through multiple statutory provisions, the Act delegates that task to the Commission.

First, the Act directs the Commission, in consultation with the DNA subcommittee, to “promulgate a policy for the establishment and operation of a DNA identification index consistent with the operational requirements and capabilities of [DCJS].” Executive Law § 995-b(9). And the Act specifies that the fundamental purpose of the Databank that the Commission operates is to generate

investigative leads that might help solve crimes. *See* Executive Law § 995-c(6)(a).

These provisions clearly express that the Commission should develop detailed regulations for both the initial “establishment” and the ongoing “operation” of the Databank. This forward-looking responsibility includes updating the ways in which the Databank operates based on experience and current science. And by specifying that the Databank shall operate consistent with DCJS’s “requirements and capabilities,” the Legislature provided that use of the Databank may grow as the agency’s technical abilities and investigative needs warrant. The familial search rule falls comfortably within this provision, updating the Commission’s policy for operating the Databank given DCJS’s capabilities to conduct familial searches and experience with the ways in which familial searches may be best used in investigating crimes.

Second, the Act specifies that, “[u]pon the recommendation of the DNA subcommittee,” “the commission shall designate one or more approved methodologies for the performance of forensic DNA testing.” Executive Law § 995-b(11). This provision squarely

authorizes the Commission to promulgate new forensic DNA search methods, including familial searching. The word “designate” signifies that the Commission is responsible for choosing the “approved methodologies.” And the pluralization of the latter phrase along with the words “one or more” confirms that the Legislature expected there to be multiple ways of testing DNA profiles—including methods other than direct testing for full matches.

Definitional provisions in the Act further confirm the breadth of the Commission’s responsibility to approve new DNA testing methods. The Act expansively defines the term “forensic DNA testing” to mean “any test that employs techniques to examine [DNA] derived from the human body for the purpose of providing information to resolve issues of identification.” *Id.* § 995(2). And the Act defines “DNA testing methodology” to mean “the methods, procedures, assumptions, and studies used to draw statistical inferences from the test results.” *Id.* § 995(3). These words convey that the Commission’s responsibility includes deciding when a forensic DNA testing method, including familial searching, has become sufficiently accepted in the scientific field to be approved for use

under the Act. And the phrase “draw statistical inferences” is particularly telling because it confirms the Commission’s authority to determine when a particular methodology is sufficiently reliable to support inferences about the test result that merit further investigation.

Third, the Act also delegates to the Commission the authority 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.” *Id.* § 995-b(12). The Act notably does not define the word “match,” consistent with the Legislature’s overall choice to delegate to the Commission the responsibility to make expert judgments about the reliability of forensic testing results. Moreover, the word “standards” authorizes the Commission to determine when the association between two DNA profiles is sufficiently strong to consider it a “match” that warrants disclosure as a lead.

Finally, additional provisions of the Act further clarify that the Legislature intended for the Commission to update the Databank’s operation and the approved forensic DNA testing methodologies to



account for scientific advancements. For example, the Legislature assigned the responsibility for recommending new methodologies to the DNA Subcommittee—an expert body with representatives from the fields of molecular biology, population genetics, and forensic science. *See id.* § 995-b(13)(a). That delegation plainly reflects a legislative policy judgment that scientists familiar with developments in their field are best positioned to identify when new methodologies should be used.

Indeed, the very existence of the DNA Subcommittee—which was created by the Act—underscores the Commission’s authority to keep pace with evolving research and adjust the permissible testing methodologies accordingly. The DNA Subcommittee “shall assess and evaluate 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). This ongoing duty ensures that the Commission will act based on developing science rather than leaving the approved search methodologies frozen to those approved in 1994.

Many other provisions of the Act make sense only if they are properly read in the context of the Commission’s authority to adopt new search methodologies. For example, the Act provides that although the Commission must approve the forensic methodologies and technologies to be used for investigations, laboratories may “perform[] research and validation studies on new methodologies which may *not yet* be approved by the commission *at that time.*” *Id.* § 995-b(1) (emphases added). This provision demonstrates that the Legislature expected the Commission to select new methodologies that ought to advance from the research-and-development stage to being used in actual cases.

Similarly, 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) (emphasis added). The Legislature thus plainly intended the Commission to develop the Databank’s uses in ways that may not have been scientifically accepted when the Act was enacted in 1994, but later became accepted as reliable bases for drawing

forensic inferences. The familial search rule falls squarely within the Commission’s authority.

**B. The First Department’s Contrary Reasoning Misconstrued the DNA Databank Act.**

In holding that the familial search rule exceeded the Commission’s authority, the First Department relied on an improperly constrained interpretation of the Act. The court ignored most of the relevant statutory provisions, failing to give the Act “a sensible and practical over-all construction” that “harmonizes all its interlocking provisions.” *Town of Aurora v. Village of East Aurora*, 32 N.Y.3d 366, 375 (2018) (quotation marks omitted); accord *Matter of Peyton*, 36 N.Y.3d at 281-82 (“A statute must be construed as a whole,” and “its various sections must be considered together and with reference to each other” (quotation marks omitted)).

The First Department focused almost solely on the Commission’s authority “[t]o promulgate standards for determination of a match” under Executive Law § 995-b(12). (*See* R. 981-982.) But that provision supports the familial search rule because the rule reflects the Commission’s expert judgment that the “standards”

used in familial searching result in a partial “match” between the DNA profile in the Databank and the DNA profile from the crime scene that warrants disclosure when further confirmed by Y-STR testing. See *supra* at 16-18. And that provision is just one of the many provisions that, independently or taken together, establish the Commission’s authority to issue the familial search rule. See *supra* at 44-51.

The First Department erred in narrowly construing the Commission’s statutory role as merely an accreditation agency for forensic laboratories and a “quality control” watchdog (*see* R. 982). That cramped view is incompatible with the Act. The court relied on the first six subparagraphs of Executive Law § 995-b, which pertain to accreditation and quality control. *See* Executive Law § 995-b(1)-(6). (*See* R. 982.) But the court improperly omitted the next six subparagraphs, which enumerate the Commission’s authority to regulate the Databank’s operation, approve DNA testing methodologies, and consider new forensic technologies. *See* Executive Law § 995-b(7)-(12); *see supra* at 10-12. And the court ignored the DNA Subcommittee’s responsibilities regarding, inter

alia, “evaluating all DNA methodologies” and determining scientific standards for DNA analysis—including the “methods employed to determine probabilities and interpret test results,” *id.* § 995-b(13)(b).

The First Department was also incorrect in concluding that the lack of an express “reference to familial DNA matching” in the Act means that the familial search rule exceeded the Commission’s authority (*see* R. 982). That reasoning misses the point. There is no reference to *any* particular forensic DNA testing methodology in the Act—i.e., direct matches, partial matches, familial searching, or any other technique—precisely because the Legislature understood that DNA science continues to evolve and new approaches become accepted. As this Court recognized in *Wesley*, the direct matching approach that is now commonplace was regarded as a novel forensic methodology when that case went to trial in the late 1980s. *See* 83 N.Y.2d at 422.

Through the Act, the Legislature made the policy judgment that the Commission (assisted by the DNA subcommittee) is best-equipped to select appropriate DNA methodologies going forward. *See* Approval Mem., *supra*, at 5. Indeed, the Legislature could easily

have written a statute that limited the Databank to being searched via a specific forensic DNA methodology—for example, the direct search method this Court approved in *Wesley*. But it opted instead for a flexible approach.

The First Department was thus mistaken in concluding that the Legislature alone may authorize familial searching. (*See* R. 965, 974, 986.) The court relied on the Legislature having amended the Act to expand the pool of individuals whose DNA profiles are maintained in the Databank. But this amendment reflects a division of responsibility underlying the Act. By specifically defining “designated offender,” Executive Law § 995-c(1)-(5), the Legislature reserved to itself the authority to determine whose DNA profiles must be included in the Databank. By contrast, the Legislature broadly delegated to the Commission the responsibility to determine how the Databank may be searched and utilized.

Finally, the First Department also misconstrued both the Act and the familial search rule in concluding that the rule “vastly expanded use of the databank” beyond the statute’s bounds. (*See* R. 984.) To the contrary, the rule provides for “incremental changes

in methodology” in keeping with the statute’s provisions and the Commission’s prior exercises of its delegated authority—as Supreme Court accurately concluded. (R. 15 (quotation marks omitted).)

The familial search rule reflects, at most, a modest expansion on the 2010 partial match rule that petitioners have conceded is lawful. In the Appellate Division, petitioners acknowledged that the partial match rule’s procedures “immediately follow from the Legislature’s directive” to promulgate a Databank policy and standards for determining a match. *See* Br. for Pet’rs-Appellants at 31 (May 31, 2021), NYSCEF No. 9 (citing Executive Law § 995-b(9), (12)). As petitioners correctly said, “[t]he partial match regulations do precisely that: define technical standards for determining a match between a sample of forensic DNA and Databanked DNA.” *Id.*

Petitioners’ concession below ought to have resolved the issue. Just like the partial match rule, the familial search rule defines scientific standards for determining a match between a crime-scene DNA profile and a Databank profile. Familial searching uses essentially the same science to identify the same type of match found in a partial match, i.e., a familial relationship. *See supra* at 6-8, 34.

Indeed, the Innocence Project acknowledged during the rule's notice-and-comment process that there is no "substantive distinction" between partial matching and familial searching. (R. 710.) And as it did for partial matches, the Commission found, based on its review of the relevant science, that familial searching may produce a reasonable investigatory lead provided that stringent standards are met to ensure that the statistical likelihood of a relationship is sufficiently high. (*See* R. 859.) That judgment was well within the Commission's statutory charge to make.

**C. The Appellate Division Majority Erred in Holding That the Familial Search Rule Violates the Separation of Powers.**

The First Department erred in invalidating the familial search rule under this Court's *Boreali* line of cases. As an initial matter, the *Boreali* doctrine is not a useful decisional tool in this case because the regulation at issue was adopted under specific delegations of statutory authority. In any event, analysis of the *Boreali* factors merely illustrates the Commission's authority to adopt the familial search rule, which directly advances the legislative purposes



of the Act through application of the Commission’s technical expertise.

**1. *Boreali* is not the appropriate test to apply here because the Commission acted under highly specific delegations of authority.**

Because the Act expressly delegates rulemaking power to the Commission on the specific topic of approving forensic DNA search methodologies, the lower court’s focus should have been on whether the Act’s provisions authorize the Commission to issue the familial search rule. But instead, the First Department erroneously subordinated analysis of the statutory text to the question of whether the familial search rule is a “social policy” judgment under this Court’s *Boreali* line of cases. (*See* R. 982.)

This Court has made clear 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 v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 609 (2018). *Boreali* is inapplicable here, where the agency did not rely on “the broadest and most open-ended of statutory mandates” to find “a license to correct whatever societal

evils it perceives.” 71 N.Y.2d at 9. Rather, the Commission designated a new search methodology under a statute that, among other things, specifically directs the Commission to “designate one or more approved methodologies” for forensic DNA testing, Executive Law § 995-b(11), and to make technical judgments about “methods, procedures, assumptions, and studies used to draw statistical inferences,” *id.* § 995(3), that advance the Legislature’s stated policy goal of investigating crimes, *id.* § 995-c(6)(a).

However strongly petitioners may disagree with the judgments the Commission has made, the Legislature plainly expected the Commission to make them. It is no answer to say, as the majority below did, that the Act does not reference familial searching (*see* R. 982), because the Act *anticipates* that the Commission will designate additional methodologies, subject to the limitations that all testing must be “performed in accordance with the highest scientific standards practicable,” Executive Law § 995-b(2)(b), and that test results may never be released except for law enforcement or defense purposes in connection with criminal investigations, *id.* § 995-c(6)(a).

Because of the specificity of the statute under which the Commission acted, this is a statutory interpretation case, not a constitutional case. “[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.” *Garcia*, 31 N.Y.3d at 616; *see also Matter of Acevedo v. New York State Dept. 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)). The separation of powers is not a tool for courts to assess “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 id.* at 280 (Wilson, J., joined by Rivera, J., dissenting) (*Boreali* has no bearing on the “non-constitutional question” of whether a regulation is “authorized by the cited statutes”).

**2. If the Court applies *Boreali*, all four factors favor the Commission.**

Even where they are useful, the *Boreali* factors “are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency’s exercise of power.” *Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn.*, 25 N.Y.3d 600, 612 (2015). If the agency’s exercise of authority here is subjected to a *Boreali* analysis, the result is to sustain the rule, because all four factors support the familial search rule.

**a. The Commission properly followed the Legislature’s policy choices and did not improperly weigh social goals.**

The first *Boreali* factor—the factor on which the First Department primarily focused—asks whether the regulation being challenged was “the result of the [agency] making difficult and complex value judgments, choosing between competing policy goals.” *Garcia*, 31 N.Y.3d at 611. This factor supports the Commission because the familial search rule advances the specific legislative purposes of the statute it implements rather than general policy goals of the agency’s own choosing.

The First Department thought that the first *Boreali* factor favored petitioners because, in its view, deciding “whether and under what circumstances the database should be used for familial DNA testing . . . are driven primarily by social policy.” (R. 982.) This reasoning ignores that in the Act, *the Legislature* made the express policy choice that the purpose of the Databank is to provide investigative leads to solve crimes. *See* Executive Law § 995-c(6)(a). The familial search rule thus is driven not by the agency’s vision of social policy but by the Legislature’s own policy.

Furthermore, contrary to the First Department’s view (R. 983), the regulation was not a result of the Commission weighing the legislative interest in investigation against social interests such as privacy. The First Department perceived improper balancing because familial searching is limited to the specific crimes of murder, sexual assault, arson, terrorism, and crimes that involve a “significant public safety threat.” *See* 9 N.Y.C.R.R. § 6192.3(h). The majority assumed that the inclusion of these limits was “not a scientific decision, but rather a policy decision and value judgment about where to draw a line.” (R. 983.)

But the provision limiting familial searching to certain crimes is consistent with both forensic science and the statute’s purposes. Familial searching is reliable in cases where there is not only a DNA sample left at the crime scene, but also where that sample “appear[s] to have a direct connection with the putative perpetrator of the crime.” 9 N.Y.C.R.R. § 6192.3(h)(3)(ii). (*See* R. 463). The crimes listed in the regulation are the types of crimes for which a reliable crime-scene sample is more likely to be available, i.e., where the perpetrator is more likely to have left behind blood, semen, or other physical biological evidence.

Moreover, reserving familial searching for the most serious crimes that remain unsolved despite reasonable investigatory efforts advances the fundamental legislative purpose of the statute. The limits allow the State CODIS laboratory—which requires substantial time to review each application and perform each familial search—to allocate its resources to the cases where further investigation is most warranted, often cold cases involving violent

crimes.<sup>12</sup> That practice fits squarely within the legislative framework, which calls for the Commission to use DNA forensic testing to assist investigations “consistent with the operational requirements and capabilities” of DCJS. *See* Executive Law § 995-b(9).

Furthermore, familial searching serves not only to identify potential perpetrators but also to exonerate the innocent by increasing the likelihood that the correct perpetrator of a crime will be identified, a particularly salient consideration in cold cases. (R. 520.) “Unsolved crimes also represent a cost to the innocent, potentially facing investigative questioning and suspicion being cast upon the wrong individual and an increased risk of a wrongful conviction.” Wickenheiser, *supra*, at 2; see *supra* at 9. The Legislature accounted for this interest in the Act, and the regulation here advances that legislative purpose by improving the accuracy of

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<sup>12</sup> Other States that perform familial searching also limit searches to serious crimes because of the considerable workload involved in a familial search. For example, Wisconsin limits familial searching to “unsolved, violent crimes,” noting that “[d]ue to the additional time and resources this tool requires the DNA Databank team is only able to perform six searches a year.” Wisconsin Dept. of Justice, Familial DNA Search (internet).

investigations. By serving the Act's core purposes, the regulation does not reflect improper policy compromise.

In any event, to the extent that the specific crimes named in the regulation reflect some judgment about where resources were most appropriately directed, that alone does not establish *Boreali's* first factor, because "*Boreali* should not be interpreted to prohibit an agency from attempting to balance costs and benefits." *Garcia*, 31 N.Y.3d at 611 (quotation marks omitted).

The majority below also erred in suggesting that the familial search rule inherently reflects a policy judgment because it exposes people of color to an increased risk of being investigated. (*See* R. 983.) As explained, familial searching relies on non-coding DNA that cannot be used to ascertain race or any physical characteristics other than sex. Moreover, familial searching uses a DNA profile from crime-scene evidence left by an unknown perpetrator and compares that profile to the entire DNA Databank, without regard to race. *See supra* at 5, 7-8, 35. And the makeup of the Databank (R. 983) is the result of the Legislature's choice about which crimes warrant taking a DNA sample for the Databank. *See* Executive Law § 995-



c(3)(a). It does not reflect any decision by the Commission, let alone an improper policy decision.

Indeed, *any* use of the Databank—including a direct search or a potential disclosure of a partial match—depends on comparing a sample to the profiles in the Databank. Under the First Department’s view, the Commission would be precluded from designating any new search methodologies because all searches are done on a Databank that contains the same demographic makeup. But that is plainly not correct given the statute’s express expectation that the agency will approve new search methods.

The First Department also incorrectly found policy balancing by the Commission based on its view that the Commission had *failed* to give adequate weight to certain policy concerns. For example, the majority noted that the rule fails to require judicial review of familial search applications. (R. 983.) But while some commenters suggested that judicial supervision should be required (R. 716), the DNA Databank Act does not contain any requirement of judicial supervision for DNA testing, and the absence of this

nonstatutory suggestion in the rule in no way implies that the agency ventured beyond its statutory mandate.

**b. The First Department’s analysis of the three remaining *Boreali* factors is unpersuasive.**

Each of the remaining three *Boreali* factors also support the familial search rule, contrary to the First Department’s reasoning.

The second *Boreali* factor—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 Garcia*, 31 N.Y.3d at 613-614—strongly favors the Commission. 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 N.Y.*, 32 N.Y.3d at 260.

Here, the Legislature created the Commission and DNA Subcommittee specifically to promulgate a policy for the Databank’s operation, to designate new search methods, and to set standards for determining a match—based on evolving science. The Act leaves

no serious doubt that the Legislature delegated authority to the Commission over the specific subject at issue here. Although the First Department majority deemed the familial search rule to be a “vastly expanded use of the databank” (R. 984), that characterization is not accurate or reasonable. See *supra* at 54-56. Far from writing on a clean slate, the Commission grounded the familial search rule in multiple provisions of the Act and long-accepted search methodologies.

This Court’s *Boreali* cases have never demanded granular statutory directives in areas where agencies have long regulated pursuant to a delegation of authority on a specific subject. For example, the Legislature delegated lawfully when it designated certain vaccinations that schoolchildren must receive, while allowing agencies to decide whether additional vaccinations should be administered. See *Garcia*, 31 N.Y.3d at 612-13.

The same principles apply here. The Legislature set certain core requirements for the Databank, such as specifying which DNA profiles must be included and requiring that matches be disclosed to law enforcement for the purpose of solving crimes. But the

Legislature assigned to the Commission the responsibility to determine which DNA testing methods should be used and when a search return is sufficiently reliable to constitute a match and be disclosed and used for investigative purposes. The familial search rule is a proper exercise of that statutory responsibility.

In considering the third *Boreali* factor—whether the Legislature has repeatedly tried and failed to reach consensus on an issue, see *Matter of NYC C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation and Historic Preservation*, 27 N.Y.3d 174, 183 (2016)—the First Department correctly concluded that the third factor does not weigh in petitioners’ favor. (R. 984-985.) As the majority below recognized, all but one of the bills cited by petitioners died in committee. (R. 985.) Bills that fail to make it out of committee have little to no significance because they have not been voted on by a full chamber, let alone the full Legislature. See *Matter of LeadingAge*, 32 N.Y.3d at 265-66; *Matter of NYC C.L.A.S.H.*, 27 N.Y.3d at 183.

However, the majority below erred in concluding that no inferences can be drawn in the Commission’s favor from the

Legislature's inaction. (See R. 985.) To the contrary, as Supreme Court rightly noted, the Commission has been developing the operation of the Databank and the search methods used for nearly thirty years. (See R. 19.) The fact that the Legislature "has done nothing to curb the [Commission]'s authority or otherwise signal disapproval" shows "the legislature's ongoing reliance on [the Commission's] expertise," see *Matter of Acevedo*, 29 N.Y.3d at 225. Indeed, when the Legislature amended the statute to expand the number of individuals required to provide a DNA sample to the Databank, the partial match rule had already been in effect for two years. The Legislature's decision to revise the Act without abrogating the partial match rule or otherwise altering the Commission's regulatory authority is strong evidence that the Legislature always intended to defer to the agency's expertise in designating new testing methods and match standards. See *Garcia*, 31 N.Y.3d at 614.

Finally, the fourth *Boreali* factor weighs heavily in favor of the Commission, and the First Department erred in saying otherwise. (See R. 985.) This 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). Here, the Commission relied on the scientific expertise of its DNA Subcommittee to develop the familial matching rule—exactly as the Legislature intended. *See* Executive Law § 995-b(13)(a). As the administrative record shows, the DNA Subcommittee reviewed extensive scientific research on familial searching (R. 506-587), and its “expertise was essential” to the issuance of rule, *see Garcia*, 31 N.Y.3d at 615-16.

Despite acknowledging that “[t]echnical expertise was clearly essential” to develop the regulation, the majority deemed the fourth factor “largely neutral” based on the theory that deciding “the underlying public policy issue” of whether to permit familial searching did not involve “technical” skills. (R. 985.) This reasoning is circular and fundamentally flawed. The fourth factor looks to whether the agency used its technical expertise as contemplated in the statute. It does not assess whether the agency engaged in improper policymaking; that assessment is the ultimate conclusion to be drawn from the *Boreali* analysis. Here, the First Department assumed its conclusion (that allowing familial searching involved

improper policy balancing) and injected it into the fourth factor to reason that the agency did not use technical expertise to do the purported policymaking. Properly applied, the court's findings that the Commission did use its technical expertise demonstrates that the agency did not engage in policymaking.

In any event, the fourth *Boreali* factor has never prohibited an agency from making some judgments beyond its core competencies. Rather, the fourth factor asks whether an agency relied *significantly* on its technical expertise. And 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). As this Court 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.

## CONCLUSION

This Court should reverse the decision and order of the Appellate Division and dismiss the petition.

Dated: New York, New York  
August 31, 2022

Respectfully submitted,

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## AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Matthew W. Grieco, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 12,926 words, which complies with the limitations stated in § 500.13(c)(1).

*/s/ Matthew W. Grieco*  
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## AFFIRMATION OF SERVICE

Matthew W. Grieco affirms upon penalty of perjury:

I am over eighteen years of age and a Senior Assistant Solicitor General in the office of the Attorney General of the State of New York, attorney for the Appellants herein. On August 31, 2022, I served, with consent of opposing counsel or the opposing party, the accompanying Brief for Appellants by sending one portable document format copy by electronic mail as complete and effective personal service upon the following named person(s):

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**Cc:** Cheung, Kelly; Ballesteros, Alenette  
**Subject:** FW: service of brief and record in Matter of Stevens v. DCJS

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Yes, we consent to the same. Thank you.

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Matthew,

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Best,  
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Joseph and Doran,

Will you consent to electronic service of the record on appeal and brief in this appeal?

Thanks,  
Matthew

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