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Court of Appeals

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,

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

BRIEF FOR PETITIONERS-RESPONDENTS

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PRELIMINARY STATEMENT

In 1994, New York's Legislature enacted the DNA Databank Act (the "DNA Statute"), creating a statewide DNA identification index ("DNA Databank") to store, in the form of DNA records, the genetic information of individuals convicted of certain enumerated crimes. Exec. Law § 995 *et seq*. Once the DNA Databank was established, a biological sample found at a crime scene could be analyzed, and the forensic DNA record obtained from such a sample could be compared with the DNA records of convicted offenders ("Databanked Individuals") to determine if there is a "match." *Id.* § 995-b(12). A match between the genetic information in the forensic sample and DNA record of a Databanked Individual might suggest that the Databanked Individual was the source of the biological material found at the crime scene, providing law enforcement with an investigative lead.

Defining scientifically appropriate and reliable processes for creating DNA records (for both convicted offenders and for biological samples collected from crime scenes), and for comparing those records, requires many technical decisions. In the DNA Statute, the Legislature created a Commission on Forensic Science and directed the Commission to set the technical standards for such "forensic DNA testing," and to accredit laboratories to apply those standards when they conducted the forensic DNA testing procedures. *Id.* § 995-b(1)-(3). The Legislature also authorized the Commission, and the scientists comprising the DNA Subcommittee

of the Commission, to define the scientific and technical standards for laboratories to apply when they determined whether there was a match between a forensic DNA record and any DNA record in the Databank. *Id.* § 995-b(12).

The Legislature limited the authority of the Commission and the DNA Subcommittee to the purely scientific, technical questions that were within their expertise. But the Legislature reserved for itself two fundamental legislative responsibilities. First, the Legislature retained the authority to define whose DNA records could be stored in the Databank; in various acts it gradually expanded that definition beyond the crimes enumerated in the original DNA Statute. Second, the Legislature retained the authority to define *how* the DNA Databank could be used. The DNA Statute limited the Databank's uses to searching for a "match" with a forensic DNA record, and certain research and exoneration purposes; the Legislature later considered, and declined to permit, additional uses, such as familial searching. Those two areas of retained Legislative authority require policy decisions—balancing society's interests in investigative tools with New Yorkers' interests in genetic privacy, in being free from excessive police encounters, and in avoiding tools that disproportionately target and impact New Yorkers of color.

In 2018, Respondents-Appellants ("Respondents") stepped outside their legislative mandate and, intruding into the policy-making sphere reserved by the Legislature, authorized an entirely new use for the DNA Databank: familial

searching. Familial searching asks a different question than the statutorily-permitted question of whether a "match" exists between a forensic DNA record from a crime scene and a DNA record in the Databank. Rather than seeking to determine whether an *individual* with a DNA record in the Databank was the source of the forensic DNA obtained from a crime scene—the permitted use of the Databank's DNA records—familial searching ultimately seeks to determine whether a *family member of an individual* with a DNA record in the Databank could be the source of the forensic DNA. It is a different type of search, using different software, asking a different question, and targeting individuals who are not convicted offenders under the DNA Statute, and who may never have been arrested, but who simply happen to be related to Databanked Individuals, themselves disproportionately persons of color.

In authorizing familial searching, *Respondents*—largely unelected scientists—made a host of policy decisions: The Commission and the DNA Subcommittee, not the Legislature, balanced society's interests in law enforcement against the genetic privacy interests of New Yorkers, particularly those of color, who have never been convicted of crimes. The Commission and the DNA Subcommittee, not the Legislature, determined which crimes justified familial searching, which types of familial relationships could be captured, what (if any) procedural or privacy protections those family members should be given, and what role (if any) each government branch should play in connection with a particular search.

Petitioners are two Black New Yorkers who have never been convicted of a crime. Each has a brother who was convicted of a felony, and whose genetic information was collected and stored in the DNA Databank. As a consequence, Petitioners are at risk of being targeted through a familial search of the DNA Databank, a risk not shared by those New Yorkers who do not have close biological relatives who were convicted of felonies. In view of their heightened risk of police encounters, and the attendant stigma, fear, and anxiety that come with that heightened risk, Petitioners brought this challenge to the FDS Amendment. The First Department correctly held that Petitioners have standing to pursue their challenge.

The First Department also correctly held that Respondents, in deciding the profound social questions relating to the use of the DNA Databank for familial searching, acted outside the scope of their carefully delegated authority, and in violation of separation of powers. Having failed to persuade the First Department that the authority to enact familial searching fell within their mandate to "promulgate standards for a determination of a match," Exec. Law § 995-b(12), however, Respondents try a new tack: re-writing the DNA Statute.

Respondents now contend that familial searching is a method of ***forensic DNA testing***—and that their responsibility for designating "approved methodologies for the performance of forensic DNA testing" thus encompasses the authority to

permit familial searching in New York. *Id.* § 995-(b)(11). But Respondents ignore that "forensic DNA testing," and methodologies for such testing, relate to the analysis of biological samples to *create* DNA records—***not methods for searching them***. *Id*. § 995-b(2), b(9)(a). Respondents' effort to shoehorn the asserted authority to permit familial searching into their authority concerning forensic DNA testing therefore fails. Searching—familial or otherwise—is not a forensic DNA test. Respondents' other arguments are similarly unavailing.

The decision of the First Department annulling the FDS Amendment was correct, and should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the First Department of the Appellate Division correctly held that Petitioners have standing to bring this C.P.L.R. article 78 proceeding.

2. Whether the First Department of the Appellate Division correctly held that Respondents, in enacting the FDS Amendment, lacked statutory authorization to do so, in violation of separation of powers.

COUNTERSTATEMENT OF THE CASE

A. DNA

DNA (deoxyribonucleic acid), which is stored in nearly all of the trillions of cells that make up the human body, encodes an individual's genetic information. R.108. An individual's DNA sequence is comprised of roughly six billion

nucleotides, each represented by the letter A, C, G, or T. *Id.* No two individuals, with the exception of identical twins, have the same sequence of nucleotides in their DNA, but there is less variation between the DNA sequences of close family members.

In forensic DNA testing, a laboratory extracts DNA from a biological sample, and then examines specific locations ("loci") within the DNA sequence that are known to contain repetitive nucleotide sequences, referred to as "short tandem repeats" or "STRs." R.108, 166-67. The number of STR repeats at each of these DNA loci of interest varies among individuals; by measuring the number of STR repeats at specified loci of interest, the laboratory can create an electronic DNA "profile" or "record" that is fairly unique to that DNA sample. *Id.*; *see also* FBI, Frequently Asked Questions on CODIS and NDIS, https://www.fbi.gov/how-we-can-help-you/dna-fingerprint-act-of-2005-expungement-policy/codis-and-ndis-fact-sheet (last accessed Nov. 1, 2022) (addressing the application of forensic DNA testing to create DNA records uploaded to the FBI's national "Combined DNA Index System" known as CODIS, which compares the STR repeat numbers at 20 loci obtained from physical DNA samples).

When blood, semen, saliva, or similar biological matter is discovered at a crime scene and collected by the police, a laboratory may create a DNA profile (i.e., the number of STR repeats at each of the loci of interest) for that sample. *Id.* The

DNA record of the forensic sample may then be compared to the DNA records stored in a DNA databank to determine if it matches any of the stored records—which would suggest that the same individual was the source of both DNA samples. *Id.* Such a match could then be used in investigating and identifying the perpetrator of a crime.

B. The DNA Statute

In 1994, the Legislature enacted the DNA Databank Act (the "DNA Statute" or "Statute"). *See* Ch. 737, 1994 N.Y. Laws 3709 (codified at Executive Law 995 *et seq*.). The DNA Statute mandated the creation of New York's DNA Databank to (among other things) store genetic information of Databanked Individuals in the form of "DNA record[s]." Exec. Law § 995-c(5).

Pursuant to the Statute, the DNA records of Databanked Individuals are derived from biological samples collected by designated persons that are then "forwarded to any forensic DNA laboratory which has been authorized by the commission to perform forensic DNA testing and analysis for inclusion in the [Databank]." *Id*. The "forensic DNA laboratory" conducts "forensic DNA testing" and applies "DNA testing methodolog[ies]" to "extract and analyze DNA material" from the biological samples of Databanked Individuals—as well as from biological specimens collected from crime scenes—to create DNA records for the purpose of "providing information to resolve issues of identification." *Id.* §§ 995-c(5), 995(2),

(3), (8).

1. The Legislature Created The Commission And DNA Subcommittee And Charged Them With Accrediting Laboratories, Implementing Scientific Standards For DNA Testing, And Identifying a Match

Setting up a DNA Databank requires many scientific decisions, such as choosing the technical procedures and standards for collecting biological samples from convicted offenders and from crime scenes, physically extracting DNA from those materials, and choosing the portions of DNA (loci) whose number of STR repeats will constitute the DNA record.

To help ensure state crime laboratories efficiently, reliably, and accurately perform such forensic DNA testing, the Statute authorized the creation of a Commission on Forensic Science to "develop minimum standards and a program of accreditation for all forensic laboratories in New York state, including establishing minimum qualifications for forensic laboratory directors." Exec. Law § 995-b(1), § 995-b(2), 995-b(2)-a, 995-b(3)–b(6) (addressing the objectives of establishing "minimum standards and a program of accreditation" which include ensuring that "forensic analyses, including forensic DNA testing, are performed in accordance with the highest scientific standards practicable"). To aid the Commission in executing these duties, the Legislature provided for a "subcommittee on forensic DNA laboratories and forensic DNA testing." *Id.* § 995-b(13)(a). The scientists comprising the DNA Subcommittee are charged with the "sole authority to grant,

deny, review or modify a DNA forensic laboratory accreditation"; to evaluate "DNA methodologies proposed to be used for forensic analysis"; to develop standards in "conducting forensic DNA analysis"; and to make a binding recommendation to the Commission "with regard to an accreditation program." *Id.* § 995-b(2-a), 995-(b)(13)(a)–(c).

In addition to requiring the creation of "minimum standards and [a] program of accreditation" for forensic laboratories conducting forensic DNA testing, the Legislature tasked the Commission with "promulgat[ing] a policy for the establishment and operation" of the Databank. *Id.* § 995-b(9). The Legislature carefully specified the issues the policy would address, which include selecting "the forensic DNA methodology or methodologies to be utilized ***in compiling the index [i.e., Databank]***," and "procedures for assuring that the state [Databank]" is protected from unauthorized access and unauthorized disclosure of its records. *Id.* (emphasis added).

As with forensic DNA testing and methodologies—i.e., extracting DNA from physical specimens and creating DNA records (*id.* § 995(2), 995-b(9)(a))—defining the process for determining whether a forensic DNA record *matches* a DNA record in the Databank reflects scientific and technical decisions. And as with forensic DNA testing, the Legislature delegated those responsibilities to Respondents—i.e., to "[p]romulgate standards for a determination of a match between the DNA records

contained in the [DNA Databank] and a DNA record of a person submitted for comparison therewith." *Id.* § 995-b(12). Where that process does not lead to a "match," the Statute delegates no further actions regarding the Databank.

2. The Legislature Decided Whose DNA Records May Be Stored In The Databank And How Those DNA Records May Be Used

The Legislature did not delegate to Respondents the authority to decide *whose* DNA records could be taken for inclusion in the Databank, and the *uses* to which those records could be put.

The Legislature initially limited the population of Databanked Individuals to persons convicted of enumerated felonies, which included certain homicide, assault, and sexual offenses. *Id.* §§ 995(7), 995-c(3). It subsequently authorized discrete additions to the list of crimes for which, if convicted, individuals may have their genetic information added to the Databank—including felonies such as drug dealing and robbery in 2000 (Exec. Law § 995, as amended by L. 2000, ch. 8), terrorism offenses in 2004 (as amended by L. 2004, ch. 1), all remaining felony offenses and some misdemeanor offenses in 2006 (as amended by L. 2006, chs. 2, 91, 320), and eventually all misdemeanor offenses (as amended by L. 2012, ch. 19; L. 2021, ch. 92).

The Legislature also specified the limited purposes for which the DNA records of Databanked Individuals could be used. Pertinent here, the Legislature

authorized those DNA records to be used "for law enforcement identification purposes upon submission of a DNA record in connection with the investigation of the commission of one or more crimes . . . ." Exec. Law § 995-c(6). The Legislature also authorized DNA records to be used to assist in the recovery or identification of specified human remains, to create a population statistics database, and to support research towards the development of protocols for forensic DNA analysis and for quality control. *Id.*

C. Respondents Initially Declined To Authorize Familial DNA Searching

Following the DNA Statute's adoption, the Commission enacted a set of regulations, 9 N.Y.C.R.R. pt. 6192, reflecting the scientific and technical considerations required to reliably and accurately collect physical DNA specimens (whether from convicted offenders or crime scenes, as designated by the Legislature), to extract and determine the STR repeat numbers for relevant portions of the DNA from those specimens, to create DNA records derived from those specimens, and to identify a match between a forensic DNA record and that of a Databanked Individual. At the time the original regulations were enacted, state crime laboratories could only disclose to law enforcement the results of a direct "match" between a forensic DNA record and a DNA record of a Databanked Individual (i.e., an exact match between the two DNA records, suggesting that the same individual was the source of both).

In 2010, the Commission and the Division of Criminal Justice Services ("DCJS") addressed concerns raised by forensic scientists concerning partial matches that would sometimes arise in searching for an exact match between a forensic DNA record and a DNA record of a Databanked Individual. Respondents recognized that the quality of a forensic DNA sample collected from a crime scene varies: the forensic sample might contain mixtures of DNA from more than one individual, or the sample could be partially degraded. *See* 9 N.Y.C.R.R. § 6192.3(c). In such instances, the forensic DNA record might only partially match a Databanked Individual's DNA record, even though the the source of the forensic DNA record may nevertheless be the Databanked Individual.

Forensic scientists could conduct additional testing of these imperfect hits to try to determine whether there was in fact a match, but the match had been obscured at first due to the poor quality of the forensic DNA sample. *See id*. If additional testing could not confirm an exact match, however, then the forensic DNA sample may not have come from the Databanked Individual at all, but rather a close biological relative, who shared most—but not all—of the Databanked Individual's DNA sequence (and thus most, but not all, of the STR repeat numbers for the designated loci).

Existing regulations did not permit forensic laboratories to disclose to law enforcement these indirect hits that they found in their quest to find and confirm an

exact match. In 2010, Respondents decided to allow forensic laboratories to disclose such "partial matches" to law enforcement, and promulgated regulations to "address th[is] rare case where a routine search of the DNA Databank results in an inadvertent near hit." *See* Partial Match Policy for the DNA Databank, 32 N.Y. Reg. 2, 5, https://docs.dos.ny.gov/info/register/2010/jul21/pdfs/rules.pdf (July 21, 2010).

The partial matches were "inadvertently obtained," *id.*—i.e., they were obtained by forensic laboratories in their process of searching for and attempting to confirm a match. Respondents enacted Partial Match Regulations to authorize the forensic laboratories to disclose to law enforcement the partial matches they had inadvertently found. 9 N.Y.C.R.R. § 6192.3(3)-(g).

Respondents acknowledged that in allowing the disclosure of these results that were inadvertently obtained in their quest to find an exact match, the Partial Match Regulations would "not permit what is often called 'familial searching,' or ***singling out particular families and actively searching their DNA profiles***." 32 N.Y. Reg. at 5. (emphasis added). The partial match ("indirect association") that the Partial Match Regulations authorized to be disclosed to law enforcement always arose from searching for the individual who could be the source of the forensic DNA; finding candidates in the Databank using the FBI's CODIS software, the same software used for identifying direct matches; and requiring further investigation because the DNA records in the Databank did not directly match the forensic DNA record.

9 N.Y.C.R.R. § 6192(e)-(g).

D. The Legislature Repeatedly Considered Authorizing Familial Searching But Declined To Do So

Familial searching, as described by the FBI, and as referenced by Respondents in enacting the Partial Match Regulations, refers to "an intentional or deliberate search" of a DNA database "conducted ***after*** a routine search [of a DNA database] for the purpose of potentially identifying close biological relatives of the unknown forensic sample associated with the crime scene." R.629 (emphasis added.) It is a decision to use DNA records of Databanked Individuals as a springboard to target their ***family members***—whose DNA records have been confirmed not to exist in the Databank. Familial searching thus increases the likelihood that a New Yorker who has never been convicted of a crime, but with a family member who has been, may be identified by the police as an investigative lead in the course of searching for the perpetrator of a crime.

Beginning in 2014, the Legislature began considering whether to authorize the use of the Databank for familial searching, and would do so over several years, ultimately declining to do so. On the Assembly side, bills that would amend the New York DNA Statute to permit familial searching were proposed and submitted to the Governmental Operations Committee in 2014, 2015, 2016, 2017, and 2018. 2014 N.Y. Assembly Bill A-9247; 2015 N.Y. Assembly Bill A-1515; 2017 N.Y. Assembly Bill A-683.

In the New York Senate, on December 9, 2016, Senator Boyle introduced a bill that would "authorize familial DNA searching in New York and authorize the DNA Subcommittee to create a report on familial searching." 2016 N.Y. Senate Bill S-8216. A substantially identical bill was introduced in early 2017, 2017 N.Y. Senate Bill S-2956, to "allow the [C]ommission and the DNA [S]ubcommittee to determine the best practices for implementing familial searching in New York by establishing a NYS Familial Search Policy." *Senate Bill S2956A*, N.Y. State Senate, https://www.nysenate.gov/legislation/bills/2017/S2956 (last visited Nov. 1, 2022). After passing a full senate vote 49–11 in February 2017, the bill was referred to the Assembly where it was deemed to have died on January 3, 2018. *Senate Bill S2956A*, N.Y. State Senate, https://www.nysenate.gov/legislation/bills/2017/S2956 (last visited Nov. 1, 2022).

E. Respondents Enacted the FDS Amendment

At the same time that the Legislature debated whether to permit familial searching of the Databank, Respondents took the matter into their own hands, made their own policy choices, and enacted the FDS Amendment. On May 19, 2017, the DNA Subcommittee submitted its binding recommendation that the Commission adopt its proposed familial search policy. R.246. The Commission formally adopted the policy on June 16, 2017, and on October 18, 2017, the Division promulgated the policy in the New York State register as an amendment to 9 N.Y.C.R.R. § 6192.

R.243, 246.

The FDS Amendment implements Respondents' decisions on a broad range of policy concerns. First, Respondents determined the threshold for familial searching, specifying that law enforcement agencies may only request a familial search of the DNA Databank after it has been determined that "there is not a match or a partial match to a sample in the DNA [D]atabank." 9 N.Y.C.R.R. § 6192.3(h).

Second, Respondents determined the penological standard for implementing a familial search—specifying that a familial DNA search may only be conducted if the forensic DNA is associated with certain crimes or "a crime presenting a significant public safety threat." *Id.* § 6192.3(h)(1)(iv).

Third, Respondents defined the societal need that would justify a familial DNA search in a particular case—specifying that familial searching may only be done if "reasonable investigative efforts have been taken in the case, or exigent circumstances exist." *Id.* § 6192.3(h)(2).

Fourth, Respondents determined how closely related a Databanked Individual must be to the individual who was the source of the crime scene DNA to warrant investigating that Databanked Individual's family members. By choosing the "kinship threshold values" that would define a hit in the DNA Databank, *Id.* § 6192.3(j), Respondents themselves thus also determined how many potential "relatives" of Databanked Individuals should be swept within the familial search.

Finally, Respondents selected the executive branch—and more specifically the DCJS Commissioner—as the one to decide, after balancing all interests in a particular case, whether a particular familial DNA search is warranted. *Id.* § 6192.3(i)(2)(ii).

F. Petitioners Commenced This Article 78 Proceeding

Petitioners had just four months from the October 18, 2017 enactment of the FDS Amendment to bring an article 78 challenge to Respondents' unlawful action. C.P.L.R. § 217(1). Accordingly, on February 16, 2018, Petitioners commenced this proceeding, disputing Respondents' authority to implement the FDS Amendment, among other claims. R.62–70. Respondents denied all counts, and asserted that Appellants lacked standing to bring the action. R.446–47.

Supreme Court held argument on November 29, 2018, and on March 26, 2020, issued a decision and order finding that Petitioners had standing to bring their article 78 petition, but otherwise denying the petition in its entirety. R.4–20. Petitioners appealed.

On May 5, 2022, the First Department of the Appellate Division reversed. The majority agreed with Supreme Court that Petitioners had article 78 standing because, among other reasons, they uniquely a faced a "heightened risk of police encounters" as the result of the FDS Amendment. R.976. After applying the four factors this Court set forth in *Boreali v. Axelrod*, for determining when "the difficult-

to-define line between administrative rule-making and legislative policy-making has been transgressed," 71 N.Y.2d 1, 11 (1987), the majority concluded that Respondents lacked the authority to enact the FDS Amendment. The First Department annulled the FDS Amendment on that basis, declining to reach Petitioners' additional argument that the FDS Amendment was arbitrary and capricious.

STANDARD OF REVIEW

This Court reviews the First Department's decision *de novo*. *See Matter of Indus. Liaison Comm. of Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137, 144 (1988).

ARGUMENT

POINT I

PETITIONERS HAVE ARTICLE 78 STANDING TO CHALLENGE THE FDS AMENDMENT

Standing to challenge a regulation under article 78 requires establishing that the petitioner (i) suffered an injury in fact, and (ii) is within the zone of interest of the challenged statute or regulation. *Graziano v. Cty. of Albany*, 3 N.Y.3d 475, 479 (2004). In an article 78 proceeding, application of these requirements "should not be heavy-handed." *Ass'n for a Better Long Island v. N.Y. State Dep't Envt. Conservation*, 23 N.Y.3d 1, 6 (2014). Indeed, the "increasing pervasiveness of administrative influence on daily life. . . necessitates a concomitant broadening of

the category of persons entitled to a judicial determination as to the validity of the proposed action." *Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 10 (1975).

Here, Supreme Court and the First Department correctly found that Petitioners readily meet this Court's intentionally liberal article 78 standing requirements.

A. The FDS Amendment's Enactment Injured Petitioners

The FDS Amendment singled out Petitioners from the general population by subjecting them to a heightened risk of police investigation, targeting them for no other reason than their genetic similarity to Databanked Individuals. Both the First Department and Supreme Court correctly held that this increased risk of heightened police scrutiny (and the inherent stigma, fear, and anxiety associated with that risk) is an injury in fact. R.974-75 (FDS Amendment injured Petitioners by subjecting them to the "peculiar risk that they will be targets of criminal investigations" for "no other reason than that they share family genetics with a convicted criminal"); R.7 (same, because Petitioners bear the "peculiar risk" of being "approached by an investigating agency in connection with an investigation aided by the [FDS Amendment]").

These courts correctly applied New York law in concluding that the heightened risk of police scrutiny caused by the FDS Amendment was an injury in fact. In *Lino v. City of New York*, for example, the plaintiffs challenged the New York Police Department's inclusion of their arrest records in the City's "stop and

frisk" database—a database that served as "a tool for investigators to utilize in subsequent location and apprehension of criminal suspects." 101 A.D.3d 552, 554 (1st Dep't 2012) (citation omitted). The petitioners suffered an injury in fact because the records of their criminal charges remained unsealed, putting them at "*risk* that their records will be disclosed," and that they would "be[] targeted in future investigations," and risk bearing "the stigma that is created as a result." *Id.* at 556 (emphasis in original). Heightened susceptibility to a future, adverse effect of the challenged regulation constituted a sufficiently cognizable injury to create standing. The court refused to require plaintiffs "to wait until their job applications are in the mail or they are about to appear for job interviews before they have standing to bring a cause of action against the effect of the unsealed records." *Id.* at 555.

The circumstances here are even more compelling. New Yorkers such as Petitioners should not need to be accosted by the police in their homes, at their workplaces, or in a public setting, in order to have suffered an injury in fact that permits them to challenge a regulation that deliberately puts them at heightened risk of such encounters. *See Gernatt Asphalt v. Sardinia*, 87 N.Y.2d 668, 687 (1996) (nearby property owner had standing to challenge a proposed zoning change because aggrievement could be inferred from proximity to re-zoned land). The day the FDS Amendment took effect, Petitioners' *risk* of falling victim to any of those encounters increased, solely because their brothers had committed crimes. Under New York

law, that is a cognizable injury in fact.

B. Respondents' Injury-In-Fact Arguments Fail

Respondents make three arguments concerning Petitioners' injuries. Each is without merit.

1. Respondents' "Long Chain of Events" Requirement Is Not—And Should Not Be—The Law

First, Respondents argue that Petitioners' heightened risk of police suspicion and encounters is not a sufficient injury in fact to enable them to challenge the regulation that created that risk. Br. 30-32. Instead, Respondents would require Petitioners to suffer further injury before they could bring an article 78 challenge—i.e., familial search targets such as Petitioners would need to wait until a crime is committed; biological evidence is uncovered; the lawful DNA search provides no direct matches; a familial search is applied for, approved, takes place, and points to relatives of Petitioners' brothers; Petitioners themselves are identified as among those relatives; Petitioners are determined to be worth investigating in connection with the crime; and the police interact with Petitioners. *Id.* And this long chain of events would need to occur within the four-month statute of limitations applicable to article 78 review. *Infra* at 22-25.

Respondents' re-definition of the injury as the end result of a "remote chain of events," and their focus on whether that chain is likely or speculative, ignore the injuries to Petitioners that precede those events—and which were correctly found to

be the basis of standing here. As a consequence of the FDS Amendment, Petitioners face a greater probability of being subjected to police investigation and police encounters—at home, at work, or anywhere—solely because of their genetic relationship to Databanked Individuals. That heightened risk, with its attendant stigma, fear, and anxiety, is the legally cognizable injury that the two courts below recognized as sufficient for article 78 standing. This Court should too.[1]

2. The Public's Interest In Ensuring Article 78 Review Of The FDS Amendment Supports Finding Standing Here

Requiring the chain of events Respondents construct contradicts New York law by insulating the FDS Amendment from article 78 review. An article 78 challenge must be brought within just four months of the suspect agency action—here, the enactment of the FDS Amendment. Although the public's interest in article 78 review does not itself confer standing, it is a factor to be considered in determining whether a petitioner has a cognizable injury in fact—and thus in setting

[1] Respondents' "chain of events" argument cites the First Department's dissent for the proposition that the validity of the FDS Amendment "should be addressed in the context of an actual dispute and not based on a hypothetical, wholly speculative harm that is unlikely to occur." Br. 41–42 (quoting R.995). This conclusory framing again ignores the real harm the FDS Amendment inflicts on Petitioners, by subjecting them to a greater risk than others of enhanced police scrutiny, including the stigma, fear, and anxiety associated with that risk, and the knowledge that the state has determined their genetic privacy interests should be reduced solely because their relatives have been convicted of crimes. These are not "generalized grievances more appropriately addressed by the representative branches," R.990—they are concrete injuries Petitioners uniquely experience solely because their brothers were convicted of crimes—a risk that more significantly afflicts Petitioners as New Yorkers of color.

the appropriate standard for article 78 standing. *See Ass'n for a Better Long Island*, 23 N.Y.3d at 8 (denying petitioners standing would insulate the challenged regulation from judicial review); *Har Enters. v. Town of Brookhaven*, 74 N.Y.2d 524, 529 (1989) (same).

Here, as the First Department correctly held, the public's interest in ensuring article 78 review of the FDS Amendment reinforces the straightforward conclusion that Petitioners' injuries suffice to confer standing. Respondents do not dispute that their proposed standing requirement—that Petitioners must actually experience a police encounter rather than just bear the heightened risk of one—would insulate the FDS Amendment from article 78 review. Br. 40. And for good reason: the police encounter Respondents would require for an injury in fact could not practically occur within the four-month statute of limitations applicable to article 78 proceedings—a reality exacerbated by the fact that persons of color are disproportionately impacted by the FDS Amendment and typically have fewer resources to sue. R.977. ("Respondents' factual scenario on what constitutes an injury in fact would result in no one having the ability to challenge the promulgation of this regulation."). Respondents' position thus flies in the face of this Court's long acknowledgment of the public's interest in ensuring the availability of article 78 review of administrative

action. *See Dairylea*, 38 N.Y.2d at 10.[2]

Respondents argue that depriving Petitioners of standing would not *entirely* preclude judicial review of the FDS Amendment. Respondents urge that a future criminal defendant ensnared by a familial DNA search could seek to suppress evidence obtained as a consequence of the familial search by challenging the constitutionality of the FDS Amendment in an evidentiary hearing. But an evidentiary hearing in connection with a criminal proceeding is not an article 78 challenge. Such a hearing would vindicate neither the public's important interest in an article 78 challenge, nor Petitioners' interests in seeking redress for the injuries asserted here: the "peculiar risk" imposed on Petitioners "that they will be targets of criminal investigations" for "no other reason than that they share family genetics with a convicted criminal." R.974.

As the First Department correctly noted, and Respondents do not dispute: "Objections to regulatory actions taken by an administrative body can only be challenged in an article 78 proceeding." R.977. It would make no sense for the article 78 standing requirement to foreclose the use of article 78—a contradiction

[2] If it were the law, Respondents' standing requirement also would allow an agency to insulate its regulations from article 78 review. By simply waiting four months before searching the Databank, Respondents could avoid subjecting anyone to the "police contact" Respondents would require, thus preventing anyone from having standing to challenge the FDS Amendment under article 78. This is another reason that Respondents' standard is contrary to the public interest.

that would not be ameliorated by a possible evidentiary hearing down the road.

3. The First Department Did Not Ignore The Injury-In-Fact Requirement

Respondents lodge misplaced and inaccurate objections to the First Department's analysis. Respondents argue that the First Department did not require an injury in fact at all, and instead decided to find standing simply because of "the value of judicial review." Br. 41–42. Respondents are wrong: The First Department clearly held that Petitioners suffered an injury in fact, and described that injury as Petitioners' increased risk of law enforcement scrutiny. *Supra* at 19. In concluding that this alleged injury was sufficient to confer standing, the First Department noted that the correct standard for finding an injury in fact is and must be more lenient than the standard advocated by Respondents—because Respondents' standard would improperly deprive the public of article 78 review of the FDS Amendment, contrary to public policy and this Court's guidance. *Ass'n for a Better Long Island*, 23 N.Y.3d at 8.

Respondents also maintain that the First Department improperly relied on "examples of police using investigative tools that are different from familial searching" to conclude that Petitioners had standing. Br. 32-34. But the court did not rely on those examples for their conclusion on standing; it simply discussed them in the background section of the opinion, as context for understanding familial searching. R.969-970.

Finally, Respondents contend that the First Department erroneously "found standing based on the Databank containing a disproportionate number of profiles of people of color." Br. 35-36. Once more, Respondents miss their mark. The First Department found that Petitioners suffered an injury in fact because the FDS Amendment "subjects them to the peculiar risk that they will be targets of criminal investigations for *no other reason* than that they have close biological relatives who are criminals," R.975 (emphasis added), not because they are persons of color. Insofar as the First Department recognized that the Databank's racial make-up puts persons of color such as Petitioners at greater risk of being investigated in connection with a familial search, that recognition supported the First Department's conclusion that promulgating the FDS Amendment necessarily involved wrestling with important public policy considerations.

The First Department's analysis and conclusion were correct: the FDS Amendment injured Petitioners because it subjected them to an increased risk of police investigation solely because of their close genetic proximity to Databanked Individuals, i.e., their brothers. Those injuries suffice to establish standing particularly where, as here, the contrary result would foreclose article 78 challenges to the FDS Amendment by injured parties.

C. Petitioners' Injuries Fall Within the Zones Of Interest Of The DNA Statute And the FDS Amendment; Either Is Sufficient For Standing

To satisfy the second prong of the standing inquiry, Petitioners need only

allege that the injuries they assert are within the zone of interest to be promoted or protected by either the statute or the regulation at issue. *In re. City of New York v. City Civ. Serv. Comm'n*, 60 N.Y.2d 436, 443 (1983); *Via v. Franco*, 223 A.D.2d 479 (1st Dep't 1996) (petitioners had standing to pursue article 78 proceeding where they were in the zone of interest "intended to be protected by the regulations" in dispute). Petitioners' injuries here are well within the zones of interest of both the FDS Amendment and the DNA Statute.

1. Petitioners' Alleged Injuries Are Within The Zone of Interest of the FDS Amendment

Respondents ignore that Petitioners' injuries fall squarely within the zone of interest purportedly protected by the FDS Amendment, which alone is enough to satisfy the "zone of interest" prong of the standing inquiry. The "familial DNA search" regulation promulgated by Respondents purports to implement safeguards to address the privacy interests of those who are "biologically related" to "offenders" with "DNA profiles in the DNA databank"—such as Petitioners. 9 N.Y.C.R.R. § 6192.1(ab); *id.* § 6192.1(k)(1)(ii) (requiring "guidance on how best to evaluate leads from a familial search in order to protect unknown family relationships"); *id.* § 6192.3(h)(1)(iv) (limiting types of crimes and circumstances when a familial search may be conducted); *id.* § 6192.3(k)(2)-(3) (requiring familial search result must "exceed the established kinship threshold value" before resulting in a name being divulged to law enforcement).

These provisions unequivocally demonstrate that the injuries the FDS Amendment inflicts on Petitioners and other close biological relatives of Databanked Individuals are within the privacy-protective zone of interests considered by the Commission and embodied in the FDS Amendment. As the First Department correctly stated, "[b]y not allowing kinship searches for every crime, respondents decided that family members should be insulated from investigations concerning lesser crimes"—and thus, "the rights of family members were taken into consideration by respondents in deciding who and what interests would be protected by the regulation." R.974-75; *cf. Cooke Ctr. for Learning & Dev. v. Mills*, 19 A.D.3d 834, 835 (3d Dep't 2005) (alleged injury to private school—the denial of funds—was within the zone of interest because the regulation contemplated that private schools would seek approval of such funds).

Respondents assert that the First Department incorrectly assumed that the Commission limited familial searching to certain serious crimes in order to insulate "family members . . . from investigations concerning lesser crimes." Br. 39. According to Respondents, the real reason the Commission limited familial searches to serious crimes was because familial searches incur "substantial time and resources." *Id.* But that argument is belied by the record. In their notice of adoption, Respondents said that the FDS Amendment "is designed to ensure that the familial search policy is applied fairly and in accordance with constitutional safeguards," and

that "the proposal . . . is not violative of any privacy protections." R.860. And Respondents told the First Department that the FDS Amendment "responsibly included certain safeguards . . . *to ensure police oversight, personal privacy, and other considerations*." Br. for Respondents-Respondents 64, NYSCEF 13 (Sept. 24, 2021) (emphasis added).

Respondents cannot now claim that the FDS Amendment's "safeguards" were not intended to protect the privacy and liberty interests of family members implicated by familial searching, such as Petitioners, but instead were intended to save "time and resources." Br. 39. The record is clear: Petitioners' injuries are within the FDS Amendment's zone of interest.

2. Petitioners' Injuries Are Also Within the DNA Statute's Zone of Interest

Petitioner's injuries separately satisfy the zone-of-interest prong because they are also within the zone of interests protected by the DNA Statute, which specifically contemplates their privacy interests.

When the Legislature crafted the DNA Statute, it gave significant attention to concerns that storing genetic information about individuals with no criminal history could invade their privacy rights and wrongfully subject them to police investigation and its attendant challenges. R.269-72. Accordingly, the Legislature explicitly limited the class of New Yorkers for whom genetic information can be collected and stored in the Databank, in order to protect *other* New Yorkers—like Petitioners

here—who do not have the requisite criminal record. *See* Exec. Law §§ 995(7), 995-c(3)(a) (only "designated offender[s] subsequent to conviction and sentencing" for specified crimes are "required to provide a sample appropriate for DNA testing," and defining class of "designated offender[s]"); *id.* § 995-c(9)(a) (requiring DNA records be expunged from the Databank upon reversal or vacatur of a conviction and that results of DNA testing be treated as confidential).

Respondents posit that the Legislature considered only law enforcement's interest in investigating crimes, ignoring any countervailing interests balanced by the Legislature—such as the privacy interests of individuals who are not in the Databank. *See* Br. 37 ("the fundamental purpose of the Act is to assist in the investigation of crimes"). But as the First Department recognized, the DNA Statute's text plainly reflects a range of interests—including the State's interest in protecting from enhanced law-enforcement scrutiny innocent individuals who have never been convicted of a crime. R.974 ("Respondents fail to acknowledge, however, that privacy concerns were weighed and balanced by the Legislature[.]").

Respondents also posit that the only privacy interests considered by the Legislature were those of the convicted offenders whose DNA records would be included in the Databank—and not the privacy interests of individuals "whose DNA is indisputably not in the Databank," such as Petitioners here. Br. 38. But by placing clear limits on whose DNA information must be included in the Databank (i.e.,

convicted offenders), the Legislature necessarily protected the interests of those individuals whose genetic information could not be included—i.e., the privacy interests of other New Yorkers, such as Petitioners. Respondents' suggestion that in drawing a line, the Legislature only considered who was inside the line, and was oblivious to those who were outside the line, strains credulity.

Finally, Respondents argue that Petitioners' interests were not within the zone of interest of the DNA Statute because the statute does not explicitly protect them. Br. 38. That makes no sense. First, the exclusion of familial searching from the permitted uses of the Databank itself manifests a protection of Petitioners' interests. Moreover, if the mere failure to name Petitioners and those like them in the statute was sufficient to conclude that they are not within a statute's zone of interest, then any time an agency enacted a regulation directed to individuals who were outside the defined purview of the enabling statute, those targeted individuals could never pursue an article 78 challenge to such regulations because they were not named in the statute.[3] That result would encourage *ultra vires* actions by agencies and would run afoul of New York's "liberalized attitude toward recognition of standing."

[3] Likewise, Respondents' argument suggests that any affirmative delineation of permissible uses does not carry "zone of interest" implications for the uses that are not permitted. Br. 38. The presumption that the Legislature only considers what it permits, and not what it prohibits or does not permit, is without basis. In any event, these arguments address only the Statute's zone of interest, and not the FDS Amendment's zone of interest, which confers standing here as explained above.

Matter of Morgenthau v. Cooke, 56 N.Y.2d 24, 30 (1982).

Respondents' position is not the law, and courts have found that individuals not identified in a statute may nevertheless have standing to challenge it. *See id.* (finding zone of interest for statute providing procedure for appointing judges included district attorneys who were outside the satute's text); *Grygas v. New York State Ethics Comm'n*, 147 Misc. 2d 312, 314 (Sup. Ct. Albany Cty. 1990) (finding one petitioner, who was not a state employee, had standing to challenge agency action under statute directed towards state employees). Respondents' overly restrictive zone-of-interest position should be rejected.

POINT II

RESPONDENTS LACKED THE POWER TO PROMULGATE THE FDS AMENDMENT

The First Department correctly concluded that Respondents were not authorized to make the profound social policy decisions that are reflected in the FDS Amendment, and that promulgating that regulation therefore violated separation of powers. The First Department's analysis relied on the four factors this Court set forth in *Boreali*, which are intended to help courts discern the precise question here: whether "the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed." 71 N.Y.2d at 11. That analysis was correct.

A. This Court Should Reject Respondents' Attempt to Circumvent *Boreali*

1. *Boreali* Provides The Correct Framework For Analyzing The Question Before The Court

Respondents now argue, for the first time, that this Court should ignore *Boreali* and simply rely on the language of the DNA Statute to conclude that the Legislature permitted familial searching. Br. 57-59. But as every case Respondents cite demonstrates, *Boreali* provides the framework for courts to make the very determination that Respondents would short-circuit: whether agency action was authorized, and permissible, under the enabling statute. *See Garcia v. New York City Dep't of Health & Mental Hygiene*, 31 N.Y.3d, 601, 608-16 (2018); *Acevedo v. New York State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 221-26 (2017); *LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 262-67 (2018).

Accordingly, even if the Court agreed with Respondents that the enabling statute provided a "comprehensive grant of regulatory authority" that could sweep in familial searching, the Court would still need to determine whether the grant was improperly used "to resolve[] under the guise of regulation[] matters of social or public policy reserved to legislative bodies." *Shah*, 32 N.Y.3d at 260. (citing *Boreali*, 71 N.Y.2d at 9). The *Boreali* factors are intended to guide that inquiry.

2. The Legislature Did Not Delegate To Respondents The Authority To Enact Familial Searching

Not only is Respondents' attempt to circumvent the *Boreali* analysis contrary

to New York law, it also fails, on its own terms, at the threshold. There is simply no plausible interpretation of the DNA Statute supporting the conclusion that the Legislature authorized the Commission to fashion a familial search scheme out of whole cloth.

Determining whether the DNA Statute explicitly authorized the FDS Amendment begins with the statute's language, and how it defines "the function of the agency whose actions are challenged"—here, the Commission on Forensic Science and DNA Subcommittee. *Id*. at 261. The DNA Statute created the Commission and directed it to "promulgate a plan for the establishment of a computerized state DNA identification index," i.e., the Databank, Exec. Law § 995-c. That plan encompassed two main tasks: (i) to "develop minimum standards and a program of accreditation for all forensic laboratories in New York state," § 995-b(1), and (ii) to "[p]romulgate standards for a determination of a match between the DNA records contained in the [DNA Databank] and a DNA record of a person submitted for comparison therewith." § 995-b(12). Neither duty encompasses the authority to promulgate rules authorizing a new type of search.

3. Developing A Program of Accreditation And Quality Control Standards for Forensic DNA Testing Does Not Include Creating A New Use For DNA Records In The Databank

To aid the Commission in developing a laboratory accreditation program, and "to ensure that forensic analyses, including forensic DNA testing, are performed in

accordance with the highest scientific standards practicable," § 995-b(2)(b), the Legislature provided for a "subcommittee on forensic DNA laboratories and forensic DNA testing," § 995-b(13)(a). The scientists comprising the DNA Subcommittee were given the "sole authority to grant, deny, review or modify a DNA forensic laboratory accreditation"; to evaluate "DNA testing methodologies proposed to be used for forensic analysis"; to develop standards in "conducting forensic DNA analysis"; and to make a binding recommendation to the Commission "with regard to an accreditation program," including the adoption of "proficiency testing programs." § 995-b(2-a), (13)(a)-(c).

Respondents seize on the terms "forensic DNA testing" and "DNA testing methodologies," arguing that the Commission's authority over the quality of forensic DNA testing performed in crime laboratories, and the selection of forensic testing methodologies, somehow authorizes it to develop new uses for the records in the Databank. Br. 46-48. But these statutory terms are about obtaining the genetic material and information from a crime scene or convicted offender to develop the DNA records stored in the Databank in the first place—not the subsequent uses to which those records may be put. *See* Exec. Law § 995-b(2)-(3).

Under the DNA Statute, "forensic DNA testing" means "any test that employs techniques to examine [DNA] derived from the human body for the purpose of providing information to resolve issues of identification." *Id.* § 995(2). Forensic

DNA testing thus focuses on extracting and analyzing the DNA obtained from the physical specimens collected from crime scenes (the forensic DNA). *See id.* (defining "forensic DNA laboratory" as "any forensic laboratory operated by the state . . . that performs forensic DNA testing on crime scenes or materials derived from the human body for use as evidence in a criminal proceeding"). "DNA testing methodology" is defined as "methods and procedures used to extract and analyze DNA material," and "the methods . . . used to draw statistical inferences from the test results." *Id.* § 995(3).

Respondents assert that these definitions of "forensic DNA testing" and "DNA testing methodology" convey "that the Commission's responsibility includes deciding ***when*** a forensic DNA testing method, including familial searching" may be approved. Br. 47 (emphasis added). This assertion is belied by the DNA Statute, because familial searching is not a "forensic DNA testing method." *Id.* A familial search, as Respondents themselves defined it, is a "targeted evaluation" of the DNA records of Databanked Individuals "which generates a list of candidate profiles based on kinship indices to indicate potential biologically related individuals to one or more sources of evidence." 9 N.Y.C.R.R. § 6192.1(ab). A familial search is thus a means of searching the DNA records stored in the Databank—it is not a means of forensically testing DNA, i.e., analyzing a DNA sample to generate a DNA record, as reflected in Respondents' own regulations. 9 N.Y.C.R.R. § 6192.1 ("DNA

databank shall be comprised of data generated from DNA testing methods approved in the NDIS Operating Procedures"—which do not encompass familial searching). And the "methods used . . . to draw statistical inferences" from DNA testing, § 995(3), refer to statistical analysis of the DNA records created from the samples—not statistical analysis of matches obtained from Databank searches.[4]

It follows that the First Department did not err in "ignor[ing] the DNA subcommittee's responsibilities regarding[] 'evaluating all DNA methodologies'" and methods to interpret test results. Br. 47, 50, 52-53 (citing Respondents' authority to establish "as many advisory councils as it deems necessary to provide expertise" with respect to forensic testing methodologies). These responsibilities have no bearing on whether Respondents had the authority to create a new use for the Databank's DNA records. Simply put, Respondents' position that the Legislature delegated to them "the responsibility to select the forensic DNA testing methods that may be used to search the Databank" is specious: a forensic DNA testing method by definition is not a method to search the Databank. Br. 45.

[4] The government's attempts to blur the Statute's definition of DNA testing is nowhere more stark than when they assert the purported "responsibility to select the forensic DNA testing methods that may be used to search the Databank." Br. 45. That sentence conflates "DNA testing methods," which references the creation and confirmation of DNA records, with Databank searching, doing violence to the statute.

4. Promulgating Standards To Identify A Match Does Not Authorize Familial Searching

With respect to the uses of the DNA records in the Databank, the Legislature delegated to Respondents the limited authority to "[p]romulgate standards for a determination of a match between the DNA records contained in the [DNA Databank] and a DNA record of a person submitted for comparison therewith." Exec. Law § 995-b(12). The Legislature did not delegate any authority concerning the analysis of DNA records in the Databank when the application of Respondents' standards for identifying a match does not result in one. But in enacting the FDS Amendment, Respondents arrogated that authority, creating a new search regime that specifically applies *only* "[w]hen there is *not a match or a partial match* to a sample in the DNA databank." 9 N.Y.C.R.R. § 6192.3(h) (emphasis added).

Respondents thus understood that in authorizing a familial search they were not acting within their authority to promulgate standards for determining a match between a forensic DNA record and the DNA record of a Databanked Individual. Rather, Respondents authorized a new use of the Databank's records in precisely the circumstances the Legislature *excluded* from Respondents' authority to regulate the DNA records in the Databank: when no match or partial match is found.

Respondents claim familial searching is also authorized by the provision directing them to "promulgate a policy for the establishment and operation of a DNA identification index" (i.e., the Databank) "consistent with the operational

requirements and capabilities of [DCJS].” Br. 45 (quoting § 995-b(9)). But the leap from ensuring consistency with DCJS's “requirements and capabilities” to developing new uses for the records in the Databank is flatly contradicted by the Legislature's decision to delegate to Respondents the limited authority to promulgate standards for identifying *matches*.

Respondents also contend that the First Department erred in concluding that the absence of any reference to familial searching in the DNA Statute supported its conclusion that the FDS Amendment exceeded Respondents' authority. They say that reasoning is irrelevant because “[t]here is no reference” in the DNA Statute “to any particular” method for identifying matches. Br. 53. This too is incorrect: in delegating to Respondents the authority to develop standards for identifying matches, Respondents necessarily delegated the authority to determine whether an exact match exists. What the Legislature did not do was delegate the additional authority to search for familial relationships only after the absence of an exact or partial match is confirmed.

5. The Existence of the Partial Match Regulations Does Not Authorize The FDS Amendment

With the DNA Statute's provisions against them, Respondents lean on their enactment of the Partial Match Regulations in 2010—essentially arguing that their own prior regulations conferred the legislative authority needed to enact the FDS Amendment. Br. 55 (asserting that because the FDS Amendment “reflects, at most,

a modest expansion of the 2010 partial match rule" it is authorized). Respondents' reasoning fails.

As an initial matter, Respondents are wrong to suggest that the FDS Amendment is merely a modest expansion of the Partial Match Regulations: the differences between those regulations and the FDS Amendment are stark.

The Partial Match Regulations apply where—in an intentional search for an exact match between a forensic DNA record and the DNA record of a Databanked Individual—the searching apparatus inadvertently reveals a partial match. *See* 9 N.Y.C.R.R. § 6192.1(q) (partial match is an "indirect association" resulting from "the CODIS candidate match confirmation process," i.e., the routine process that compares a forensic DNA record with the Databank's DNA records); § 6192.3(f)-(g).

These "indirect association[s]" or partial matches can arise because samples of forensic DNA collected from a crime scene may be partially degraded, or may contain mixtures of DNA, hampering the ability to identify a full match to any of the Databank's DNA records. *See* 9 N.Y.C.R.R. § 6192.3(c). The Commission allows forensic DNA laboratories to conduct additional testing to confirm whether an apparent "indirect" hit is in fact an exact match obscured due to the poor quality of the forensic DNA sample, or if it instead reflects a potential biological relationship

between the individual to whom the forensic DNA belonged, and a Databanked Individual. *Id.*

Because the partial matches are "inadvertently obtained"—i.e., they arise from forensic laboratories executing Respondents' delegated "standards for a determination of a match between the DNA records" in the Databank—Respondents in 2010 authorized the disclosure of this information to law enforcement in enacting the Partial Match Regulations. *See* 32 N.Y. Reg. at 5.

A familial search, by contrast, is not borne out of the search for a match. A familial search is an additional search conducted *only* when "[w]hen there is ***not a match or a partial match*** to a sample in the DNA databank." 9 N.Y.C.R.R. § 6192.3(h) (emphasis added). That search is performed using a new software that is not used in searching for an exact match (the "Denver Familial Search Software" as selected by Respondents) which generates a list of Databank candidates who are potentially related to the source of the forensic DNA. R.843, 855. That list is then winnowed based on "kinship threshold value(s)" that are "approved by the DNA subcommittee and commission." § 6192.3(j)(1)-(2). A familial search thus reflects a deliberate choice to set rules to determine whether the source of the forensic DNA may be biologically related (with the Commission deciding how closely related they should be) to a Databanked Individual—a choice that is absent in searching for an exact match, from which partial matches arise.

In other words, partial matches and familial searches are conducted for different purposes. The result of a partial match flows from the intent to identify to identify a Databanked Individual as the source of the forensic DNA (an exact match)—but where this effort is complicated by a poor forensic sample. A familial search is only conducted ***after*** it has been determined that the forensic DNA sample does not belong to a Databanked Individual (i.e., ***after*** it is confirmed that no match or partial match exists).

This choice the FDS Amendment embodies—to look ***again*** at the Databank, after no exact or partial hit is identified, and in order to broaden the pool of potential suspects to family members of Databanked Individuals—reflects a host of policy determinations that do not arise in the search for an exact match, nor the decision to disclose the results of a partial match, reflected in the Partial Match Regulations: What kind of crimes and circumstances justify intentionally searching a Databank to identify as targets the family members of a convicted offender who themselves have never been convicted of a crime? What kinds of familial relationships should be included in that net? What level of judicial or other oversight should apply to a request to initiate that process?

The First Department's conclusion that the FDS Amendment "vastly expanded the use of the databank" beyond the statute's bounds was correct. R.984. Respondents made multiple policy determinations for the FDS Amendment that are

different in kind and degree than those reflected in the Partial Match Regulations. *Infra* at 46-47. Regardless, even if the FDS Amendment reflects only a "modest" expansion of the partial match program, as Respondents contend, the expansion still pushes Respondents' actions outside the scope of their delegated authority, crossing the line into the Legislature's domain. Br. 55.

B. The *Boreali* Factors Confirm That The FDS Amendment Violates The Separation Of Powers

Respondents' new position that *Boreali* does not apply is not surprising: the four *Boreali* factors, properly applied as a whole, inexorably compel the conclusion that Respondents acted outside the scope of their delegated authority, and impermissibly intruded into the Legislature's policy-making domain, when they enacted the FDS Amendment.

1. Factor I: In Promulgating The FDS Amendment, Respondents Made Legislative Policy Decisions

The first *Boreali* factor looks to whether, in promulgating a regulation, the agency made "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." *N.Y.C. C.L.A.S.H. v. New York State Office of Parks*, 27 N.Y.3d, 174, 179–180 (2016) (citations omitted). Regulations that embody "a distinct value judgment" that is "not clearly connected to the objectives outlined by the legislature" are the unlawful product of a usurpation of legislative authority. *Shah*, 32 N.Y.3d at 268–69.

In *Shah*, the relevant Public Health Law authorized the Department of Health ("DOH") to "regulate the financial assistance granted by the state in connection with all public health activities," and to "receive and expend funds made available for public health purposes pursuant to law." 32 N.Y.3d at 262 (quoting Pub. Health Law § 201(1)(o)-(p)). The DOH's "soft cap" regulations restricted "the total amount or percentage of funding a covered provider use[d] on administrative expenses or executive compensation"—"regardless of the funding source." *Id.* at 268. This Court found the "soft cap" regulations thus "impose[d] a restriction on management of the health care industry" that advanced a policy of limited executive compensation, and was "not sufficiently tethered to the enabling legislation identified by DOH." *Id.*

Similarly, in *Boreali*, the Public Health Council implemented anti-smoking regulations that reflected the "balance . . . between safeguarding citizens from involuntary exposure to secondhand smoke on the one hand, and minimizing governmental intrusion into the affairs of its citizens on the other." 71 N.Y.2d at 12. Because the agency had "built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it was acting solely on its own ideas of sound public policy and was therefore operating outside of its proper sphere of authority." *Id.*

Finally, in *Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*, the City Board of Health's regulations restricting restaurants from selling sugary drinks reflected a choice "between ends, including public health, the economic consequences associated with restricting profits by beverage companies and vendors, tax implications for small business owners, and personal autonomy with respect to the choices of New York City residents concerning what they consume." 23 N.Y.3d 681, 698 (2014). Thus, "[b]y choosing between public policy ends in these ways, the Board of Health engaged in law-making beyond its regulatory authority." *Id.* at 699.

Here, the decision to implement a familial search regime, and the attendant decisions about when and how familial searching should be used, reflect the quintessential "choice[s] between competing public policy interests" that doomed the regulations in the above cases, and that constitute "law-making beyond [Respondents'] regulatory authority." *Shah*, 32 N.Y.3d at 269 (first); *Hispanic Chambers of Comm.*, 23 N.Y.3d at 699 (second).

a. Expanding The Use of the Databank To Intentionally Target Family Members Of Convicted Offenders Is An Inherently Legislative Function

Authorizing familial searching was a social policy decision. It required Respondents to resolve "matters of social or public policy reserved to legislative bodies . . . under the guise of regulation," in violation of separation of powers. *Shah*,

32 N.Y.3d at 269. Thus, in authorizing familial searching, Respondents made the core value judgments underlying the expansion of the uses of the Databank to intentionally target the family members of convicted offenders—i.e., that society's interest in solving crimes outweighs the genetic privacy interests of New Yorkers who have never been convicted of a crime, and who were never intended to be targeted through the Databank, or that it is acceptable and wise to create yet another criminal-enforcement tool that disproportionately targets and impacts New Yorkers of color.

Respondents were never delegated the authority to develop any new uses of the Databank, regardless of whether they serve a law enforcement-related purpose. Nor were they delegated the authority to make any of the foregoing social policy decisions.

b. The FDS Amendment Reflects Numerous Subsidiary Policy Decisions Reserved For The Legislature

Nearly every component of the FDS Amendment's implementation of the challenged familial search regime also reflects a policy determination that Respondents lacked authority to make, including the following:

1. The determination that a familial search can only be requested after it has been concluded that "there is not a match or a partial match to a sample in the DNA [Databank]." 9 N.Y.C.R.R. § 6192.3(h).

2. The determination that the law enforcement interest in familial searching outweighs the policy costs of such searches for certain crimes, which the Commission itself defines, or for any crime "presenting a significant public safety threat." *Id.* § 6192.3(h)(1), (3).
3. The determination that law enforcement should be permitted to use familial searching, despite the concomitant intrusion on privacy interests, as long as "reasonable investigative efforts have been taken in the case" or "exigent circumstances exist." *Id.* § 6192.3(h)(2).
4. The determination that Respondents should be able to choose the degree of biological relatedness at which law enforcement interests outweigh New Yorkers' interest in the privacy of "unknown family relationships" and in the other intrusions of familial searching. *See id.* §§ 6192.3(j)(2), (k)(1), (k)(2)(ii).
5. What mechanisms for police oversight, objections, and notifications are appropriate to protect the privacy interests of New Yorkers. *See, e.g.*, *id.* §§ 6192.3 (h)(2), (i), (k)(2)(ii).
6. That judicial review is not needed to protect New Yorkers' privacy rights or ensure that the criteria for a familial DNA search have been met prior to the authorization of a search. *See id.* § 6192.3(i)(2), (j).

7. When law enforcement's interest in familial searching justifies the disproportionate burden that such searches place on Black and Hispanic New Yorkers, including the potential for disproportionately increased encounters with the police. *See id.* § 6192.3(i)(2), (j).

The First Department correctly held that resolving these issues is a task reserved for the Legislature, and that Respondents made those decisions in enacting the FDS Amendment. R.982-983.

c. Respondents' Incomplete Attempt To Disclaim That The FDS Amendment Reflects Social Policy Balancing Fails

Respondents selectively address only a handful of the above policy determinations, arguing they are not determinations of improper policy, but rather a permissible "attempt[] to balance costs and benefits" in accordance with preexisting guidelines. Br. 64. These arguments miss the mark.

Specific Crimes and Circumstances. Respondents primarily focus on their choice to limit familial searching to specific crimes (involving murder, sexual assault, arson, terrorism), and crimes involving a "significant public safety threat." 9 N.Y.C.R.R. § 6192.3(h). According to Respondents, those choices did not involve social policy balancing, and instead resulted from the fact that (i) the specified crimes are those more likely to have associated physical biological evidence that can

be used for familial searching and (ii) reflect Respondents' allocation of resources as to where further investigation is most warranted. Br. 62.

Respondents' arguments are belied by the record and common sense. In deciding that familial searching would be justified only for the crimes they specified, Respondents necessarily decided that these were the crimes that warranted subjecting biological relatives of convicted offenders to enhanced police scrutiny. Respondents decided that the balance of these interests tipped from one side to the other for these crimes, including "a crime presenting a significant public safety threat"—itself a determination Respondents chose to assign to the Commissioner——and regardless of whether limiting familial searching to those crimes also made economic sense to Respondents. 9 N.Y.C.R.R. § 6192.3(h)(1), (3). Respondents even addressed public comments about the *privacy risks* created by their then-proposed FDS Amendment by emphasizing that it would only be used in connection with more serious crimes. *See also* R.246 (asserting "[t]he legal and policy implications associated with the familial search policy were discussed by the Commission at several open meetings"). Respondents' choice about what crimes would justify the use of a familial search tool was a legislative, social policy decision.

Relatedly, Respondents say nothing about their choice to define the social need that would justify a familial search in a particular case as one after which "reasonable investigative efforts have been taken in the case," or "exigent

circumstances exist"—a determination they again allocated to the Commissioner. 9 N.Y.C.R.R. § 6192.3(h)(2). This choice too was a matter of legislative policy.

Disparate Impact. Respondents argue the First Department erred in finding that the FDS Amendment reflects a policy judgment insofar as it disproportionately exposes people of color to an increased risk of investigation. R.975-76. Respondents stress that the process of actually comparing forensic DNA obtained from a crime scene with the DNA records in the Databank, for the purpose of identifying familial relationships, is completed without regard to (or without knowledge of) race.[5] Br. 34-35. That the mechanics of executing the DNA comparison involved in a familial search do not reveal race, however, is beside the point.

What matters is that the Databanked Individuals are disproportionately New Yorkers of color (which Respondents do not dispute)—and thus, the investigation targets resulting from familial searches (the biological relatives of Databanked

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[5] Specifically, Respondents argue that since the STR loci used to create a DNA record are not known to be within DNA regions that code for physical traits relating to race, familial searching cannot disparately affect persons of color. Br. 34-35. But as explained below, the disparate impact is not because of what STR loci do biologically, but because of the rules that determine which individuals are forced to have their DNA information included in the Databank in the first place. Moreover, because familial searching software uses genetic relatedness to identify hits, the Databanked Individuals' close biological relatives that can be identified through familial searching will, like the Databanked Individuals themselves, disproportionately be people of color.

Individuals) will also disproportionately include New Yorkers of color. *See* R.323–24 ("[S]ocial groups [that] both share genetic relationships and are over-represented in the database would experience a disproportionate increase in genetic surveillance if familial searching were routinely implemented."). The First Department correctly recognized that the decision that any perceived benefits to law enforcement of having a greater ability to identify the family members of convicted offenders (who have not been convicted of crimes) outweighed the disproportionate impact on persons of color "[i]s a matter of social policy." R.983.

Respondents also say that, to the extent the FDS Amendment disparately impacts persons of color because those individuals are overrepresented in the Databank, that is simply a function of "the Legislature's choice about which crimes warrant taking a DNA sample for the Databank." Br. 64 (citing Exec. Law § 995-c(3)(a)). But "it is no secret that people of color are disproportionate victims of [police] scrutiny." *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting); *United States v. Curry*, 965 F.3d 313, 345 (4th Cir. 2020) (Thacker, J., concurring) ("[H]istorical crime data . . . can be infected with years of racial bias."). And Respondents' self-professed blindness to these social policy concerns in expanding the uses of the Databank is disingenuous considering they purported to address these very concerns (albeit inadequately) before promulgating the final FDS Amendment. *See* R.244-45. If anything, Respondents' position that the FDS

Amendment does not entail any social policy balancing related to police scrutiny of persons of color demonstrates just how ill-equipped they are to make determinations about the uses of the Databank in the first place.

Judicial Review. Finally, Respondents argue the First Department erred in finding they engaged in policy balancing by deciding that judicial review would not be required for familial search applications. Br. 65-66. Respondents say no policy balancing was involved in that determination because "the DNA Databank does not contain any requirement of judicial supervision for DNA testing[.]" *Id*.

This is a non-sequitur. The ***testing of physical samples*** of DNA taken from a crime scene is clearly distinct from the methods of ***searching the DNA records*** contained in the Databank. *Supra* at 34-37. Petitioners do not dispute that Respondents were authorized to regulate the testing and analysis of physical DNA samples without judicial oversight of that obviously scientific and technical process. But the decision to vest in the Commissioner the final authority to determine when and how a ***search of the DNA records*** in the Databank—for the sole purpose of identifying family members ***outside*** the Databank—can be conducted represents a policy determination as to how to balance the relative powers and interests of the three branches of government.

Kinship Thresholds. As the First Department correctly recognized, the FDS Amendment also reflects Respondents' choice to arrogate to themselves the

authority to determine what threshold of biological relatedness should be used to determine when a familial search result is worthy of disclosure to law enforcement as a potential familial relationship. R.982-83; 9 N.Y.C.R.R. § 6192.3(j)(2), (k)(2)-(3) (state police crime laboratory will conduct a familial search to generate a candidate list of Databank profiles "based on established kinship threshold value(s) approved by the DNA subcommittee and commission").

In other words, Respondents decided that they would determine how large a population of potential "relatives" resulting from a familial search should be disclosed to law enforcement as targets for further investigation. This is yet again a legislative value judgment about when law enforcement's interest in obtaining additional targets for investigation of a crime trumps the privacy interests of biological relatives of Databanked Individuals.

Other Predicate Policy Decisions. Respondents' decision that they would not require that Databanked Individuals identified through familial searching to be informed that they had been identified or be given a chance to challenge those results—***before*** the police begin to target and investigate their relatives—is another policy decision reflected in the FDS Amendment, and one Respondents do not address. 9 N.Y.C.R.R. § 6192.3(k)(3). Respondents' decision not to provide a neutral arbiter to make final determinations, and not to provide a bulwark against potential police overreach, are again the kind of "difficult, intricate and controversial

issue[] of social policy" that falls within the arena of "policymaking, not rulemaking." *Hispanic Chambers of Comm.*, 23 N.Y.3d at 699.

The welter of the policy decisions above overwhelmingly reflect profound value judgments about the critical balance between the interests of law enforcement and the genetic privacy of innocent New Yorkers. The first *Boreali* factor demonstrates that the FDS Amendment was implemented outside the scope of Respondents' authority.

2. Factor II: Respondents Created Their Own Set Of Rules In Drafting The FDS Amendment Without The Benefit Of Legislative Guidance

The second *Boreali* factor looks to whether the agency "did not merely fill in the details of broad legislation describing the over-all policies to be implemented [but i]nstead wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." *Boreali*, 71 N.Y.2d at 13. Far from merely "fill[ing] in the details" of prior legislation, *id.*, the FDS Amendment created a fundamental departure from the prior permitted uses of the Databank's records with no guidance from the Legislature at all.

Nothing in the DNA Statute can reasonably be construed as legislative guidance to Respondents to develop an entirely new use for the Databank's records, craft an intricate set of rules to govern that use, and put themselves in charge of interpreting those rules. The FDS Amendment requires, for example, that "the

investigating agency and appropriate prosecutor must certify, in the form and manner required by the division," that "(i) reasonable investigative efforts have been taken in the case; or (ii) exigent circumstances exist warranting a familial search." 9 N.Y.C.R.R. § 6192.3(h)(2). None of these requirements (or even terms) appear in the New York DNA Statute. In promulgating the FDS Amendment, Respondents created these standards, which are entirely absent from the legislation (in addition to "establish[ing] kinship threshold value(s)") and gave themselves the power to implement and interpret them. *Id.* § 6192.3(h)(2), (j)(2). More glaring, Respondents provided the Commissioner with unilateral authority to assess compliance with those standards and approve or deny applications for familial searching. *Id.* § 6192.3(i)(2). These decisions are not rooted in any legislative guidance.

Respondents argue that the Legislature provided guidance because it "delegated authority to the Commission over the specific subject at issue here," including "to designate new search methods, and to set standards for determining a match." Br. 66. Respondents cite no statutory provisions in support of this argument. Nor could they. Nothing in the DNA Statute authorized Respondents to "designate new search methods" (let alone new uses) for the Databank, and nothing authorized them to regulate "over the specific subject at issue here," i.e., familial DNA searching. And while the Legislature may have anticipated developments in the science behind collecting and testing forensic DNA samples and comparing them to

DNA records, nothing in the DNA Statute or legislative history suggests the Legislature anticipated Respondents would develop new uses for the Databank's records, including as a tool to investigate individuals whose DNA records were never included in the Databank.

The FDS Amendment's text confirms that it was enacted on a clean slate. The FDS Amendment purports to authorize Respondents to conduct familial searches "when there is not a match or a partial match to a sample in the DNA [D]atabank," 9 N.Y.C.R.R. § 6192.3(h)—whereas the DNA Statute only authorized Respondents to develop standards for searching the Databank to identify such a match. Exec. Law § 995-b(12). But an agency does not "fill in the details" of legislation when it regulates only in the absence of conditions required by the legislation. *Boreali*, 71 N.Y.2d at 12; *Matter of Tze Chun Liao v. NYS Banking Dep't*, 74 N.Y.2d 505, 510 (1989) (annulling state Banking Department's decision to deny a check casher license to a store owner to avoid "destructive competition" because the Legislature had "explicitly enumerated the factors to be considered by the Superintendent for check casher license qualification" and there was "not a word about 'destructive competition.'").

The DNA Statute does not encompass the circumstances under which the FDS Amendment applies. Worse, the circumstances in which the FDS Amendment applies (when there is not a match or partial match) are the ***opposite*** of those

contemplated by the DNA Statute (when there is a match).

Respondents' reliance on *Garcia*, 31 N.Y.3d at 611, is misplaced. In *Garcia*, the Legislature's directive empowered the New York City Board of Health to "add necessary additional provisions to the health code in order to most effectively prevent the spread of communicable diseases," and to "take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination." 31 N.Y.3d at 610-611. That specific delegation plainly authorized the Board to determine which flu vaccines should be required for children attending day care programs, and provided appropriate legislative guidance. *Id.*

Here, the Legislature did not delegate to the Commission the power to promulgate regulations to most effectively solve crime, find potential suspects, or to develop new uses for the DNA information that is collected. Rather, with regard to the Databank's records, the Legislature only empowered the Commission to "[p]romulgate standards for a determination of a match between the DNA records contained in the [DNA Databank] and a DNA record of a person submitted for comparison therewith." Exec. Law. § 995-b(12). The FDS Amendment's familial search regime falls outside that purview and was drafted on a clean slate as a result. The second *Boreali* factor favors Petitioners.

3. Factor III: The Legislature Considered Enacting Laws Permitting Familial Searching But Declined To Do So

The third *Boreali* factor looks to whether the Legislature has considered acting on the subject issue. 71 N.Y.2d at 13. When the "[L]egislature has unsuccessfully tried to reach agreement on the issue, [that] would indicate that the matter is a policy consideration for the elected body to resolve." *N.Y.C. C.L.A.S.H.*, 27 N.Y.3d at 180 (quoting *Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 611–12 (2015)).

Bills permitting familial searching were introduced in the Legislature repeatedly before Respondents acted on their own. *Supra* at 14-15. The First Department held that because the bills were largely never debated in any legislative chamber, this factor did not weigh in Petitioners' favor.[6] R.984-85. But the First Department also correctly held that this factor does not favor Respondents.

Respondents say the First Department erred in concluding that no inferences can be drawn in their favor from the Legislature's inaction, relying on *Acevedo*, 29 N.Y.3d at 225. *Acevedo* is inapposite because the failed bills in that case did not contemplate enacting the same laws reflected in the challenged regulations. 29 N.Y.3d at 202, 224-25. Here, by contrast, the cited bills addressed the precise search

[6] Petitioners respectfully disagree with this conclusion on the ground that the Legislative debate on familial searching underscores that it is an issue of public concern because of the underlying social policy decisions it reflects.

regime created through the FDS Amendment. *See, e.g.*, 2015 N.Y. Assembly Bill A-1515, § 2; 2017 N.Y. Senate Bill S-2956, § 1.

Respondents also contend the Legislature's decision to revise the DNA Statute without abrogating the Partial Match Regulations is additional evidence the Legislature intended to defer to the agency's expertise in designating "new testing methods and match standards." Br. 68-69. Not so. The Partial Match Regulations do not even reflect a new "testing method" or "match standard"—but rather a decision that inadvertent partial matches revealed in the search for an exact match may be disclosed to law enforcement. 32 N.Y. Reg at 5; 9 N.Y.C.R.R. 6192.3(e)-(g).

In any event, it would make little sense to infer that in choosing not to abrogate the Partial Match Regulations the Legislature deferred to Respondents on whether to authorize a familial research regime that would operate "when no[] match or a partial match" exists. 9 N.Y.C.R.R. § 6192.3(h). As Respondents concede, partial matches and familial searches are different. Br. 6, 8, 13-14. The Legislature's inaction in response to the Partial Match Regulations cannot properly be read to infer anything about the Legislature's view of the FDS Amendment. The third factor does not favor Respondents.

4. Factor IV: Respondents Have No Expertise Relevant To The Choices They Needed to Make On Complex Social Policy Issues

Under the fourth *Boreali* factor, a reviewing court considers whether the challenged action required determinations outside the Respondents' area of expertise. *Boreali*, 71 N.Y.2d at 13–14.

Respondents argue this factor favors them because the DNA Subcommittee reviewed extensive scientific research on familial searching, their scientific expertise was purportedly "essential" to the issuance of the rule, and the fourth factor does not otherwise prohibit an agency from making some judgments beyond its core competencies. Br. 70. Respondents ignore that this factor focuses on the degree to which an agency made decisions outside its expertise, *Boreali*, 71 N.Y.2d at 13-14—and that the breadth of social policy decisions Respondents made in enacting the FDS Amendment ***outside*** their core competencies is far greater than the technical decisions Respondents made within those competencies.

As described above, nearly every component of the FDS Amendment reflects a social policy decision. *Supra* at 46-47. Yet the seven members of the DNA Subcommittee, at the time of the FDS Amendment, were predominantly non-New Yorkers whose expertise lie in technical areas such as molecular biology. R.70-71. Petitioners do not dispute that Respondents relied in part on that expertise in implementing those portions of the FDS Amendment that address the scientific

mechanics in conducting a familial search. But the technical provisions of the FDS Amendment are dwarfed by those that reflect the above policy considerations, and it is the abundance of predicate policy determinations that dooms the rule. *Compare* 9 N.Y.C.R.R. § 6192.3(h), (i), (k) (addressing when a familial search may be conducted, the process for applying for such a search, and the conditions to be met before the search results may be disclosed to law enforcement) *with* § 6192.3(j) (addressing the technical steps the laboratory will perform in conducting a familial search). Respondents' technical expertise in biology and genetics is irrelevant to the value judgments reflected in the policy considerations that dominate the FDS Amendment: no amount of technical, scientific expertise can compensate for the Respondents' complete lack of expertise in deciding the thorny social issues they did. The fourth factor thus favors Petitioners.[7]

Considering the four factors together, and regardless of whether fewer than four favor Petitioners, the weight of the *Boreali* analysis compels the conclusion that the circumstances under which the FDS Amendment was promulgated violated separation of powers.

[7] Respondents miscontrue the First Department's analysis of the fourth factor. Br. 69-71. Respondents again overstate the First Department's opinion. The court merely held, correctly, that the skills necessary to decide the social policy questions underlying the decision to authorize familial searching are not technical in nature. R.985.

CONCLUSION

For the foregoing reasons, the decision of the First Department should be affirmed. In the event that this Court reverses the First Department's decision on whether the FDS Amendment violated separation of powers, the case should be remanded to the Appellate Division for resolution of the claim that it was arbitrary and capricious. C.P.L.R. § 5613.

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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