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Court of Appeals of the State of New York

In the Matter of the Application of

TERRENCE STEVENS, *et al.*,

Petitioners-Respondents,

– against –

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

Respondents-Appellants.

BRIEF OF AMICUS CURIAE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS-RESPONDENTS

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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Dated: April 28, 2023
New York, N.Y.

RULES OF PRACTICE 500.1 [F] AND 500.23 [4]
DISCLOSURE STATEMENTS

The New York Civil Liberties Union Foundation (the "NYCLU") is a non-profit 501 [c] [4] organization and the New York State affiliate of the American Civil Liberties Union. The NYCLU does not have other subsidiaries or affiliates.

No other person or entity has contributed to the preparation or submission of this brief. Additionally, no party or party's counsel contributed money that was intended to fund preparation or submission of this brief.

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PRELIMINARY STATEMENT

Before this Court is a challenge to agency regulations that purport to authorize familial DNA searches where the Legislature has not chosen to authorize such searches. As this Court has explained, an important factor in determining whether the regulations are *ultra vires* and thus unlawful is the extent to which the agency "resolve[s] difficult social problems by making choices among competing ends." The brief of Petitioners-Respondents discusses several dimensions of this factor, including the racial impact of familial searching and the judicial oversight that should accompany familial searching.

The New York Civil Liberties Union submits this amicus brief to address an additional policy dimension: the grave privacy consequences of the familial-search regulations for large numbers of people innocent of any wrongdoing. Specifically, by authorizing familial DNA searches, the regulations expose a wide swath of family members to intrusive law-enforcement investigations, and those investigations in turn may result in the family members' DNA samples being added to investigative databases—even after DNA testing clears them of suspicion. Whatever debate there may be about familial DNA searching, these privacy consequences further illustrate that familial DNA searching implicates important policy considerations squarely in the legislative domain.

INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union, the New York State affiliate of the American Civil Liberties Union, is a non-profit, non-partisan organization with over 85,000 members and supporters that defends and promotes civil rights and liberties as embodied in the United States Constitution, the New York State Constitution, and state and federal law. The NYCLU has long supported the protection of genetic privacy, including ensuring that technological advances do not erode privacy protections.

The NYCLU brings extensive expertise to the issues before the Court in this case. The NYCLU was actively involved in the drafting and passage of, and subsequent amendments to, the legislation establishing New York State's DNA databank. Likewise, it was actively involved in the drafting and passage of Section 79 of the New York Civil Rights Law, which establishes New Yorkers' right to genetic confidentiality. And the NYCLU participated in—and voiced its opposition to—the rulemaking at issue in this appeal.

The NYCLU also participated as *amicus* in the seminal case considering the constitutionality of the state's DNA databank at the federal Court of Appeals for the Second Circuit. (*See Nicholas v Goord*, 430 F3d 652 [2d Cir 2005].) Finally, through public commentary, testimony, and *amicus* submissions the NYCLU has provided analysis about the lawfulness of maintenance of DNA samples in the

databank system operated by the New York City Office of Chief Medical Examiner. (*See People v Rodriguez*, 193 Misc 2d 725 [Sup Ct, Kings County 2002], *affd upon rearg*, 196 Misc 2d 217 [Sup Ct, Kings County 2003]; *see also People v. Hendrix*, Criminal Part 18, Indictment No. 3668/03 [Sup Ct, Kings County 2003].)

ARGUMENT

Familial DNA search techniques involve the intentional search of a DNA database using specialized software to identify candidates who are not themselves in the database but who may be close biological relatives of individuals in the database. [R.42-45].[1] Because familial DNA searches target people whose DNA is *not* in the database, they dramatically expand the universe of people subject to the State's criminal investigatory powers. Familial DNA searches thus implicate a complex array of weighty policy considerations, which bears directly on whether the familial-search regulations before this Court are lawful.

As this Court has explained, under the principle of the separation of

[1] The FBI describes familial DNA searching as follows: "Familial searching is an additional search of a law enforcement DNA database conducted after a routine search has been completed and no profile matches are identified during the process. Unlike a routine database search, which may spontaneously yield partial match profiles, familial searching is a deliberate search of a DNA database conducted for the intended purpose of potentially identifying close biological relatives to the unknown forensic profile obtained from crime scene evidence." (FBI Law Enforcement Resources, *Biometrics and Fingerprints*, *Familial Searching,* available at https://le.fbi.gov/science-and-lab-resources/biometrics-and-fingerprints/codis#Familial-Searching [last accessed Apr. 24, 2023].)

powers—"the bedrock of the system of government adopted by this State"—it is the role of the "Legislature [to] make the critical policy decisions, while the executive branch's responsibility is to implement those policies." (*LeadingAge New York, Inc. v Shah*, 32 NY3d 249, 259–60 [2018] (citations and internal quotation marks omitted).) Thus, "an administrative agency possesses no inherent legislative power," (*Nicholas v Kahn*, 47 NY2d 24, 28 [1979]), and "cannot promulgate rules or regulations that contravene the will of the Legislature" (*Weiss v City of New York*, 95 NY2d 1, 5 [2000]; *see also Jones v Berman*, 37 NY2d 42, 53 [1975] ("Administrative agencies . . . have no authority to create a rule out of harmony with the statute.")). "If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers." (*LeadingAge New York*, 32 NY3d at 259–60.)

In particular, an agency cannot rely on its enabling statute "as a basis for drafting a code embodying its own assessment of what public policy ought to be." (*Boreali v Axelrod*, 71 NY2d 1, 9, 13 [1987].) This is because "it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." (*Id.* at 13; *see id.* at 12 ("Striking the proper balance among [various societal] interests . . . is a uniquely legislative function.").)

The familial-search regulations at issue here plainly present the kinds of

"difficult social problems" this Court has held to be only within the prerogative of the Legislature to resolve. This is apparent from the legislative history of New York's DNA database scheme and an examination of the privacy implications of familial DNA searches.

I. The Legislative History of New York's DNA Database Scheme Shows the Legislature Guards Its Prerogative to Weigh All Policy Determinations Implicating DNA Testing and Databanking.

While other briefs before the Court discuss the legislative history behind the original DNA Databank Act and subsequent amendments, the NYCLU writes to highlight aspects of that history that bear directly on the privacy implications of familial DNA searches. When it enacted the DNA Databank Act in 1994 and created the Commission on Forensic Science and the Commission on Forensic Science DNA Subcommittee, the Legislature considered both the crime-solving and privacy implications of the burgeoning field of forensic science. (1994 NY Senate-Assembly Bill S8897, A12252, codified at Executive Law § 995 *et seq.*) The Legislature specifically articulated its desire for the new law to "safeguard . . . confidentiality and privacy"[2] to address its concern that "while the use of DNA evidence is expanding rapidly, forensic laboratories in New York State currently

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[2] Ten-Day Bill Budget Report on Bills, Bill Jacket, L 1994, ch 737, at 000010, available at https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/d976fc39-13ac-4556-941d-f917802858a2.

function without any State oversight."[3]

Then-Governor Mario M. Cuomo echoed this sentiment, explaining that he was spurred to approve the bill because it contained "specific proscriptions governing the State DNA identification index and use of DNA records," addressing "concerns regarding the lack of regulation of forensic services . . . brought to the forefront with the introduction of this new and complex technique of forensic DNA analysis."[4] And then-Attorney General G. Oliver Koppell affirmed that "this legislation will ensure that DNA samples are collected and analyzed so as to enhance law enforcement investigations *while not trampling on the rights of innocent individuals.*"[5]

Consistent with the privacy concerns animating the passage of the DNA Databank Act, the Legislature took measures to ensure that no more people are subject to intrusive forensic investigations than it intended. For example, the DNA Databank Act makes explicit provision for the expungement of the records of those

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[3] Governor's Approval Mem, Bill Jacket, L 1994, ch 737, at 000008, available at https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/d976fc39-13ac-4556-941d-f917802858a2.

[4] Governor's Approval Mem, Bill Jacket, L 1994, ch 737, at 000005-000006, available at https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/d976fc39-13ac-4556-941d-f917802858a2 [last accessed Apr. 24, 2023].

[5] Attorney General G. Oliver Koppell's Approval Mem, Bill Jacket, L 1994, ch 737, at 000012 (emphasis added), available at https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/d976fc39-13ac-4556-941d-f917802858a2 [last accessed Apr. 24, 2023].

who were required to provide their DNA based on felony convictions but who were subsequently exonerated or pardoned. (NY Exec Law § 995-c [9].) Moreover, the statute makes it a felony to disclose without authorization or to use for unauthorized purposes "a DNA record[] or the results of a forensic DNA test or analysis." (*Id.* at § 995-f.)

When it amended the DNA Databank Act in 1999 to expand the definition of persons who must submit biological samples to the DNA Databank, the Legislature noted its intent to carefully balance, one the one hand, the need to assist law enforcement officials in accurately solving offenses committed by persons already convicted of serious crimes and, on the other hand, the need to protect innocent persons from unjustified investigation. The Memorandum in support of the Senate bill noted that although "[e]xpanding the range of designated offenses for which DNA information is indexed" had the potential to help solve crimes, it could also compromise "an individual's right to privacy."[6]

The Legislature similarly made its intent clear when it enacted specific privacy protections for genetic testing not long after establishing the DNA Databank Act. Section 79-l of the New York Civil Rights Law prohibits the

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[6] *See* State Senate Introducer's Mem in Support; Assembly Budget Report on Bills, Bill Jacket, L. 1999, ch.560, at 000004, https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/20134, [last accessed April 24, 2023].

performance of any genetic test—including "DNA profile analysis"—unless the tested individual gives "written informed consent." (NY Civ Rights Law § 79-l [2] [a]). Section 79-l also prohibits the dissemination or disclosure of test results without written informed consent and mandates that test samples be destroyed at the end of the testing process.[7] (*Id.* § 79-l [2] [b] [7], [3] [a].) There are only a few narrow exceptions to Section 79-l's requirements; one of these narrow exceptions is the DNA testing pursuant to the DNA Databank Act of people convicted of crimes. (*See id.* § 79-l [4] [b], 79-l [4] [c]). DCJS itself acknowledged the Legislature's intent that DNA retrieved pursuant to Article 49-B was the "notabl[e] ... exception" to Section 79-l.[8] Section 79-l thus reflects the Legislature's express command that no nonconsensual genetic testing may be conducted unless expressly permitted by law—and the DNA Databank Act does not permit the

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[7] Echoing the Legislature's recognition of the weighty policy judgments implicated by the DNA Databank Act, the Senate sponsor of Section 79-l explained that the law struck "a compromise ... [balancing] the rights of the individual with the legitimate interests of our criminal justice system." (Letter from Kenneth P. LaValle, June 24, 1996, Bill Jacket, L 1996, ch 497 at 000009, available at https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/35158 [last accessed Apr. 24, 2023].) Similarly, the Assembly sponsor of Section 79-l explained, "Individuals are entitled to privacy protection with respect to such personal information, and to protection against misuse of that information by unauthorized persons [and this legislation] protect[s] the confidentiality of records of genetic tests and require[s] the informed consent of the subjects of such tests, with specified exceptions in the forensic context." (Assemblyman Ronald Canestrari's Mem in Support, Bill Jacket, L 1996, ch. 497 at 000010, available at https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/35158 [last accessed Apr. 24, 2023].)

[8] Letter from Maureen E. Casey, July 8, 1996, Bill Jacket, L 1996, ch. 497 at 9, ch 345, at 000015, available at https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/35158 [last accessed Apr. 24, 2023].

testing of DNA of individuals who are not in the Databank.

As the Appellate Division observed, the Legislature has been debating the use of familial DNA searches in New York State since at least 2014. [R.971-972]. The Appellate Division further noted that, over that time, many legislative bills permitting familial DNA searches were proposed in both the Assembly and Senate. (*See* 2014 NY Assembly Bill A9247; 2015 NY Assembly Bill A1515; 2017 NY Assembly Bill A683; 2016 NY Senate Bill S8216.) Most of these bills, however, were never reported out of committee. [R.971-972; R.985]. In 2017, a bill that would have allowed familial DNA testing under certain circumstances and would have allowed Respondents to determine best practices for implementing a familial search policy passed the Senate. [R.971; R.985]. But after the bill was referred to the Assembly, it was never voted out of the governmental operations committee. [R.971]. That the Legislature has repeatedly considered but refused to permit familial DNA searches demonstrates that that decision is a "policy" one for "the Legislature [to] make." (*LeadingAge New York*, 32 NY3d at 259–60.)

II. The Authorization of Familial DNA Searches Implicates Weighty Policy Considerations.

The Legislature's treatment of familial DNA searches as a "critical, primary policy decision[]," [R.979], is well founded. Putting expansive DNA search powers into the hands of law enforcement entails the balancing of important policy

considerations that only the Legislature itself is qualified to weigh. To name just a few:

Dragnet targeting of individuals solely on the basis of their biological associations. Civil liberties and privacy advocates, including the NYCLU, have raised concerns that familial DNA searches, by subjecting persons to criminal investigations on the basis of their biological associations, embody the very presumptions that our constitutional and evidentiary rules have long endeavored to counteract: guilt by association, racial discrimination, propensity, and even biological determinism. Familial DNA searches effectively empower law-enforcement officials to collect and store the DNA of otherwise database-ineligible persons solely because they share a blood relation with a convicted person.

While state law limits storage, and searching, of DNA samples in the *state* databank to those convicted of felonies, nothing in state law or the familial-search regulations specifically prohibits law enforcement from collecting and storing the DNA of family members identified through familial DNA searches in *local* DNA databases.[9] There is also nothing in state law or the familial-search regulations that

[9] Neither the DNA databank statute, nor the regulations governing the state DNA databank and the local DNA databanks, contemplate the expansive use to which the NYPD has put the OCME Databank. As a result, there is no law that either expressly authorizes or prohibits the NYPD from using the OCME Databank as a repository for DNA profiles of suspects who have never been charged with a crime, arrestees who have never been convicted of a crime, exonerated or acquitted former suspects, or individuals who provide an "elimination" DNA sample (as discussed below)—notwithstanding that none of those DNA profiles are permitted to be stored,

prohibits law enforcement from routinely conducting programmatic searches of those *local* DNA databases that contain the indexed DNA samples extracted from family members identified through familial DNA searches without any level of individualized suspicion that these individuals have committed any crime.[10]

New York State has twenty local DNA databases.[11] The largest of those is the one run by the New York City Office of Chief Medical Examiner ("OCME Databank"). The operation of the OCME Databank amply illustrates the privacy concerns arising out of familial DNA searching.[12]

Familial DNA searches make it possible for the DNA samples of innocent

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and searched, in the central State DNA Databank. (NY Exec Law § 995 *et seq*; 9 NYCRR § 6190 *et seq*. (no limits on local database retention).)

[10] *Id.*

[11] Division of Criminal Justice Services, *New York State (NYS) Public Forensic Laboratories Accredited by the NYS Commission on Forensic Science*, available at https://www.criminaljustice.ny.gov/forensic/labaccreditation.htm. [last accessed Apr. 24, 2023].

[12] The NYPD has admitted that it has longed engaged in the collection and storage of potential suspects' DNA, followed by repeated programmatic searches of those DNA profiles, as part of routine criminal investigations utilizing the OCME Databank. (*See, e.g.,* The New York City Council, *Oversight - DNA Collection and Storage in NYC, Public Testimony and Hearing Transcript* [Feb. 25,2020], available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4320022&GUID=D6C58364-FD4F-44EC-9229-CF530C3EB5B4&Options=&Search [last accessed April 24, 2023].)

There is a pending class action lawsuit in the United States District Court for the Southern District of New York challenging this NYPD practice. (*See Leslie v City of New York*, US Dist Ct, SD NY, 22 Civ 02305, Buchwald, J., 2022; *see also* Troy Closson, *This Database Stores the DNA of 31,000 New Yorkers. Is It Illegal?*, NY Times, March 22, 2022, available at, https://www.nytimes.com/2022/03/22/nyregion/nyc-dna-database-nypd.html [last accessed Apr. 24, 2023].)

family members of individuals in the State DNA Databank to be collected and stored in the OCME Databank for law-enforcement access in perpetuity. For example, when investigating a person identified by familial DNA searching as a possible suspect, the police may collect a DNA sample from that person to compare with crime-scene DNA. This "elimination sample" allows the police to eliminate the person as a suspect if their DNA sample does not match the crime-scene sample. But even when the elimination sample confirms the person identified by familial DNA searching is innocent—and therefore may not be added to the State DNA databank—the police could add their DNA sample to the OCME Databank. Once added, their DNA profile remains in the OCME Databank forever; there is no policy for purging such profiles from the system. There are no privacy protections for subjects whose DNA materials are contained in the OCME Databank, which exists without any independent oversight. Thus, any samples obtained as a result of familial DNA searches can be analyzed for information far beyond that provided by standard investigative comparisons. Such practices contradict the very principles of equality and liberty that law enforcement serves to uphold.[13]

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[13] Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Michigan Law Review 291, 297-298, 317 [2010], available at https://repository.law.umich.edu/mlr/vol109/iss3/1/.

The risk of error in identifying potential perpetrators of crime inherent in the familial DNA searching process. Because familial DNA searching uses fewer genetic markers than in standard testing protocols to determine a "match" between a forensic DNA sample and a stored DNA profile, the algorithm that determines the degree of probability that there may be a "match" introduces a higher risk of erroneously identifying innocent individuals as suspects.[14] The National Research Council, whose members include the nation's most distinguished scientists and academics, has cautioned:

> DNA databanks have the ability to point not just to individuals but to entire families including relatives who have committed no crime. Clearly, this poses serious issues of privacy and fairness. . . . [I]t is inappropriate for reasons of privacy to search databanks from convicted criminals in such a fashion. Such uses should be prohibited both by limitations on the software for search and by statutory guarantees of privacy.[15]

Intrusions on civil liberties and genetic privacy. A DNA sample contains a person's entire genetic makeup and therefore reveals to the State an extraordinary amount of intensely sensitive information about that person.[16]

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[14] *See* Rori V. Rohlfs, et al., The Influence of Relatives on the Efficiency and Error Rate of Familial Searching, PLoS One, Aug. 2013, available at https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0070495.

[15] National Research Council, "DNA Technology in Forensic Science," National Academy Press, Washington, D.C. (1992).

[16] A DNA sample can reveal intensely sensitive information, including our likelihoods for having certain medical conditions, such as Alzheimer's, cystic fibrosis, breast cancer, and addiction; our ancestry; and our biological familial relationships, including family members we never even knew we had. Private companies purport to be able to use our DNA for additionally identifying everything from eye, hair, and skin colors, (*see, e.g.*, Parabon Nanolabs,

DNA material can be mined for a wealth of information, including not only a subject's skin pigmentation, bio-geographical origin, gender, and eye color, but also sensitive information about a host of medical diseases, behavioral and medical predispositions, and even potential indicators of sexual orientation. Such genetic information can expose the most personal family relationships and the most intimate workings of the human body, including the likelihood of the occurrence of thousands of types of medical conditions, such as Alzheimer's, cystic fibrosis, breast cancer, and addiction; legitimacy at birth; and food preferences and allergies.[17]

With the ongoing advancement of DNA technology, the scope of law enforcement's incursions into our genetic privacy—unless regulated by the Legislature—will only increase. For example, the STR analysis profiles typically generated by government crime labs yield highly sensitive facts about a person. These profiles can reveal details like "precise ancestry estimates, health and

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https://snapshot.parabonnanolabs.com [last accessed Apr. 24, 2023]); to food preferences and allergies, (*see* 23andMe, *Compare our Services*, available at https://www.23andme.com/compare-dna-tests [last accessed Apr. 24, 2023]); to the likely migration patterns of our ancestors, (Ancestry, *What Do the Dots and Lines on the Map Represent?*, available at https://www.ancestry.com/cs/dna-help/communities/dots-and-lines [last accessed Apr. 24, 2023]).

[17] 23andMe, *Compare our Services*, available at https://www.23andme.com/compare-dna-tests [last accessed Apr. 24, 2023].

identification information,"[18] and ancestry information can in turn be used to make determinations about physical appearance based on assumptions about race and ethnicity.[19] This Court has recognized that "innovations in surveillance tools . . . enhance[] the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," (*People v Schneider*, 37 NY3d 187, 192 [2021] (alterations omitted), citing *Carpenter v United States*, 138 S Ct 2206, 2214 [2018]), and that increasingly, DNA samples "put into the possession of law enforcement authorities . . . a wealth of . . . highly personal information" (*People v Goldman*, 35 NY3d 582, 589, 592 [2020], quoting *Birchfield v North Dakota*, 136 S Ct 2160, 2177 [2016]).

Because biological relatives have substantial commonalities in their genetic profiles, familial DNA searches intrude on the privacy not only of the people whose DNA profiles are in the Databank but also millions more who have committed no crime and whose genetic profile the Legislature has not authorized law enforcement to obtain.

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[18] Michael D. Edge et al., *Linkage Disequilibrium Matches Forensic Genetic Records to Disjoint Genomic Marker Sets*, 114 Proceedings of the Nat'l Acad. of Scis. 5671, 5675 [2017], available at https://www.pnas.org/content/114/22/5671 [last accessed Apr. 24, 2023].

[19] Bridget F.B. Algee-Hewitt et al., *Individual Identifiability Predicts Population Identifiability in Forensic Microsatellite Markers,* 26 Current Biology 935, 939 [2016], available https://doi.org/10.1016/j.cub.2016.01.065 [last accessed Apr. 24, 2023].

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In light of the difficult policy judgments involved, law-enforcement agencies and jurisdictions across the country have approached familial DNA searching with circumspection. Familial DNA searching is not currently conducted at the national level or performed by the National DNA Index System, and the United States Department of Justice has cautioned that while "familial DNA searches . . . have the potential to greatly assist law enforcement in the investigation of criminal activity," they "simultaneously have the potential to pose difficult legal questions and policy debates."[20]

The legislatures in Maryland and the District of Columbia have banned familial DNA searching. (*See* Maryland Public Safety § 2-506 [d]; Code of the District of Columbia § 22-4151.) Several states—including Arizona, California, Colorado, Florida, Ohio, Texas, Utah, Virginia, Wisconsin, and Wyoming—have administratively developed procedures regulating the use of familial searching and partial match analysis. These procedures governing familial DNA searches vary widely on the conditions in which familial DNA searches may be performed and

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[20] *See e.g.* U.S. Department of Justice Bureau of Justice Assistance, *An Introduction to Familial DNA Searching for State, Local, and Tribal Justice Agencies: Issues for Consideration*, available at https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/an_introduction_to_familial_dna_searching1.pdf [last accessed Apr. 24, 2023].

present a patchwork of use and disclosure restrictions.[21]

As the First Department correctly concluded, the "overwhelming policy issues inherent in authorizing the use and limitations upon familial match searches of DNA information collected in the New York State databank warrant[s] the conclusion that it is an inherently legislative function." [R.986].

CONCLUSION

Accordingly, the First Department's determination that the Respondents' promulgation of the FDS Regulations exceeded their statutory authority and violated

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[21] *See, e.g.*, Arizona Department of Public Safety Scientific Analysis Bureau, *Familial DNA Analysis*, available at https://www.azdps.gov/sites/default/files/media/Familial%20DNA%20Analysis%20Flyer.pdf [last accessed Apr. 24, 2023]; California Department of Justice, *Memorandum of Understanding DOJ Familial Searching Protocol*, available at https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/fsc-mou-06072019.pdf [last accessed Apr. 24, 2023]; Colorado Bureau of Investigation, *DNA Database Operations Manual, DBS 11.2 Familial Searching*, available https://cbifs.qualtraxcloud.com/ShowDocument.aspx?ID=31060 [last accessed Apr. 24, 2023]; Florida Department of Law Enforcement, *Crime Laboratory Evidence Submission Manual, Biology and DNA Database Overview*, available at https://www.fdle.state.fl.us/Forensics/Documents/2020-ESM.aspx [last accessed Apr. 24, 2023]; Ohio BCI Crime Laboratory, *Familial Search Policy and Procedures*, available at https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/BCI/Familial-Search-Policy-and-Procedures.aspx [last accessed Apr. 24, 2023]; Texas Department of Public Safety, *Local CODIS Laboratory Familial Search Request Checklist*, available at https://www.dps.texas.gov/InternetForms/Home/Details/3129 [last accessed Apr. 24, 2023]; Utah Department of Public Safety, *Forensic Services, Biology*, available at https://forensicservices.utah.gov/testing-services/biology/ [last accessed Apr. 24, 2023]; Commonwealth of Virginia Department of Forensic Science, *Policy Relating to Acceptance of Cases For Performance of Familial DNA Searching*, available at https://dfs.virginia.gov/wp-content/uploads/2021/03/109-D100-Familial-Search-Case-Acceptance-Policy.pdf [last accessed Apr. 24, 2023]; Wisconsin Department of Justice, *Wisconsin DNA Databank Familial DNA Search Request Form*, available at https://www.doj.state.wi.us/dfs/familial-dna-search [last accessed Apr. 24, 2023]; Wyoming State Crime Laboratory, *Biology*, available at https://wyomingdci.wyo.gov/state-crime-laboratory/biology [last accessed Apr. 24, 2023].

the doctrine of separation of powers should be affirmed.

Dated: April 28, 2023
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CERTIFICATE OF COMPLIANCE
WITH 22 NYCRR § 500.1 AND 500.13 [C] [1]

I hereby certify that:

1. This brief complies with the type-volume limitation of 500.13 [c] [1] because the total word count for all printed text in the body of the brief, exclusive of the corporate disclosure statement; the table of contents, the table of cases and authorities required by subsection [a] of this section is 4126.

2. This brief complies with the typeface requirements and the type-style requirements of 500.1 [j] [1] because the body of this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in l4-point Times New Roman and the footnotes are printed in 12-point Times New Roman.

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