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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF STEVENS,

Respondents,

-against-

NO. 70

NEW YORK STATE DCJS,

Appellants.

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20 Eagle Street  
Albany, New York  
September 14, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUSTICE MICHAEL C. LYNCH  
ASSOCIATE JUSTICE STEPHEN K. LINDLEY

Appearances:

MATTHEW W. GRIECO, ESQ.  
NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL  
Attorney for Appellants  
The Capitol  
Albany, NY 12224

DORAN J. SATANOVE, ESQ.  
GIBSON DUNN  
Attorney for Respondents  
200 Park Avenue  
New York, NY 10166

Amanda M. Oliver  
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar  
2 is Number 70, Matter of Stevens v. New York State DCJS. We  
3 are joined not only by Justice Michael Lynch from the Third  
4 Department but have the pleasure of sitting with our  
5 colleague from the Fourth Department, Justice Stephen  
6 Lindley.

7 MR. GRIECO: May it please the court, Matthew  
8 Grieco, for the appellants.

9 May I please reserve three minutes for rebuttal?

10 CHIEF JUDGE WILSON: Yes.

11 MR. GRIECO: This court should reverse for either  
12 of two reasons. First, petitioners lack standing. Second,  
13 the Commission had statutory authority to approve familial  
14 searching.

15 The First Department erred in holding that a  
16 petitioner with a remote risk of future harm has standing  
17 to challenge a government action that causes any  
18 incremental increase to that risk even if the risk remains  
19 undeniably remote and speculative. That would represent a  
20 significant expansion of standing.

21 This court, in the nurse anesthetist case,  
22 declined to accept an increase in risk as a basis for  
23 standing because more is needed to ensure that a court's  
24 ruling is informed by facts, and is neither abstract nor  
25 advisory.

1 JUDGE TROUTMAN: But in the nurse anesthetist  
2 case, it was about they may lose their job. Here, when the  
3 rule is enacted, a group that was not otherwise in a  
4 databank, are now permitted to be included.

5 MR. GRIECO: Well, they're not at - - - at - - -  
6 no names have been added to the databank. And there's no  
7 way that any familial search could result in the disclosure  
8 of the names of either of the petitioners. The names in  
9 the databank remain the same names that have always been in  
10 the databank.

11 JUDGE TROUTMAN: But it - - - true, that their  
12 names are not in there, but a mechanism is being put in  
13 place wherein their DNA can be developed?

14 MR. GRIECO: I would not agree with that  
15 characterization, Your Honor, because the - - -

16 JUDGE TROUTMAN: So what does the amendment do?

17 MR. GRIECO: What the - - - what the amendment  
18 does is it allows the same technology that's always been  
19 used for other kinds of searching in New York, where you're  
20 comparing a certain number of alleles across the same - - -  
21 it's the same - - - you're looking at the same alleles,  
22 over the same loci, on the - - - on the - - - on the same  
23 part of the DNA - - -

24 JUDGE TROUTMAN: But when the original statute  
25 was created, did it specifically indicate that the familial

1 searches were also part of that process?

2 MR. GRIECO: The - - - the original statute  
3 simply said that the - - - that the responsibility for  
4 determining which methodologies would be used would be  
5 determined by the - - - by the Commission, and that the  
6 Commission is responsible for - - - for promulgating  
7 standard - - -

8 JUDGE TROUTMAN: So you're saying a familial  
9 search is just a methodology; it's not a question of  
10 creating a class that didn't exist?

11 MR. GRIECO: That's exactly right. Yeah. The  
12 Commission is - - - is statutorily responsible to - - - to  
13 determine the methods for drawing statistical inferences  
14 from forensic DNA testing, and to promulgate standards for  
15 the determination of a match in the databank. And the  
16 familial search rule was a proper exercise of these  
17 responsibilities.

18 First of all, Your Honor, the familial search  
19 rule - - -

20 CHIEF JUDGE WILSON: Counsel?

21 MR. GRIECO: - - - is a DNA - - -

22 CHIEF JUDGE WILSON: - - - can I go back - - -  
23 can I go back to the standing for a moment, unless I - - -  
24 are you - - - are you done with standing, or you were  
25 coming - - - you were going to come back to it later?



1 MR. GRIECO: I am happy to talk about it - - -

2 CHIEF JUDGE WILSON: Okay.

3 MR. GRIECO: - - - at this time.

4 CHIEF JUDGE WILSON: So suppose, just for a  
5 moment, that the New York State lottery is cheating people  
6 out of jackpots, right, they're - - - they're underpaying  
7 people in a way that violates the law. Nobody's chance of  
8 winning the lottery, even if they play regularly, is very  
9 great. Does everyone lack standing in that circumstance?

10 MR. GRIECO: I - - - I - - -

11 CHIEF JUDGE WILSON: Suppose I'm somebody who  
12 played every day, but I never win. And my chance is quite  
13 small of winning.

14 MR. GRIECO: Well, in that hypothetical you are  
15 at least playing every day. The - - - the - - - there's  
16 nothing - - - there is - - -

17 CHIEF JUDGE WILSON: Well, suppose I played every  
18 other day. I mean, it seems to me that remoteness is - - -  
19 part of the - - - part of the question about standing is  
20 also, is there a better-situated plaintiff? And I don't  
21 know what the answer to that is here. It seems to me  
22 everybody bears that risk, you don't really have much  
23 control over where - - - whether somebody who shares some  
24 piece of your DNA is going to be apprehended for something.

25 MR. GRIECO: Well, what the - - - what this court

1 has looked at in the past is whether the - - - whether  
2 there's another circumstance in which someone - - - someone  
3 would - - - would suffer an injury. Now, these plaintiffs  
4 have not been injured. And the court has never held that  
5 someone who hasn't actually been affected by a government  
6 action can then challenge that action because of a - - - an  
7 incremental increase to that risk that leaves it as  
8 nevertheless remote.

9 JUDGE TROUTMAN: Are - - - are they the only ones  
10 subject to this risk, the group of persons who have people  
11 within the bank? Are they only ones that are affected by  
12 the amendment?

13 MR. GRIECO: Well, the way that the rule is going  
14 to work is that whenever a familial search is done, the - -  
15 - the offender - - - all - - - all of the offenders whose  
16 names are actually in the databank - - -

17 JUDGE TROUTMAN: Right.

18 MR. GRIECO: - - - are going to - - - are going  
19 to be - - - be ranked and given a likelihood ratio. And  
20 then that - - - any names that exceed the likelihood ratio  
21 are going to be cut off - - -

22 JUDGE TROUTMAN: It's - - - it's their relatives  
23 that are being captured though, correct?

24 MR. GRIECO: But the - - - the relatives are  
25 already in the databank under - - - under the - - - under

1 the express terms of the statute.

2 And I would point out that the reason that  
3 looking for standing - - -

4 JUDGE TROUTMAN: And exactly what are those  
5 express terms?

6 MR. GRIECO: Well, the statute says - - - the  
7 statute says that anyone who is convicted of a misdemeanor  
8 or a felony in the State of New York must provide a sample  
9 to them.

10 JUDGE TROUTMAN: But not the - - - the relatives  
11 who have not been convicted?

12 MR. GRIECO: Right. And their - - - and their  
13 data is still not in the databank. And they - - - and they  
14 are not searched. The - - - it is the crime scene sample  
15 as searched against the - - - the names that are actually  
16 in the databank, and then only names that exceed the - - -  
17 the very high likelihood ratio, and that are then not  
18 excluded by Y-STR testing - - -

19 JUDGE TROUTMAN: But because their relatives are  
20 in the bank, they are - - - their identity is then allowed  
21 to be investigated, correct?

22 MR. GRIECO: Well, their - - - their names could  
23 never be disclosed. All that could happen would be that  
24 the - - - that a - - - a name that is in the databank would  
25 be disclosed, and that would be provided as - - -

1 JUDGE TROUTMAN: Right. It - - - it - - - it  
2 springs forth the - - - it's an investigative tool to  
3 determine who's the actual depositor, albeit not the person  
4 that was originally in the bank.

5 MR. GRIECO: And - - - and the - - - and the  
6 likelihood that - - - that the entire chain of events of a  
7 familial search would play out such that either of these  
8 two petitioners would ever be subject to any sort of police  
9 encounter or investigation as a result of a family search  
10 is too remote to confer standing.

11 JUDGE TROUTMAN: Why do you say that?

12 MR. GRIECO: Because we have - - - they have - -  
13 - they have pleaded no facts to support a - - - an  
14 inference that their names would be likely to result from  
15 any familial search or that they believe that they're under  
16 investigation.

17 JUDGE TROUTMAN: So because they have a relative  
18 that's a felon, it does not increase their likelihood?

19 MR. GRIECO: Well, as - - - as I said at the  
20 outset, the - - - an incremental increase in risk that  
21 nevertheless remains a remote risk has never been  
22 understood to be a basis for standing.

23 JUDGE TROUTMAN: Does it matter that no one else  
24 in the population is included? The other people outside of  
25 the people who are relatives of people in the bank don't



1 suffer that risk.

2 MR. GRIECO: The - - - the - - - the risk of  
3 being - - - the risk of being identified - - - of being  
4 found through an investigation in a - - - out of - - - that  
5 arises out of a - - - a familial search, is - - - is more  
6 likely to happen to someone who has a first degree relative  
7 in the databank. But the - - - the - - - the likelihood  
8 that it's going to happen to either of these two  
9 petitioners is - - - remains remote. And I don't - - -

10 JUSTICE LINDLEY: Counsel? Counsel, could I ask  
11 you this? I will grant you that the chances that Mr.  
12 Stevens or Mr. Joseph of being investigated by the police  
13 as a result of this familial search policy is exceedingly  
14 low. But would you agree that it's higher than for people  
15 who don't have relatives in the databank, like myself, and  
16 also would you agree that nobody else in the world has a  
17 higher risk than these two petitioners of being  
18 investigated by the police? They are at the top floor of  
19 risk even though the risk for them is quite low; would you  
20 agree with that?

21 MR. GRIECO: Well, I - - - I think that there is  
22 going - - - that even with - - - that even among those who  
23 are in - - - who are - - - who have relatives in the  
24 databank, there's - - - the - - - the likelihood is going  
25 to be determined based on individual facts of whether the -

1 - - of whether there's any connection to an individual  
2 crime. Because the - - - in any given familial search that  
3 occurs, what happens is going to be determined not by who  
4 generally is in the databank, but who - - - what is the  
5 crime scene sample that was left at that particular crime.

6 JUSTICE LINDLEY: You're not - - - you're not  
7 contending that to have standing the petitioners need to  
8 actually be investigated? You agree - - - as I read your  
9 brief, you agree that the risk of being followed by the  
10 police or being investigated is enough. You just think the  
11 risk is too small, fair to say?

12 MR. GRIECO: That's - - - that's correct, yes.

13 CHIEF JUDGE WILSON: So there's a First  
14 Department case involving 360,000 people who were subjected  
15 to stop and frisk who were entitled legally to have their  
16 records sealed, they then sued saying their records were  
17 not being properly sealed, and the City imposed a - - - a -  
18 - - a standing defense. And the First Department said,  
19 they don't have to wait until the records are actually  
20 released. They're at sufficient risk.

21 MR. GRIECO: Yeah, that's the Lino case - - -

22 CHIEF JUDGE WILSON: Yeah.

23 MR. GRIECO: - - - that - - - that both of the  
24 courts - - - lower courts in this case relied upon.

25 CHIEF JUDGE WILSON: Yeah. Is that just wrong,

1 that decision?

2 MR. GRIECO: That - - - that decision, at - - -  
3 the court certainly doesn't need to say that decision is  
4 wrong to conclude otherwise in this case because in that  
5 case the petitioners had actually experienced contact with  
6 the police. And there was reason - - - they had an  
7 individualized reason to know that - - - that - - - that -  
8 - -

9 CHIEF JUDGE WILSON: Well, but these - - -

10 MR. GRIECO: - - - that their names were in a  
11 publicly - - -

12 CHIEF JUDGE WILSON: - - - but here - - -

13 MR. GRIECO: - - - available database.

14 CHIEF JUDGE WILSON: - - - but here, the  
15 relatives of the plaintiffs have experienced contact with  
16 the police which is why that's in the database. I mean,  
17 the risk - - - I don't know that the risk of these people  
18 being turned up in a search is particularly less than the  
19 risk of a police record for one of these 360,000 people  
20 being disclosed.

21 MR. GRIECO: Well, in the case of the 360,000  
22 people in Lino, those records were actually publicly  
23 available.

24 Here, we have to remember that we're dealing with  
25 a database that can only be searched after a lengthy



1 application process, can't be searched by the public, can  
2 only be searched by the New York State Police Laboratory,  
3 and would not - - - would not result in a - - - in a public  
4 disclosure, but only - - -

5 JUDGE CANNATARO: Counsel, is this under the  
6 family search - - - the new family search policy or the  
7 prior policy that - - - when - - - when you say - - - when  
8 you say those are the limitations on the process?

9 MR. GRIECO: The - - - the - - - the partial  
10 match rule and the familial search rule, they have certain  
11 similarities. The - - - the - - - in both cases, though,  
12 it's going to be done by the state police. It's not going  
13 to be done by the - - - it's not going to be done by the -  
14 - - the individual law enforcement agency.

15 JUDGE CANNATARO: What are the differences?

16 JUDGE GARCIA: Yeah. What's the difference  
17 between partial search and family relations - - -

18 JUDGE CANNATARO: What happens - - - yeah. Just  
19 one more time. What happens in the family search protocol  
20 that wouldn't have happened under the - - -

21 JUDGE GARCIA: Partial match.

22 JUDGE CANNATARO: - - - partial?

23 MR. GRIECO: So a - - - a - - - a familial search  
24 is a search for a - - - a partial match, as the - - - as  
25 the trial court in this case, at page 15 of the record,

1 correctly explained. And the - - - what happens in a  
2 partial match is that in - - - that - - - that during the  
3 search of a court - - - in the - - - during the course of  
4 the search for a direct match, a partial association is - -  
5 - is detected. And then follow - - - follow-up testing is  
6 done, including the same kind of, you know, Y-STR testing  
7 that would be done in the case of a - - - a - - - a  
8 familial search. And in some circumstances, that can - - -  
9 if it passes the - - - the appropriate threshold, it can be  
10 disclosed.

11 In the case of - - -

12 JUDGE CANNATARO: Could the partial search yield  
13 a potential familial finding? Like, could you do a partial  
14 search, and say we - - - this sample is within one degree  
15 of a relation to a known person in the database?

16 JUDGE GARCIA: Or put another way, could a  
17 partial result that's disclosed yield a relative?

18 MR. GRIECO: Well, yeah, that's - - - that - - -  
19 that is the purpose of a - - - of a partial match, is that  
20 it's - - - it's - it's to look for a - - - a familial  
21 relationship.

22 I would point the court to, specifically, to  
23 pages - - - I would ask the court to look at pages 466 and  
24 467 of the record, which quotes at length from the - - -  
25 the FBI's 2006 CODIS bulletin. It makes clear that there's

1 multiple match stringency levels. And - - - and the  
2 bulletin further explains that partial matches are based on  
3 moderate stringency matches. And again this is - - - this  
4 is from 2006, which is before either the partial match or  
5 the familial search rule had been adopted.

6 And this - - - this also goes to one of our  
7 points on the merits, is that this shows that - - - that  
8 even well back then, that a partial matching and a - - -  
9 and familial searching were understood as a form of  
10 matching. It shows that - - -

11 JUDGE TROUTMAN: Well, Counsel, what about this -  
12 - - it says, as stated in the New York Register, partial  
13 match rule is limited to, quote, "the rare case where a  
14 routine search of DNA databank, results in an inadvertent  
15 near hit that could greatly limit the pool of potential  
16 suspects but did not authorize familial searching which is  
17 intentionally singling out particular individuals and  
18 actively searching their DNA profiles. Particular families  
19 or ethnic groups will not be targeted or singled out."

20 MR. GRIECO: And - - - and - - - and that remains  
21 true for the familial search rule too. In the familial  
22 search rule, you're not targeting any particular - - - any  
23 particular person. And you cannot use - - - the DNA that  
24 is included on databank profiles cannot be used to - - - to  
25 target particular groups. It's - - -

1 JUDGE CANNATARO: So one more time, Counsel, how  
2 is it different?

3 JUDGE TROUTMAN: Exactly.

4 JUDGE CANNATARO: What is different about the  
5 familial search policy?

6 MR. GRIECO: The - - - the - - - the primary  
7 distinction between the familial search rule and partial  
8 matching is that in partial matching it is discovered  
9 during the course of the search for a - - - a - - - a  
10 direct match. In a familial search, you've already done a  
11 direct search. And you've already - - - there's already  
12 been no partial match. And you are using the Denver  
13 software, which is the software that was selected by the  
14 Commission, as - - - to - - - to draw statistical  
15 inferences from - - - from the record - - - from the DNA  
16 record, to - - - to see if there is a - - - if there is  
17 enough of an association to cross the likelihood threshold,  
18 at which point, if it - - - if there is, then the Y-STR  
19 testing is done.

20 JUDGE CANNATARO: And once - - - once - - - let's  
21 - - - let's - - - I just want to fast forward a little bit  
22 because your red light is on. Let's say the familial  
23 search yields a - - - some sort of positive result, do you  
24 disclose the information about the match the same way you  
25 would on a partial search, or is there something - - -

1 because really we're talking about who gets injured and how  
2 they get injured by this.

3 So what are you doing with that information  
4 that's different under the familial search policy than the  
5 partial?

6 MR. GRIECO: So - - - I - - - I think in - - - in  
7 a broad sense, they are - - - in a broad sense, they are  
8 the same. The - - - in - - - in the case of a familial  
9 search rule, there - - - there is the application process  
10 that has to - - - that has to be done first.

11 JUSTICE LINDLEY: Right. Well, look, one - - -  
12 with a familial search, you're intentionally looking for a  
13 non-match, correct?

14 MR. GRIECO: Well, you - - - you're - - -

15 JUSTICE LINDLEY: You are intentionally looking  
16 for a non-match. With a partial match, you're looking for  
17 an exact match, and then you inadvertently come up with,  
18 oh, it's not somebody in the bank; it could be somebody  
19 related.

20 So partial match really is just a disclosure  
21 policy. This is what we found out when we used the DNA of  
22 the bank as we were supposed to. What do we do with this  
23 information? Do we notify local law enforcement?

24 Familial searches, totally different software,  
25 totally different purpose. Again, you're not using the



1 bank as intended; you're looking for non-matches?

2 MR. GRIECO: It - - - a familial search, though,  
3 is a search for a match. And the - - - the - - - the - - -

4 JUSTICE LINDLEY: Well, you - - - you already  
5 know there's not an exact match when you do the familial  
6 search because that's one of the conditions.

7 So you're looking for close enough, somebody's  
8 who related?

9 MR. GRIECO: Yeah. Which is a form of match.  
10 And that's - - - that's how it's understood in the world of  
11 - - - of DNA forensics. And again that - - - this - - -  
12 this is - - - those pages that I cited earlier, from pages  
13 466 and 467 of the record, discuss why - - - why a partial  
14 match and a familial search are both a - - - a form of  
15 match.

16 And we know that it's a match because it - - - it  
17 relies on looking for matching alleles at the same loci  
18 that are used in the context of a - - - of a direct search.

19 JUSTICE LINDLEY: Do you know - - - do your  
20 clients keep any statistics on how well this works, how  
21 effective it is? It looks like in the - - - from the  
22 brief, there were thirty-seven applications, thirty  
23 familial searches, two people were eventually charged. Do  
24 you know how many people were investigated - - - well, how  
25 many names came up in the databank for those thirty

1 searches that were completed, how many people were  
2 investigated that led to those two people being arrested?

3 MR. GRIECO: Well, I do know - - - and - - - and  
4 this is - - - this is not in the record, but since you've  
5 asked the question directly, I will tell you what I know,  
6 is that the - - - that from the thirty - - - the thirty  
7 searches that were completed prior to the Appellate  
8 Division's decision, twenty of those searches did not  
9 result in names being disclosed, and ten resulted in names  
10 being disclosed.

11 JUSTICE LINDLEY: How about people investigated  
12 off of that?

13 MR. GRIECO: I - - - I don't know the answer to  
14 that question, Your Honor.

15 I do, if I may, very briefly, want to address one  
16 more statutory point?

17 CHIEF JUDGE WILSON: Yes.

18 MR. GRIECO: Which is that in addition to what I  
19 - - - what I've said - - - what I said earlier about why a  
20 familial - - - a familial - - - familial search is a search  
21 for a type of match, a familial search - - - the familial  
22 search rule is also a DNA-testing methodology. We know  
23 this because the statute defines DNA-testing methodology to  
24 refer not only to the extraction and analysis of DNA  
25 material, but also to, "the methods" and "the procedures"

1 that are "used to draw statistical inferences from the test  
2 results".

3 And that's what a familial search is. It's a  
4 statistical inference. Specifically, it's an inference,  
5 drawn by the state police laboratory, based on likelihood  
6 ratios determined by the Commission, about the likelihood  
7 that you would observe the - - - the same set of alleles  
8 across these two profiles, based on the proposition that  
9 they are from - - - liken - - - related individuals as  
10 opposed to unrelated individuals.

11 And that - - - that inference is then further  
12 refined through Y-STR testing. So this falls explicitly  
13 within the Commission's job to designate one or more  
14 methodologies for the performance of forensic DNA testing.

15 I would reserve the rest of my time for rebuttal.

16 CHIEF JUDGE WILSON: Thank you.

17 JUDGE TROUTMAN: Counsel, could you start with  
18 the statute and authorization for this type of searching to  
19 be done?

20 MR. SATANOVE: Absolutely, Your Honor.

21 The structure and the substance of the DNA  
22 statute makes clear that respondents here were authorized  
23 to perform a technical oversight and quality control role  
24 over forensic DNA testing in New York, not to answer the  
25 kinds of complex policy questions that they did in enacting

1 the FTS amendment. And we know that by simply looking to  
2 the powers and duties of the Commission and the  
3 subcommittee that are set forth in Section 995-b.

4 The first half of that section, the first six  
5 sections, all pertain to the Commission's mandate to  
6 develop minimum standards and a program of accreditation  
7 for laboratories in the state. And I don't even - - -

8 JUDGE GARCIA: But could they have delegated this  
9 authority to them?

10 MR. SATANOVE: No, Your Honor, I don't think they  
11 could have delegated this authority to them because a  
12 decision to expand the uses of the databank in this way is  
13 a quintessential social policy decision that this  
14 subcommittee - - -

15 JUDGE GARCIA: But that's not a Boreali issue,  
16 right? That's not - - -

17 MR. SATANOVE: Oh, no, it's very much a Boreali  
18 issue. It's - - -

19 JUDGE GARCIA: That point on they could not have  
20 delegated is not a Boreali issue. Boreali is separation of  
21 powers issue saying the agency, the executive branch,  
22 usurped non-delegated authority that belongs to the  
23 legislature.

24 What you're arguing, I think, is a non-delegation  
25 issue, that the legislature itself does not have the power

1 to delegate this authority.

2 MR. SATANOVE: It - - - it's a - - -

3 JUDGE GARCIA: So which is your argument?

4 MR. SATANOVE: No, it's - - - it's - - - it's an  
5 argument in the alternative, Your Honor. It's - - - the  
6 legislature did not delegate the authority to enact  
7 familial searching. That is very clear within the text of  
8 Section 995-b, that these agencies did not have the  
9 authority to do it.

10 And in addition, the - - -

11 JUDGE TROUTMAN: Do you disagree - - -

12 MR. SATANOVE: - - - legislature could not have -  
13 - -

14 JUDGE TROUTMAN: So you've just answered. You  
15 say, they didn't, and they couldn't?

16 MR. SATANOVE: Correct, Your Honor.

17 JUDGE GARCIA: They did it - - - I'm sorry, they  
18 didn't do it, and they couldn't do it? Or they didn't do  
19 it, and they couldn't have - - - or they could have done it  
20 if they wanted to? I'm sorry - - -

21 MR. SATANOVE: Yeah - - - they - - - they - - -

22 JUDGE GARCIA: - - - you got cut off.

23 MR. SATANOVE: - - - they didn't do it. And they  
24 couldn't have done it.

25 JUDGE GARCIA: They could not have done it?

1 MR. SATANOVE: No.

2 CHIEF JUDGE WILSON: Couldn't have done it?

3 MR. SATANOVE: No. And we start - - - we start  
4 with the fact that they didn't do it, right? We start with  
5 the text - - - we start with the text of the statute, and  
6 we see was the decision to authorize this type of regime  
7 that goes so far beyond the technical, administrative  
8 quality control role that these agencies were designated to  
9 regulate over, and ask, okay, where does, within the  
10 statute, does that fit.

11 And I think what the government misses in their  
12 briefing is the critical importance of section b(12). When  
13 it came to the uses of the databank, specifically,  
14 respondents were delegated the authority to promulgate  
15 standards for determining matches, whether the source of  
16 the forensic profile and the source of the DNA record in  
17 the databank, come from the same person.

18 In a familial search - - -

19 CHIEF JUDGE WILSON: It does - - - 995-b(12)  
20 says, "The Commission can promulgate standards for a  
21 determination of a match between the DNA records contained  
22 in the state DNA identification index, and a DNA record of  
23 a person submitted for comparison therewith." It doesn't  
24 purport to - - - to say who that person submitted - - -  
25 whose DNA is submitted for comparison it could be.

1 MR. SATANOVE: Yeah, but we have to focus on the  
2 fact that it's the standards for identifying a match. When  
3 you read b(12), in standards for determining a match, and  
4 when you read b(12) in the context of - - - of b(11) and  
5 b(13), it's clearly talking about the technical,  
6 administrative standards for determining whether or not the  
7 - - - the two profiles that are being tested are a match,  
8 whether they come from the same - - -

9 CHIEF JUDGE WILSON: Right, but - - -

10 MR. SATANOVE: - - - person.

11 CHIEF JUDGE WILSON: - - - b(12) seems to say  
12 that the comparison can be between anybody in the databank  
13 and anybody else whose - - - whose DNA is submitted for  
14 comparison. There's no restriction there.

15 MR. SATANOVE: Yeah, right, right, that's  
16 correct, Your Honor. But the - - - the purpose of - - - of  
17 the comparison is to identify a match. In the - - - in the  
18 FTS amendment, the - - - the text of the FTS amendment says  
19 that when there is not a match or a partial match in the  
20 databank, that is when - - -

21 JUDGE CANNATARO: So what is the significance of  
22 that distinction? Are you saying that if it's not used to  
23 find a perfect match, a hundred percent match, it's somehow  
24 beyond the scope of the authorization?

25 MR. SATANOVE: The - - - the decision to expand

1 the uses of the databank in that way, to look beyond  
2 whether the source of the forensic profile, and the  
3 convicted offender are the same, and to now target, as part  
4 of the investigation, the family members of those  
5 individuals - - -

6 JUDGE SINGAS: But what's your authority for  
7 saying that?

8 MR. SATANOVE: The authority for - - - for saying  
9 what, Your Honor? The - - -

10 JUDGE SINGAS: The Chief Judge read to you what  
11 it said. It could be a match between two people. It had  
12 nothing to do - - - it has nothing to say about familial  
13 DNA. So you're expanding that in your argument, and I'm  
14 just asking what your authority, other - - - other than  
15 your interpretation. Do you have any authority?

16 MR. SATANOVE: So the section b(12), when we're  
17 talking about comparing - - -

18 JUDGE SINGAS: Um-hum.

19 MR. SATANOVE: - - - the forensic DNA, and we're  
20 comparing the records in the databank, and searching for a  
21 match, what b(12) is speaking to is what standards are  
22 going to be set in order to make that comparison.

23 But it was - - - the technical scientific  
24 determinations that are required to decide which genetic  
25 markers are you going to test, what software programs are



1           you going to run to do that comparison, are - - - are - - -  
2           those kind of technical considerations is - - - is what was  
3           delegated to this agency.

4                        But what we've done with familial searching is  
5           we've now authorized a profoundly new use of the databank  
6           that now - - -

7                        CHIEF JUDGE WILSON: Well, what about the  
8           disclosure of partial matches? Was that authorized?

9                        JUDGE CANNATARO: Yeah, wasn't some - - - wasn't  
10          some version of this happening under partial matches?

11                       MR. SATANOVE: Yeah. So there's some fundamental  
12          distinctions here between the partial match program, which  
13          I - - - I think - - -

14                       CHIEF JUDGE WILSON: So let's - - - okay, but  
15          before you get to that for a second, are you - - - is it  
16          your contention that the Commission doesn't have the  
17          authority to disclose partial matches?

18                       MR. SATANOVE: No, Your Honor, we're - - - we're  
19          not - - - we're not - - -

20                       CHIEF JUDGE WILSON: Okay, so - - -

21                       MR. SATANOVE: - - - expressing an opinion on - - -  
22          - on the validity of the partial match regulations on this  
23          appeal here.

24                       CHIEF JUDGE WILSON: Well, I would like you to do  
25          so whether it's - - - you think it's okay or it's not okay.

1           What does the statute allow? It does allow it or it  
2           doesn't allow it?

3                   MR. SATANOVE: The statute does not allow  
4           familial searching.

5                   JUDGE CANNATARO: Partial.

6                   CHIEF JUDGE WILSON: I'm not asking - - -

7                   JUDGE CANNATARO: Partial.

8                   CHIEF JUDGE WILSON: - - - about familial  
9           searching.

10                  JUDGE TROUTMAN: Partial.

11                  CHIEF JUDGE WILSON: Partial. Does the statute  
12           authorize the Commission to disclose partial matches?

13                  MR. SATANOVE: Again, Your Honor, that's not at  
14           issue on - - - on this appeal.

15                  CHIEF JUDGE WILSON: I understand that, but it  
16           affects the issue that is here before us. So if you can't  
17           answer it, you can tell me that.

18                  MR. SATANOVE: I - - - I think - - - I think that  
19           there is a distinct line that's been recognized by ethical  
20           and legal scholars in the - - - in the amicus brief, that -  
21           - - that between partial match and familial searching, that  
22           makes it clear that familial searching is necessarily  
23           outside the line of respondents' authority.

24                  CHIEF JUDGE WILSON: The ethical scholars didn't  
25           create the statute. What does the statute allow?

1 MR. SATANOVE: The statute does not allow  
2 familial searching.

3 CHIEF JUDGE WILSON: Does it allow partial  
4 matches?

5 MR. SATANOVE: The statute permits that - - -  
6 permitted that disclosure of - - - of partial matches - - -

7 CHIEF JUDGE WILSON: The statute authorized the  
8 Commission to permit the disclosure of partial matches?

9 MR. SATANOVE: Again, I mean, we're - - - we  
10 haven't con - - - taken a position on that - - -

11 CHIEF JUDGE WILSON: I under - - -

12 MR. SATANOVE: - - - in this appeal.

13 CHIEF JUDGE WILSON: - - - I would - - - yes, I  
14 know. But it seems to me that that may be determinative of  
15 the question that is before us.

16 MR. SATANOVE: Well - - -

17 CHIEF JUDGE WILSON: And if you don't want to  
18 take a position on it, that's okay. We'll have to find our  
19 way without your taking a position. But I'd encourage you  
20 to take a position.

21 MR. SATANOVE: I - - - I mean, I don't think it  
22 should be determinative. But I - - - I do think that there  
23 are, you know - - - there are reasons why the partial match  
24 regulations can be construed as within the scope of - - -

25 JUDGE TROUTMAN: Well, let me ask you - - -

1 MR. SATANOVE: - - - legislature's authority.

2 JUDGE TROUTMAN: - - - this. Did they auth - - -  
3 did the legislature authorize partial matches?

4 MR. SATANOVE: No. The legislature did not  
5 authorize familial searching either. And - - - and what's  
6 critical here is understanding the distinctions between the  
7 disclosure of a partial match and what the familial search  
8 regime does.

9 CHIEF JUDGE WILSON: Could the legislature have  
10 authorized partial matches?

11 MR. SATANOVE: Are - - - are - - - could the  
12 legislature have authorized the - - - these particular  
13 partial - - - these regulations that were adopted in '22?  
14 Of course, they - - - yep.

15 CHIEF JUDGE WILSON: No, no, that's - - - no, no,  
16 that's familial. Partial?

17 MR. SATANOVE: The - - - the partial - - - right.  
18 The decision to disclose - - -

19 CHIEF JUDGE WILSON: Because didn't you tell  
20 Judge Garcia that the legislature could not have authorized  
21 the Commission to promulgate rules about familial matches?  
22 Maybe I misunderstood.

23 MR. SATANOVE: No, no, that's - - - that's  
24 correct. No, I - - - I think that the legislature could -  
25 - -



1 CHIEF JUDGE WILSON: So my question is - - -

2 MR. SATANOVE: - - - no, I think the legislature  
3 could have permitted the disclosure of - - -

4 CHIEF JUDGE WILSON: The familial, but not  
5 partial? I'm sorry, partial - - -

6 MR. SATANOVE: Other - - -

7 CHIEF JUDGE WILSON: - - - but not familial?

8 MR. SATANOVE: - - - way around, Your Honor.  
9 Yes.

10 CHIEF JUDGE WILSON: Yes.

11 MR. SATANOVE: Yeah. The legislature could have  
12 permitted the disclosure of partial matches as - - - as the  
13 regulations do. But it certainly could not have with  
14 respect to familial searching. And that is because a  
15 partial match is an inadvertent byproduct flowing from the  
16 scientific and technical standards that are applied in  
17 searching for a direct match.

18 It arises fortuitously as a result of the  
19 forensic DNA laboratory searching for whether the source of  
20 the forensic profile and the source of the record in the  
21 databank are the same.

22 JUSTICE LINDLEY: But partial matching is  
23 targeting people in the databank, which is what the  
24 legislature authorized in 1994.

25 MR. SATANOVE: Precisely.

1 JUSTICE LINDLEY: The familial search is  
2 targeting people outside the databank who are innocent and  
3 never committed a crime, who were not in the databank.

4 Your argument seems to be, look, this decision,  
5 on whether to pursue familial DNA searching, was made by  
6 the subcommittee, the DNA subcommittee, that's made up of  
7 seven scientists, six of whom don't even live in New York  
8 State, and your position is an important decision along  
9 those lines, the legislature it's - - - it's policy driven,  
10 it can't be delegated - - - it was either not delegated - -  
11 - it was not foreseen at the time because this - - - this  
12 technology didn't exist, but if it was, it wasn't - - -  
13 there was no intent to delegate to a committee of seven  
14 unelected scientists to make decisions of this import.

15 Is that - - - that's essentially what you're  
16 arguing?

17 MR. SATANOVE: I think - - - yeah. So that's  
18 correct, Your Honor. And I mean, just one clarification on  
19 the partial match, there - - - when you're - - - there - -  
20 - there is no intent behind searching for a partial match.  
21 You're searching for an exact match, and it's just an  
22 inadvertent byproduct that happens in that process.

23 JUDGE GARCIA: The lead that - - - that comes out  
24 of the system that is authorized to be disclosed is not  
25 necessarily a lead, that - - - that says, it's this person

1           - - - it may be this person in the databank, it may be, I  
2           guess, I'm not a hundred percent sure on that. But it may  
3           be someone whose DNA is close to this person in the  
4           databank.

5                     MR. SATANOVE: Right. But the familial search is  
6           a - - - a new - - -

7                     JUDGE GARCIA: I understand that - - -

8                     MR. SATANOVE: Yeah.

9                     JUDGE GARCIA: - - - the targeting or - - - so to  
10          speak. But what I'm asking is the result, the result that  
11          comes out of the databank, on a partial match, that goes to  
12          an investigator, may be the person in the databank, I'm not  
13          entirely sure about that, but it may be a relative?

14                    MR. SATANOVE: Yeah, it could be - - - it could  
15          be a familial relationship, or it could be the result of a  
16          low-quality forensic sample - - -

17                    JUDGE GARCIA: That's what I meant - - -

18                    MR. SATANOVE: - - - and there's steps to - - -

19                    JUDGE GARCIA: - - - that's a better way of  
20          putting it. Yeah.

21                    MR. SATANOVE: Right. And there's steps built  
22          into the regulations to determine which is the case.

23                    JUDGE CANNATARO: Those are basic - - -

24                    JUDGE SINGAS: Do you know how many states have  
25          familial DNA protocols dictated by the legislature versus a

1 committee?

2 MR. SATANOVE: I - - - I don't have an exact  
3 figure on that for you, Your Honor. But I will tell you  
4 that it - - - it is varied. And it - - -

5 JUDGE SINGAS: Well, I can tell you that it's not  
6 many at all. In fact, there are two that outlawed it - - -

7 MR. SATANOVE: Two have banned it, yeah - - -

8 JUDGE SINGAS: - - - right, had banned it. But  
9 other than - - -

10 MR. SATANOVE: Right.

11 JUDGE SINGAS: - - - that, they have given that  
12 authority to the forensic science commissions of scientists  
13 to institute these protocols. So do you think that  
14 suggests that it's a function for the specialists as  
15 opposed to the legislature?

16 MR. SATANOVE: No, Your Honor. And I - - - I  
17 don't think that the statutes that are at issue in other  
18 states, and what they delegated, is - - - is simply not at  
19 issue here. I mean, we're dealing with New York, and what  
20 is the correct - - - you know, the appropriate role of  
21 these agencies in New York, under New York's DNA statute.

22 And what is clear is that the Commission - - - or  
23 that the - - - the legislature would never have envisioned  
24 that this unelected committee of scientists would be making  
25 binding recommendations to the Commission over how to



1 expand the uses of the databank in manners that bring in  
2 the privacy interests of individuals who have never  
3 convicted (sic) crimes. The legislature was very careful  
4 to do - - -

5 JUDGE GARCIA: Counsel, could I ask you a  
6 standing hypothetical just because I think it's fair you  
7 should get one as your adversary got one.

8 So if you have a mugshot book, right, and there  
9 are certain rules about retaining mugshots. And maybe they  
10 expand them, and you can now include other mugshots in this  
11 book. And you're looking through the mugshot book and you  
12 say, you know - - - you can say, wow, it really looks like  
13 the guy. It's not him, but it - - - it - - - that could be  
14 his brother. And cops go out and they knock on the  
15 brother's door.

16 Do the relatives of the people in the mugshot  
17 book have standing to challenge an expansion of that  
18 database?

19 MR. SATANOVE: The - - - the database of - - -

20 JUDGE GARCIA: Of the - - - the book - - -

21 MR. SATANOVE: - - - the booklet - - -

22 JUDGE GARCIA: - - - that has the mugshots in it.

23 MR. SATANOVE: - - - of mugshots. So - - -

24 JUDGE GARCIA: The only reason you came to my  
25 door is because I look like that guy.

1 MR. SATANOVE: Not - - -

2 JUDGE GARCIA: I have a close enough resemblance  
3 that it could be a family member.

4 MR. SATANOVE: Yeah, so I think that there's a  
5 critical distinction between - - - between that  
6 hypothetical that you're positing and the situation we have  
7 here, which is that this regulation is specifically  
8 intended to target those individuals who do - - - the - - -  
9 the intent was - - - the mugshot book, it's - - - it - - -  
10 there is not - - - there is not a specific - - -

11 JUDGE GARCIA: The primary intent of the mugshot  
12 book is to identify someone in that mugshot book as a  
13 perpetrator. But a secondary benefit of that mugshot book  
14 is, hey, it really looks like that person, but I don't  
15 know, could be a relative. You would follow up on that  
16 lead, and the only reason you follow up on that lead is  
17 because I've retained that mugshot.

18 MR. SATANOVE: Right. But, here, the - - - the  
19 petitioners are being singled out of the population by  
20 being subjected to a heightened risk of law enforcement  
21 because they're - - - solely because they are genetically  
22 related - - -

23 JUDGE GARCIA: Solely because I look like you.  
24 You're my brother; I look like you. I'm solely being  
25 targeted because of my family resemblance, family

1 resemblance being the equivalent of DNA resemblance.

2 MR. SATANOVE: Right. But the harm here is that  
3 the stigma and the anxiety and the fear that flow from  
4 being the target of - - - of the increased risk of police  
5 investigation - - -

6 JUDGE GARCIA: Wouldn't you - - - I know my  
7 brother's been arrested. I know his mugshot's in the book.  
8 I look like him.

9 MR. SATANOVE: Again, what the whole - - - the  
10 whole purpose of - - - we're dealing with an Article 78  
11 challenge to - - - to administrative statute. And so  
12 there's a policy here of ensuring that, you know, the  
13 litigants have a concrete stake in the outcome, that  
14 there's no risk - - -

15 JUDGE GARCIA: So my question is, would those  
16 litigants have a concrete stake in that outcome?

17 MR. SATANOVE: So just to make sure I understand  
18 the hypothetical. These are - - - they're litigants who  
19 are family members of individuals who are - - - have photos  
20 in a book?

21 JUDGE GARCIA: They got arrested and convicted.  
22 Under the state statute, you can retain their mugshots and  
23 put them in a book. Maybe that - - - the - - - the  
24 universe of people that qualify for inclusion in the book  
25 has expanded now. And these relatives want to bring a - -

1 - a case saying my relative is in that book, I bear a  
2 family resemblance, and the only reason you're going to  
3 come knocking on my door is because I bear a family  
4 resemblance to that person.

5 MR. SATANOVE: Right. But we're not talking  
6 about whether or not there's - - - there's a - - - a  
7 semblance of, you know, a physical similarity here. This  
8 is people's DNA. This is the DNA of the convicted offender  
9 - - -

10 JUDGE GARCIA: But we're only talking about  
11 standing here, so - - -

12 MR. SATANOVE: Right, right, we're talking about  
13 standing. We're talking about a unique injury that - - -  
14 that - - - that ties to the privacy interest of - - - of  
15 the DNA of individuals - - -

16 JUDGE GARCIA: But the DNA isn't in that. Their  
17 photos aren't in the book. Their DNA isn't in the book. I  
18 think that's kind of been a - - - a misapprehension in  
19 this. Their DNA isn't in this databank, just like their  
20 photos aren't in that book. They're not - - - to get the  
21 DNA of one of these petitioners, you'd have to go through  
22 whatever lawful process you could to get that.

23 MR. SATANOVE: But they are able to be targeted  
24 because of the high similarity of their DNA to their  
25 relatives.

1 JUDGE GARCIA: And that makes that different for  
2 standing purposes than my hypothetical?

3 MR. SATANOVE: I - - - I - - - I think it does  
4 because again, the - - - the notion, when - - - when we're  
5 thinking of standing from Article 78 purposes, and - - -  
6 and the point that, you know, this is not a particularly  
7 heavy bar that ought to be set, the question is, do - - -  
8 is there an injury in fact here? And the fact - - - the  
9 notion that these petitioners, who - - - as it was put  
10 before are, you know, the individuals who are directly  
11 harmed by this regulation because they are first order  
12 relatives of - - - their - - - their brothers are convicted  
13 offenders, makes them - - - if - - - if they don't have  
14 standing, then - - - then there's no one who does.

15 JUDGE CANNATARO: But what's the harm - - -

16 JUDGE SINGAS: What's the injury in fact?

17 JUDGE CANNATARO: - - - that - - - the harm - - -  
18 yeah, the injury is their relation to the people who - - -

19 MR. SATANOVE: No, no - - -

20 JUDGE CANNATARO: - - - are in the database?

21 MR. SATANOVE: - - - it's being subjected to the  
22 peculiar risk of being - - - of being the target of a law  
23 enforcement investigation, and the attendant stigma,  
24 anxiety, and fear that flow from that.

25 JUDGE GARCIA: But why the peculiar - - -

1 JUDGE CANNATARO: What - - - what's peculiar - -  
2 - I'm sorry, Your Honor.

3 What's peculiar about that risk? I mean, we - -  
4 - we - - - we had a hypothetical that involved one means of  
5 law enforcement, or investigation, and this is a different  
6 means of investigation. But what's so unique - - - what -  
7 - - you know, the - - - the purpose of a criminal  
8 investigation is to develop a target of it. And this is -  
9 - - sounds to me like one means of developing a target that  
10 just happens to be related to a group of people who are in  
11 a database.

12 MR. SATANOVE: Well, the means of developing the  
13 target were - - - were not authorized, and so - - - that's  
14 what - - - and that's what's being challenged here. The  
15 question is do these petitioners have standing to challenge  
16 - - -

17 JUDGE GARCIA: But - - -

18 MR. SATANOVE: - - - the regulation that directly  
19 targets them - - -

20 JUDGE GARCIA: - - - you're bootstrapping the  
21 standing argument there. The first thing you have to get  
22 by is standing. So yes, maybe the - - - it's authorized,  
23 maybe it isn't, separate question.

24 But first, what's the standing?

25 MR. SATANOVE: They are being singled out because

1 their DNA is substantially similar to their brothers' who  
2 are convicted offenders in the databank. And being  
3 subjected to an increased risk of law enforcement  
4 interaction solely because of who their brothers are, and  
5 the stigma that is associated - - -

6 JUDGE GARCIA: Actually, they're - - - they're  
7 being singled out for investigation because their DNA is a  
8 close enough match to an unsub, to an unknown specimen;  
9 that's why they're being investigated. They're not being  
10 investigated because of the relationship to the person in  
11 the databank. They're being investigated because of their  
12 relationship to the unknown perpetrator.

13 MR. SATANOVE: I - - - I - - -

14 JUDGE GARCIA: Their DNA relationship.

15 MR. SATANOVE: - - - I don't think that that's  
16 correct under the way the statute operates. They're being  
17 investigated because it was determined that a convicted  
18 offender, their brother, was not the direct source of the  
19 forensic profile but was - - -

20 JUDGE GARCIA: But somebody who was either their  
21 brother or father or son was?

22 MR. SATANOVE: Right. Exactly. And so that - -  
23 - but that decision to - - - to capitalize on the fact that  
24 the biological relatedness between, you know, brothers had  
25 - - - they have more substantially similar DNA - - -

1 JUDGE CANNATARO: Counsel, can you just check  
2 something for me so - - - so I'm sure I understand what's  
3 going on here. When - - - when you bring the DNA sample to  
4 - - - to the database for - - - for testing, you don't know  
5 where that DNA's coming - - - I would think in many or most  
6 instances, you don't know at all where that DNA is coming  
7 from. I mean, it was found at the scene of some crime or  
8 something like that.

9 Then they run the test. And they - - - and the -  
10 - - and they tell you, well, it's not a match for anybody  
11 in our database, but we can tell you that it is a, you  
12 know, a first-degree brother or a first - - - you know, a  
13 sibling of someone, this person, in our database.

14 Is - - - is that a correct characterization of  
15 how the system works? Because I'm trying to understand  
16 when you say that they are targeted by their relationship  
17 to someone who's in the database, how that logically tracks  
18 if when the DNA is brought over, they have no idea where  
19 that DNA is coming from.

20 MR. SATANOVE: So when the DNA is first brought  
21 over, and the first search is run, the intent behind the -  
22 - - that search is to determine whether or not the forensic  
23 sample matches the record in the database.

24 JUDGE CANNATARO: Correct.

25 MR. SATANOVE: Okay. And then only after it's



1 determined that there is not a match, we look at the  
2 databank again.

3 JUDGE CANNATARO: We look for partials and family  
4 and - - -

5 MR. SATANOVE: There's - - - well, I mean, I  
6 wouldn't say we're looking for partial matches, I would say  
7 we're looking for familial relationships - - -

8 JUDGE CANNATARO: Okay.

9 MR. SATANOVE: - - - but we are intentionally  
10 using the databank for a new purpose. And what is the  
11 purpose this time? It's not - - - it's already - - - it's  
12 already been determined that there is - - - that the source  
13 of the forensic profile and the record in the databank are  
14 not the same.

15 JUDGE CANNATARO: Yeah.

16 MR. SATANOVE: The whole purpose is, okay, well,  
17 if there's a familial relationship there, then that will  
18 allow us as law enforcement to have investigative lead to  
19 investigate and target the family members of that convicted  
20 offender.

21 JUSTICE LINDLEY: But we don't know if - - - if  
22 it's positive for the familial searches, no guarantee that  
23 the person who comes up in the databank is actually related  
24 to the source. There could be a number of people from the  
25 databank whose names come up on one familial search,

1 correct?

2 MR. SATANOVE: That - - - that's also possible.

3 JUSTICE LINDLEY: It could be ten, twenty people  
4 come up?

5 MR. SATANOVE: That is also a possibility. And  
6 the regulations contemplate, you know, what to do for the  
7 privacy interests of - - - of individuals in that  
8 situation, which is why our - - - our petitioners are  
9 within the zone of interest.

10 But to go back to, I think, the question about  
11 how are these petitioners targeted because of their DNA,  
12 there is no question here, I don't think the government can  
13 dispute, that there is an increased risk of them now being  
14 subject to a police investigation in the future, and - - -

15 JUDGE SINGAS: Yeah, but where - - - where else  
16 in our jurisprudence is fear and anxiety an injury in fact?

17 MR. SATANOVE: I mean, I think the - - - the  
18 fear, anxiety, and stigma associated with being the subject  
19 of a peculiar risk is - - - I mean, the Bellino case is a  
20 perfect example of that. And I - - - I think that the - -  
21 - the harm, that there's a stigmatic harm, associated with  
22 the fact that the regulation singles out this group of  
23 people from the population to a discrete set of New Yorkers  
24 who have first-order relatives in the databank - - -

25 JUDGE SINGAS: Well, it's a discrete set, who

1           someday there would be an investigation of a crime, right,  
2           that's enumerated in the policy when DNA is recovered from  
3           a scene, that is suitable for testing, all the conditions  
4           set forth such as a reasonable investigation or exigent  
5           circumstances have been presented, there's an application  
6           for familial search, which then has to be approved, and  
7           then which engenders results that meet the required  
8           likelihood ratio and is not thereafter then excluded. All  
9           of that has to happen - - -

10                  MR. SATANOVE: No, it does - - - all - - - all of  
11           that has to happen in order for a - - - a real - - - a  
12           police interaction to occur. But that's not the injury  
13           here. The injury here - - -

14                  JUDGE SINGAS: But that's the injury - - -

15                  MR. SATANOVE: - - - precedes those events.

16                  JUDGE SINGAS: - - - in fact?

17                  MR. SATANOVE: No, the - - - the injury - - -

18                  JUDGE SINGAS: Yes. The injury in fact is what  
19           you just said, the interaction with the police officers.

20                  MR. SATANOVE: No, no, no, no, no, it's not.  
21           It's the risk of that happening.

22                  JUDGE SINGAS: It's the fear - - -

23                  MR. SATANOVE: And the subjects - - -

24                  JUDGE SINGAS: - - - and the anxiety. Then we're  
25           opening up the doors to every - - - there's lots of people

1 who are anxious and fearful of having - - -

2 MR. SATANOVE: No, because none of - - -

3 JUDGE SINGAS: - - - a police encounter.

4 MR. SATANOVE: - - - well - - - no. Because it's  
5 fear and anxiety associated with an encounter because you  
6 are a first-order relative of an individual - - -

7 JUDGE TROUTMAN: Counsel - - -

8 MR. SATANOVE: - - - whose DNA is in the  
9 database.

10 JUDGE TROUTMAN: - - - when - - -

11 JUDGE SINGAS: After this happens, only after all  
12 of these conditions are met. And only after there's a  
13 specimen at a scene of a crime that fits this criteria.

14 MR. SATANOVE: No, but my clients have to live  
15 every day - - -

16 JUDGE TROUTMAN: Counsel - - -

17 MR. SATANOVE: - - - with fear like that.

18 JUDGE TROUTMAN: - - - when does the injury  
19 occur, or when did it occur?

20 MR. SATANOVE: The injury occurred the day the  
21 amendment was enacted.

22 JUDGE TROUTMAN: Thank you.

23 JUSTICE LINDLEY: Could I just clear something  
24 up? The First Department suggested, the majority, that  
25 your clients' risk of being investigated was heightened

1 because of their race. I don't read your argument - - -  
2 your brief to make that argument; is that correct? You do  
3 not suggest that their race heightens their risk of being  
4 investigated as a result of this policy?

5 MR. SATANOVE: So - - - so certainly, their race  
6 is not a - - - a predicate to standing.

7 JUSTICE LINDLEY: Standing - - - it's irrelevant  
8 to standing?

9 MR. SATANOVE: I - - - I mean, I - - - I think  
10 for our particular petitioners, the - - - the fact that  
11 apprehension of police contact is racially disparate, which  
12 is discussed in Professor Roehrka's brief, does you know  
13 further support standing here. But, no, the - - -

14 JUSTICE LINDLEY: That goes to the merits?

15 MR. SATANOVE: - - - their race is not - - -

16 JUSTICE LINDLEY: The fact that more blacks will  
17 be investigated than whites - - -

18 MR. SATANOVE: Right.

19 JUSTICE LINDLEY: - - - goes to the merits, but  
20 not to standing, correct?

21 MR. SATANOVE: No. Again, it's not - - - it's  
22 not necessary to standing here.

23 JUSTICE LINDLEY: But it's not even relevant, and  
24 it's not true?

25 MR. SATANOVE: I mean, I think for our particular

1 petitioners, you know, if you look at Professor  
2 Roehrkasse's brief, there is the - - - you know, the  
3 literature that says that apprehension associated with  
4 police contact does differ by race.

5 But regardless our petitioners here have standing  
6 solely because of their first-degree order relationship to  
7 the convicted offenders, and the fact that the amendment,  
8 on the day it was enacted, singled them out from the  
9 general population of New Yorkers solely for that reason.

10 CHIEF JUDGE WILSON: Thank you, counsel.

11 MR. GRIECO: Five specific points that I want to  
12 - - -

13 CHIEF JUDGE WILSON: Could I start you off for a  
14 - - - with a question that may not matter to anything, but  
15 it sort of bothered me, which is that I take it the  
16 regulations here were developed by the subcommittee and  
17 then sent to the full Commission, as binding  
18 recommendations, and then adopted; is that right?

19 MR. GRIECO: So let me clarify the scope of what  
20 binding recommendations means. The - - - the - - - the  
21 Commission initiated the process of looking into creating a  
22 - - - a familial search rule. There was a - - - the - - -  
23 the immediate proximate reason that they started looking at  
24 this, was there was a letter from the Queens County  
25 district attorney asking the Commission to consider



1 adopting familial searching. And the Commission then made  
2 a referral to the - - - to the DNA subcommittee, and then  
3 the process bounced back and forth between the DNA  
4 subcommittee and the Commission a few times. And it's in  
5 the record, the - - - the Commission meetings at which they  
6 discussed the - - - the subcommittee's - - - the  
7 subcommittee's role.

8 The subcommittee can make - - - it makes binding  
9 recommendations as to the specific statistical standards,  
10 for example, the likelihood ratios, and so forth. But the  
11 decision to - - - to adopt familial searching, broadly  
12 construed, that decision came from the - - - from the  
13 forensic science commission.

14 CHIEF JUDGE WILSON: So the regulations were  
15 developed - - - well, were promulgated by the Commission,  
16 not - - - it wasn't a binding recommendation of the  
17 subcommittee. It was information; is that how you  
18 understand it?

19 MR. GRIECO: There's - - - there's - - - there's  
20 parts of the rule that are binding recommendations from the  
21 DNA subcommittee.

22 CHIEF JUDGE WILSON: Technical pieces?

23 MR. GRIECO: Yes.

24 CHIEF JUDGE WILSON: But how - - - so 995 - - -  
25 the reason I'm asking is 995-b(12), which I've read a

1 couple times, says it's the Commission's duty to promulgate  
2 the standards for a match. And I just want to make sure  
3 that's what happened here, it was the Commission that  
4 promulgated these?

5 MR. GRIECO: Yeah. No - - - and again, the - - -  
6 the likelihood ratios and the nature of the Y-STR testing,  
7 that - - - which are part of those standards, they come in  
8 from the - - - from the subcommittee.

9 CHIEF JUDGE WILSON: But the - - - but the rules  
10 around the - - - the parameters for when a familial search  
11 can be conducted are Commission rules, not subcommittee  
12 rules?

13 MR. GRIECO: That is correct. It is the  
14 Commission - - - it is the Commission that prom - - - that  
15 promulgates the rules.

16 CHIEF JUDGE WILSON: Right.

17 MR. GRIECO: Okay. So the - - -

18 JUSTICE LYNCH: Counsel, can I - - - on that  
19 point, can I just ask you. There's an application process  
20 for a familial search that doesn't exist for the basic  
21 search for a direct match. What would be the reason in  
22 defining the parameters of that application process? Why  
23 is that there for a familial search?

24 MR. GRIECO: It's - - - it's there for - - - for  
25 a number of reasons. Number one, it's there to ensure that



1 - - - that - - - that familial searching is used in the - -  
 2 - the categories of cases for which the rule has - - -  
 3 specifies that it may be used. It also is there to ensure,  
 4 for example, that there are certain requirements as to the  
 5 sample. It has to be a sample. It has to be a sample that  
 6 has to be - - - has to be a specific basis for believing  
 7 that it's associated with the perpetrator - - -

8 JUSTICE LYNCH: There are sample requirements,  
 9 but there are also case-specific requirements. And it  
 10 seems the case-specific requirements are not the stuff of  
 11 science. They're more the stuff of policy.

12 MR. GRIECO: No, there's the stuff of science  
 13 because they - - - they - - - they - - - they - - - they  
 14 pertain to what you need to know about a - - - a - - -  
 15 about a sample to - - - to make sure that it's reliable.

16 And in term - - - and if you're - - - if you're  
 17 referring to a - - - I know my adversary has talked a lot  
 18 about the fact that familial searching is used for certain  
 19 particular crimes. Well, those are the kinds of crimes  
 20 that were - - - that were - - - that were the original - -  
 21 - original purpose of the databank back when the databank  
 22 actually was adopted in - - -

23 JUSTICE LINDLEY: Well, I'll give you another - -  
 24 - I'll give you another example. Part of it also is there  
 25 had to have been a reasonable investigative effort made

1 before the application is made, so who determines that and  
2 - - - and how is that the stuff of a subcommittee, or even  
3 the Commission, as compared to - - - a more of a policy  
4 decision, when you consider the impact of this type of  
5 search?

6 MR. GRIECO: Well, that rule is in place to  
7 ensure that familial searching is used for the cases where  
8 it's going - - - where it's - - - where it's going to be  
9 most useful. Familial searching is a labor intensive  
10 process. It takes - - - it takes a great deal of time to  
11 perform a search. And by ensuring that it is used for  
12 cases in which a - - - other investigative methods have  
13 already failed, it - - - it reserves the case for  
14 particular - - -

15 CHIEF JUDGE WILSON: For - - - for an ordinary -  
16 - - forget familial and - - - and partial match for a  
17 moment. For an ordinary DNA search, the prosecutor sends  
18 you a sample. Do they tell you what it is they're looking  
19 for, or do you just act on the sample without knowing?

20 MR. GRIECO: I'm not sure I understand the  
21 question.

22 CHIEF JUDGE WILSON: Sure. So if I'm a district  
23 attorney, and I'm - - - I'm investigating a crime, and I  
24 take a DNA sample from the crime scene, do I just send it  
25 to you? Are there any restrictions? Do I - - - is there

1 anything I have to explain to you about what it is, or what  
2 I want you to do?

3 MR. GRIECO: There - - - there - - - there are  
4 procedures. These are procedures - - - there - - - there  
5 are - - - there are certain rules that - - - that a sample  
6 has to meet under CODIS. This - - - this would be under  
7 the - - - the - - - the FBI database. They're - - -  
8 they're not set forth in this regulation. But they are a  
9 set of rules specific to - - - to direct searching.

10 I did want to - - -

11 CHIEF JUDGE WILSON: I'm sorry. Well, what kind  
12 - - - are they rules about the quality of the sample or are  
13 they rules about what the - - -

14 MR. GRIECO: Yes, there are.

15 CHIEF JUDGE WILSON: No - - -

16 MR. GRIECO: For example, there - - -

17 CHIEF JUDGE WILSON: Are there rules about - - -

18 MR. GRIECO: - - - have to be a certain number of  
19 - - -

20 CHIEF JUDGE WILSON: Are there rules about the  
21 purpose? Like, do I have to certify that the purpose is  
22 that I'm looking for the DNA of the perpetrator?

23 MR. GRIECO: I - - - I believe so. I - - - I - -  
24 - I am not certain. I'm not - - - I'm not as familiar with  
25 the regular - - - with - - - with the requirements for - -

1 - for CODIS as I am for the - - - the familial search rule.  
2 But there are - - - there are certainly requirements. For  
3 example, that it pertain to - - - that certain core loci  
4 are - - - are available. And that - - -

5 CHIEF JUDGE WILSON: The technical, okay.

6 MR. GRIECO: Technical, yeah.

7 JUSTICE LINDLEY: Counsel, if we go back to  
8 standing real - - - real briefly. Would you agree that if  
9 these two petitioners lack standing, nobody has standing  
10 and this regulation would be beyond judicial review?  
11 That's just a fact, right?

12 MR. GRIECO: I - - - I don't know if that's  
13 necessarily true. We did - - - we - - - there - - - there  
14 - - -

15 JUSTICE LINDLEY: Where else could it be  
16 litigated?

17 MR. GRIECO: Well, the - - - the - - - the  
18 dissenters below - - - dissenters below suggested the  
19 possibility of it being raised by someone who's actually  
20 being prosecuted.

21 JUSTICE LINDLEY: Right. So you would have  
22 standing if you committed a heinous crime and get charged.  
23 But people who are innocent, don't have standing? And - -  
24 - and by the way, the only two people arrested, one of them  
25 did make that argument, and I think you cited the Williams

1 case.

2 MR. GRIECO: Yes.

3 JUSTICE LINDLEY: The Williams case, the court,  
4 Justice Doyle, Monroe County, refused to suppress on this  
5 Stevens ground. So there was no judicial review there. I  
6 don't know what happened in the Bronx case. But as I  
7 understand it, you're saying the only way this will ever  
8 get to court is with a defendant moving to suppress. Well,  
9 they've tried that, and it hasn't worked for lack of  
10 standing.

11 MR. GRIECO: Well, what I would say is that in a  
12 circumstance where someone was actually directly affected  
13 by the rule, that at least there would be an injury. And  
14 the standing inquiry has not been about speculating about  
15 the particular procedures that would be used in another  
16 case for reviewability of the rule.

17 The question is who is the person who's going to  
18 actually have an injury.

19 I did want to quickly address Judge Singas' point  
20 about how familial searching has been adopted in other  
21 states. You are correct that - - - and as far as I'm  
22 aware, and I've researched this pretty extensively, I'm not  
23 aware of any states that have - - - that have adopted  
24 familial searching through legislation.

25 And in fact when I - - - when I researched this,

1 I - - - the only state that has actually done it through a  
2 - - - through formal rulemaking that I'm aware of, that I  
3 found during my search, was the State of New York. In most  
4 states, it has simply been something that has been  
5 implemented under existing guidance.

6 And what the - - - and the - - - the reason that  
7 this has happened, I would submit, is because it is relying  
8 on fundamentally the same kind of science as direct  
9 searching and familial searching. It does use the - - -  
10 the specific Denver software to do a search of the  
11 database.

12 JUSTICE LYNCH: But it does more than that.  
13 There's - - - there's two components for a familial search  
14 that I believe are different than the - - - the basic  
15 search.

16 You've got the software that is approved by the  
17 subcommittee. But you also have the subcommittee  
18 establishing a kinship threshold value. And those are  
19 distinct components, I believe, from the - - - from the - -  
20 - the basic search. And so in a sense, when I - - - when I  
21 look at that, does - - - is it possible, relative to the  
22 family tree of what a - - - what a search would disclose,  
23 is the familial search potentially identifying persons  
24 further into a family tree than a direct match or a partial  
25 match?

1 MR. GRIECO: It is not impossible for a familial  
2 search to re - - - to re - - - to reveal someone who is  
3 beyond being a - - - a first-degree relative. However, as  
4 the - - - as the - - - the guidance put out by the forensic  
5 science commission and the state police makes clear, if a  
6 name is released, the - - - the greatest likelihood is that  
7 it is either - - - that it is a first-degree relative.

8 I - - - I also wanted to address the point from  
9 Judge Garcia that as you point - - - as you - - - as you  
10 correctly pointed out, it - - - the release of a partial  
11 match is - - - is fundamentally similar to what happens  
12 with a result of a - - - of a familial search. And there  
13 is nothing in the statute that makes the intentional versus  
14 inadvertence distinction that my adversary has drawn  
15 relevant to the legality of a search. They are - - - they  
16 are both searches for - - - for a match; one is a search  
17 for a direct match, one is a search for a familial match.

18 And I also wanted to finally address Judge  
19 Garcia's other point about non-delegation, where he asked  
20 the question, could the agency assign this - - - this  
21 decision to - - - to the agency? For - - - it - - - it  
22 can, and did. The statute in this case is narrowly  
23 structured in that it - - - it gives the agency a  
24 particular task. It's not a broad open-ended mandate that  
25 sweeps across an entire area of law, but rather it is

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specifically about the operation of a specific thing, the DNA databank, and how it is to be searched.

And the agency - - - and so there's no - - - there's no non-delegation problem created by interpreting the statute to say that they can, especially when they're relying on the same basic form of science, looking at the same - - - same alleles across the same loci, come up with a slightly different way of searching the databank. There's no non-delegation problem presented by that.

CHIEF JUDGE WILSON: Thank you, Counsel.

MR. GRIECO: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of New York State DCJS v. Matter of Stevens, No. 70 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Agency Name: eScribers  
Address of Agency: 7227 North 16th Street  
Suite 207  
Phoenix, AZ 85020  
Date: September 25, 2023