SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RECLAIM THE RECORDS, Petitioner,	Index No. 153996/2019
- against -	Hon. Julio Rodriguez III
NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, NEW YORK CITY BUREAU OF VITAL STATISTICS, NEW YORK CITY BOARD OF HEALTH, OXIRIS BARBOT, in her official capacity as New York City Commissioner of Health, GRETCHEN VAN WYE, in her official capacity as New York City Registrar, and STEVEN P. SCHWARTZ, in his official capacity as former New York City Registrar, Respondents.	Motion Seq. # 001

PETITIONER'S SURREPLY MEMORANDUM OF LAW IN FURTHER OPPOSITION TO RESPONDENTS' CROSS-MOTION TO DISMISS, AND IN FURTHER SUPPORT OF ITS PETITION

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Petitioner Reclaim the Records ("RTR") respectfully submits this surreply memorandum of law in further opposition to Respondents' Memorandum of Law in Support of their Cross-Motion to Dismiss the Verified Petition ("Motion"), and in further support of its Petition.[1]

I. THE STATUTE OF LIMITATIONS FOR THE ACCESS RULES COMMENCED ON JANUARY 1, 2019

A. New York Precedent Makes Clear That the Effective Date Commenced the Statute of Limitations in this Action

RTR explained in its Opposition how New York precedent makes clear that the statute of limitations started to run on the effective date of the Access Rules, collectively January 1, 2019. Instead of grappling with precisely on-point cases cited by RTR (Opp. at 4–5), Respondents instead feebly claim that RTR "ignores recent controlling authority," specifically *Walton v. New York State Department of Correctional Services*, 8 N.Y.3d 186 (2007), and *Best Payphones, Inc. v. Department of Information Technology & Telecommunications of the City of New York*, 5 N.Y.3d 30 (2005). (Reply at 3.)[2] First, the notion that RTR somehow "ignored" these purportedly superseding cases is belied by the fact that RTR cited and quoted *Walton* (the more recent of the two cases) in its Opposition. (*See* Opp. at 3–4, 5 n.2.) Indeed, Respondents argue themselves into a knot: they state that RTR ignored *Walton*, yet two paragraphs later argue that RTR put a "misplaced focus" on *Walton*. (Reply at 3.) Further, Petitioners wholly ignore the fact that the Court of Appeals in both *Walton* and *Best Payphones* emphasized that an administrative decision must be able to "inflict injury" before the statute of limitations begins to

[1] This Court held a hearing on Respondents' Motion to Dismiss on November 7, 2019, and at that hearing the Court requested that Respondents file a reply brief and RTR subsequently file a surreply brief in connection with the Motion to Dismiss. All capitalized terms have the same meaning as defined in RTR's Petition.

[2] Respondents state that RTR cited "Albany Supreme Court and Second and Third Departments cases from the 1970s." (Reply at 3.) As clearly cited in RTR's brief, while the Second Department case is from 1974, the Third Department case is from 1990 and the Albany County Supreme Court case is from 1997. (Opp. at 4–5.)

run, precisely what RTR suggests. Here, there can be no doubt that the statute of limitations commenced only upon the effective date of the Second Access Rule, as supported by countless cases from across New York. In any event, to the extent there is any ambiguity, this Court should follow the "well established" principle that "any ambiguity or uncertainty created by a public body 'as to when and whether the determination became—or was intended to be—final and binding' should be resolved against it." *N.Y.S. Rehab. Ass'n v. State Office of Mental Retardation & Developmental Disabilities*, 237 A.D.2d 718, 720 (3d Dep't 1997) (citations omitted); *see also City of N.Y. v. DeCosta*, 289 A.D.2d 144, 144–45 (1st Dep't 2001) ("The ambiguity created by the Board should be resolved against it where, as here, it would otherwise result in petitioner being denied its day in court.").

Respondents do not even attempt to distinguish the cases cited by RTR, which are explicitly on point and completely in line with the rationale described in *Walton* and *Best Payphones*.[3] And despite Respondents' plainly false assertion that RTR's argument is "so unsupported by the law" (Reply at 3), not only were the cases cited in the Opposition precisely on point, but they were also mere examples of the myriad other cases from New York that have also addressed the statute of limitations starting as of the effective date, including:

- *Armstrong v. Centerville Fire Co.*, 83 N.Y.2d 937 (1994), in which the Court of Appeals reviewed an Article 78 proceeding where the petitioner sought to be reinstated as a member of a fire company; petitioner was notified by letter of dismissal on March 21, 1991, to be effective on March 28. *Id.* at 938. The Court of Appeals held: "The four-month period of limitations governing mandamus to review starts to run when the determination becomes final and binding. In this case, that occurred on March 28, 1991, ***the effective date*** of petitioner's expulsion." *Id.* at 939 (emphasis added) (citations omitted).

[3] (*See* Opp. at 4–5 (citing, in order, *Wininger v. Williamson*, 46 A.D.2d 689 (2d Dep't 1974); 6 N.Y. Jur. 2d *Article 78* § 186; *Gen. Bldg. Contractors of N.Y.S., Inc. v N.Y.S. Educ. Dep't*, 175 Misc. 2d 922, 923 (Sup. Ct. Albany Cty. 1997); *Hosp. Ass'n of N.Y.S. v. Axelrod*, 164 A.D.2d 518 (3d Dep't 1990).)

- *New York Carting Co. v. Sexton*, in which the Second Department considered a New York City Department of Sanitation notice indicating a rate increase and ultimately concluded that "the petitioners were aggrieved when the fee increase ***went into effect*** in October 1988. At that point, the impact of the increase on the petitioners could be accurately assessed." 201 A.D.2d 651, 652 (2d Dep't 1994) (emphasis added) (citation omitted).

- *Naftal Assocs. v. Town of Brookhaven*, in which the Second Department concluded that resolutions became final and binding on their effective date and "[u]ntil that time the plaintiffs would have had little incentive to challenge the resolutions, ***as they were of no effect***." 173 A.D.2d 799, 800 (2d Dep't 1991) (emphasis added).

- Several cases from within the First Department, which have addressed the "effective date" issue after *Walton* in the employment context. *See, e.g.*, *Nash v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 82 A.D.3d 470, 470–71 (1st Dep't 2011) ("a petition to challenge the termination of probationary employment must be brought within four months of ***the effective date*** of termination, during which time the termination is deemed to become final and binding" (emphasis added)), *aff'd sub nom. Kahn v. N.Y.C. Dep't of Educ.*, 18 N.Y.3d 457 (2012).[4]

There is nothing in *Walton* and *Best Payphones* to suggest that decades of precedent from across the State were "superseded" by those decisions, as Respondents argue. (Reply at 3.) Meanwhile, Respondents' credibility in connection with their unjustified attack on RTR's statute of limitations argument is further undermined by their failure to disclose the City's own statements about the effective date of the First Access Rule. Specifically, despite Respondents arguing that "Section 207.21 was made final in the City Record on March 19, 2018 and became effective on that date" (Reply at 2), New York City's own rulemaking website states as to Section 207.21: "Effective Date: Wednesday, April 18, 2018."[5]

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[4] *See also Triana v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 47 A.D.3d 554, 557 (1st Dep't 2008) ("The law is well established that a decision to terminate the employment of a probationary teacher is final and binding on the date the termination becomes effective."); *Hart v. N.Y.C. Dep't of Educ.*, No. 100910/13, 2014 WL 125867, at *2 (Sup. Ct. N.Y. Cty. Jan. 6, 2014) ("As an initial matter, there is a four month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. 'The law is well established that a decision to terminate the employment of a probationary [professional] is final and binding on the date the termination becomes effective.'" (alteration in original) (citation omitted)).

[5] *See* Ex. 1, NYC Rules, *Amendment to General Vital Statistics Provisions (Article 207 of the NYC Health Code) Regarding Birth and Death Records*. Compounding that omission, Respondents additionally filed a letter with the

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Next, Respondents assert that the requirement for something to "inflict actual, concrete injury" in order to be "final and binding" is "unsupported by the law." (Reply at 3.) But that standard is stated explicitly in both *Walton* and *Best Payphones*. *See Best Payphones*, 5 N.Y.3d at 34 ("First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury"); *Walton*, 8 N.Y.3d at 194 (quoting *Best Payphones*). By cherry-picking selective quotations from *Walton* and *Best Payphones*, Respondents misstate the rationale in those decisions; assessing the standards raised by each of these decisions makes very clear that Respondents' argument that the statute of limitations for all administrative rules runs four months from enactment is illogical, and entirely irrational in this context.

Specifically, those decisions explain that before any statute of limitations can run, "the agency must have reached a definitive position on the issue that inflicts actual, concrete injury." *Best Payphones*, 5 N.Y.3d at 34. In *Best Payphones*, on which Respondents heavily rely (*see* Reply at 4–5), the "injury" issue was different than here. There, the petitioner was challenging a specific determination of an agency that was made directly against the petitioner, who was obligated to take specific actions within 60 days or else "its phones would be subject to removal from city property and Best would be considered for all purposes a nonholder of a city franchise." *Id.* at 33. Thus, as the Court of Appeals explained, when the petitioner received a letter identifying its obligation to act one way or another within the next 60 days, that letter "left no doubt that the agency had reached a definitive position regarding petitioner's payphones *that inflicted actual, concrete injury* on Best." *Id.* at 34 (emphasis added). There, it was clear that

Court on December 12, 2019, which explained that none of the regulations could have possibly gone into effect on the date they entered the City Record (as Respondents repeatedly argued), because the New York City Charter *requires* thirty days to pass before any regulation may take effect (barring certain narrow exceptions not applicable here). N.Y.C. Charter § 1043(f)(1)(c).

the petitioner had been injured. But in terms of administrative enactments to be effective on a later date, this is not always so clear. Therefore, courts have reasonably applied the effective date to start the clock for the statute of limitations. And there is simple logic to that conclusion: a party is typically "aggrieved" when an enactment goes into effect, *N.Y. Carting Co.*, 201 A.D.2d at 652, before which time a plaintiff "would have had little incentive to challenge the resolutions, as they were of no effect." *Naftal*, 173 A.D.2d at 800.[6]

This matter regards general administrative rulemaking, not directed at a specific individual but rather at the public. And what Respondents have never been able to reconcile is whether anyone here could have been "injured" by the rules – or could have even had standing to challenge the new Access Rules – *before* they came into effect. This difference is important, as there are countless circumstances where – if Respondents' argument prevailed – the subsequent result of statutes of limitations running *before* a rule's effective date would be illogical and unjust. For example, if the Board of Health passed a new regulation on January 1, 2020 that completely restricted access to birth records for newborn children, but the effective date was set to be not until the following January, according to Respondents' argument, the statute of limitations for that new rule would run May 1, 2020. However, during those four months, *no one* would have been inflicted with any injury, as the rule currently in effect would have permitted all new parents to receive a copy of a birth certificate, and the restriction preventing access would not come into place for several months, without the ability to inflict injury on new parents until the effective date. Therefore, Respondents' argument could lead to scenarios where there is a delay in the effective date by more than four months, and during that period *no one*

[6] While there may be circumstances when a party could be harmed by a new regulation *before* it goes into effect, this is not that scenario and Respondents have not challenged that here.

would be able to adequately allege injury. This could even lead to administrative agencies affirmatively enacting new regulations with effective dates that are more than four months in the future to intentionally restrict individuals from challenging new rules, raising concerns of fairness, due process and common sense.

B. The Access Rules Should be Considered Together

The Court of Appeals has explained that if there is an injury, "the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Best Payphones*, 5 N.Y.3d at 34 (citations omitted). In *Best Payphones*, the Court of Appeals explained that such an injury will not be ameliorated where an administrative action "left no doubt that there would be no further administrative action" and that additional steps "would do nothing to change the agency's position or alleviate appellants' injury." *Id.* (citing *Essex Cty. v. Zagata*, 91 N.Y.2d 447, 454 (1998)). As the Court of Appeals explained in *Walton*, "[i]n deciding the point at which petitioner's administrative remedies are exhausted, courts must take a pragmatic approach and, when it is plain that 'resort to an administrative remedy would be futile,' an article 78 proceeding should be held ripe." 8 N.Y.3d at 196 (citation omitted). That being said, "hindsight cannot be used to determine whether administrative steps were futile." *Id.* Thus, in *Walton*, although an agency ultimately declined to review a certain issue that was being challenged, the Court found that before the agency reached its ultimate conclusion, "petitioners could reasonably have believed" that there could be a change and therefore the statute of limitations had not run during that period. *Id.*[7]

[7] *See also N.Y.S. Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991) (notification "injected ambiguity and uncertainty as to when and whether the determination became--or was intended to be--final and binding"); *Mundy v. Nassau Cty. Civil Serv. Comm'n*, 44 N.Y.2d 352, 358 (1978) ("Having created the ambiguity and impression of nonfinality, it was up to the defendant commission to either 'make it clear what was or what was not its [final] determination' or, failing that showing, to abide by reasonable delays which it alone had engendered." (alteration in original) (citation omitted)); *Adirondack Council, Inc. v. Adirondack Park Agency*, 92 A.D.3d 188, 190–91 (3d
(cont'd)

Here, Respondents argue that once the First Access Rule was passed, "no additional administrative action would or could have changed the rule," and therefore the statute of limitations ran. (Reply at 6.) However, Respondents ignore the record, which suggests an ongoing, enmeshed and continual process that was not complete until the Second Access Rule took effect. This is especially highlighted by the Second Board Meeting, on March 13, 2018. (*See* Pet. Ex. 6, 2d Bd. Mt'g Tr.) There, Dr. Bassett, then-Commissioner of Health, stated: "The proposals, both proposals, can be considered jointly." (*Id.* at 32:8-10.) As a result, the questions that followed from the Board towards the Registrar, Steven Schwartz (proponent of the new rules), were completely intertwined between the two Access Rules. For example, the first question was about why 125 years was appropriate for restricting births, a question regarding the first Access Rule (*id.* at 32:11-13); while the next several questions were about step-relations (*id.* at 33:13-17), how many generations to grant access (*id.* at 33:24-34:1), and access for researchers (*id.* 35:1-8), all the second Access Rule; followed by questions about the Model Act (*id.* 37:16-23) and the U.S. Department of Health and Human Services' 50-year time restrictions, back to the first Access Rule (*id.* at 39:2-8).

This notion of an intertwined and ongoing process was perfectly captured by Commissioner Bassett, who stated: "I thought it was appropriate to discuss these together because they are linked. In many ways, the proposal that we are being asked to consider for publication is the response to comments about access, limitations that will develop because of the age limits, the years that are being proposed." (47:25-48:8.) And while the Board proceeded

Dep't 2012) (court had to consider when anticipated harm "may be prevented or significantly ameliorated by further administration action," without which the action would not be ripe, and considering that "the harm anticipated by petitioner may be prevented by further administrative action," the petitioner had "not alleged an actual, concrete injury" and its challenges were therefore not ripe for review).

to only vote on the first rule and allow more public comment to follow on the second rule, another Board member, Dr. Forman, specifically left open the possibility for additional changes to come. In addressing his desire to vote on the First Access Rule, he explained:

> So my response to that would be that even setting a schedule of . . . 75 years after death and 125 years after birth is an improvement from what we currently have, which is there is no schedule. There is absolutely no plan. . . . ***So I would support voting on this today for approval because it is a step forward, and at least that's a bar to move from. People could come back, you could come back, and say, "We've decided it's too long. We want to change it."*** But right now, there's no schedule at all, so this at least sets the schedule. I have confidence in the process of public comment and this Board to then address, in the next three months, the question of expanded access for people who really should have access.

(*Id.* at 53:16-54:14 (emphasis added).) Most telling about Dr. Forman's comments is that he appeared to simply want a transfer rule in place (regardless of the time restriction), because there had been none at all. But the comments also clearly suggest that the Board could change the rule if the protections were deemed too long and burdensome.[8] This clearly highlights that the process was an ongoing evaluation and that the second round of public comments would provide continued insight to the Board to assess the full picture of who should have access to records and when. And at the very least, the Board's discussion injected evident ambiguity regarding whether the First Access Rule's process was actually complete, or whether the next round of comments might bring about further change.

As a result, the statute of limitations for the rules should be considered together because before the Second Access Rule process was carried out, it was reasonable for the public to believe that the First Access Rule could be "significantly ameliorated by further administrative action." *Best Payphones*, 5 N.Y.3d at 34; *see also Axelrod*, 78 N.Y.2d at 166 (notification

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[8] In fact, there was a disagreement among the Board regarding whether they should even vote on the First Access Rule until comments had been received for the subsequent amendment. (*See id.* at 57:1-2 ("I do not want to vote on this without the amendment.").)

"injected ambiguity and uncertainty as to when and whether the determination became--or was intended to be--final and binding"); *Burch v. N.Y.C. Health & Hosps. Corp.*, 987 N.Y.S.2d 348, 349 (1st Dep't 2014) ("[W]here an administrative agency 'create[s][ ] ambiguity and [the] impression of nonfinality,' that ambiguity regarding finality is to be resolved against the agency." (alterations in original) (citation omitted)); *DeCosta*, 289 A.D.2d at 144–45 ("The ambiguity created by the Board should be resolved against it where, as here, it would otherwise result in petitioner being denied its day in court"). The mere fact that changes did not follow despite the outpouring of opposition does not alter this conclusion. *See Walton*, 8 N.Y.3d at 196 ("hindsight cannot be used to determine whether administrative steps were futile"). The end result was the Second Access Rule, which did not go into effect until January 1, 2019. Therefore, the statute of limitations runs from that date for both Access Rules, and this action was a timely challenge to both rules.[9]

II. RTR HAS ADEQUATELY STATED A CLAIM THAT THE BOARD OF HEALTH ACTED *ULTRA VIRES* IN ENACTING THE ACCESS RULES

Respondents ignore the standard for dismissal and do not present any legal support for this Court to disregard countless binding cases from the Court of Appeals that apply the *Boreali* factors to assess claims of improper policymaking.[10] In their Reply, Respondents simply cite a

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[9] Respondents suggest that RTR is seeking a ruling that statutes of limitations for administrative rules should be tolled because of a FOIL denial premised on that previously-enacted rule. (Reply at 5.) That is not what RTR is suggesting; instead, RTR merely suggests that the statute of limitations commences upon the effective date, and it is not arguing that statutes of limitations can be indefinitely tolled based on FOIL challenges years later. Nor is RTR suggesting (as Respondents contend) that the new Access Rules could have only been challenged following a FOIL request. (*Id.*) Separately, while there were regulations in place pre-dating the Second Access Rule, which permitted certain individuals to gain access, the Second Access Rule attempted to broaden access but did so improperly and without any rational basis. Thus, if the Second Access Rule were invalidated, as requested, RTR expects that Respondents would propose a new rule, open it for comments and discussion, and work collaboratively with experts in the field this time to cause a new rational rule to come into effect.

[10] *See, e.g.*, *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 696 (2014) ("Given our position that the Board's role is regulation, not legislation, the next issue raised in this appeal is whether the [New York City Board of Health] properly exercised its regulatory authority in *(cont'd)*

list of regulations; ignore six pages of the Petition that methodically walk through the *Boreali* factors by instead stating that RTR "tack[ed] on a conclusory and unsupported claim"; and assert that the Board of Health has "authority" to act because its powers are "clear and explicitly delegated." (Reply at 8 n.3, 9.) Wholly absent from the Reply, though, is what are the legal standards for limits on an agency's powers. As was made evident in the Opposition, an agency's powers pursuant to a delegation of authority *are not unlimited*. (Opp. at 6–9.) In essence, Respondents concede that a full analysis of this claim would require "giving a detailed recounting of the facts in a Verified Answer," which "could require a lengthy and substantial agency response" (Reply at 8 n.3); instead of appropriately answering the detailed allegations in the Petition, Respondents attempt dismissal, contrary to binding authority and absent legal support.

Respondents argue that "there can be no dispute that the Board acted well within its authority" (Reply at 7) and that the Board did "exactly what was contemplated" by certain Administrative Code provisions, specifically: "set a schedule for the public release of death records and define the scope of a proper purpose for those who wish to access them before they become public." (Reply 9.) This statement, though, is deprived of any facts or legal standard. Respondents' argument essentially implies that *regardless* of what the Board did in connection with setting a schedule and defining a scope, it *must have been* permissible because authority was delegated to the Board by certain regulations. This is not what the law permits. Instead, as explained in the Opposition and wholly ignored by Respondents, the Court of Appeals in *Boreali*

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adopting the Portion Cap Rule. The parties and the lower courts correctly analyze this question by using the conceptual framework of *Boreali*. Because a doctrine of 'separation of powers [is] delineated in the City Charter,' *Boreali* provides the appropriate framework." (alteration in original) (citation omitted)).

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itself found that the State's Board of Health had acted improperly by engaging in policymaking, *even with* a proper delegation of authority. (Opp. at 7–9.)[11] In *Boreali*, the Court of Appeals explained how the Court was required to "inquire whether, assuming the propriety of the Legislature's grant of authority, the agency exceeded the permissible scope of its mandate by using it as a basis for engaging in inherently legislative activity." *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). The Court explained: "Even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives." *Id.* Speaking to the core of the issue here, the Court explained that even though "the precise provision that is at issue in this case . . . has been upheld against a constitutional challenge based upon the 'nondelegation' doctrine," nonetheless:

> This does not mean . . . that the regulations at issue should be deemed valid without further analysis. To the contrary, the courts have previously struck down administrative actions undertaken under otherwise permissible enabling legislation where the challenged action could not have been deemed within that legislation without giving rise to a constitutional separation of powers problem.

Id. at 11. Thus, the Court of Appeals concluded that while New York's Public Health Law contained "a valid delegation of regulatory authority," even so, "it cannot be construed to encompass the policy-making activity at issue here without running afoul of the constitutional separation of powers doctrine." *Id.* at 14; *see also LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260 (2018) ("[I]n promulgating regulations, an agency may rely on a general but comprehensive grant of regulatory authority. To be sure, a broad grant of authority is not a

[11] Respondents additionally allege that "the Petition suggested that the state's Public Health Law prohibited the City from making the Access Rules." (Reply at 9 n.5 (citing Motion at 7 n.2).) They misinterpret the Petition, which instead states that despite New York State having a policy under which "death certificates may be made available in uncertified form to researchers" and "permits disclosure of death records to the public after 50 years," nonetheless "the Board specifically *disregarded* those" for its own rules. (Pet. ¶ 92.) RTR does not state nor contend that New York State does not permit the Board of Health from enacting regulations; it merely highlights that the Board of Health's irrational divergence from the State's policies supports the fact that they engaged in improper policymaking.

license to resolve—under the guise of regulation—matters of social or public policy reserved to legislative bodies." (citation omitted)).

The factual implications of Respondents' argument further highlight their illogical assertion. What if, for example, the Board decided to set the schedule for the public release of death records to 200 years and defined the scope of who may access records for a proper purpose as no one? If that had been the Board's enactment, the Board would still have taken an action that was, according to Respondents, "exactly what was contemplated" by the New York regulations that they cite. That attempt, though, would not pass any test of rationality. An agency's actions cannot simply be rubber-stamped because, as the Court of Appeals makes clear, New York City's Charter "contains no suggestion that the Board of Health has the authority to create laws." *N.Y. Statewide Coal.*, 23 N.Y.3d at 694. This notion of absolute power based on regulatory authority is further belied by cases such as *LeadingAge*, where the Court of Appeals considered *two* regulations that followed the same grant of regulatory authority and found one permissible and one impermissible. *See* 32 N.Y.3d at 254–71 (addressing two regulations enacted pursuant to same executive order and holding that one was valid under *Boreali* and the other was invalid). Thus the notion that grants of legislative authority must lead to validation does not have support.

Ultimately, the dispute over improper policymaking is inherently a factual one, which cannot be dismissed at this stage. The criterion in assessing a motion to dismiss is "whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) (citation omitted). And courts "must accept the facts alleged in the pleading as true and accord the opponent of the motion . . . 'the benefit of every possible favorable inference [to] determine only whether the facts as alleged fit within any cognizable

legal theory.'" *Siegmund Strauss, Inc. v. E. 149th Realty Corp.*, 104 A.D.3d 401, 403 (1st Dep't 2013) (alteration in original) (citation omitted). The Petition clearly states an adequate claim: Respondents ignored 6,000 public comments,[12] did not consider any evidence, did not consult with any experts, and listened only to the person who drafted the rule, all the while regulating on a public policy consideration (data privacy) which was outside the scope of their expertise.[13] To the extent Respondents disagree with those allegations, including by blanketly claiming that the Board "acted well within its authority when it promulgated the Access Rules" (Reply at 7), that is a factual dispute which should not be resolved at the motion to dismiss stage.

Finally, Respondents' citations to two cases that purportedly support their argument to ignore the *Boreali* factors and simply dismiss the case should be given no weight, as neither case even challenged an agency's improper policymaking. Both cases involve the same issue, a FOIL request that was denied because of New York City Charter § 557(g), which specifically states that certain records "shall not be open to public inspection":

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[12] Respondents improperly conflate Petitioner Reclaim the Records with "Petitioner's counsel," arguing "[t]he fact that Petitioner's counsel finds the Board's schedule arbitrary, or believes it doesn't have enough to do with 'health,' doesn't make it a violation of the Board's authority." (Reply at 9.) Respondents seemingly ignore the Petition of Reclaim the Records, which explains that the Board failed to adequately consider the opinions of 6,000 public comments and every person that publicly testified, and which also includes the declarations of four individuals with significant expertise, all of which collectively undermine the bases for passing the Access Rules.

[13] Respondents ignore RTR's argument that the regulations should relate to health concerns. (Reply at 9.) However, that has been a critical consideration in a number of *Boreali* analyses. For example, in *N.Y. Statewide Coalition*, the Court of Appeals explained that the Board of Health's scope of regulatory authority is far from unlimited, and *should* focus on matters of health. The Court explained: "[T]he language in section 558(c) of the Charter—describing the Board's purview as comprising 'all matters and subjects' within the authority of the Department of Health and Mental Hygiene—was included in 1979 to preclude the Board from attempting to regulate areas not related to health. At that time, the City's Committee on Health became concerned that '[r]egulations passed by the Board of Health may be overly broad and so invade the [province] of the City Council's legislative authority.' . . . Far from indicating a wide legislative jurisdiction, as respondents contend, section 558(c) was intended to ensure that the Board of Health not regulate too broadly." 23 N.Y.3d at 694–95 (alterations in original) (citation omitted). Similarly, in *Boreali*, the Court of Appeals criticized the Board of Health's passage of anti-smoking rules in part because "no special expertise or technical competence in the field of health was involved in the development of the antismoking regulations challenged here." *Boreali*, 71 N.Y.2d at 14; *see also Ahmed v. City of N.Y.*, 129 A.D.3d 435, 440 (1st Dep't 2015) ("[N]o expertise in the field of health care services or disability insurance was involved in the development of the rule (indeed, this is not TLC's area of expertise), a fact highlighted by the lack of technical discussion at the hearings on the proposed rule amendments.").

- In *Mitchell v. Borakove*, an individual filed an Article 78 proceeding "for an order directing the Chief Medical Examiner to produce [an] autopsy audiotape and worksheets." 225 A.D.2d 435, 437 (1st Dep't 1996) (Tom, J., concurring). The First Department addressed that there was a conflict between two laws, County Law § 677 and New York City Charter § 557(g), regarding access to the records. Ultimately, the First Department concluded that the Charter applied and barred disclosure, and in that context, the Court discussed the role of the City Charter, noting that there was a "clear indication that the Legislature intended to give the City government the autonomy to regulate the release of autopsy records as it sees fit." *Id.* at 440. The Court was not assessing *ultra vires* rulemaking, and there was no challenge that arose to even provoke *Boreali*. The decision is inapposite.

- In *Borukhova v. City of New York*, 57 Misc. 3d 1224(A), 2017 N.Y. Slip Op. 51676(U) (Sup. Ct. N.Y. Cty. 2017), the same issue again arose, but the petitioner also added an equal protection claim, which the court explained had "been previously challenged" and was rejected (for unrelated reasons to those here). *Id.* at *6. Then, discussing the role of the New York City Charter as being in purported conflict "with the legislative intent behind the Home Rule Amendment to the New York State Constitution," the court explained that the First Department in *Mitchell* "made clear that the legislative body intended to defer to the City Charter the regulation of [medical examiner] records within its jurisdictional bounds." *Id.* This case also did not raise or discuss *ultra vires* rulemaking by an administrative agency.

The argument that this Court should ignore binding precedent from the Court of Appeals in favor of cases addressing irrelevant matters is unavailing. The Petition presents a facially valid claim that the Board engaged in improper policymaking beyond its authority, and this factually-intensive claim should not be dismissed on a frail theory of absolute authority and two inapposite cases.[14]

CONCLUSION

Respondents' motion to dismiss the Petition should be denied, and the Petition should be granted.

[14] Respondents have made no legal challenge to RTR's first cause of action demanding that Respondents comply with FOIL by producing the requested Scans. For the reasons stated in the Petition and the Opposition, RTR's request for disclosure of the Scans should also be granted.

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Respectfully submitted,

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