No. APL-2022-00075

To be argued by:
MATTHEW W. GRIECO
15 minutes requested

State of New York
Court of Appeals

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.

REPLY BRIEF FOR APPELLANTS

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants
28 Liberty Street
New York, New York 10005
(212) 416-8014
(212) 416-8962 (*f*)
matthew.grieco@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
MATTHEW W. GRIECO
Senior Assistant Solicitor General
of Counsel

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PRELIMINARY STATEMENT

Petitioners do not deny that they face at most a remote possibility that they would ever be investigated by the police because of the familial search rule. Instead, they suggest that any increased risk of future harm—such as the unlikely possibility of them being investigated due to their brothers being profiled in the State DNA Databank—confers standing. But standing based on future harm requires that the future harm be likely or imminent—not just that the challenged regulation causes a marginal, but still speculative, risk increase to a plaintiff compared to the general public. This Court should dismiss the petition for lack of standing.

In any event, multiple provisions of the DNA Databank Act authorize the familial search rule. For example, the Act authorizes the Commission to designate methodologies for "forensic DNA testing." Executive Law § 995-b(11). Nothing in the Act or forensic science suggests that this authority is limited to the extraction of DNA samples and creation of records, as petitioners contend. To the contrary, the Act's definition of "forensic DNA testing" broadly covers "*any* test that employs techniques to examine" DNA "for the

purpose of providing information to resolve issues of identification." *Id.* § 995(2) (emphasis added). Familial searching qualifies because it uses techniques to examine DNA to produce information used to investigate a perpetrator's identity. Moreover, the Act directs the Commission to "[p]romulgate standards for a determination of a match" between crime-scene samples and Databank profiles. *Id.* § 995-b(12). The familial search rule does precisely that by establishing scientific standards for when crime-scene DNA and a profile in the Databank sufficiently match each other to demonstrate that the two profiles are extraordinarily likely to belong to individuals who are close biological relatives. Indeed, the same type of match occurs in a partial match, which petitioners concede is lawful.

Finally, because the agency acted under detailed statutory authority, no separation-of-powers question is presented. In any event, petitioners' arguments misconstrue the *Boreali* test by attempting to use it to raise their own policy objections to the Act rather than identifying improper policy compromises made in the regulation.

ARGUMENT

POINT I

PETITIONERS LACK STANDING

A. The Remote Possibility That Petitioners Might One Day Be Affected by the Familial Search Rule Does Not Constitute Injury in Fact.

Petitioners' claim of injury here depends entirely on the purportedly "heightened risk" that they might someday be investigated because of a search authorized by the familial search rule, and on the fear or stigma petitioners attribute to that alleged risk. (Br. 19-20.) But it is exceedingly unlikely that the many events required for that result would come to pass. As appellants' opening brief explained (at 28-31), this asserted risk is far too remote and speculative to confer standing.

1. This Court's precedents foreclose petitioners' claim that any marginal increase in risk of future harm constitutes injury in fact.

Petitioners contend that a government regulation that causes *any increase* in the risk of future harm to a plaintiff gives rise to standing—even if the increase is minimal and the risk of future harm remains remote. But petitioners do not identify any authority

from this Court that supports that proposition. Rather, this Court has made clear that future harm must be "actual or imminent" to confer standing—not marginally more likely than without the challenged government action. *See Matter of Association for a Better Long Island, Inc. v. New York State Dept. of Envtl. Conservation*, 23 N.Y.3d 1, 7 (2014) (quotation marks omitted).

Moreover, a plaintiff cannot transform a remote risk of future harm into the requisite injury through "speculation about the future course" of uncertain events. *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 214 (2004). For example, in *Nurse Anesthetists*, the plaintiff nurses argued that the Department of Health had exceeded its authority by adopting rules for supervision of in-office anesthesia. *See id.* at 210. The Court acknowledged the risk that the rules might cause physicians to feel pressure to replace nurses with anesthesiologists. But that acknowledged risk of future harm was not itself sufficient to confer standing because the hypothesized job losses would not occur absent a series of choices by physicians. *Se id.* at 214-15.

Here, the risk of future harm to petitioners from the familial search rule likewise remains too conjectural to create standing. Petitioners have not alleged any facts from which a court might infer that, because their brothers have profiles in the DNA Databank, petitioners are likely to face police investigation triggered by a familial search. As petitioners do not dispute, the familial search rule cannot result in any investigation of petitioners unless "many rare conditions are all independently satisfied." (Record on Appeal (R.) 998.)

Indeed, the implementation of the rule demonstrates that any incremental risk to an individual petitioner caused by the rule is vanishingly small. On average, fewer than ten familial searches are performed statewide each year. See Opening Br. 22. And the investigative leads that may arise from the few familial searches that occur are narrowly restricted to immediate relatives of the source of the specific crime-scene DNA to be examined in a given investigation. Thus, contrary to petitioners' suggestion (Br. 19), the nature of familial searching does not expose petitioners—or any individual or group—to selective enforcement. Having a relative in the

Databank does not increase one's chances of investigation unless a relative of the person in the Databank leaves DNA at a crime scene.

2. None of the cases on which petitioners rely supports their theory of standing.

Like both courts below, petitioners rely heavily (Br. 19-20) on a single appellate division decision that does not support their broad standing theory. *See Lino v. City of New York*, 101 A.D.3d 552, 554 (1st Dep't 2012). *Lino* held that the plaintiffs in that case had suffered an injury in fact because their claimed future injury was likely to occur imminently, given that they had already been arrested, and the records of those arrests had already been left unsealed. *Id.* They thus faced an imminent risk of their records being publicly disclosed. *See id.* at 556-57.

No such risk of imminent disclosure is present here because petitioners' records are not already in the Databank, their names could never be returned by a familial search, and they have not alleged that they have encountered law enforcement. (*See* R. 991 (harm in *Lino* "arose from actual police conduct") (dissenting op. below).) And the Databank is not publicly accessible. Rather, a

familial search may be conducted only by the State Police laboratory and only if many prerequisites are satisfied.

Petitioners are also mistaken in relying (Br. 18, 20, 23) on cases that reflect unique standing rules applicable to land-use litigation. *See Matter of Sun-Brite Car Wash v. Board of Zoning & Appeals of Town of N. Hempstead*, 69 N.Y.2d 406, 413-14 (1987). In the land-use context, a property owner may be able to establish standing when the property's proximity to the area affected by the challenged land-use decision makes it sufficiently likely that the owner's property will be affected. For example, in one such case, a company that owned a potential mining site located within a town had standing to challenge an ordinance "removing new mining operations from the permitted uses within the Town." *Matter of Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 687-88 (1996). No inferential leap was necessary to conclude that the mining company would likely be affected. *See id.*

This Court has not extended these principles to agency rulemaking challenges. In any event, the land-use cases still require that potential future harm be sufficiently likely to materialize. *See*

Matter of Sun-Brite, 69 N.Y.2d at 414. But here, petitioners' allegations do not support any plausible inference of *likely* future harm.

Petitioners miss the mark in noting (Br. 19, 26) that their brothers' inclusion in the Databank distinguishes to some degree petitioners' risk from the risk faced by "the general population." Facing a harm or risk distinct from that of the public is a necessary—but not sufficient—condition for standing. Petitioners rely on cases involving procedural rights, where the government's failure to follow required procedures already constituted the injury in fact. *See Matter of Association for a Better Long Is.*, 23 N.Y.3d at 8 (quotation marks omitted). But such procedural rights are recognized as "special," *id.*, and no such procedural injury is alleged here. Rather, petitioners challenge the substance of a regulation, and they must show existing or likely harm. *See id.* at 9.

There is also no merit to petitioners' argument (Br. 22-26) that allowing them to challenge the rule would serve a generalized interest in ensuring judicial review of agency action. As the dissent below correctly recognized (R. 994-995), petitioners' lack of standing

does not insulate the familial search rule from judicial review. Indeed, petitioners do not dispute that the courts may be able to review the rule in a criminal case in which the defendant moves to suppress evidence obtained via a familial search (see Opening Br. 40-42).[1]

Instead, petitioners argue (Br. 24) that this avenue of review is not the same as article 78 review. But as petitioners have acknowledged, "the public's interest in article 78 review does not itself confer standing." *Id.* at 22. Petitioners may prefer to prevent an investigation rather than seek to suppress its results, but to obtain judicial relief barring a future investigation they must show they are likely to be harmed by one. The risk of petitioners being investigated is not judicially cognizable because it is too unlikely to occur. See *supra* at 5-6. Disregarding petitioners' lack of actual or

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[1] A trial court recently declined to suppress evidence obtained following a familial search, holding that the defendant did not have standing under the Fourth Amendment to challenge a search of his relatives' DNA profiles. *See People v. Williams*, 2022 N.Y. Slip Op. 22355 (Sup. Ct. Monroe County Nov. 21, 2022). That court did not address whether a criminal defendant may have standing on other grounds. (*Cf.* R. 994-995 (dissenting op. below).)

imminent injury to provide general guidance concerning the familial search rule would violate the constitutional bar against advisory opinions. *See New York PIRG v. Carey*, 42 N.Y.2d 527, 529-30 (1977).

B. Petitioners Also Do Not Satisfy the Zone-of-Interests Test.

Because petitioners lack an injury in fact, it is unnecessary for this Court to consider whether petitioners fall within the Act's zone of interests. In any event, petitioners' zone-of-interests arguments fail.

At the outset, petitioners err in arguing (Br. 27-28) that the Court should look to the familial search rule—rather than the DNA Databank Act—to determine the zone of interests protected. Petitioners supply no supporting authority from this Court for their argument. This Court consistently looks to the *statute* under which the government has acted to determine the zone of interests. *See Matter of Schwartz v. Morgenthau*, 7 N.Y.3d 427, 432 (2006). And looking to the statute makes sense because the statute reflects the interests that the Legislature sought to promote or protect.

Here, the Legislature's purpose in enacting the Act was "[t]o harness the extraordinary investigative potential" of forensic DNA technology, particularly for solving "sex offenses and violent crime." Governor's Approval Mem. (Aug. 2, 1994), *in* Bill Jacket for ch. 737 (1994), at 5. The Legislature thus intended the Databank's records to be used to assist in the investigation of crimes—a process that encompasses both identifying perpetrators and exonerating innocent suspects. *See* Executive Law § 995-c(6)(a)-(b). The interest petitioners assert here—protection from potentially being investigated based on Databank searches—runs contrary to the statutory purpose and thus is outside the zone of interests. *See Matter of Transactive Corp. v. Dept. of Soc. Servs.*, 92 N.Y.2d 579, 587 (1998).

Petitioners are incorrect to say (Br. 30-31) that because the Legislature has specified who must provide DNA samples for inclusion in the Databank, everyone who is not required to do so is within the zone of interests. The Act's zone of interests encompasses the public's interest in solving major crimes, including rapes and homicides, and the equally important interest of criminal defendants who rely on the Databank's information "to demonstrate their inno-

cence." Introducer's Mem. in Supp. (March 19, 2012), *in* Bill Jacket for ch. 19 (2012), at 12. The Act further protects the interest of the general public in being free from a requirement to provide DNA samples by requiring samples only of those convicted of crimes, and by providing a means for those whose convictions are reversed to expunge their samples. *See* Executive Law §§ 995-a(7); 995-c(3), (9).

But an interest in not being required to surrender a biological sample of one's DNA is not the same as an interest in being free from investigation. Nothing in the Act protects any interest in avoiding being investigated as a result of a Databank search. Where a search results in a profile being disclosed either to law enforcement or to a criminal defendant, the use of the profile beyond that disclosure *always* depends upon additional investigation.

POINT II

THE FAMILIAL SEARCH RULE FALLS SQUARELY WITHIN THE AGENCIES' DELEGATED STATUTORY AUTHORITY

The familial search rule falls comfortably within the Commission's delegated statutory authority to develop the use of the Databank based on evolving forensic science. Petitioners' contrary

arguments are untethered from both the statute and the way familial searching operates in practice.

A. Petitioners Misconstrue the DNA Databank Act and Ignore How Familial Searches Actually Work.

As explained (Opening Br. 44-56), the Commission properly promulgated the familial search rule under its statutory authority to select and update the ways in which the Databank may be used for criminal investigative purposes.

Petitioners argue (Br. 2, 34, 38-39) that the Commission lacks authority to determine how the Databank may be used because the Act purportedly reserves solely to the Legislature the authority to determine both *who* is required to provide a DNA sample for the Databank and *how* the Databank may be used. Petitioners are correct on the first point: the Act specifically enumerates who must provide a sample for the Databank—anyone convicted of a felony or misdemeanor—and does not delegate authority on this topic to the Commission. *See* Executive Law §§ 995(7), 995-c(3). But petitioners are incorrect on the second point: multiple provisions of the Act

plainly delegate to the Commission the authority to determine how the Databank may be used.

1. The familial search rule falls squarely within the Commission's authority to designate methodologies for forensic DNA testing.

The Act empowers the Commission to "designate one or more approved methodologies for the performance of forensic DNA testing," Executive Law § 995-b(11), and defines "forensic DNA testing" to mean "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). These provisions easily encompass a familial search, which examines crime-scene DNA to determine whether it is a close match to a known profile, for the purpose of gaining information to resolve the identity of the crime-scene donor. See Opening Br. 46-47. Contrary to petitioners' contention (Br. 36), the rule challenged here confirms that a familial search fits within the definition of forensic DNA testing, defining a "familial search" as a "targeted evaluation" of "candidate profiles" from the Databank based on "one or more sources of evidence," 9 N.Y.C.R.R. § 6192.1(ab).

Petitioners are incorrect in arguing (Br. 35-37) that the term "forensic DNA testing" pertains only to "obtaining the genetic material and information" to develop DNA records, and not to any testing or examining of those records. *Id.* at 35. First, the statute's broad definition of "forensic DNA testing" is inconsistent with petitioners' argument. The statutory definition of "forensic DNA testing" is not limited to the creation of DNA records or crime-scene samples. To the contrary, the Legislature broadly included within the Commission's authority the power to approve methodologies not merely for creating records or samples, but instead for the performance of "any test that employs techniques to examine [human DNA] for the purpose of providing information to resolve issues of identification." Executive Law § 995(2). If the Legislature had instead meant to restrict the Commission's authority solely to methodologies for tests used to create DNA records or crime-scene samples, it could have said so—particularly given that the term "DNA record" is separately defined and used in the Act. *See id.* § 995(8).

Second, petitioners' argument relies on the incorrect assumption that when a laboratory turns to the Databank, the

laboratory has by that point stopped performing "DNA forensic testing" and has started doing something else. Neither the statute nor the science of forensic DNA analysis works in this siloed way. Forensic testing of DNA is defined by statute to include not merely the extraction and preparation of samples, but also the analysis of those samples to provide information. Before the State Police laboratory turns to the Databank in a familial search, the laboratory examines the crime-scene sample to assess whether it is suitable for familial searching—including making sure that the sample comes from a single person or that the identity of a single person can be "fully deduced" from a mixed sample. 9 N.Y.C.R.R. § 6192.3(h)(3). The laboratory then uses the Denver software approved by the Commission (see Opening Br. 17-18) to identify potential candidates in the Databank for a familial match, *see id.* § 6192.3(j)(1), and applies likelihood ratios to eliminate candidates who fall below the appropriate threshold, *see id.* § 6192.3(j)(2). Then, the laboratory performs Y-STR and additional testing on the samples to further exclude candidates. *Id.* § 6192.3(j)(3)-(4).

This process requires extensive testing and analysis, with state laboratories capable of performing only a small number of tests annually.[2] Each phase in that labor-intensive process is part of a "test that employs techniques to examine [DNA] derived from the human body for the purpose of providing information to resolve issues of identification." Executive Law § 995(2). And each phase is part of the process created by the familial search rule that petitioners challenge. (*See* R. 243.)

Third, further confirming the Commission's authority to set regulations for all phases of DNA testing is the additional statutory definition of "DNA testing methodology." That term means not only "methods and procedures used to extract and analyze DNA material," but also "the methods, procedures, assumptions, and studies used to draw statistical inferences from the test results." Executive Law § 995(3). This definition plainly encompasses not only creation of DNA samples but also the subsequent steps of examining those

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[2] For example, Ohio's statewide DNA laboratory has the capacity to process familial searches in only "three to four cases per year." *State v. Bortree*, 2021-Ohio-2873, ¶ 80 (Ct. App. Aug. 23, 2021), *rev'd on other grounds*, 2022-Ohio-3890 (Ohio Nov. 3, 2022).

samples, applying statistical principles, and drawing inferences from the results.

Petitioners fail to point to any statutory provision that supports their conclusory assertion that familial searching does not fall within these broad definitions. They rely on the Act's definition of "forensic DNA laboratory," but in doing so, petitioners omit words from the definition, thereby improperly changing its meaning. "[F]orensic DNA laboratory" means any state or local laboratory that "performs forensic DNA testing on crime scenes or materials derived from the human body for use as evidence in a criminal proceeding *or for purposes of identification*." *Id.* § 995(2) (emphasis added). But petitioners omit the italicized words (*see* Br. 36), creating the incorrect impression that a forensic DNA laboratory's work—i.e., forensic DNA testing—means only the gathering of DNA evidence or its use at a criminal trial. The complete statutory text makes clear that the process of *identifying* a crime-scene sample's source is also part of that work.

Petitioners also err in relying (Br. 5) on Executive Law § 995-b(9)(a), which confers on the Commission authority to

determine "the forensic DNA methodology or methodologies to be utilized in compiling" the Databank. While this provision plainly authorizes the Commission to select the system used to compile the Databank, it does not limit the Commission's authority to that function. To the contrary, the Act utilizes separate subsections to refer to the Commission's designation of methodologies for "compiling the index," Executive Law § 995-b(9)(a), and to the Commission's distinct authority to designate methodologies "for the performance of forensic DNA testing," *id.* § 995-b(11). Under petitioners' erroneous interpretation, the latter subsection would be redundant because the former already empowers the Commission to determine the methodologies for compiling DNA records. *Cf. Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253, 271 (2022) (superfluous language is disfavored).

Petitioners similarly err (Br. 34-37) in echoing the Appellate Division's focus on statutory subdivisions related to the Commission's "quality control" functions regarding forensic laboratory accreditation. Only the first six subsections of Executive Law § 995-b pertain to accreditation. See Opening Br. 45-48, 52-53. Separate

subsections of § 995-b delegate to the Commission the responsibility to develop the Databank's uses and to designate new methodologies for forensic DNA testing, including through methods that use the information in the Databank.

Finally, petitioners' reliance on the subsections discussed above to narrow the broad meanings of "forensic DNA testing" and "DNA testing methodology" fails because the definitional provisions must take precedence. The Act's definitional section defines both terms without any suggestion that they are limited to the creation of DNA records. *See* Executive Law § 995(2)-(3). Statutory definitions are "virtually conclusive" and should not be replaced with other theoretical meanings. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 36 (2012); *Town of Waterford v. New York State Dept. of Envtl. Conservation*, 18 N.Y.3d 652, 657 (2012).

2. The rule also falls within the Commission's authority to promulgate standards for the determination of a match, because a familial search identifies a partial match.

The familial search rule also falls squarely within the Commission's delegated authority to "[p]romulgate standards for the determination of a match" between crime-scene samples and Databank profiles. Executive Law § 995-b(12).

The Act plainly authorizes the rule because familial searching, like all forensic DNA testing, is a search for a match. See Opening Br. 4-8, 16-17. Every testing methodology approved in New York relies on the same fundamental scientific principle: when comparing two DNA profiles, the more alleles that match on the core loci, the greater the likelihood that the two profiles come from the same person or from two biologically related people. (R. 215-216, 222.) The familial search rule applies this principle by setting a standard that two profiles *match* sufficiently to warrant disclosure if, upon application of the approved software and the State Police laboratory's additional testing, the number of matching alleles indicates that the likelihood of a close family relationship meets the

likelihood ratio threshold the Commission has set. See Opening Br. 16-17.

Indeed, as the Commission has explained (Br. 7-8, 17, 55-56), a familial search determines whether there is a partial match—a type of match that petitioners have conceded is authorized by the Act. Petitioners do not dispute that (1) a familial search and a partial match rely on essentially the same forensic DNA science; (2) commenters, including the Innocence Project, agree that there is no substantive distinction between a familial search and a partial match; and (3) petitioners have conceded that disclosure of partial matches is lawful. *See* Br. 39-43; see Opening Br. 55-56.

Indeed, in their brief to the First Department, petitioners correctly acknowledged that the partial match rule does "precisely" what Executive Law § 995-b(12) means when it directs the Commission to "define technical standards for determining a match between a sample of forensic DNA and Databanked DNA." See Br. for Pet'rs-Appellants at 31 (May 3, 2021), 1st Dep't NYSCEF No. 9. The familial search rule likewise does precisely what the statute means,

by determining standards for when a partial match identified through a familial search is sufficiently close to warrant release.

Petitioners argue (Br. 40-42) that the dispositive difference between the two regulations is that partial matches are obtained "inadvertently," i.e., they are discovered during the course of searching for a direct match, and familial searches are "deliberate" searches for partial matches. But nothing in the Act makes this distinction legally relevant. A match occurs under the Act when, while comparing a crime-scene sample to the Databank, a laboratory determines that the relationship between the two is sufficiently strong to meet standards set by the Commission. *See* Executive Law § 995-b(12). Whether the partial match and attendant release of the name results from a fortuitous discovery during a search for an exact match or from a familial search deliberately looking for a partial match, the statute is satisfied.

There is thus no merit to petitioners' argument (Br. 41) that a familial search "is not borne out of the search for a match." As Supreme Court correctly held below, a familial search is borne out of the search for a match because it searches for a partial match.

(*See* R. 15.) There is no plausible basis for limiting the term "match" to mean solely an "exact match," as petitioners urge (Resp. Br. 39-43). Petitioners' argument improperly inserts the word "exact" into the statute. A court "must read statutes as they are written," without adding words the Legislature did not include. *People v. Page*, 35 N.Y.3d 199, 207-08 (2020) (quotation marks omitted).

Moreover, the word "match" commonly means "a person or thing equal or similar to another," or "a pair suitably associated." *Match*, *Merriam-Webster Online Dictionary* (last visited Nov. 22, 2022) (internet). Thus, for a match to occur, two things need not share an identity, but must have a significant association with each other. And under the Act, the Commission has been expressly charged with determining the standards for when such an association is sufficient to constitute a match.

Petitioners also suggest (Br. 38, 41) that a familial search is not a search for a match because the regulation authorizes a familial search "[w]hen there is not a match or a partial match." 9 N.Y.C.R.R. § 6192.3(h). But properly read in context, § 6192.3(h) is a cross-reference to the preceding subsections of the regulation, which

outline the procedures for determining when exact matches, *see id.* § 6192.3(a)-(d), and partial matches, *see id.* § 6192.3(e)-(g), may be released. Those provisions were adopted before the familial search rule was adopted, and they use the term "partial match" to describe the result of a search for an exact match that instead discloses a potential familial relationship. Nothing in this provision, however, suggests that a familial search is not in fact a search for a partial match.

Moreover, the Court should defer to the Commission's interpretation of the term "match" because—unlike many other terms in the Act—the term "match" was not defined by the Legislature. Where, as here, the Legislature both chooses not to define a term and uses that term to delegate to an agency the responsibility to develop operational practices in an area of the agency's expertise, the agency's discretion is at its strongest. *See Matter of Gruber*, 89 N.Y.2d 225, 231-32 (1996). Indeed, the use of the term "match" in expressly delegating authority to the Commission is the *sole* appearance of the term "match" in the Act.

Petitioners are mistaken in arguing (Br. 3, 42-43) that the Legislature must have intended "match" to encompass solely an "exact match" because neither partial matches nor familial searching had been developed when the Act was initially enacted in 1994. Many provisions of the Act underscore that the Legislature intended the Commission to update the Databank's uses. See Opening Br. 45-51. For example, the Act empowers the Commission to "promulgate a policy for the establishment and operation" of the Databank for law enforcement identification purposes. Executive Law §§ 995-b(9), 995-c(6)(a). This forward-looking provision contemplates that the Commission has considerable authority to shape not only the Databank's initial establishment but also its ongoing uses.

Moreover, the Act empowers the DNA Subcommittee to make binding recommendations to the Commission regarding new DNA methodologies as they develop. *See* Executive Law § 995-b(13). Indeed, the DNA Subcommittee is responsible for reviewing and recommending "*all* DNA methodologies proposed to be used for forensic analysis," including "methods employed to determine probabilities and interpret results." *Id.* § 995-b(13)(b) (emphasis

added). Petitioners have no meaningful response to these provisions, which clearly contemplate that the Commission and its expert DNA Subcommittee will incorporate new methodologies regarding both the creation of DNA samples and the analysis of those samples to determine when a match occurs.

In assessing ongoing developments in forensic science and determining that partial matches, whether found through a search for a direct match or a familial search for a partial match, qualify as matches, the Commission performed exactly the function assigned to it by the Legislature. Since 2006, the FBI has recognized that a "'candidate *match* between two single source profiles'" exists when two DNA profiles have a sufficient number of alleles in common, showing that "'a potential familial relationship may exist between the offender and the putative perpetrator.'" (R. 466 (emphasis added) (quoting CODIS Bulletin BT072006 (July 20, 2006)).) And following the FBI's recognition of the value of partial matches and familial searching, the Commission reviewed scientific developments and ultimately determined to authorize "such matches" to be disclosed from New York's Databank. (R. 466.)

B. Petitioners' Arguments Under the *Boreali* Doctrine Are Mistaken.

1. This case presents a question of statutory interpretation, not separation of powers.

Petitioners argue (*see* Br. 33) that the *Boreali* line of cases provides the proper decisional framework for *every* case that presents a question of whether an agency's action is authorized by statute. This Court rejected that view of *Boreali*, holding that the doctrine should not "be rigidly applied in every case in which an agency is accused of crossing the line into legislative territory."[3] *Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 609 (2018).

By its own terms, *Boreali* provides a decisional framework when an agency acts "under the broadest and most open-ended of statutory mandates." *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). By contrast, when an agency acts pursuant to a detailed delegation of statutory authority over a specific subject, the question presented

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[3] The Commission argued below that *Boreali* does not apply to every agency rulemaking challenge. See Br. for Resp'ts 54 (Sept. 24, 2021), 1st Dep't NYSCEF No. 13. Petitioners are thus mistaken in suggesting (Br. 33) that the Commission raises a new argument.

is one of statutory interpretation, not separation of powers. *See Nurse Anesthetists*, 2 N.Y.3d at 211.

Here, the Commission issued a rule regarding the same specific topic that the Act addresses in detail—the use of forensic DNA testing for law-enforcement identification purposes. Indeed, the Act explicitly directs the Commission to develop a policy for how the DNA Databank will operate to assist criminal investigations, to set standards for determining a match, and to select multiple methodologies for forensic DNA testing. Thus, this case is not remotely comparable to *Boreali*, where the agency promulgated a public smoking code under a broad enabling statute that did not contain any references to a public smoking policy. *See* 71 N.Y.2d at 7. The question before the Court is the statutory-interpretation question of whether the familial search rule comports with the Act—and as the Commission has explained, it does (see *supra* at 14-27).

2. Consideration of the *Boreali* factors confirms that the Commission acted within its statutory mandate.

In any event, evaluating the familial search rule under the *Boreali* factors further illustrates that the Commission acted within its statutory authority. Like the Appellate Division below, petitioners give most of their attention to *Boreali*'s first factor—but petitioners do not so much apply the first factor as rewrite it. Petitioners' limited discussion of the other three factors is also unpersuasive.

a. Petitioners' arguments transform the first *Boreali* factor into a tool to challenge the policies of the DNA Databank Act itself, not the familial search rule.

Correctly applied, *Boreali*'s first factor considers whether a regulation is so laden with exceptions and compromises antithetical to the legislative policy being implemented that the regulation has "transgressed into policymaking." *Garcia*, 31 N.Y.3d at 611. For example, in *Boreali,* the Court inferred that the agency had engaged in impermissible policymaking when its public smoking regulation exempted bars, convention centers, and small restaurants—

exemptions without "foundation in considerations of public health." 71 N.Y.2d at 12.

By contrast, petitioners here do not show that the familial search rule contains compromises that undermine the statutory purpose of the Act. Instead, petitioners seek to use *Boreali* as a tool to promote *petitioners'* policy views regarding familial searching. Petitioners identify certain anticipated consequences of familial searching, and argue that the rule must be social policymaking because it may lead to those consequences. But that is not how *Boreali* works. *Boreali*'s first factor asks whether the agency has used its regulation to adopt policy compromises that undermine the underlying statute. Petitioners thus get *Boreali* backwards, transforming a regulation's lack of policy compromises into a basis for striking down the regulation.

Petitioners argue (Br. 50-52) that because persons of color are disproportionately represented in the Databank, the familial search rule reflects the agency's policy judgment that the rule's benefits to law enforcement outweigh its impacts on persons of color. But any policy judgment was made by *the Legislature* through the Act.

Indeed, it is the Legislature that decided that individuals convicted of crimes must give samples to the Databank, and that the Databank's purpose is to assist in the investigation of crimes. Petitioners' concern is just as applicable to use of the Databank for exact matches or partial matches, which are undisputedly lawful under the Act, as to use of the Databank for familial searches. Petitioners' disagreement is thus with the Act itself, not with the regulation.

There is no merit to petitioners' argument (Br. 51) that the Commission's position is "disingenuous" because the administrative record contains a response to commenters' concerns about the racial composition of the Databank. The record shows that the Commission merely provided a written response to comments it received, as it was required to do. *See* State Administrative Procedure Act § 202(5)(b), (5)(c)(vii). And the response explained that nothing in the rule allows racial groups to be targeted or singled out. (R. 245.)

This response to public comments does not remotely reflect that the familial search rule contains exceptions or political compromises that undermine the Act. Under petitioners' view of *Boreali*, any person opposed to a proposed regulation could use the

notice-and-comment phase to criticize the rule, and then cite the agency's written response as purported proof that the agency weighed improper factors in promulgating the rule. That would make administrative rulemaking all but impossible.

Petitioners' other objections under *Boreali*'s first factor are similarly objections to the Act itself, not to the regulation. Petitioners argue (Br. 52) that the Commission made a "policy determination" not to require judicial review of familial search applications. But the Act neither requires judicial review nor authorizes the Commission to enlist the judiciary to provide it. Far from "a non-sequitur" (Br. 52), the lack of any judicial review provisions in the Act demonstrates the fundamental flaw in petitioners' argument. *Boreali*'s first factor asks whether the agency made compromises inconsistent with the underlying statute—not whether the agency declined to embrace commenters' suggestions that have no basis in the statute.

Similarly, petitioners miss the mark in arguing (Br. 53) that the rule exceeds the Commission's authority because it does not contain a means for people named in the Databank to challenge

familial search results before they are disclosed, or "provide a neutral arbiter" to review searches. Petitioners again fail to point to any features of the rule indicating policy compromise; they merely identify commenters' suggestions that the regulation does not include. (*See* R. 245.)

Petitioners also err in contending (Br. 48-50) that certain limitations on when familial searches may be performed reflect improper policy choices. The provisions petitioners point to serve the underlying purposes of the statute. The Act was enacted first and foremost to assist in "investigating sex offenses and violent crime." Governor's Approval Mem., *supra*, at 5. It thus serves the Legislature's policy goals for the familial search rule to limit its scope to sexual and violent crimes. *See* 9 N.Y.C.R.R. § 6192.3(h)(1).

Limiting the regulation to the most serious offenses is particularly important to advance the statute's purposes because each familial search is a time-consuming process, with only a small number of familial searches feasible each year. See *supra* at 17 & n.2. If familial searches were authorized for lesser offenses, the State Police would not be able to prioritize the violent and sexual

crimes that motivated the Act's passage. Similarly, giving priority to cases in which other investigative efforts have failed, or exigent circumstances exist, *see* 9 N.Y.C.R.R. § 6192.3(h)(2), conserves resources for those cases in which familial searching will be most useful in advancing investigations.

Contrary to petitioners' contention (Br. 49), the record reflects that the Commission based the rule on scientific standards and did not compromise the efficacy of the rule based on privacy considerations. Rather, the Commission responded to commenters' privacy concerns by explaining why the limited scope of the rule made those concerns unfounded. (R. 245.) And to the extent the agency gave privacy some consideration, it did not act outside its statutory role in doing so. The Act requires one member of the Commission to be "an attorney or judge with a background in privacy issues and biomedical ethics," Executive Law § 995-a(2)(j), demonstrating that the Legislature intended the Commission to give some attention to matters of privacy.

As this Court has made clear, *Boreali* does not forbid agencies from considering matters of policy or weighing costs and benefits.

To the contrary, an agency *must* balance social costs and benefits for reasoned rulemaking to be possible. *See Garcia*, 31 N.Y.3d 601, 611 (2018). Thus, when an agency balances social costs and benefits in a way that serves statutory purposes, the agency remains in its proper role. *Matter of LeadingAge N.Y. v. Shah*, 32 N.Y.3d 249, 265 (2018). At most, petitioners here have shown that the agency did not ignore a consideration pertinent to rational rulemaking.

Finally, there is no merit to petitioners' contention (Br. 52-53) that the Commission made social policy by selecting statistical thresholds for disclosure of familial searches. The kinship thresholds and likelihood ratios required for a successful search are based on scientific principles determining when a pair of profiles share matching alleles at a sufficient number of loci to be a statistically valid familial match. The kinship thresholds are not based on anyone's policy preferences regarding what degree of relationship ought to merit investigation. Rather, the thresholds reflect that, as a matter of current science, familial searching is sufficiently advanced to identify only first-order relatives. See Opening Br. 17-18. Setting these thresholds falls well within the Commission's

statutory authority to promulgate standards for a match and determine testing methods.

b. Petitioners' arguments under the remaining *Boreali* factors are mistaken.

As appellants explained (Opening Br. 66-71), each of the remaining *Boreali* factors supports the rule.

Petitioners merely repeat their incorrect statutory interpretation arguments in discussing the second *Boreali* factor (Br. 54-57)—which considers whether the underlying statute provides legislative guidance for the agency. As explained (see *supra* at 14-27), the Legislature has given extensive guidance through multiple delegations of authority to the Commission. Petitioners cannot establish a *Boreali* problem by pointing to the level of detail in the regulation, because an agency is permitted to adopt detailed rules, including choosing statistical thresholds, when it acts within its delegated role. *See LeadingAge N.Y.*, 32 N.Y.3d at 255, 265.

The First Department correctly declined to weigh the third *Boreali* factor in petitioners' favor. That factor asks whether the Legislature has repeatedly tried and failed to resolve an issue. As

the Commission has explained (Opening Br. 68-69), since the Act's enactment in 1994, the Legislature has consistently deferred to the Commission regarding forensic DNA testing methods and Databank match standards. And because nearly all of the bills pertaining to familial searching died in committee, and thus did not receive a vote from a full chamber, it is irrelevant whether those bills closely resembled the familial search rule. *See LeadingAge N.Y.*, 32 N.Y.3d at 265.

Finally, the fourth *Boreali* factor strongly favors the Commission. See Opening Br. 69-71. The fourth factor asks whether the agency's scientific expertise was "essential" to the rule, *see Garcia*, 31 N.Y.3d at 615-616, because when an agency is not exercising its technical competence it is more likely that it is trying to legislate policy, *see Boreali*, 71 N.Y.2d at 14; *see also Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 23 N.Y.3d 681, 701 (2014). But there is no requirement (*cf.* Br. 61) that the agency's reliance on expertise predominate, nor could there be, because all administrative rulemaking depends on a combination of an agency's

subject-matter expertise and provisions that are "less reliant on [the agency's] technical competence" but necessary to make a rule effective. *Garcia*, 31 N.Y.3d at 616.

In any event, as discussed (see *supra* at 36-37), many of the provisions petitioners cite as nontechnical provisions are grounded in the agency's expertise. The provisions that petitioners characterize as "addressing when a familial search may be conducted" (Br. 61) in fact describe when a crime-scene profile is of sufficient quality to be used for a familial search, *see* 9 N.Y.C.R.R. § 6192.3(h)(3); provide a procedure for applying those sample-quality standards, *see id.* § 6192.3(i); and ensure that law enforcement officials who receive the results of familial searches understand the science of familial searching and its limitations, *see id.* § 6192.3(k).

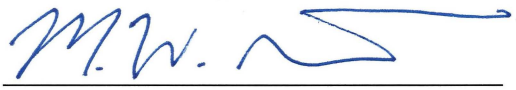
CONCLUSION

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

Dated: New York, New York
November 22, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants

By: 
MATTHEW W. GRIECO
Senior Assistant Solicitor General

BARBARA D. UNDERWOOD
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
MATTHEW W. GRIECO
Senior Assistant Solicitor General
of Counsel

28 Liberty Street
New York, NY 10005
(212) 416-8014

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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 6,993 words, which complies with the limitations stated in § 500.13(c)(1).

Matthew W. Grieco

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 November 22, 2022, I served, with consent of opposing counsel, the accompanying Reply 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):

Doran J. Satanove
Gibson, Dunn & Crutcher LLP
DSatanove@gibsondunn.com

Joseph Evall
Gibson, Dunn & Crutcher LLP
JEvall@gibsondunn.com

Matthew W. Grieco