UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHAKIRA LESLIE; and SHAMILL BURGOS; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

CITY OF NEW YORK; KEECHANT SEWELL, Police Commissioner for the City of New York, in her official capacity; KENNETH COREY, Chief of Department for the New York City Police Department, in his official capacity; JAMES ESSIG, Chief of Detectives for the New York City Police Department, in his official capacity; EMANUEL KATRANAKIS, Deputy Chief in the Forensic Investigations Division of the New York City Police Department, in his official capacity; and DR. JASON GRAHAM, Acting Chief Medical Examiner for the City of New York, in his official capacity,

Defendants.

Case No. 1:22-CV-02305-NRB

BRIEF OF AMICUS CURIAE THE POLICING PROJECT AT NEW YORK UNIVERSITY SCHOOL OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Rene Kathawala
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019-6142
(212) 506-5380
rkathawala@orrick.com

Attorney for Amicus Curiae
The Policing Project at New York University School of Law

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE

The Policing Project at the New York University School of Law is a non-profit organization that promotes just and effective policing through democratic accountability, equity, and community engagement. The Project's Director is the Reporter for the American Law Institute's *Principles of the Law: Policing*.

The Policing Project rarely files amicus briefs. It does so here because this case and Defendants' Motion to Dismiss implicate the Project's core principle: to the greatest extent possible, law enforcement activities must be democratically authorized by legislative bodies. When no such authorization exists, the injury to affected individuals is often, as here, profound.

INTRODUCTION

The scope of the authority of the New York City Police Department (NYPD) and Office of Chief Medical Examiner (OCME) is set by law. Only democratically accountable bodies may expand that authority; the agencies may not do it themselves. This bedrock requirement of constitutional and administrative law—reinforced for centuries by federal and New York state courts—is particularly essential for law enforcement agencies, given the extraordinary power they are granted to use force and coercion, and engage in surveillance.

NYPD and OCME violated this fundamental democratic principle when they overstepped carefully drawn legislative boundaries and unilaterally created a program that surreptitiously captures the DNA of people who have been convicted of no crime and stores those DNA profiles in a "Suspect Index." The plain language of Article 49-B of New York's Executive Law—the only statute Defendants cite as authorizing the Suspect Index—permits agencies to collect and upload DNA records, but *only* records of those *convicted* of felonies and criminal misdemeanors. Mere arrestees and suspects lie beyond the statute's reach. The statutory text, and cases interpreting it, leave no room for local agencies to exceed that authorization. This is the crux of

Plaintiffs' second claim, alleging that the Suspect Index violates Article 49-B. Compl. at 22.

Defendants urge this court not to exercise supplemental jurisdiction over that claim. They assert first that some state trial courts have sanctioned the NYPD/OCME Suspect Index and second that the issue is of such novelty or complexity that the exercise of supplemental jurisdiction is inappropriate.[1] Neither argument is persuasive. State courts repeatedly have explained how Article 49-B comprehensively regulates DNA database practices and prohibits the index at issue here. The issue is one of straightforward statutory interpretation, with clear and recent guidance from the New York Appellate Division.

Reaching the claim of unauthorized conduct is of particular importance, because NYPD/OCME exacerbated their already unlawful and anti-democratic conduct by failing to follow *any* of the required administrative procedures for public notice and comment before creating the Suspect Index. Such disregard of legislative and administrative requirements, which are at the heart democratic decision-making, inexorably leads to the type of federal constitutional violations described in Plaintiffs' Complaint. Those constitutional violations invade fundamental privacy and liberty interests—further highlighting the importance of exercising supplemental jurisdiction over Plaintiffs' authorization claim.

ARGUMENT

New York state courts have long held that "[t]he act of declaring what temporary invasions of the natural rights of liberty and personal immunity are necessary in the exercise of police power for the common welfare of the community *is a solely legislative act*." *Gow v. Bingham*, 57 Misc. 66, 70 (Sup. Ct. Kings Cnty. 1907) (emphasis added). Agencies "are only

[1] Defendants also argue that Plaintiffs' state claim is insufficiently related to their federal claim to create supplemental jurisdiction. Plaintiffs explain why that is false: the state claim shares the same nucleus of fact as the federal constitutional claim. Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opp.") at 20-21.

authorized to prescribe rules and regulations that are consistent with the delegation of authority contained in the enabling legislation." *Matter of Stevens v. New York State Div. of Crim. Just. Servs.*, 206 A.D.3d 88, 102 (1st Dep't 2022) (citing *Matter of LeadingAge N.Y., Inc. v. Shah,* 32 N.Y.3d 249, 259-60 (2018)) (leave automatically granted by Court of Appeals based on two-justice dissent on standing). In this case, Article 49-B comprehensively draws the boundaries for state and local DNA practices. That law only permits the indexing of DNA records of people convicted of crimes in a single state database. It does not authorize the Suspect Index at issue; nor does any other statute or regulation. This court should exercise supplemental jurisdiction to affirm this straightforward application of black letter law.

I. The Court Should Exercise Jurisdiction to Affirm That, Under a Straightforward Application of State Law, There Is No Legislative Authorization for NYPD and OCME's DNA Program.

As New York's Appellate Division recently recognized in a case enforcing the very same state DNA statute at issue here, "[i]t is black letter law that under the separation of powers doctrine, the legislature has responsibility for making critical, primary policy decisions." *Matter of Stevens,* 206 A.D.3d at 102. Indeed, "separation of powers is the bedrock of the system of government adopted" by New York and if any "agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role." *Matter of LeadingAge N.Y., Inc.*, 32 N.Y.3d at 260. Municipal agencies likewise have only the power granted them by the city council or state legislature. *New York Statewide Coal. of Hisp. Chambers of Com. v. NYC Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 693, 695 (2014) ("The City Council is … '*the* legislative body … vested with the legislative power of the city'") (quoting N.Y. CITY CHARTER § 21). And for good reason: "History teaches that a foundation of free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another." *Oneida Cnty. v. Berle,* 49 N.Y.2d 515, 522 (1980); *see also Gow*, 57 Misc. at 70.

When NYPD and OCME created a local DNA index—and even worse, an index that includes DNA profiles of individuals suspected of a crime, not just those convicted—they exceeded their authority under Article 49-B. Article 49-B authorizes only one *state* DNA index. *See* N.Y. Exec. Law § 995-c. And the statute unambiguously sets forth whose DNA profile may be included: "the database includes all DNA information of all persons convicted of a felony or misdemeanor in New York State." *Matter of Stevens*, 206 A.D.3d at 91 (citing N.Y. Exec. Law § 995-c(3), (7) (omitting inapposite statutory exceptions)). Expanding categories of individuals who may be included in the database can be "done *solely through legislative action*." *Id.* (emphasis added). The statute does not authorize local indexes at all, let alone an index that expands the categories of individuals whose DNA profiles may be stored.

In urging this court to deny supplemental jurisdiction over Plaintiffs' claim, Defendants cite New York trial court rulings that permitted use of the NYPD/OCME Suspect Index in criminal cases involving requests for protective orders, *see* Defs.' Mot. to Dismiss ("Mot. to Dismiss") at 2, 19-21. Defendants claim those cases establish that interpreting Article 49-B is a "novel or complex issue of state law" that weighs against exercising supplemental jurisdiction. *Id.* at 2, 20.

Defendants are incorrect. An array of New York trial courts have explained that Article 49-B renders the Suspect Index impermissible. Those cases hold that local DNA indexes that include people not convicted of any crime "run afoul of [the state law] which allows inclusion of a DNA profile into a wide-ranging database only after conviction." *People v. K.M.*, 54 Misc. 2d 825, 830 (Sup. Ct. Bronx Cnty. 2016); *accord People v. Halle*, 57 Misc. 3d 335, 345 (Sup. Ct. Kings Cnty. 2017); *People v. Delgado Macias*, 65 Misc. 3d 1225(A), at *1 (N.Y. Crim. Ct. 2019); *People v. Blank*, 61 Misc. 3d 542, 545 (Sup. Ct. Bronx Cnty. 2018); *People v. Flores*, 61

Misc. 3d 1219(A), at *11 (N.Y. Crim. Ct. 2018). The structure and comprehensive nature of Article 49-B, the courts have explained, show that "the legislature believes that local DNA identification indexes are improper" and there is no basis to hold "that the legislature has implicitly" authorized them. *People v. Rodriguez*, 196 Misc. 2d 217, 230 (Sup. Ct. Kings Cnty. 2003).

The cases Defendants rely on *agree* that "nothing in [the state law] authorizes local public DNA laboratories to 'index' DNA profiles," as OCME has done here. *People v. Belliard*, 70 Misc. 3d 965, 970 (Sup. Ct. N.Y. Cnty. 2020); *accord People v. White*, 60 Misc. 3d 304, 307 (Sup. Ct. Bronx Cnty. 2018). But then the cases mistakenly conclude that such local indexes are permissible because the state law "contains no prohibition against such indexing either." *Belliard*, 70 Misc. 3d at 970.[2]

The logic of Defendants' cases turns black-letter New York administrative law on its head by conflating the question of whether state law affirmatively prohibits (or preempts) local indexes with whether state law gives municipal agencies the power to create them in the first place.[3] Executive agencies only have the powers delegated to them by the legislature. *Matter of LeadingAge N.Y., Inc.*, 32 N.Y.3d at 260. Article 49-B is the *only* source of authority Defendants cite for their Suspect Index.[4] Thus, the relevant question is not whether Article 49-B *prohibits* the Suspect Index. It is instead whether Article 49-B vests NYPD and OCME with authority to

[2] Following intervening appellate caselaw, Justice Marcus repudiated his decision in *White*, finding that Article 49-B does not authorize local indexes. *People v. Fisher*, 71 Misc. 3d 1051, 1056-57 (Sup. Ct. Bronx Cnty. 2021).

[3] As Plaintiffs further explain, not only does Article 49-B fail to authorize the Suspect Index, but also the statute so completely regulates the field of DNA databases that it preempts the index. *See* Opp. at 21-22. That argument is neither "novel or complex." Opp. at 21-22. Through Article 49-B, "[t]he state has created a 'comprehensive and detailed regulatory scheme' with regard to the subject matter" of DNA databases, and "OCME's operations fall firmly within the Executive Law umbrella and 'must yield to that of the State in regulating that field.'" *Samy F. v. Fabrizio*, 176 A.D.3d 44, 51–52 (1st Dep't 2019).

[4] They cannot point to any New York City Council enactment as a source of authority because no enactment exists.

build and maintain it. After all, when an agency is "not delegated the authority to enact certain rules, then it … usurp[s] the authority of the legislative branch by enacting those rules." *Greater N.Y. Taxi Assn. v. N.Y.C. Taxi & Limousine Commn.*, 25 N.Y.3d 600, 609 (2015).

Any doubt on this score was resolved just four months ago by New York's Appellate Division, First Department, in *Matter of Stevens*, 206 A.D.3d at 102. *Stevens* addressed whether a state agency could expand the use of the state DNA database "for familial DNA searches in connection with law enforcement's investigation of crimes." *Id.* at 90. Article 49-B permits an agency to develop standards for searches to determine whether there is a "match" between a DNA sample submitted by law enforcement and a DNA record in the state database. *Id.* But, the *Stevens* court explained, the state law made "no reference to familial DNA matching," *id.* at 104, which involves "deliberate search[es] for a close biological relative of someone in the databank in order to develop a lead to identify a person who may have left forensic DNA at the crime scene," *id.* at 94. Considering the comprehensive and carefully constructed nature of the state's statutory scheme for DNA testing, the court held that the absence of statutory authorization meant that the state agency "acted outside the scope of their authority in promulgating the familial DNA regulations." *Id.* at 107. That was so even though "[t]here is little dispute that familial DNA testing is a useful tool in investigating crimes." *Id.* at 95.

The unassailable logic of *Stevens* confirms that Article 49-B does not authorize the Suspect Index. As in *Stevens*, the law makes "no reference" to local suspect indexes, even though it regulates local DNA laboratories. And just like *Stevens*, no implicit authorization should be read into the statute given how comprehensively and expressly it regulates DNA databases. In fact, the lack of authorization and democratic injury here are more profound than *Stevens* in two ways. First, this case concerns not just a new way of searching an existing database, but the

creation of an entirely new index of people who have been convicted of no crime, contravening the legislature's judgment on whom DNA databases may include. Second, the regulation in *Stevens* was promulgated through formal rulemaking with public comment; yet, as detailed below, *infra* at 7-9, NYPD and OCME followed no such process here.

In light of the bedrock requirement of democratic authorization, especially for invasions of personal privacy rights, reading the silence of Article 49-B to not authorize the Suspect Index is a straightforward matter of statutory construction and a sound application of the *Stevens* rationale. Federal courts confronted with similar issues under federal law have reached the same conclusion. *See, e.g., United States v. U.S. Dist. Court (Keith),* 407 U.S. 297, 306 (1972) (requiring express legislative authorization before allowing the government to conduct warrantless surveillance, where the statute did not expressly authorize or prohibit the practice); *ACLU v. Clapper*, 785 F.3d 787, 812 (2d Cir. 2015) (holding that FISA's authorization to collect "relevant" information on individuals was not sufficient to authorize indiscriminate collection of data on all domestic telephone communications). Just because a handful of New York trial courts departed from bedrock principles and got it wrong is no reason to refuse to exercise supplemental jurisdiction to reach the right conclusion in this case. To hold otherwise would remake the law of supplemental jurisdiction. *See, e.g.*, Charles Alan Wright et al., 13D Fed. Prac. & Proc. § 3567.3 (3d ed. 2019) (explaining that 28 U.S.C. § 1367(c)(1) only allows courts to decline to exercise supplemental jurisdiction where there is actually "something novel or complex about the relevant state law," and not "simply to funnel to state court a claim involving state law").

II. The Lack of Democratic Authorization Is Compounded by NYPD and OCME's Failure to Follow Administrative Procedural Requirements.

Even assuming that Article 49-B empowered local jurisdictions to create their own DNA

index, NYPD and OCME compounded the injury to the democratic process by failing to follow administrative rulemaking requirements before they implemented the Suspect Index.

When a city agency creates new binding rules pursuant to a valid delegation of authority by the legislature, it still must abide by the rulemaking requirements set forth in New York City's Administrative Procedure Act ("CAPA"), which ensure meaningful public notice and input. *See* N.Y. CITY CHARTER Ch. 1, 18, 45, § 1043; *Council of City of New York v. Dep't of Homeless Servs. of City of New York*, 22 N.Y.3d 150, 154 (2013). When a city agency ignores CAPA's requirements, New York courts regularly invalidate the rule. *See, e.g., Council of City of New York*, 22 N.Y.3d at 153; *Lynch v. NYC Civilian Complaint Rev. Bd.*, 183 A.D.3d 512, 518 (1st Dep't 2020); *New York State Rest. Assn. v. NYC Dep't of Health & Mental Hygiene*, 5 Misc. 3d 1009(A), at *4 (Sup. Ct. N.Y. Cnty. 2004). CAPA's requirements include publishing the full text of the proposed rule in the City Record—with a statement of purpose and identification of the authorizing statute permitting the rulemaking—and a notification of where the public may comment on the rule. N.Y. CITY CHARTER § 1043.

As city agencies, NYPD and OCME are subject to these rulemaking requirements. *See* N.Y. CITY CHARTER § 1041, N.Y. CITY CHARTER Ch. 18, § 557. NYPD is no stranger to CAPA's rulemaking process; it has promulgated 23 comprehensive rules into the NYC Rules & Regulations for everything from bicycle seizures to handgun licensing. N.Y. CITY, RULES, TIT. 38 ch. 5, 18. Similarly, the Department of Health and Mental Hygiene—which oversees OCME—has promulgated 34 different rules of its own.

Yet NYPD and OCME both failed to engage in that process when they implemented the Suspect Index—a new binding policy of general applicability and thus a rule under CAPA, N.Y. CITY CHARTER § 1041(5)(a)(i)—despite the immense public impact of that decision. In fact,

Defendants' Motion to Dismiss only confirms that failure. Defendants dedicate pages of their brief to discussing "policy changes concerning the collection and retention of DNA profiles" that they undertook in February 2020. *See* Mot. to Dismiss at 4-9. Yet those changes were made without any public input or formal democratic process.

III. The Court's Exercise of Supplemental Jurisdiction over the Question of Authorization Is Especially Critical Given the Nature of the Rights at Issue.

The lack of democratic authorization is particularly disquieting in this case given the vital nature of the underlying rights that the NYPD/OCME Suspect Index invades—underscoring the need for the exercise of supplemental jurisdiction.

More than a century ago, New York courts confronted a similar question to the one presented in this case: whether to uphold NYPD's practice of photographing, measuring, and fingerprinting criminal suspects who had not yet been convicted, where there was no express legislative authorization for that practice. *See Gow*, 57 Misc. at 66; *Hawkins v. Kuhne*, 153 A.D. 216, 137 (2d Dep't 1912), *aff'd*, 208 N.Y. 555 (1913); *Fidler v. Murphy*, 203 Misc. 51, 53 (Sup. Ct. Onondaga Cnty. 1952). In holding the practice invalid, the courts emphasized the "natural rights" of liberty and privacy that the police practice intruded upon. *Gow*, 57 Misc. at 70. Without express legislative authorization, the court concluded, "[i]t is not conceivable that the lawmaking power, which proceeded so carefully and by express enactments with reference to the cases of persons convicted of crime, should have intended by vague and indefinite provisions . . . to affect the sacred rights of persons presumed to be entirely innocent of any crime." *Id.* at 73.[5]

What was true over 100 years ago remains true today. Nothing about the fundamental principles on which *Gow* rested has changed in the interim. The police here secretly captured

[5] The New York Legislature later expressly authorized the practice at issue in *Gow*. *Thom v. New York Stock Exch.*, 306 F. Supp. 1002, 1008 n.19 (S.D.N.Y. 1969).

Plaintiffs' intimate genetic profiles, and stored them away, all without a whiff of legislative authorization. The requirement of legislative authorization ensures that the enormous power we confer on policing agencies is circumscribed not by the police themselves, but by the people's elected representatives. *See Keith*, 407 U.S. at 306; *Clapper*, 785 F.3d at 812. As the United States Supreme Court explained nearly 140 years ago regarding infringements of fundamental liberty interests, "[i]f it is law, it will be found in our books" and "[i]f it is not to be found there[,] it is not law." *Boyd v. United States*, 116 U.S. 616, 627 (1886).

Finally, it is important to keep in mind the practical consequences of having one's DNA stored in an unregulated law enforcement DNA database. Just ask Lukis Anderson, who spent eight months in jail after paramedics accidently transferred his DNA onto a murder victim they treated hours later, resulting in Anderson's DNA being identified on the deceased victim's fingernails.[6] Or Roy Verret, who spent three years in jail awaiting trial for murder after his DNA was mixed up by a DNA analyst.[7] Any agency that engages in the invasive and fraught practice of DNA collection, analysis, and retention needs clear authorization from the public and their elected representatives, authorization NYPD and OCME utterly lack when it comes to the Suspect Index.

CONCLUSION

For the above reasons, this court should deny Defendants' Motion to Dismiss and exercise supplemental jurisdiction over Plaintiffs' state law claim to affirm the basic democratic norms at stake.

---

[6] Katie Worth, *Framed for Murder by His Own DNA*, The Marshall Project (April 19, 2018), https://www.themarshallproject.org/2018/04/19/framed-for-murder-by-his-own-dna.

[7] Michelle Mark, *A mechanic spent 3 years in jail after being wrongly accused of murder, because a lab mixed up DNA samples from the murder weapon and his washing machine*, Insider (June 26, 2020), https://www.insider.com/louisiana-mechanic-murder-dna-mix-up-2020-6.

Dated: September 2, 2022

Respectfully submitted,

Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, New York 10019
Tel: (212) 506-5100
Fax: (212) 506-5151
Email: rkathawala@orrick.com

Attorneys for *Amicus Curiae*,
The Policing Project at New
York University School of Law

By: */s/ Rene Kathawala*

Rene Kathawala (RK—9584)

Paul Stancil (not admitted)
Reese Oñate (not admitted)
Zoe Russell (not admitted)

cc: All counsel by ECF