No. APL-2022-00075

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of
TERRENCE STEVENS and BENJAMIN JOSEPH,
Petitioners-Respondents,

-against-

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 and Rules

PROPOSED BRIEF OF PARENTS OF MURDERED CHILDREN, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, Parents of Murdered Children, Inc. ("POMC") states as follows:

POMC is an Ohio nonprofit 501(c)(3) corporation with 47 chapters in 22 states, including three in New York. POMC has no parents or subsidiaries. POMC's only affiliates are its state chapters.

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STATEMENT OF INTEREST

POMC is the only nationwide organization dedicated to helping survivors of homicide victims cope with the devastation and grief caused by the murder of their loved ones. In addition, POMC's programs and services help keep murderers behind bars, assist in solving unsolved cases, educate, train and inform society of the problems faced in the aftermath of murder and help survivors deal with the criminal justice system. POMC provides training to professionals in such fields as law enforcement, mental health, social work, community services, law, criminal justice, medicine, education, religion, the media and mortuary science who are interested in learning more about survivors of homicide victims and the aftermath of murder.

In 2021, there were over 15,000 homicides in the United States. When a loved one is murdered, surviving family members suffer an unimaginable loss, and require significant support in their interactions with the criminal justice system. Their tragic loss is compounded by trying to make sense of such a senseless act and trying to seek justice and accountability on behalf of their murdered loved ones. Solving crimes can provide a major help to families who have lost a loved one through murder.

No party or its counsel contributed content to this brief or otherwise participated in the brief's preparation.

PRELIMINARY STATEMENT

One of the cases involving familial DNA search and a POMC member was the case of the murder of Allison Feldman, youngest daughter of Harley (Member, POMC National Board of Trustees) and Elayne Feldman. Allison was murdered in her home in Scottsdale on February 16, 2015. The police took evidence for five days. One of the things the police discovered is that the murderer left Allison's house for 45 minutes after the murder (door openings and closings sensed by the alarm system) and brought back a cleaning substance. The murderer spent an additional 45 minutes cleaning up his prints from all surfaces which caused the police to be unable to find any fingerprint evidence left by the murderer. Police also took 200 buccal swabs of men in the neighborhood or those men that they had queried about a possible delivery or visit to Allison's house. After three years of investigative work, the Scottsdale Police could not identify who murdered Allison.

Given the lack of fingerprints and with no buccal swab data matching the DNA from the crime scene, the familial DNA search was the only method of finding Allison's killer. Scottsdale Police and the Department of Public Safety had concluded that, even given the large expense of conducting familial DNA search, it was the best method for solving Allison's murder after all of the other standard investigative techniques had been exhausted. In April 2019, a familial DNA search match was discovered with Mark Mitcham. Mark was in jail for child molestation

which is why his DNA was registered in the Combined DNA Index System ("CODIS"). Since Mark only had three immediate male relatives, his father and two brothers, Scottsdale Police started investigative work to see if there was a connection between one of the relatives and Allison's murder. Shortly thereafter, Scottsdale Police found they had Ian Mitcham's (one of Mark's brothers) DNA in their databank from a DUI arrest. This DNA sample moved the case from knowing the murderer's brother to the actual murderer. Ian was arrested a few days later and charged with Allison's murder.[1]

POMC supports efforts in the criminal justice system to use every appropriate support tool and methods within the criminal justice system to solve crime, including the use of familial DNA testing. POMC files this brief pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York, urging reversal.

[1] The Mitcham case, *State of Arizona v. Mitcham*, Maricopa County Superior Court No. CR2018-118086-001DT, is now on Appeal (No. 1 CA-CR 23-0014) over the issue of whether the Scottsdale Police were entitled to rely on a DNA sample Mitcham had earlier provided in an unrelated DUI case.

ARGUMENT

PETITIONERS LACK STANDING TO CHALLENGE THE FAMILIAL SEARCH RULE

The First Department found that petitioners had standing to challenge the familial DNA regulation (9 NYCRR §6192.1 and §6192.3) (the "Regulation") in this CPLR Article 78 proceeding on the ground that the Regulation "subjects them to the peculiar risk that they will be targets of criminal investigation for no other reason than that they have close biological relatives who are criminals." The court added: "[Petirioners] claim that because they are persons of color, their risk of being investigated is greater than the general population, based upon the disproportionate number of people of color in the databank. In this case, the heightened risk of police encounters, along with resulting fear and anxiety, establish a cognizable injury sufficient to confer standing." (R 976; numbers in parenthesis preceded by "R" refer to pages of the Record on Appeal). The First Department erred in so finding.

A. CPLR Article 78 Proceedings Require Petitioners to Experience Injury In Fact Within the Statute's Zone of Interests.

CPLR Article 78 proceedings impose the same standing requirement as other actions, namely that an injury in fact has been suffered and that the injury asserted falls within the zone of interests that the relevant statutory provisions seek to protect. (*Powers v. de Groodt*, 43 A.D.3d 509, 512 (3rd Dept. 2007)). "Generally, to establish

standing to challenge governmental action, a party must show that it will 'suffer direct harm, injury that is in some way different from that of the public at large' and that 'the in-fact injury of which it complains ... falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted.' Thus, a private citizen who does not show any special rights or interests in the matter in controversy, other than those common to all taxpayers and citizens, has no standing to sue. Indeed, even the fact that 'an issue may be one of vital public concern does not entitle a party to standing." (*Tilcon New York, Inc. v. Town of New Windsor*, 172 A.D.3d 942, 944 (2d Dept. 2019) (citations omitted)).

B. Petitioners Have Not Experienced Injury in Fact.

In another CPLR Article 78 proceeding, *Vasser v. City of New Rochelle*, 180 A.D.3d 691(2nd Dept. 2020), the court held that the petitioner challenging the governmental action "has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the statute alleged to have been violated" (*id.* at 692). In that case, the court held that neighbors of a proposed senior citizens center lacked standing to challenge the approval to build the center under CPLR article 78 because "the speculative and unsubstantiated claims of potential harm alleged in the petition failed to make the requisite showing that the petitioners would suffer any direct injury-in-fact different in kind or degree from that experienced by the public at large." (*id.*)

Likewise, petitioners in this case would not suffer any direct injury-in-fact different in kind or degree from that experienced by the public at large. Petitioners' data is not in the DNA Databank. They allege that their relatives' DNA is in the data bank, but they "do not allege that law enforcement has approached them to provide a DNA sample or that they have been affected by the familial search role" and "do not point to any action by law enforcement has taken towards them but merely conjecture that police action may be taken against them in some unspecified future case." (R 991). Familial searches are conducted solely for identification purposes (*see* N.Y. Exec. Law§ 995[8]). They do not reveal information regarding race, ethnicity, or health conditions. (R 461).

In *Westside Grocery & Deli v. City of Syracuse*, 211 A.D.3d 1551(4th Dept. 2022), another CPLR Article 78 proceeding, the court affirmed the city's finding that a public nuisance existed on premises where the petitioner operated a convenience store. The city had imposed a $1,000 civil penalty on the premises' owner and ordered closure of the premises for a period of 12 months. The court held that the store's operator did not have standing to challenge the civil penalty because it was imposed on the owner of the premises and petitioner therefore did not suffer an injury in fact. For the same reason, petitioners here should be denied standing because they have not suffered an injury in fact. As the dissent stated, petitioners' asserted risk of injury is too remote to constitute injury in fact because [a]n

investigation will not necessarily lead to prosecution, arrest, or even any contact with police." (R 991).

In *Powers v. de Groodt*, 43 A.D.3d 509 (3d Dept. 2007), the court held that a petitioner who challenged the proposed building of a fire station lacked standing in a CPLR Article 78 proceeding because the majority of the environmental effects to which petitioner points as sustaining his standing were no different in kind or degree from that suffered by the general public in the vicinity of the proposed firehouse; the alleged environmentally related injuries to petitioner's property were far too speculative and conjectural to demonstrate an actual and specific injury-in-fact; and petitioner failed to factually demonstrate a specific, actual and concrete injury from which standing would flow. (*See Kindred v. Monroe County*, 119 A.D.3d 13471348 (4th Dept. 2014) (finding that petitioners in a CPLR article 78 proceeding lacked standing to challenge the determination of a county to permit a four-day agricultural festival in a county-owned park because "the alleged environmentally related injuries are too speculative and conjectural to demonstrate an actual and specific injury-in-fact."))

The effects of the familial DNA search suffered by petitioners in this case would likewise be no different in kind or degree from those suffered by the general public; the alleged injuries to petitioners are too speculative and conjectural to demonstrate an actual and specific injury-in-fact; and petitioners have failed to

factually demonstrate a specific, actual and concrete injury from which standing would flow. The Regulation limits familial DNA searches to specific violent offenses under detailed criteria after layers of review. Before a familial search is even considered, the investigating agency and prosecutor must demonstrate reasonable investigative efforts and exigent circumstances in dealing with a violent felony offense. There must also be a partial match or no match found during a previous search (see 9 NYCRR § 6192.3[h]). As noted by the Appellate Division majority, as of April 2018 "only nine familial DNA applications had been approved." (R 977). The data bank contains DNA from tens of thousands of offenders, and thus the chances that petitioners' relatives' DNA will cause them to be investigated are extremely remote.

C. Petitioners' Alleged Injury is Not Within the Zone of Interests Protected by the DNA Database Act.

The purposes of the DNA Database Act are to "increase and maintain the effectiveness, efficiency, reliability, and accuracy of forensic laboratories; ensure that forensic analyses, including forensic DNA testing, are performed in accordance with the highest scientific standards practicable; promote increased cooperation and coordination among forensic laboratories and other agencies in the criminal justice system; ensure compatibility, to the extent consistent with the provisions of this article and any other applicable provision of law pertaining to privacy or restricting

disclosure or redisclosure of information, with other state and federal forensic laboratories to the extent necessary to share and exchange information, data and results of forensic analyses and tests; and set forth minimum requirements for the quality and maintenance of equipment." (NY Executive Law § 995-b) (section labels omitted).

The First Department held that petitioners satisfied the zone of interest test because the "rights of family members were taken into consideration by respondents in deciding who and what interests would be protected by the regulation" (R 975) and "privacy concerns were weighed and balanced by the Legislature in originally enacting and then incrementally expanding the DNA Database Act." (R. 974). However, the DNA Database's privacy protection provisions relate to the collection, use, release, and expungement of DNA records obtained from defendants whose DNA was collected pursuant to the DNA Database Act. (NY Executive Law § 995-c). There is no provision in the Act relating to privacy protections for those whose DNA is not in the DNA Databank. Petitioners and their DNA are therefore not within the zone of interest covered by the DNA Database Act or the Regulation.

D. The Lack of a Direct Means to Challenge the Regulation Should Not Confer Standing on Petitioners.

The First Department stated that "Respondents' factual scenario on what constitutes an injury in fact would result in no one having the ability to challenge the

promulgation of the Regulation because of the four-month statute of limitations imposed on CPLR article 78 proceedings." (R 977). The court recognized that a defendant challenging the use of family DNA match evidence would have no standing under the Fourth Amendment to assert a challenge to the forensic DNA collected at a crime scene since abandoned or discarded DNA is not protected by the Fourth Amendment. Moreover, the court reasoned. "because Fourth Amendment rights are personal, it is unclear that a defendant could challenge the use of DNA collected from a relative." (R 978) (citations omitted). There is therefore no constitutional mandate requiring that standing be conferred on petitioners in this proceeding.

In *Piagentini v. New York State Board of Parole*, 176 A.D.3d 138 (3d Dept. 2019), the petitioner argued that "if victims do not have standing to challenge decisions granting parole, no one would have the ability to raise such a challenge, even if the [Parole] Board blatantly disregarded the law." (*Id.* at 144). The court rejected this argument in part because "[a]lthough there may not be any mechanism to challenge or audit the Board in relation to each parole decision, the Board's functioning as a whole is balanced by, and will be tempered by, the power of the Governor to appoint and the Senate to confirm Board members." (*Id.* at 144-145). Likewise, Respondents, the New York State Division of Criminal Justice Services, the New York State Commission on Forensic Sciences (the "Commission"), and the

New York State Commission on Forensic Science DNA Subcommittee are independent agencies within the executive branch of state government created by the DNA Databank Act, (L 1994, ch 737, codified at NY Executive Law § 995 *et seq*). Twelve of the Commission's fourteen members are appointed by the governor. (NY Executive Law § 995-a). As in *Piagentini*, the Commission's functioning is balanced by, and will be tempered by, the power of the Governor to appoint Commission members.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the decision and order of the Appellate Division, First Department and dismiss the petition based on petitioners' lack of standing.

Dated: March 2, 2023
New York, NY

Respectfully submitted,

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WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief is 4,043 words (less than 7,000 words).

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Dated: March 2, 2023
New York, NY

Robert S. Smith