SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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In the Matter of the Application of
CHARLES HOLDEN and ALBERTO FRIAS on behalf of themselves and all others similarly situated,

Index No.801592/2021E

Petitioners,

ORDER TO SHOW CAUSE

For a Temporary Restraining Order and Preliminary Injunction Pursuant to Articles 6301 and 6313 of the Civil Practice Law and Rules,

- against -

HOWARD A. ZUCKER, as Commissioner of Health for New York State, and ANDREW M. CUOMO, as Governor of the State of New York,

Respondents.
--X

Upon the annexed affirmation, the verified petition and accompanying exhibits filed on February 4, 2021, and upon all the proceedings heretofore had herein, let the Respondents or Respondents' attorneys show cause before me or one of the Judges of this Court, at a Motion Term of the Supreme Court of the City of New York, located at 851 Grand Concourse, in the County of Bronx, City and State of New York, as soon as counsel can be heard, why an order should not be made:

1. Granting a temporary restraining order and preliminary injunction pursuant to CPLR § 6301 mandating that Respondents immediately modify current COVID-19 vaccine eligibility category 1b to authorize incarcerated individuals for vaccination; and

2. Granting such other and further relief as the Court deems just and proper.

ORDERED that sufficient cause appearing therefore, pending the hearing and determination of this motion, Respondents are hereby mandated to modify current COVID-19 vaccine eligibility category 1b to authorize incarcerated individuals for vaccination.

SUFFICIENT CAUSE THEREFORE APPEARING, let personal service by electronic mail of a copy of this Order together with a copy of the annexed supporting papers on Respondents and the Attorney General of the State of New York, pursuant to CPLR § 7804(c) on or before the ___ day of February 2021, be good and sufficient service.

Dated: February 25, 2021
Bronx, New York

ENTER,

____
JUSTICE OF THE SUPREME COURT

Dated: _________________

SO ORDERED:
DATED:

____
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
--X

In the Matter of the Application of CHARLES HOLDEN and ALBERTO FRIAS on behalf of themselves and all others similarly situated,	Index No.801592/2021E
Petitioners, For a Temporary Restraining Order and Preliminary Injunction Pursuant to Articles 6301 and 6313 of the Civil Practice Law and Rules,	**AFFIRMATION IN SUPPORT**
- against -	
HOWARD A. ZUCKER, as Commissioner of Health for New York State, and ANDREW M. CUOMO, as Governor of the State of New York,	
Respondents.--X	

Petitioners, CHARLES HOLDEN and ALBERTO FRIAS, by their undersigned attorneys, are seeking immediate injunctive relief and incorporate by reference the underlying Article 78 Verified Petition and accompanying exhibits, and allege and aver as follows:

I. PRELIMINARY STATEMENT

1. It is well-known and universally accepted that people working and living together are at exponentially heightened risk for contracting COVID-19—a virus that can cause long-term health complications and death. In light of this, New York's Health Commissioner and Governor [hereinafter "Respondents"] have specifically prioritized for vaccination thousands of New Yorkers who work and live in congregate facilities that are the breeding grounds for this deadly virus. Respondents did this not only to protect the lives of those individuals, but also to protect the broader community from the spread of the virus. This prioritization is consistent with

the unanimous recommendations of the Centers for Disease Control and Prevention ("CDC") and public health and medical experts.

2. Despite these scientific recommendations, Respondents have gone out of their way to exclude one group of people who live in congregate settings from vaccination prioritization: individuals who are incarcerated. The vast majority of these individuals are Black and Latinx. By excluding them from vaccination access, Respondents are exacerbating the very racial inequities they purport to address through their Department of Health ("DOH") COVID-19 Vaccination Program [hereinafter "the Vaccination Program"]. There is no plausible scientific, public health or medical reason for this deliberate exclusion. COVID-19 does not discriminate between congregate settings.

3. In all material respects, incarcerated people face the same heightened risk of infection, serious illness, and death, as people living in other congregate settings. And the CDC has said that those confined in jails and prisons should be vaccinated at the same time as those working in the very same facilities. Yet, for no legitimate reason—and without even bothering to offer a reason—Respondents have excluded those confined in prisons and jails from the potentially life-saving protections of the COVID-19 vaccine, while granting access to correctional workers, as well as those working and living in other government-run congregate facilities. The absence of any reason or justification for this exclusion is by definition arbitrary and capricious and violates equal protection.

4. Petitioners face an extraordinary risk of COVID-19 -- serious long-term health complications and possible death if Respondents do not immediately provide access to this life-saving preventative medication. The imminent risk of contracting COVID-19 for individuals

living within these facilities is high. Specifically, the congregate nature of Petitioners' living conditions, the rising rate of the incarcerated population and the increasing number of COVID positive cases within these facilities creates significant risk. When contracted, Petitioners are likely to suffer irreparable bodily harm. Because Respondents have failed to act—failed to protect the lives of these people—a mandatory injunction is warranted. Without such intervention, Petitioners' health and lives are at risk. Moreover, given this extraordinary situation, the immediate and irreparable harm that Petitioners face every minute of every day while unvaccinated, and that the equities weigh heavily in their favor, this Court should grant a temporary restraining order mandating that Respondents offer Petitioners and prospective class members the vaccine while the merits of the injunction are litigated.

II. PROCEDURAL HISTORY

5. On February 4, 2021, Petitioners, on behalf of themselves and others similarly situated, moved this Court pursuant to CPLR § 7803(3) for an order vacating and annulling Respondents' decision to exclude incarcerated individuals from eligibility in COVID-19 vaccine priority category 1b. Petitioners further requested that this Court direct Respondents to modify the current eligibility of category 1b and immediately authorize incarcerated individuals as a group for access to the vaccination.

6. Petitioners raise two arguments in support of the petition: Respondents' actions to exclude incarcerated individuals as a group from vaccination priority (1) are both arbitrary and capricious and an abuse of discretion and (2) violate the Equal Protection Clause of the 14th Amendment to the United States Constitution and Article 1 § 11 of the New York State Constitution. In response, this Court ordered Petitioners' Order to Show Cause returnable on

March 8, 2021. Thereafter, on February 24, 2021, without giving prior notice to or seeking consent from Petitioners, Respondents emailed the Court and undersigned counsel indicating that they would be requesting an extension of time by which to respond to the Order to Show Cause. It is worth noting that Respondents' email itself recognizes "the seriousness of the issues presented" by this case. That same day at 4:36 pm, Petitioners gave notice to Respondents via an email to Assistant Attorney General Steven Schulman that Petitioners would be moving for an Order to Show Cause on a Temporary Restraining Order and Mandatory Preliminary Injunction.

7. Due to the high risk of serious illness and possible death that Petitioners face every single day from potential exposure to COVID-19 pending adjudication on the merits, Petitioners now move this Court for a temporary restraining order and injunctive relief. As detailed below, given (1) the likelihood of success on the merits—that exclusion of this group was arbitrary and capricious and an abuse of discretion and violates Petitioners' constitutional rights, (2) the likelihood of irreparable harm and or death to the group in the absence of this immediate relief and (3) the balance of equities, it is imperative that this Court immediately order Respondents to modify the COVID-19 vaccine eligibility priorities for category 1b to include all current and future incarcerated persons and authorize their access to the vaccine.

III. STATEMENT OF FACTS

COVID-19 Pandemic

8. Since late 2019, COVID-19—a highly communicable virus—has ravaged our world, and created a global pandemic resulting in local, state and national emergencies.[1]

[1] Betsy McKay, Jennifer Talfas, & Talal Ansari, *Coronavirus Declared Pandemic by World Health Organization*, Wall Street Journal (Mar. 11, 2020), https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794;

According to the CDC, in the United States alone, 27,938,085 people have contracted COVID-19, and 497,415 people have lost their lives.[2] There have been over 2,400 reported deaths of incarcerated people in the United States due to COVID-19.[3] In addition to death and severe oxygen deprivation, those infected with COVID-19 can experience shortness of breath, fever, coughing, chest pain, confusion, loss of the senses of smell and taste from nerve damage, and chronic fatigue.[4]

9. Because of how the virus is transmitted, individuals living and working in congregate settings—such as jails and prisons—are at higher risk for exposure and infection. Since the inception of the pandemic, prisons and jails have been uniquely vulnerable to outbreaks of COVID-19. Upon entering a facility, the virus sweeps rapidly and mercilessly through its population. In the last year, hundreds of thousands of people in jails and prisons have been infected, and thousands have died. And with the daily flow of people into and out of these facilities, they have not only become hotbeds themselves, but also have fueled the spread of COVID-19 through the larger communities.[5] According to a report on COVID-19 and the U.S.

Jesse McKinley & Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency,* New York Times (Mar. 7, 2020), https://www.nytimes.com/2020/03/07/nyregion/coronavirus-new-york-queens.html; *DeBlasio Declares State of Emergency in N.Y.C., and Large Gatherings Are Banned.* New York Times (Mar. 12, 2020), https://www.nytimes.com/2020/03/12/nyregion/coronavirus-new-york-update.html; Derek Hawkins, Miriam Berger, et al., *Trump Declares Coronavirus Outbreak a National Emergency*, Washington Post (Mar. 13, 2020), https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/.

[2] https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Feb. 23, 2021).

[3] Marshall Project, *A State by State Look at Coronavirus in Prisons*, https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#prisoner-deaths (last visited Feb. 25, 2021).

[4] https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Feb. 23, 2021).

[5] *See* Mikhaela Singleton, *Greene County, Columbia County leaders call out NYS prison system claiming mishandled cases,* ABC NEWS10 (Oct. 20, 2020, 6:23 PM), https://www.news10.com/news/local-news/greene-county-columbia-county-leaders-call-out-nys-prison-system-claiming-mishandled-covid-cases/; Graham Cates, *Hundreds of inmates test positive as COVID-19*

Criminal Justice System written by professors from Johns Hopkins School of Public Health, the dynamic nature of correctional settings makes them a public health risk because "[i]ncarcerated individuals can transmit the SARS-CoV-2 virus through interaction with other incarcerated people in the facility or through transfers."[6] Staff enter and exit the congregate residential facilities every day, carrying a risk of exposure and transmission to others, particularly when they move between these settings. The Affirmation of clinicians Victoria Adewunmi, M.D. and Mark Fenig, M.D. and separate Affirmation of epidemiologist Gregg Gonsalves, Ph.D (annexed to Verified Petition) explain the heightened risk to those living in jails and prisons. (Affirmation of Victoria Adewunmi, M.D. and Mark Fenig, M.D. attached to Verified Petition ("Adewunmi and Fenig Aff.") ¶ 21); Affirmation of Gregg Gonsalves, Ph.D. attached to Verified Petition ("Gonsalves Aff.") ¶ 20). As outlined below, DOC facilities are congregate settings, just like homeless shelters, assisted living facilities and group homes. Yet Respondents have discriminated between these congregate environments, refusing to offer vaccines to those living in jails and prisons, but offering them to those living in these other types of facilities.[7]

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rips through New York prison, CBS NEWS (Oct. 28, 2020, 11:48 PM), https://www.cbsnews.com/news/covid-new-york-elmira-correctional-facility-outbreak/.

[6] Crystal Watson, et al., *COVID-19 and the US Criminal Justice System: Evidence for Public Health Measures to Reduce Risk*, JOHNS HOPKINS CTR. FOR HEALTH SEC. (Oct. 2020) at 14, https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/20201015-covid-19-criminal-justice-system.pdf.

[7] Most recently, Respondents have expanded eligibility to teenagers 16 and older in juvenile detention centers, homeless shelters, and foster care facilities, while continuing to arbitrarily and irrationally exclude the general incarcerated adult population from vaccine eligibility. *See* Marlene Lenthag, New York teens 16 and older who are homeless, jailed, or in foster care, now eligible for COVID-19 vaccine, ABC News (Feb. 24, 2021).

Significant Risk of COVID-19 within DOC Facilities

DOC Facilities are High-Risk Congregate Settings and Petitioners are at Heightened Risk

10. New York City jails fall squarely within the State's definition of congregate settings, which are "environment[s] in which a group of usually unrelated persons reside, meet, or gather either for a limited or extended period of time in close physical proximity. Examples include homeless shelters, assisted living facilities, group homes, prisons, detention centers, schools and workplaces."[8] New York City's DOC facilities are quintessentially congregate settings. And Petitioners in these congregate settings are particularly vulnerable to COVID-19 infection.

11. It is undisputed that DOC facilities share trademark characteristics of congregate residential settings: shared sleeping spaces, shared eating spaces, and shared toilets, sinks, and showers. (Adewunmi and Fenig Aff. ¶ 25; Gonsalves Aff. ¶ 6, 24); Affidavit of Petitioner Charles Holden attached to Verified Petition ("Petitioner Holden Aff.") ¶ 4); Affidavit of Petitioner Alberto Frias attached to Verified Petition ("Petitioner Frias Aff.") ¶ 3,4). Common areas include: housing unit day rooms where there are benches for communal seated gathering, shared phones and televisions; areas where people in custody are expected to form lines such to obtain food or medication; and the mess hall where they eat. (Adewunmi and Fenig Aff. ¶ 25); (Petitioner Holden Aff. ¶ 4); (Petitioner Frias Aff. ¶ 3,4).

12. The physical realities of DOC facilities comport with the high risks associated with other congregate settings: there is an increased likelihood of airborne transmission because

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[8] NEW YORK CITY HEALTH DEP'T, COVID-19: GUIDANCE FOR CONGREGATE SETTINGS (Apr. 4, 2020), http://wnylc.com/wp-content/uploads/2020/04/guidance-for-congregate-settings-covid19.pdf.

such transmission occurs in enclosed spaces, during prolonged exposure to respiratory particles, and in settings with inadequate ventilation or air handling. (Adewunmi and Fenig Aff. ¶ 29). These facilities were primarily constructed in the 1970s and 1980s and have poorer ventilation systems than newer buildings.[9] Communal eating, which requires removal of a mask, is a particularly perilous activity for airborne transmission, as there is no barrier to mitigate the viral spread. (Adewunmi and Fenig Aff. ¶ 38). This danger exists in the spectrum of meal settings found in jails and prisons, from mess halls, to shared dayrooms, and even individual cells in close proximity to one another. (Adewunmi and Fenig Aff. ¶ 38; Petitioner Holden Aff. ¶ 4; Petitioner Frias Aff. ¶ 4).

13. Public health authorities widely agree that correctional facilities pose a heightened risk during this pandemic. As recognized by the CDC, incarcerated people are at a unique risk for contracting and spreading COVID-19 for reasons including "crowded dormitories, shared lavatories, limited medical and isolation resources, daily entry and exit of staff members and visitors, continual introduction of newly incarcerated or detained persons, and transport of incarcerated or detained persons in multi-person vehicles for court-related, medical, or security reasons."[10] These risk factors are both highly present in DOC facilities and of grave concern.[11] Dr. Homer Venters, an epidemiologist and the former Correctional Health

[9] *Facilities Overview*, NEW YORK CITY DEP'T OF CORR., https://www1.nyc.gov/site/doc/about/facilities.page/ (last visited Feb. 23, 2021).
[10] Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities — United States, February-April 2020.* CTR. FOR DISEASE CONTROL AND PREVENTION: MORBIDITY AND MORTALITY WEEKLY YEARLY REPORT 2020 (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm.
[11] *See* Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates,* U.S. DEP'T OF JUST., BUREAU OF JUST. STATISTICS (Oct. 4, 2016), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf; Letter from Hanna Ehrlich, et al., Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States (Mar. 62,

Services ("CHS") Chief Medical Officer and Assistant Vice President describes the design and operation of jails as "basically a system designed to spread communicable disease."[12]

14. Moreover, public health experts acknowledge prisons and jails as particularly high-risk congregate settings because incarcerated people are uniquely limited in their ability to protect themselves against contracting COVID-19: incarcerated people cannot take many of the basic steps to protect themselves against contracting COVID-19 that are available to people living in non-carceral settings. (Adewunmi and Fenig Aff. ¶ 22; Gonsalves Aff. ¶ 6; Petitioner Holden Aff. ¶ 5; Petitioner Frias Aff. ¶ 8). In congregate living settings, like jails, where social distancing is limited or impossible, the importance of masks is heightened. And though they can choose to wear masks themselves, incarcerated individuals are still highly vulnerable to viral transmission if any other incarcerated person or staff person chooses not to wear a mask. (Adewunmi and Fenig Aff. ¶ 22). Moreover, people in custody are forced to rely on the facility to provide every basic human need and are subject to facility security measures. (Adewunmi and Fenig Aff. ¶ 28; Gonsalves Aff. ¶ 6). Dr. Rachael Bedard, Director of Geriatric and Complex Care Services for CHS, describes how the operational realities of a jail setting pose an extreme risk comparable to shelter environments—settings authorized for vaccine access:

> When [people in custody] are moved from one location to another, a person has to take them there. That person has to open the door for them, and they have to be let through it and be walked down the hallway. When they are moved from one facility to another, somebody has to touch them and put cuffs on them. When we bring them their food, workers go from housing area to housing

2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/march6_2020_final_covid-19_letter_from_public_health_and_legal_experts_2.pdfhttps://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid- 19_letter_from_public_health_and_legal_experts.pdf.

[12] Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, THE NEW YORKER (Mar. 14, 2020), https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus.

> area with trays that have to be distributed. When we give them their medication, that has to be done for them. They can't do it for themselves. And so, if you think about how many excess human contacts that is, ***even compared to something like a shelter setting***, you can imagine why viral spread in this environment is extra dangerous…when staff and officers and others are coming in and out, we just cannot make a commitment that we can protect them. (emphasis added).[13]

15. Indeed, in New York City jails, it is virtually impossible to engage in the necessary social distancing required to mitigate the risk of transmission. Incarcerated individuals have limited control over their own movements and no control over the movements of others whom they are required to congregate. Many live in dormitory arrangements, where several dozen people sleep in one room, mere feet apart. (Petitioner Holden Aff. ¶ 4; Johns Aff. ¶ 6). As of February 19, 2021, over 40% of dormitory units in DOC facilities exceeded 50% of capacity, preventing even the ability to practice alternate bed spacing.[14] Incarcerated individuals must share common areas like dayrooms, phone banks, and showers. (Petitioner Holden Aff. ¶ 4; Petitioner Holden Aff. ¶ 9). The more people in each unit, the less opportunity a person has to maintain adequate physical distance between themselves and others in custody or staff. As of February 19, 2021, 3,505 people in DOC custody—67% of the entire population—were in a cell or dorm unit that was at or greater than 50% of its capacity.[15]

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[13] Jennifer Gonnerman, *A Rikers Island Doctor Speaks Out to Save Her Elderly Patients from the Coronavirus*, THE NEW YORKER (Mar. 20, 2020), https://www.newyorker.com/news/news-desk/a-rikers-island-doctor-speaks-out-to-save-her-elderly-patients-from-the-coronavirus.
[14] *Weekly COVID-19 Update, Week of February 13 - February 19, 2021*, NEW YORK CITY BD. OF CORR. 25 (Feb. 24, 2021), https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-02-13-02-19-21.pdf.
[15] *Id.* at 31.

16. Social distancing becomes more difficult as the jail population increases. As of February 19, 2021, there were 5,482 people in the city jails—almost as many people as were incarcerated at the beginning of the pandemic in March 2020.[16] The New York City Board of Correction ("BOC")—an independent oversight board that regulates, monitors, and inspects NYC correctional facilities[17]—warns that the number of individuals in custody has steadily increased throughout the pandemic, preventing effective social distancing measures.[18]

17. Further, the possibility of contracting the virus is not limited to one's exposure to other detained people. DOC employs more than 10,000 staff members who themselves may contract the virus in the community or at a jail facility, come into close contact with those incarcerated and then spread it throughout the facility.[19] Correctional facilities, including DOC facilities, create an increased risk of community viral transmission because staff move between the facility and the community on a daily basis. As CHS Dr. Bedard described in an interview, "[e]very day, staffers move among housing areas and in and out of the jails, potentially

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[16] *Id.* at 4–5.

[17] NEW YORK CITY CHARTER § 626, BOARD OF CORRECTION, https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0- 2217 (last visited Feb. 23, 2021).

[18] *Housing Area Capacity Data Summary, January 1 – October 31, 2020*, NEW YORK CITY BD. OF CORR. (Nov. 3, 2020), at 6-11, https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2020/November/7a.%20Density%20Deck_November%20Meeting_Updated_11_3_20%20%20-%20%20Read-Only.pdf.

[19] *Local Law 59: Report for Week of January 11, 2021 – January 17, 2021*, NEW YORK CITY CORR. HEALTH SERVS. at 6, https://hhinternet.blob.core.windows.net/uploads/2021/01/report-for-the-week-of-january-11-2021-to-january-17-2021.pdf (last visited Feb. 23, 2021).

exposing dozens to contagion."[20] (*See also* Petitioner Holden Aff. ¶ 6, Petitioner Frias Aff. ¶ 7).

COVID-19 Threatens the Lives and Health of Those in Custody

18. Unsurprisingly, COVID-19 has spread rapidly within DOC facilities and since March 2020 has continued to threaten their population. To date, the COVID-19 pandemic has caused at least 3,000 infections and at least 18 deaths among incarcerated people and jail staff within DOC, and the conditions in the New York City jails grow more dangerous every day.[21] According to CHS, the spring outbreak of COVID-19 in the jails resulted in 537 positive tests among people in custody as of May 15, 2020.[22] Over the next five and a half months, CHS reported only about 40 additional cases total.[23] That lull abruptly ended as cases began to rise

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[20] Rachael Bedard, *I'm a doctor on Rikers Island. My patients shouldn't have to die in jail.* THE WASHINGTON POST (Apr. 10, 2020, 9:47 AM), https://www.washingtonpost.com/outlook/doctor-rikers-compassionate-release/2020/04/10/07fc863a-7a93-11ea-9bee-c5bf9d2e3288_story.htmlhttps://www.washingtonpost.com/outlook/doctor-rikers-compassionate-release/2020/04/10/07fc863a-7a93-11ea-9bee-c5bf9d2e3288_story.html (last visited Feb. 2, 2021).

[21] *See Local Law 59: Report for Week of February 1, 2021 — February 7, 2021,* , NEW YORK CITY CORR. HEALTH SERVS. at 5, https://hhinternet.blob.core.windows.net/uploads/2021/02/report-for-the-week-of-february-1-2021-to-february-7-2021.pdf (last visited Feb. 23, 2021) (968 cumulative COVID-19 infections among NYC jail population since March 13, 2020); *Weekly COVID-19 Update, Week of February 6-February 12, 2021,* NEW YORK CITY BD. OF CORR. at 13, https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-02-06-02-12-21.pdf (3 cumulative COVID-related deaths among NYC jail population, 268 infections among CHS staff, and 1,827 infections among DOC staff since March 13, 2020); Jan Ransom, *Virus Raged at City Jails, Leaving 1,259 Guards Infected and 6 Dead*, N.Y. TIMES (May 20, 2020), https://www.nytimes.com/2020/05/20/nyregion/rikers-coronavirus-nyc.html (last visited Feb. 2, 2021) (6 COVID- related deaths among correctional officers (with the officers' union contending 1 additional officer died from COVID-19), 5 COVID-related deaths among other jail employees, 2 COVID-related deaths among CHS staff, 3 COVID-related deaths in custody with 2 deaths occurring just after release).

[22] *COVID-19 in City Jails and Juvenile Detention Centers,* Joint Hearing Before the New York City Council Committees on Criminal Justice and the Justice System, May 19, 2020 (testimony of CHS Senior Vice President Dr. Patricia Yang).

[23] Local Law 59: Report for Week of October 26, 2020 – November 1, 2020, CORRECTIONAL HEALTH SERVICES, available at https://hhinternet.blob.core.windows.net/uploads/2020/11/report-for-the-week-of-october-26-2020-to-november-1-2020.pdf (last visited Feb. 17, 2021) (reporting that as of October 31, 2020, the cumulative

in New York City in the fall. The resurgence in DOC facilities continues to climb toward the number of positive tests reported in the spring: from November 1, 2020 to February 23, 2021, CHS has reported 470 additional positive tests.[24] After months of reporting one or fewer active infections, CHS reported a recent high of active infections among people in DOC custody: from 2 on November 17, 2020[25] to 100 on January 31, 2021.[26] As of February 23, 2021, there were 63 active infections in the jails and 528 people currently in custody had confirmed cases of COVID-19[27]—up from 306 on January 1, 2021 and 419 on January 22, 2021.[28] This rapid spread demonstrates the increasing risk to the lives of incarcerated persons and the need for emergency action. As of February 19, 2021, 17% of the entire city jail population was housed in a unit with a COVID-related designation: either likely exposed, symptomatic, or confirmed positive.[29]

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number of *people* in custody who had tested positive was 575, and number of cumulative positive *tests* was 581).

[24] *Compare id*. (reporting that as of November 1, 2020, the cumulative number of *people* in custody who had tested positive was 576, and the number of cumulative positive *tests* was 582); Correctional Health Services (CHS) COVID-19 Data Snapshot, February 24, 2020, available at https://hhinternet.blob.core.windows.net/uploads/2021/02/CHS-COVID-19-data-snapshot-20210224.pdf (reporting 1052 cumulative positive tests among people in custody as of February 23, 2021).

[25] Correctional Health Services (CHS) COVID-19 Data Snapshot, November 17, 2020. *Available at* https://hhinternet.blob.core.windows.net/uploads/2020/11/CHS-COVID-19-data-snapshot-20201118.pdf (last visited November 30, 2020).

[26] Correctional Health Services (CHS) COVID-19 Data Snapshot, February 1, 2021. *Available at* https://hhinternet.blob.core.windows.net/uploads/2021/02/CHS-COVID-19-data-snapshot-20210201.pdf (last visited Feb.17, 2021).

[27] *Id*.

[28] *Compare COVID-19 Update, Week of December 26, 2020 - January 1, 2021,* NEW YORK CITY BD. OF CORR. at 13, https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-12-26-20-01-01-21.pdf (last visited Feb. 25, 2021) with *COVID-19 Update, Week of January 16, 2021 - January 22, 2021,* NEW YORK CITY BD. OF CORR. at 13, https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-01-16-01-22-21.pdf (last visited Feb. 25, 2021).

[29] *Weekly COVID-19 Update, Week of February 13-February 19, 2021,* NEW YORK CITY BD. OF CORR. at 23.

19. In addition to the fact that “people who are incarcerated tend to have multiple risk factors that can increase their risk of contracting [COVID-19],”[30] incarcerated people are more likely to have underlying conditions that predispose them to having a more serious case of COVID-19. (Adewunmi and Fenig Aff. ¶ 31-33; Gonsalves Aff. ¶ 14-19). The prevalence of chronic health conditions for individuals in prisons and jails is 24.5% to 42.8% higher than in the general population.[31] And the correctional environment itself has a deleterious impact on the health of those in custody.[32] Furthermore, the recent and ongoing emergence of new variants of the virus only makes Petitioners’ need for access to a vaccine more urgent.[33]

COVID-19 Disproportionately Impacts Black and Latinx Communities

20. The threat of COVID-19 in DOC facilities falls heavily on Black and Latinx individuals. 59.1% of the current DOC population are identified in BOC reports as Black, and 33% are identified as Hispanic.[34] As of February 19, 2021 75.7% of the people housed in a DOC

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[30] Helene Gayle et al., *Framework for Equitable Allocation of COVID-19 Vaccine*, NAT’L ACAD. OF SCI., ENG’G, & MED. 6 (2020) at 37-38, https://www.nap.edu/catalog/25917/framework-for-equitable-allocation-of-covid-19-vaccine (follow “Download Free PDF” link).

[31] *See* Andrew Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey.*, 99 AM. J. PUB. HEALTH 666 (2009); Jennifer R. Bai et al., *Prevalence and Predictors of Chronic Health Conditions of Inmates Newly Admitted to Maximum Security Prisons*, 21 J. Corr. Health Care. 255 (2015); David L. Rosen et al., *Prevalence of chronic health conditions among adults released from the North Carolina prison system, 2015-2016*, 80 N.C. MED. J. 332 (2019).

[32] David H. Cloud et al., *Addressing Mass Incarceration: A Clarion Call for Public Health*, 104 AM. J. PUB. HEALTH 389 (2014).

[33] Several concerning variants have emerged, including B.1.1.7 in the United Kingdom, B.1.351 in South Africa, and P.1 in Brazil. (Adewumni and Fenig Aff. § 17, 18). Experts have emphasized that vaccinations are critical to fighting the new variants: Dr. Michel Nussenzweig, an immunologist at Rockefeller University, notes, “[p]eople who have recovered from the coronavirus or who have been vaccinated are very likely to be able to fight this variant off.” *See* Mandavilli, Apoorva, *A New Coronavirus Variant Is Spreading in New York, Researchers Report,* The New York Times (Feb. 25, 2021), https://www.nytimes.com/2021/02/24/health/coronavirus-variant-nyc.html.

[34] *Weekly COVID-19 Update, Week of February 13-February 19, 2021,* NEW YORK CITY BD. OF CORR. *Id.* at10.

"Confirmed or Symptomatic" and 87.1% of the people housed in a DOC "Likely Exposed" COVID-19 unit were identified as either Black or Hispanic.[35] Early reports about demographics of vaccine distribution indicate that Black and Latinx communities are already underserved by the current vaccine effort, in contradiction with Respondents' professed guiding principle that vaccine distribution should focus on ensuring access to the communities hardest-hit by COVID-19. Though the New York City population is estimated by the U.S. Census Bureau to be 24% Black and 29% Hispanic,[36] as of February 23, 2021, the population of New York City adults who have received at least one dose of the vaccine is 12% Black and 16% Hispanic.[37]

Scientists Recommend Prioritizing Incarcerated Individuals for Vaccines

21. The CDC recognizes the high-risk nature of congregate settings. And in recommending priority for vaccine eligibility, the CDC has included both incarcerated individuals and others living in congregate settings ***in the same*** high-risk category. The CDC has advised that states should consider authorizing vaccinations for individuals in congregate living facilities, including those in correctional facilities, during the 1b vaccination phase.[38] In its recommendation, the CDC includes correction and detention facilities in the same category of other congregate living facilities which includes homeless shelters, group homes, and employer-provided shared housing units. The National Academy of Science, Engineering and

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[35] *Id.* at 10.
[36] *New York City, Demographic and Housing Estimates*, U.S. CENSUS BUREAU, https://data.census.gov/cedsci/table?q=new%20york%20city&tid=ACSDP1Y2019.DP05&hidePreview=false (last visited Feb. 23, 2021).
[37] *COVID-19 Vaccines: COVID-19 Vaccine Tracker,* NEW YORK CITY DEP'T OF HEALTH, https://www1.nyc.gov/site/doh/covid/covid-19-data-vaccines.page (follow "All Adults Vaccinated" link) (last visited Feb. 23, 2021).
[38] CTR. FOR DISEASE CONTROL AND PREVENTION, COVID-19 VACCINATION INTERIM PLAYBOOK FOR JURISDICTION OPERATIONS (Oct. 29, 2020) at 15, https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf.

Medicine ("NASEM") similarly places incarcerated individuals and people who live in group homes and homeless shelters in the same priority group, and "stresses the importance of recognizing their reduced autonomy and the difficulty of preventing spread in such settings should COVID-19 be introduced."[39]

22. Experienced clinicians also attest that access to widespread vaccinations for people in jails and prisons helps to make everyone safer—including the medical staff who treat them, the jail staff who work in the facilities, and the members of the community. (Adewunmi and Fenig Aff. ¶ 39). "Vaccinating individuals in jails and prisons is both necessary for the safety of those in these high-risk congregate settings, but also to the community at large, which is put at greater risk when outbreaks occur in high-density congregate settings." (Gonsalves ¶ 31). Public health experts across the country must also compensate for the challenge of vaccine hesitancy— an implementation difficulty from which even jail medical staff are not immune.[40] (*See also* Adewunmi and Fenig Aff. ¶ 39). It is sound public health practice to expand access to all people within a particular setting to decrease the risk to everyone. (Adewunmi and Fenig Aff. ¶¶ 39, 42; Gonsalves Aff. ¶ 33) ("Excluding people in custody from the current vaccine eligibility structure is irrational from a medical and public health perspective. New York State is prioritizing staff and residents of one risky setting but only prioritizing staff in another, despite a body of evidence that the latter setting is at least as dangerous as the former. The

[39] Statement of Dr. Helene Gayle, A Preliminary Framework for Equitable Allocation of Covid-19 Vaccine (Sept. 30. 2020), https://www.nationalacademies.org/ocga/testimony-before-congress/a-preliminary-framework-for-equitable-allocation-of-covid-19-vaccine.

[40] *See Minutes of January 12, 2021 Public Meeting*, NEW YORK CITY BD. OF CORR. (Jan. 12, 2021), https://www1.nyc.gov/site/boc/meetings/january-12-2021.page.

distinction is, at best, arbitrary. It certainly does not align with available COVID-19 literature and CDC guiding principles of phased vaccine distribution.”).

23. Dr. Gregg Gonsalves, an epidemiologist and global health expert, explains “[e]pidemiologically, it is irrational to prioritize individuals in some congregate residential settings, like homeless shelters and nursing homes, while not providing the same prioritization for individuals in jails and prisons.” (Gonsalves ¶ 28). And “from a public health perspective, it is nonsensical to provide vaccine access to people who work in the jails and prisons without providing the same access to people who live in those facilities.” (*Id.* ¶ 32).

Scientists Recommend Vaccinating Staff and Those Incarcerated Simultaneously

24. The CDC has not only called for the vaccination of incarcerated individuals, it has also recommended that states “vaccinate staff and incarcerated/detained persons of correctional or detention facilities ***at the same time*** because of their shared increased risk of disease” (emphasis in original).[41] Public health experts, including NASEM, have likewise uniformly recommended that both correctional workers and incarcerated people be prioritized within the same phase because they have the same high level of risk.[42]

25. Moreover, the American Medical Association (“AMA”) has also affirmed that designating *both* correctional staff *and* incarcerated people as high-priority populations for the

[41] *Vaccine FAQs in Correctional and Detention Centers*, CTR. FOR DISEASE CONTROL AND PREVENTION (Feb. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/vaccine-faqs.html (supporting this recommendation by explaining that “[o]utbreaks in correctional and detention facilities are often difficult to control given the inability to physically distance, limited space for isolation or quarantine, and limited testing and personal protective equipment resources. Incarcerated or detained persons living in correctional and detention facilities may also be older or have high-risk medical conditions that place them at higher risk of experiencing severe COVID-19. COVID-19 outbreaks in correctional and detention facilities may also lead to community transmission.”).
[42] Helene Gayle et al., *supra* note 30, at 79.

vaccine is the way to protect these populations and the broader community from COVID-19 outbreaks. The AMA does not differentiate between the risk of infection to correctional workers and the risk of infection to incarcerated persons, recognizing that both "should be prioritized in receiving access to safe, effective COVID-19 vaccine in the initial phases of distribution."[43]

26. The risk for incarcerated individuals is commensurate with the ris*I* for correction staff.[44] Authorizing the vaccine for correction staff will not abate the risk of transmission to everyone in the facilities any time in the near future—including risk to staff. Correction staff have only begun to be vaccinated under the New York State program, may decline vaccination, or may be medically ineligible for the vaccine, and it also is unknown whether people who are vaccinated can still transmit the virus. (Adewunmi and Fenig Aff. ¶ 26).

Despite Respondents' Purported Reliance on Science and Equity in Developing New York's Vaccination Program, They Ignore Both When It Comes to Incarcerated People

27. New York State's vaccine distribution and implementation program was promulgated by Respondent Commissioner Zucker in coordination with Respondent Governor Cuomo. The Vaccination Program outlines a phased sequencing plan for vaccine distribution throughout the state and the timing of when certain categories of individuals become authorized

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[43] Preliminary Report of Am. Med. Ass'n House of Delegates Reference Comm. D Meeting (Nov. 2020), at 12–13, https://www.ama-assn.org/system/files/2020-11/nov20-ref-com-d-annotated.pdf. Moreover, Arthur Caplan, Professor of Bioethics at New York University Grossman School of Medicine, in an interview with *The Lancet* medical journal, noted his disagreement with vaccinating only correctional staff, stating that "if they're in conditions that don't allow them to isolate, they should get vaccinated. I see no reason to distinguish. Nayanah Silva, *Experts Call to Include Prisons in COVID-19 Vaccine Plans,* THE LANCET (Dec. 12, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32663-5/fulltext.

[44] Emily Wang et al., *Recommendations for Prioritization and Distribution of COVID-19 Vaccine in Prisons and Jails*, COLUMBIA JUST. LAB (Dec. 16, 2020), at 3, https://justicelab.columbia.edu/sites/default/files/content/COVID_Vaccine_White_Paper.pdf.

to receive vaccinations.[45] Importantly, Respondents determine whether and when incarcerated individuals will receive access to this medicine. New York's Vaccination Program purports to be built on equity and inclusion, but nonetheless abandons those principles as they would apply to incarcerated individuals.

28. Under the Vaccination Program, ***Respondents purported to prioritize groups for COVID-19 vaccination based "solely on clinical and equitable standards."***[46] Specifically, DOH provides that "New York State will prioritize vaccination recipients based on science, clinical expertise, and federal guidelines" with critical populations "identified and recommended by the Advisory Committee on Immunization Practices (with input from the National Academies of Sciences, Engineering, and Medicine)."[47] The Advisory Committee on Immunization Practices ("ACIP") is a CDC committee of medical and public health experts that develop recommendations on how to use vaccines to control diseases.[48]

29. In the Vaccination Program, DOH specifically cites to the CDC's identification of "[p]eople who are incarcerated/detained in correctional facilities" as a group "at risk for COVID-19 illness or acquiring or transmitting COVID-19" alongside "[p]eople experiencing homelessness/living in shelters" and "[p]eople living and working in other congregate settings."[49] Moreover, DOH claims that the Program is based on "equitable standards that

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[45] *New York State's COVID-19 Vaccination Program,* N.Y. STATE DEP'T OF HEALTH (October 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_COVID_Vaccination_Program_Book_10.16.20_FINAL.pdf.
[46] *Id.* at 10.
[47] *Id.* at 27.
[48] *Role of the Advisory Committee on Immunization Practices in CDC's Vaccine Recommendations*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/vaccines/acip/committee/role-vaccine- recommendations.html
[49] N.Y. STATE DEP'T OF HEALTH*, supra* note 44 at 79.

prioritize access to persons at higher risk of exposure, illness, and/or poor outcome, regardless of other unrelated factors, such as wealth or social status, that might confer unwarranted preferential treatment."[50] DOH recognizes that "[h]eightened COVID-19 mortality among Black and Hispanic communities" is well established.[51] And that "compared to white non-Hispanic adults, racial/ethnic minority populations had disproportionately higher per population likelihoods of COVID-19 diagnosis and hospitalization."[52] DOH states that "prioritization decisions will be made mindful of the disparate impact of COVID-19 on communities of color, and the health disparities present in underrepresented and marginalized communities, and those with historically poor health outcomes."[53] Even Governor Cuomo has recognized racial inequities associated with the spread of COVID-19 and the severity of the disease once transmitted:

> COVID has revealed from the very beginning the underlying injustice and inequity in this society. COVID highlighted what we knew but it raised it to a point where it was obnoxious and blatant how we have disparities and inequalities. Why was the COVID infection rate so much higher in communities of Black and Brown people? Because they're health care deserts. There were health care disparities to begin with. People weren't getting as much regular care. They had underlying issues, underlying illnesses, and COVID both in the infection rate and the death rate disproportionately affected the Black and Brown population.[54]

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[50] *Id.* at 10.
[51] *Id.* at 31.
[52] *Id.*
[53] *Id*. at 27.
[54] Press Call with Governor Andrew M. Cuomo, et al., Federal COVID Vaccine Plan Fails to Adequately Serve Communities of Color Who Were Disproportionately Impacted by Pandemic (Nov. 1, 2020), https://www.governor.ny.gov/news/governor-cuomo-ag-james-national-urban-leagues-morial-naacp-s-johnson- federal-covid-vaccine.

30. Despite their purported reliance on science and equity, Respondents ignore both when it comes to incarcerated people. DOH has begun its phased distribution of vaccines to individuals in the State's Phase 1a category and to some groups within its Phase 1b category. Those initially authorized to receive the vaccine included, among other groups: residents and staff at nursing homes, skilled nursing facilities, and adult care facilities; and residents in congregate living situations, including those overseen or funded by the Office for People with Developmental Disabilities ("OPWDD"), Office of Mental Health ("OMH"), and Office of Addiction Services and Supports ("OASAS") facilities.[55] OPWDD, OMH, and OASAS are residential centers and just as with correctional facilities, most residents live full-time in these facilities and share living spaces.

31. Beginning January 11, 2021, DOH expanded authorization for vaccine eligibility to additional groups within category 1b, including "Corrections," and any "[i]ndividual living in a homeless shelter where sleeping, bathing or eating accommodations must be shared with individuals and families who are not part of the same household."[56] The 1b subcategory titled "Corrections" specifically includes: a. State Department of Corrections and Community Supervision Personnel, including correction and parole officers; b. Local Correctional Facilities, including correction officers; c. Local correctional facilities, including correction officers; d.

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[55] *COVID-19 Vaccine: Phased Distribution of the Vaccine*, N.Y. STATE DEP'T OF HEALTH, https://covid19vaccine.health.ny.gov/phased-distribution-vaccine#phase-1a---phase-1b (last visited Feb. 23, 2021).
[56] *Housing*, N.Y. State Off. for People With Developmental Disabilities, https://opwdd.ny.gov/types-services/housing (last visited Feb. 23, 2021); *Licensed Program Type Definitions*, N.Y. State Off. of Mental Health, https://omh.ny.gov/omhweb/licensing/definitions.htm (last visited Feb. 23, 2021); *Treatment*, Off. of Addiction Services & Support, https://oasas.ny.gov/treatment (last visited Feb. 23, 2021).

Local Probation Departments, including probation officers; f. State Juvenile Detention and Rehabilitation Facilities; and e. Local Juvenile Detention and Rehabilitation Facilities.

32. Incarcerated individuals are excluded from priority category 1b despite the fact that Respondent Commissioner Zucker and Larry Schwartz, former top aide to Governor Cuomo and now head of New York State's vaccination program planning, informed lawmakers in early January that incarcerated individuals would be eligible for the COVID-19 vaccine along with correctional officers, as part of the state's phased 1b plan.[57] Incarcerated individuals are excluded from category 1b despite the fact that both science and equity support their inclusion.[58] As expressed by Manhattan Assembly Member Richard Gottfried, who chairs the New York State Assembly's Health Committee, "[s]cience and sound public health policy point to what we already know: all persons living and working in congregate settings in New York, including those incarcerated in correctional institutions, should have access to COVID vaccines as soon as possible. COVID doesn't distinguish or discriminate between different kinds of congregate settings, and neither should the State of New York[]."[59]

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[57] Morgan McKay, Confusion Over When New York Inmates Will be Vaccinated, N.Y. 1 (Jan. 6, 2021), at https://www.ny1.com/nyc/all-boroughs/ny-state-of-politics/2021/01/06/confusion-over-when-new-york-inmates- will-be-vaccinated (last visited Feb. 2, 2021) (reporting Zucker and Schwartz told lawmakers incarcerated people would be in Phase 1b).

[58] "The reason to not vaccinate incarcerated people has everything to do with politics, and nothing to do with health, science, or racial justice." Eric Lach, *Andrew Cuomo's Refusal to Vaccinate Inmates is Indefensible*, THE NEW YORKER, (Feb. 13, 2021) https://www.newyorker.com/news/our-local-correspondents/andrew-cuomos-refusal-to-vaccinate-inmates-is-indefensible.

[59] Ethan Geringer-Sameth, *Forsaken Land:' City and State Officials Mum on Covid Vaccination Plans for Incarcerated New Yorkers and Correction Officers*, GOTHAM GAZETTE, (Dec. 29, 2020), https://www.gothamgazette.com/state/10030-forsaken-land-officials-mum-covid-vaccination-new-york-jails-prisons.

LEGAL ARGUMENT

I. INTERIM INJUNCTIVE RELIEF IS NECESSARY TO AVOID IMMEDIATE AND IRREPARABLE INJURY PENDING DETERMINATION OF PETITIONERS' MERITORIOUS CLAIMS, AND THE EQUITIES BALANCE IN PETITIONERS' FAVOR

33. Petitioners are entitled to injunctive relief if they demonstrate with respect to one or more of their claims (1) a probability of success on the merits, (2) danger of irreparable injury in the absence of an injunction and (3) a balance of equities in its favor. *Nobu Next Door, LLC v. Fine Arts Hous., Inc.,* 4 N.Y.3d 839, 840 (1st Dep't 2005) (citing CPLR § 6301). Courts have wide discretion to balance the factors of this three-part requirement. *Cf. Schlosser v. United Presbyterian Home at Syosset, Inc*., 56 A.D.2d 615 (2d Dep't 1977) (granting preliminary injunction based primarily on risk of irreparable harm, where plaintiffs—senior citizens with nowhere else to live while action was pending—would be irreparably damaged without preliminary restraint, and where preservation of the status quo did little harm to defendants); *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145 (1st Dep't 1990) ("Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced."); *see also State v. City of New York*, 275 A.D.2d 740, 741 (2d Dep't 2000).

34. Moreover, with respect to the relief requested—that Respondents offer the vaccine to Petitioners—courts can grant mandatory injunctive relief by which the movant would receive some form of the ultimate relief sought as a final judgment, in situations "where the granting of the relief is essential to maintain the *status quo* pending trial of the action." *Second on Second Cafe, Inc. v. Hing Sing Trading, Inc*., 66 A.D.3d 255, 264 (1st Dep't 2009) (finding mandatory injunctive relief necessary and directing the landlord to permit restaurant to install an

exhaust vent and ducts where the tenant restaurant was irreparably harmed in that it could not otherwise operate its business, and noting that mandatory injunctions are appropriate "where the complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties . . . . ") (internal citations omitted); *McCain v Koch*, 70 N.Y.2d 109, 116 (1987) (recognizing that courts have wide discretion to grant injunctive relief mandating specific conduct by municipal agencies and mandating that respondents make homeless and emergency shelters minimally habitable). The Court of Appeals has explained that sometimes "the status quo is not a condition of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant. . . . ". *Bachman v. Harrington*, 184 N.Y. 458, 464 (1906) (providing that when a "complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties, then a mandatory injunction may be granted."); *Schwartz v. Church & Commerce Corp*., 184 Misc. 200, 202 (Sup. Ct, N.Y. Co. 1945) (stating that "a court of equity has the power to grant preliminary mandatory injunctive relief even though that is also the relief finally sought in the action."). *See also Chrysler Corp. v. Fedders Corp*., 63 A.D.2d 567, 569 (1st Dep't 1978) (providing that although "ordinarily, injunctive relief will not issue where its effect will be to grant all the relief to which the party may be entitled at trial . . . . an injunction should be granted if the activity complained of will cause irreparable injury to the party seeking such relief before a trial can be held to resolve the underlying controversy.").

35. Finally, a court, on a motion for a preliminary injunction, can issue a temporary restraining order where Petitioner has met the three-prong test and "where it appears that

immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." CPLR § 6313.

36. Here, as set forth below, Petitioners demonstrate their entitlement to preliminary relief by satisfying all elements of both of their claims.[60] And the type of relief requested is warranted. The single most important factor for this Court's analysis is the immediate and wholly irreparable harm—serious health consequences and death—faced by Petitioners. *See Sierra Club v. United States Army Corps of Engineers*, 990 F.Supp.2d 9, 38 (D.D.C. 2013) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 2013) ("[P]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered."). This is exacerbated by the recent increase in crowding, increased number of COVID exposed units, and likelihood that COVID precautions will become more relaxed as higher numbers of people in the community are vaccinated. This concern is at the heart of Petitioners' plea for relief and the analysis must begin there. Respondents' inaction—their failure to include Petitioners in Phase 1b and provide them with access to this life-saving medicine—severely jeopardizes Petitioners' health and lives. Petitioners face serious health complications and death if not immediately offered the vaccine. Because Respondents have failed to act, this type of injunctive relief is warranted to preserve the status quo—that Petitioners remain uninfected by COVID-19. Furthermore, given this extraordinary situation and the immediate and irreparable harm that

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[60] Even if the court finds that one of the elements is not as strong, the Court can balance the others and still find for the plaintiffs. *See supra cf, Schlosser*, 56 A.D.2d 615; *Republic of Lebanon v. Sotheby's*, 167 A.D.2d at 145; *State*, 275 A.D.2d at 741.

Petitioners risk so long as they are unvaccinated, this Court should grant a TRO and order Respondents to offer Petitioners the vaccine.

A. Petitioners Face Immediate Irreparable Harm

37. "[Petitioners'] risk of contracting COVID-19 and the resulting complications, including the possibility of death, is the prototypical irreparable harm." *Banks v. Booth*, 468 F.Supp.3d 101, 122 (D.D.C. 2020); *see also Matter of Walsh v. Design Concepts*, 221 A.D.2d 454, 455 (2d Dep't 1995) ("irreparable injury . . . has been held to mean any injury for which money damages are insufficient"); *Sterling Fifth Assoc. v. Carpentille Corp., Inc.*, 5 A.D.3d 328, 330 (1st Dep't 2004); *Samuelsen v. Yassky*, 29 Misc.3d 840, 848, 578 (Sup. Ct. N.Y. Co. 2010). Federal courts have held that the denial of eligibility for medical services by New York City and State officials constitutes irreparable harm. *See Caldwell v. Blum*, 621 F.2d 491 (2d Cir. 1980), *cert. denied*, 452 U.S. 909 (1981) (finding irreparable harm where plaintiffs "would absent relief, be exposed to the hardship of being denied essential medical benefits" because of a statutory enforcement of Medicaid eligibility by State Defendants); *Mayer v. Wing*, 922 F.Supp. 902, 909 (S.D.N.Y. 1996) ("Such a termination or reduction of Medicaid benefits would result in the deprivation of life-sustaining medical services . . . [t]his certainly constitutes irreparable harm").

38. There can be no dispute that unvaccinated, incarcerated people face a likelihood of immediate and irreparable harm from COVID-19. COVID-19 is a serious and fatal disease that has already claimed the lives of incarcerated people at DOC facilities, and infected at least 3,000 people in DOC custody. *See Basank v. Decker*, No. 20-cv-2518-AT, 2020 WL 1481503, at *6 (S.D.N.Y. Mar. 26, 2020) (finding that "[t]he risk of contracting

COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious" and concluding that "[p]etitioners face irreparable injury—to their constitutional rights and to their health"); *see also Maney v. Brown*, No. 6:20-cv-00570-SB, 2021 WL 354384 at *15 (D. Or. 2021) (finding same). Furthermore, the deprivation of Petitioners' rights to equal protection under the law constitutes irreparable injury. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.").

39. Respondents' failure to offer incarcerated individuals the vaccine places Petitioners at a significantly and unavoidably high risk of contracting COVID-19 compared to the general population. This risk, which can result in serious, long-term health complications and even death, is immediate, and with each day that passes, Petitioners are at further risk of irreparable harm. The granting of a temporary restraining order and preliminary injunction is vital to maintain the status quo and prevent the immediate and irreparable harm faced by Petitioners during the course of litigation.

40. By the very nature and design of DOC facilities, the harm faced by Petitioners is immediate. DOC facilities are extremely high-risk congregate settings that render the spread of COVID-19 extraordinarily difficult to control. Even if appropriate measures are taken to mitigate the spread of the virus, it remains near impossible to adequately ensure the health and safety of those incarcerated, absent vaccination. Specifically, primitive structures, older ventilation systems, crowding, and dormitory-style housing make it difficult to control the spread of the virus. Social distancing is nearly impossible to achieve in communal areas including bathrooms, showers, eating areas and dormitories. (Adewunmi and Fenig Aff. ¶

38; Petitioner Holden Aff. ¶ 4; Petitioner Frias Aff. ¶ 4). Because incarcerated people have very little freedom of movement, they are particularly reliant on the consistent and proper use of masks by all of those around them in order to minimize viral spread. And incarcerated people cannot fully control the behavior of those around them. (Adewunmi and Fenig Aff. ¶ 22; Gonsalves Aff. ¶ 6; Petitioner Holden Aff. ¶ 5; Petitioner Frias Aff. ¶ 8).

41. While reducing the number of individuals in DOC custody is generally accepted by public health experts and DOC's own medical staff as the most effective way to mitigate against the viral spread, the number of individuals currently incarcerated in DOC facilities is nearly identical to the number at the beginning of the pandemic in March 2020.[61] In response to this population density, and the reality of the current grave risks of infection in DOC facilities, Dr. Zachary Rosner, Chief Medical Officer of CHS, recently reiterated the need for decarceration, as well as the simultaneous need for vaccinations:

> "A year into the pandemic it seems this needs to be clarified again. Decarceration has a multiplier effect unlike any other COVID intervention in jails or prisons. It is important because it amplifies other protections and therefore it cannot be neglected. Here's why: Even when systems are succeeding at COVID containment, incarceration, especially short-term high-turnover detention but also all incarceration, has inherent health risks. In addition to over-[representation] of chronic illness among incarcerated people due to social inequities, there are just structural risks of the institutions themselves...This is also why **vaccine access is also critical** for all incarcerated. Its benefit goes well [beyond] benefits to those vaccinated. Like decarceration, its impact is exponential when available at a population level...We should be using the most powerful tools to protect people who live or work in these places. Decarcerate. Vaccinate. Save lives."[62]

Density of both cell and dormitory housing areas serves as a daily barrier to Petitioners'

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[61] *Weekly COVID-19 Update, Week of February 13-February 19, 2021,* NEW YORK CITY BD. OF CORR. at 5.

[62] *Twitter thread by Dr. Zachary Rosner, Chief Medical Officer of CHS*, Feb. 21, 2021, 4:21 pm, *available at* https://twitter.com/ZachRosnerMD/status/1363599771546615808.

ability to practice physical distancing.[63] As noted above, thousands of DOC and CHS staff enter and exit New York City jails every day, carrying with them a daily risk of exposure and transmission to others. Every day, DOC receives new admissions to custody from the community,[64] interacting with staff and other people in custody who may then serve as additional vectors of transmission to the rest of the people working and confined in the jails. Unsurprisingly, DOC facilities have been and continue to be a hotbed for viral spread. Since the beginning of the pandemic, there have been at least 3,000 documented cases within DOC facilities.[65] The number of incarcerated individuals confirmed positive for COVID-19 has increased at an alarming rate over the past two months, and the number has jumped by nearly 100 in the last month alone. As of February 19, 2021, there were 524 active COVID-19 cases in incarcerated individuals, representing nearly 10% of the overall DOC population.[66] The fact remains: COVID-19 continues to spread rampantly throughout the city jails and presents an immediate and unavoidable threat to the lives of those incarcerated within.

42. Absent injunctive relief, this Court will be unable to remedy the harm to Petitioners in the event of a judgment in their favor. If Petitioners contract COVID-19 before a judgment is issued in this case, they will be subject to serious illness, potential long-term health complications, and possibly death. In that case, the ultimate issue in this proceeding will become moot. The only way to ensure the status quo, in which Petitioners remain uninfected by COVID-19, is to issue a temporary restraining order and preliminary injunction. *See Bachman*, 184 N.Y. at 464.

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[63] *Id*. at 25-29, 31.
[64] *See id*. at 4.
[65] *See supra*, n. 19.
[66] *Id*. at 13.

43. Indeed, the type of physical harm Petitioners face should they contract COVID-19 is precisely the sort of immediate and irreparable harm that warrants a temporary restraining order and injunctive relief that would afford Petitioners essential and life-saving treatment. *See, e.g.*, *Egan v. New York Care Plus Ins. Co. Inc.*, 266 A.D.2d 600, 601-602 (3rd Dep't 1999) (granting preliminary injunction requiring payment for plaintiff's medical bills for treatment of central nervous system Lyme disease because of the extraordinary circumstance that without such relief, the plaintiff would "suffer dire physical consequences"); *Caldwell v. Blum*, 621 F.2d 491 (2d Cir. 1980), *cert. denied*, 452 U.S. 909 (1981) (finding irreparable harm where plaintiffs "would, absent relief, be exposed to the hardship of being denied essential medical benefits" because of a statutory enforcement of Medicaid eligibility by State Defendants); *Mayer,* 922 F.Supp. at 909 ("Such a termination or reduction of Medicaid benefits would result in the deprivation of life-sustaining medical services . . . [t]his certainly constitutes irreparable harm").

44. It is critical that Petitioners receive access to the COVID-19 vaccine immediately to avoid an increased risk of infection as city agencies and vaccinated individuals begin to — consciously and unconsciously—relax restrictions in the coming months. New York courts are on course to resume in-person operations, including jury trials, as early as March 2021.[67] Should Petitioners remain unvaccinated, they will be transported to court for routine adjournments, hearing, and trial, risking infection as they spend days in court correctional holding areas and in courtrooms with court staff, attorneys, judges, and jurors. Within correctional facilities, the risk

[67] Message from Chief Judge Janet DiFiore (Feb. 22, 2021). http://www.nycourts.gov/index.shtml ". . . the seven day rolling average is down to 3.4% as of February 20th, and the metrics are moving in the right direction. In anticipation of this positive trend continuing, we have started developing plans to resume some in-person operations, including a limited number of jury trials statewide."

of exposure to Petitioners grows more serious, not less. Despite previously stating that DOC would ensure that housing capacity remained under 50%, DOC Commissioner Cynthia Brann confirmed this month that DOC "cannot commit" to maintaining 50% population in jail dorms due to staffing issues.[68] Petitioners will face heightened risks of exposure both within increasingly crowded DOC facilities and in courthouses and courthouse transit.

45. As other groups in close proximity to Petitioners—correctional officers, CHS staff, and court staff—continue to be offered vaccinations, there is a concerning possibility that vaccinated individuals will take less stringent precautions, despite warnings to the contrary.[69] Public health experts have noted that in settings where vaccinations are high but compliance with mitigation measures is low, cases tend to rise.[70] It remains unknown, too, whether those who are vaccinated can transmit COVID-19.[71] In short, Petitioners face an imminent risk in the coming

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[68] Chelsia Rose Marcus, *NYC jail dorms are becoming overcrowded, raising concerns over social distancing as inmate population continues to climb*, N.Y. DAILY NEWS (Nov. 9, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-jails-rikers-island-social-distancing-housing-capacity-20201109-2qzrdexmbngvbokafk6mgkdzjm-story.html; *February 2, 2021 NYC Board of Correction Public Meeting*, Available at https://www1.nyc.gov/site/boc/meetings/february-9-2021.page, at 1:18:45.

[69] Press Briefing by White House COVID-19 Response Team and Public Health Officials, Statement of Dr. Rochelle Walensky, Director, Centers for Disease Control (Feb. 3, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/03/press-briefing-white-house-covid-19-response-team-and-public-health-officials/ ("Now is not the time to let our guard down."); A. Pawlowski, *The COVID-19 vaccine is here, but 5 public health concerns linger*, TODAY (Dec. 18, 2020), today.com/health/covid-vaccine-concerns-experts-urge-people-not-let-their-guard-t204267 (summarizing public health experts' concerns including "People who get vaccinated think they're immediately protected," and "People who are vaccinated will stop wearing masks and social distancing.")

[70] Angus Chen, *Vaccines Will Take Months to Slow Down the Pandemic. Until Then, Mask Up*, WBUR (Jan. 26, 2021), https://www.wbur.org/commonhealth/2021/01/26/study-masks-vaccines-covid-short-term ("The model's predictions are already playing out in one country where vaccinations are high but compliance with mitigation measures isn't, says Dr. Shira Doron, a hospital epidemiologist at Tufts Medical Center. Israel is leading the world in COVID-19 vaccinations at the moment, but cases hit a new high this month.").

[71] Smriti Mallapaty, *Can COVID vaccines stop transmission? Scientists race to find answers,* NATURE, (Feb. 19, 2021), https://www.nature.com/articles/d41586-021-00450-z (summarizing ongoing studies

months as the institutions and individuals around them relax precautions while Petitioners remain unprotected from infection and severe sickness or death.

46. Absent access to a COVID-19 vaccine, Petitioners face the dangerous realities of the congregate residential settings, therefore exposing them anew to uninterrupted and ongoing risk of serious illness, death, or long-term health complications. Every day that passes without action from Respondents authorizing access to the COVID-19 vaccine—and without intervention from the Court—poses an additional, serious risk of irreparable harm to Petitioners.

B. The Balance of Equities Falls Overwhelmingly In Favor of Granting Relief

47. Moreover, the harm to the Petitioners without the injunction will be greater than the harm to Respondents if the injunction is granted, and thus the balance of equities overwhelmingly favors the Petitioners. Specifically, as referenced above, because of the congregate nature of their living environment, the inability to protect themselves and their multiple risk factors, Petitioners face a high risk of serious illness or death from contracting COVID-19. Respondents, on the other hand, simply face the potential "harm" of offering and administering the vaccine to those in DOC custody. Any conceivable "harm" is minimal given that Respondents have already begun to administer the vaccine to correction staff and incarcerated people over 65 years of age. Further, Petitioners are not asking that any of the presently eligible groups be removed from vaccination eligibility, merely that incarcerated people as a group be *added* to the list in light of the substantially similar risks they face.

48. Additionally, granting injunctive relief, which lessens the risk that Petitioners will contract COVID-19 and suffer serious harm as a result, is in the public interest because

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attempting to determine whether vaccinated individuals can pass on the virus and concluding that "studies of individuals and larger populations are needed.")

it supports public health. Specifically, if Petitioners contract COVID-19, they risk infecting others inside the DOC facilities, including staff who live in the community, thus increasing the number of people vulnerable to infection in the community at large. Ordering Respondents to offer COVID-19 vaccinations to the Petitioners will not only lower the risk of Petitioner infections but will also benefit the public. *See, e.g., Maney*, 6:20-cv-00570-SB, 2021 WL 354384 at 3; *Banks*, 468 F.Supp.3d at 124 (finding that an injunction that "lessens the risk that Plaintiffs will contract COVID-19 is in the public interest because it supports public health," and "ordering Defendants to take precautions to lower the risk of infections for Plaintiffs also benefits the public"); *Carranza v. Reams*, --- F.Supp.3d ---, 2020 WL 2320174, at *11 (D. Colo. May 11, 2020) (concluding that the "high risk of serious illness or death if [plaintiffs] contract COVID-19 while in the Weld County Jail [ ] outweighs the harms identified by the defendant, which include maintaining control over the Jail without Court supervision and the costs of complying with plaintiffs' proposed preliminary injunction") (quotation marks omitted); *Mays*, 2020 WL 1812381, at *13 (rejecting the defendants' arguments that "an injunction requiring him to implement additional health and protective measures would be disruptive to his ongoing efforts to address the spread of coronavirus in the Jail" and "that the court should defer to the Jail's practices and its execution of policies that preserve internal order, discipline, and security in the facility"); *Ahlman v. Barnes*, 445 F.Supp.3d 671, 693 (C.D. Ca. 2020) ("[M]andating compliance with the CDC Guidelines in the Jail serves the public interest[.]"). Accordingly, the balance of equities weighs in favor of granting Petitioners' motion for interim relief.

C. Petitioners Are Likely to Prevail On the Merits of Their Claims

49. The relevant factual issues before the Court are narrow and clearly established by the factual record presented: prisons and jails are congregate settings in which Petitioners are at heightened risk of infection, serious illness, or death from COVID-19; Respondents have excluded incarcerated people from vaccine eligibility, while including those working and living in every other government-run or contracted congregate facility, and while including correctional workers; and Respondents' decision defies science, public health, and equity considerations, and contradicts the guidance they purported to rely on in making that decision. Moreover, Respondents have not provided any justification for this decision excluding Petitioners. Petitioners have provided ample factual support for their claims, including through affidavits from medical and public health experts annexed to the Petitioners' Verified Petition.

1. Petitioners are likely to succeed on their claim that Respondents' Exclusion is Arbitrary and Capricious.

50. Respondents' exclusion of incarcerated individuals from access to potentially life-saving medicine defies broad consensus in the scientific community and the equitable principles Respondents purport to have relied on. Respondents' decision to exclude Petitioners is arbitrary and capricious. A decision is arbitrary and capricious where "it is taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 N.Y.3d 424, 431 (2009). "The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact." *Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974). Government action is arbitrary and capricious where an agency fails to provide a reasoned, factual basis for its exercise of discretion. *See Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 N.Y.2d 753,

758 (1991). "[A] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." *Knight v. Amelkin*, 68 N.Y.2d 975, 977 (1986) (citing *Matter of Field Delivery Serv.*, 66 N.Y.2d 516, 517 (1985)). Further, a decision may also be arbitrary and capricious where two classes are treated differently despite being "so similar as to require the same treatment." *Matter of Buffalo Civic Auto Ramps v. Serio*, 21 A.D.3d 722, 725 (1st Dep't 2005) (citing *Matter of Klein v. Levin*, 305 A.D.2d 316, 317–18 (1st Dep't 2003)).

a. Respondents' Exclusion of Incarcerated People from Phase 1b is Arbitrary and Capricious Because It Departs Without Explanation From Their Vaccine Program's Stated Principles and Objectives, and Because It Lacks a Reasoned Justification.

51. Respondents' decision to exclude incarcerated people from Phase 1b neither accords with the principles and priorities laid out in Respondents' own Vaccination Program, nor was it accompanied by any justification—let alone a reasoned one—for this departure. That decision is arbitrary and capricious. *See Knight*, 68 N.Y.2d at 977. Furthermore, Respondents have completely "fail[ed] to adequately state a factual basis for . . . [their] conclusion[]" excluding incarcerated people from Phase 1b, which itself renders the exclusion arbitrary and capricious. *Council of Trade Waste Ass'ns, Inc. v. City of New York*, 179 A.D.2d 413, 415–16 (1st Dep't 1992); *see also Scherbyn*, 77 N.Y.2d at 758; *Matter of Montauk Improvement v. Proccacino*, 41 N.Y.2d 913, 914 (1977).

52. First, in excluding incarcerated people from Phase 1b, Respondents depart from the guidance they claim to have relied on in making decisions about vaccine access. *See* V. Pet. ¶ 17–50. Specifically, DOH stated that it would follow CDC and NASEM's guidance, and that prioritization decisions would be made mindful of the disparate impact of COVID-19 on

communities of color. *See id*. It is universally recognized that the communities of color that Respondents identified to be at the highest risk of infection and death are disproportionately represented in the incarcerated population. *See* V. Pet. ¶ 19–22, 63. Moreover, Respondents acknowledge that the CDC and NASEM recommend that incarcerated people be prioritized in the same phase as those in other congregate settings, and at the same time as correction staff. *See* V. Pet. ¶ 33–50. Specifically, Respondents initially incorporate this guidance in their Vaccination Program by placing "people who are incarcerated/detained in correctional facilities" within a section on "Priority Groups for COVID-19 Vaccine" alongside "People experiencing homelessness/living in shelters" and "People living and working in other congregate settings." *See* V. Pet. ¶ 19. Yet despite Respondents' claims that they would rely on CDC and NASEM's guidance, as well as equity principles, Respondents exclude incarcerated people generally from their Program without any explanation. This exclusion fails to adhere to their "own prior precedent" and claims of following scientifically-based guidance and appropriately weighing their own equity concerns—concerns they apparently adhered to in prioritizing other vulnerable groups and correction staff. Excluding incarcerated people from Phase 1b, when the CDC and NASEM direct that they should be included—and where serious equity concerns are implicated—is arbitrary and capricious. *See* V. Pet. ¶ 33–50.

53. Furthermore, Respondents fail to provide any explanation or justification for excluding incarcerated people in their vaccine rollout after acknowledging that they should be prioritized. *See Scherbyn*, 77 N.Y.2d at 758. Indeed, Respondents have been completely silent as to the basis for discriminating against incarcerated people and their decision to exclude them from a life-saving vaccine. *See* V. Pet. ¶ 10–11. Respondents have simply failed to provide any

"reasoned explanation"—or any reason at all—for discriminating between congregate settings housing incarcerated individuals and congregate settings housing those who are not incarcerated. Accordingly, the only plausible conclusion is that Respondents abused their discretion and made the decision arbitrarily. *See St. Vendor Project v. City of New York*, 10. Misc. 3d 978, 986 (Sup. Ct., N.Y. Co. 2005), *aff'd*, 43 A.D.3d 345, 346 (1st Dep't 2007); *cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.") (citations omitted). Furthermore, Respondents' "alter[ed their] prior stated course" without explanation. *Goldstein v. Brown*, 189 A.D.2d 649, 651 (1st Dep't 1993) ("[W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so.") (quoting *Field Delivery Serv.*, 66 N.Y.2d at 520)). Specifically, as referenced above, Respondents' Vaccination Program stated that it would adhere to CDC and NASEM guidance in deciding when to prioritize incarcerated people for vaccination eligibility. Thereafter, in early January 2021, Respondent Commissioner Zucker and Larry Schwartz represented that incarcerated individuals would be offered the vaccine at the same time as correction officers. *See* V. Pet. ¶ 27. Despite this stated course, Respondents then excluded incarcerated people from vaccine access in Phase 1b but granted access to others living and working in congregate settings. Respondent Cuomo's statements further demonstrate that Respondents had no reasoned basis to change course when he flouted and denounced the advice of public health experts saying "[w]hen I say 'experts' in air quotes, it sounds like I'm saying I don't really trust the experts . . . Because I don't. Because I don't."[72] Such "erratic and unexplained changes" are

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[72] J. David Goodman, Joseph Goldstein, and Jesse McKinley, "*9 Top Health Officials Have Quit As Cuomo Scorns Expertise*," N.Y. TIMES N.Y. Times (Feb. 1, 2021), at https://www.nytimes.com/2021/02/01/nyregion/cuomo-health-department-officials-quit.html (last visited Feb. 24, 2021).

the "antithesis" of the requirement of rational decision-making. *20 Fifth Ave., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 109 A.D.3d 159, 165 (1st Dep't 2013) (citing *Field Delivery Serv.*, 66 N.Y.2d at 516-17).

54. Respondents' failure to adhere to their own stated course of action, without any explanation or justification, is irrational as well as arbitrary and capricious, and Petitioners are therefore likely to succeed on the merits of this claim.

b. Respondents' Decision to Exclude Incarcerated People from Phase 1b Was Made Without Regard to the Fact that they are Similarly Situated to Those Residing in Other Congregate Facilities.

55. Excluding incarcerated people as a group from Phase 1b, while including staff and residents of other congregate facilities, as well as correction staff, is a decision "without sound basis in reason or regard to the facts." *Murphy v. New York State Div. of Hous. & Comty. Renewal*, 21 N.Y.3d 649, 652 (2013); *see also LaGreca Rest, Inc. v. New York State Liquor Auth.*, 33 A.D.2d 537, 538 (1969) (holding failure to consider crucial factors rendered decision arbitrary and capricious). And even where deference is afforded, "[c]ourts must scrutinize" an agency's action "for genuine reasonableness and rationality in the specific context presented by a case." *Murphy*, 21 N.Y.3d at 654–55 (internal citation and quotations omitted). Where, as here, Respondents' decision runs contrary to "overwhelming evidence" and there is a "lack of relationship" between Respondents' stated rationale and their decision, this Court must reverse their exclusion of incarcerated people from Phase 1b. *Id*. at 655.

56. Here, Respondents ignored the overwhelming scientific evidence that incarcerated people should be prioritized for vaccine access in at least the same phase as other congregate facilities. And scientists and public and medical health experts have stressed the importance of prioritizing incarcerated people for vaccine eligibility because of their own heightened risks of

infection as well as the risks to public health. *See* V. Pet. ¶ 40–50.

57. Furthermore, as the First Department has held, "[w]here two cases are so similar as to require the same treatment, to treat them differently would be evidence that the determination should be considered arbitrary and capricious." *Serio*, 800 N.Y.S.2d at 689 (citing *Matter of Klein*, 305 A.D.2d at 317–18). There is "no appreciable distinction" between the risk of infection that incarcerated people face, and the risk of infection that people living in other congregate facilities face. *Id.* (finding that a distinction drawn between two groups for worker's compensation purposes was arbitrary and capricious where "no appreciable distinction" existed between two groups facing the same level of risk). COVID-19 does not discriminate and the CDC, NASEM, and other public health experts all recognize this plainly evident reality. *See* V. Pet. ¶ 40–52. Respondents have not shown, and cannot show, that incarcerated people are in a different risk category from other groups in congregate settings. *See* V. Pet. ¶ 51–58. In prioritizing others in congregate settings for vaccination, Respondents acknowledge that congregate living arrangements pose a public health threat. Indeed, Respondents explicitly prioritized homeless shelters explaining they were doing so because "sleeping, bathing or eating accommodations must be shared with individuals and families who are not part of the same household." These identical activities occur in DOC facilities. *See* V. Pet. ¶ 25, 42, 45–50.

58. Therefore, by inexplicably failing to include incarcerated individuals as a group in Phase 1b, while including those living and working in other congregate settings, as well as correction staff, Respondents have acted in an arbitrary and capricious manner contrary to law and abused their discretion. Because the facts and the law favor Petitioners on this claim, Petitioners are likely to succeed on the merits.

2. Petitioners are likely to succeed on their claim that Respondents' Violated the Equal Protection Clause.

59. Respondents' distinction between those incarcerated and others residing in congregate settings is irrational and violates the federal and state constitutional guarantees to equal protection. "Our constitutional rights are not suspended during a crisis. On the contrary, during difficult times we must remain the most vigilant to protect the constitutional rights of the powerless. Even when faced with limited resources, the state must fulfill its duty of protecting those in its custody." *Maney v. Brown*, 6:20-cv-00570-SB, Dkt. 178 , at 3 (D. Or. Feb. 2, 2021) (holding Oregon's exclusion of incarcerated people from COVID-19 vaccine eligibility, while including other congregate settings and correctional workers, was unconstitutional).[73]

60. Under the Equal Protection Clause of the 14th Amendment and Article 1§ 11, the State classification at issue must bear "some fair relationship to a legitimate public purpose." *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Congregational Rabbinical Coll. Of Tartikov Inv. v. Vill. of Pomona*, 945 F.3d 83, 110 n.N 211 (2d Cir. 2019) (citing *People v. Kern*, 75 N.Y.2d 638, 649 (1990) ("The equal protection guarantees under the New York Constitution are coextensive with those under the U.S. Constitution.")). A state may not "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Further, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler*, 457 U.S. at 227

[73] Opinion available at https://www.courtlistener.com/recap/gov.uscourts.ord.151991/gov.uscourts.ord.151991.178.0.pdf.

(citing *Graham v. Richardson*, 403 U.S. 365, 374–75 (1971)). And when considering whether a rational basis exists in the context of an equal protection claim, a court will consider the "countervailing costs" to those who are being excluded. *Plyler*, 457 U.S. at 223-241.

61. New York State's phases 1a and 1b collectively encompass every government-run or contracted congregate living facility for adults, *except* carceral settings. *See* V. Pet. ¶ 23–25. The exclusion is stark. Phase 1a of New York State's Plan includes "residents at OPWDD, OMH and OASAS facilities." (It is worth noting that this category simultaneously priorities both "staff and residents" of these facilities. In contrast, Phase 1b includes corrections staff only, excluding residents of correctional facilities.) These agencies administer government-run or contracted congregate housing in New York State for individuals with developmental disabilities, mental health issues, and substance abuse issues. *See* V. Pet. ¶ 23. These congregate facilities are analogous to prisons and jails in every material way. *See* V. Pet. ¶ 40-60. Residents are generally not permitted to leave freely, and are confined to settings where they must share bathrooms, eating spaces, and sleeping spaces. And as outlined above, Phase 1b includes "individuals living in a homeless shelter where sleeping, bathing or eating accommodations must be shared with individuals . . . who are not part of the same household." *See* V. Pet. ¶ 25.

62. Recently, an Oregon federal court held that the Oregon Governor's decision to include those living and working in congregate care facilities and those working in correctional settings in Oregon's vaccine priority phase 1a, while excluding individuals living in correctional settings, violated the Eighth Amendment. *See Maney*, 6:20-cv-00570-SB,

Dkt. 178, at 3. While the Oregon court's constitutional analysis involved different constitutional claims from the one at hand, there are similar factual issues addressed by the Oregon court that warrant consideration. Specifically, the court found defendants' prioritization of correctional workers ahead of incarcerated people "[un]persua[sive] . . . belied by their own Vaccination Plan." *Id.* at 26. And that defendants' failure to follow CDC guidelines regarding prioritization amounted to deliberate indifference to inmates' serious medical harm. *See id*. at 29. Accordingly, the court found Oregon's policy defective and ordered the governor to offer vaccines to incarcerated individuals, as if they had been included in Phase 1a, Group 2 (analogous to New York's Phase 1b).

a. There is No Rational Basis to Exclude Incarcerated People from Phase 1b Vaccine Eligibility While Including People Residing in Every Other Type of Government- Run Congregate Living Facility.

63. Respondents' decision to exclude incarcerated people from Phase 1b must bear "some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. 202, 216 (1982). Rational basis analysis "is not meant to be toothless." *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (internal quotation marks omitted). "Equal protection requires the government to treat all similarly situated persons alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It prohibits the government from drawing "distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983).

64. Here, Respondents fail to treat similarly situated people in jails and prisons in the same way they treat those in *every other* adult congregate living facility. *See* V. Pet. ¶ 23–32.

Respondents have included all other residents of congregate living facilities in its vaccination prioritization phases, while categorically excluding those living in jails and prisons—defying the fundamental principles of equal protection. *See Felder v. Foster*, 71 A.D.2d 71, 74 (4th Dep't 1979) ("[denying] to a class of needy persons public assistance which is available to all other categories of needy persons . . . is not justifiable as rationally related to any legitimate state interest."). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Where, as here, "[t]he relation between the classification adopted and the object to be attained" simply does not bear out, the exclusion violates equal protection. *Id.* at 632–33. The exclusion systematically "produce[s] dramatic differences" in vaccine access "between petitioners…and otherwise comparable [groups]" living in homeless shelters and other congregate facilities. *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster*, 488 U.S. 336, 343 (1989); *see also Juleah Co. v. Incorporated Village of Roslyn*, 88 Misc.2d 809, 816 (Sup. Ct., Nassau Co. 1976), *aff'd* 56 A.D.2d 483 (2d Dep't 1977) (holding under rational basis that municipality had "burden to fairly apportion" a garbage removal scheme required "on a regular basis for health and safety reasons" amongst "comparable users" and "it is not equitable" to exclude a comparable class of users); *Merit Oil of N.Y. v. N.Y. State Tax Comm'n*, 111 Misc.2d 118, 119–20 (Sup. Ct., Albany Co. 1981) (finding no rational basis for "complete exemption" of one class of retailers from taxing statute). The classification "as written eliminates a large portion of [the programmatically] identified [priority] group" of those living in congregate settings "without setting forth a rational basis for doing so." *Goldman v. Fay*, 8 Misc. 3d 959, 965 (Civ. Ct.

Richmond Co. 2005).

65. Respondents have not articulated any reason for their exclusion of incarcerated people from the vaccine prioritization phases, while including those in other congregate living settings. That is because there is no material distinction between individuals living in prisons and jails, and individuals in other congregate living facilities, when it comes to their shared risk of infection from COVID-19. *See* V. Pet. ¶ 40–50. And Respondents can point to no distinction in the authorities they claim to rely on (the CDC and NASEM) or the underlying goal of the program (equitable access). To the extent that Respondents, as compared to individuals living in other congregate settings, are being excluded from access to the vaccine because they have been accused or convicted of a crime, this "difference [is] irrelevant to a legitimate governmental objective" in distributing the vaccine for public health purposes. *Lehr*, 463 U.S. at 265 (1983).; *see also U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection under the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

66. A COVID infection outbreak in a jail or prison is a public health issue because it not only impacts those inside the facility, but also the general public. Correctional facilities are incubators for the virus and those working in the facility spread it beyond the facilities' walls—there have been numerous documented spikes in communities near correctional facilities. [74] For example, a community outbreak in Greene County in the fall of 2020 was tied directly to a

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[74] *See* Eric Reinhart & Daniel L. Chen, Incarceration And Its Disseminations: COVID-19 Pandemic Lessons From Chicago's Cook County Jail, 39 HEALTH AFF. 1412 (2020), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2020.00652 (last visited Feb. 2, 2021) (finding that "cycling people through Cook County Jail alone is associated with 15.7 percent of all documented

COVID-19 outbreak at nearby New York State Greene Correctional Facility.[75] And given the fact that the majority of Petitioners are Black and Latinx, the decision to categorically exclude incarcerated people from Phase 1b must be closely scrutinized, even under a rational basis review. *See Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012) ("Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.").

67. The "countervailing costs" of being excluded from access to the vaccine could not be higher. *Plyler*, 457 U.S. at 223–24. For some, delay in receiving this vaccine may result in struggling through serious illness and facing unknown long-term side effects. For others, the delay is a matter of life and death. In sum, Respondents' decision to exclude incarcerated people as a priority group bears no fair relationship to any legitimate state interest and violates Petitioners' rights to equal protection under state and federal law. Petitioners are thus likely to succeed on the merits of this claim.

COVID-19 cases in Illinois and 15.9 percent of all documented cases in Chicago"); *see also* Michael Ollove, How COVID-19 in Jails and Prisons Threatens Nearby Communities, PEW: STATELINE (Jul. 1, 2020),https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons- threatens-nearby-communities (last visited Feb. 2, 2021).

[75] Mikhaela Singleton, Greene County, Columbia County leaders call out NYS prison system claiming mishandled cases, ABCNEWS10 (Oct. 20, 2020, 6:23 PM), https://www.news10.com/news/local-news/greene-county-columbia-county-leaders-call-out-nys-prison-system-claiming-mishandled-covid-cases/. (last visited Feb. 2, 2021).

b. Respondents' Exclusion of Incarcerated People from Phase 1b Violates the Equal Protection Clause Because It Contradicts the Vaccine Program's Stated Objectives and the Information It Purportedly Relied Upon.

68. "Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the [government]." *Romer v. Evans*, 517 U.S. 620, 632 (1996). Accordingly, this Court should consider the following: What was the government's stated objective in creating the vaccine prioritization phases? And what information did it purport to rely on in creating the phases?

69. Respondents published the Vaccination Program in October 2020, making public its framework for vaccine prioritization. *See* V. Pet. ¶ 17. As outlined above, DOH, through the Program, made clear that the sources for guidance on vaccine prioritization would be based in science, clinical expertise, and federal guidelines, in addition to equity concerns regarding the disparate impact of COVID-19 in communities of color. *See* V. Pet. ¶ 18, 20–21.

70. Respondents' decision to include residents of homeless shelters and residents of OPWDD, OMH and OASAS facilities in its initial prioritization phases is consistent with this stated framework. Respondents' inexplicable exclusion of incarcerated people from Phase 1b is not.

71. Prior to Respondents' determination of the currently eligible Phase 1b groups, the CDC and NASEM both recommended including incarcerated individuals in the same heightened risk category of "congregate living facilities" that also includes homeless shelters,

group homes, or employer-provided shared housing units. *See* V. Pet. ¶ 40–41. They did so recognizing the variety of environmental factors putting incarcerated people "at significant risk of acquiring and transmitting COVID-19," just like those living in homeless shelters or group homes. Incarcerated people reside in congregate settings— "environment[s] in which a group of usually unrelated persons reside, meet, or gather either for a limited or extended period of time in close physical proximity." *See* V. Pet. ¶ 40–41. Petitioners' experiences reflect the CDC and NASEM's concerns. Petitioners reside in DOC housing where they are confined throughout the day and night in enclosed spaces, regularly coming into close proximity with others. *See* V. Pet. ¶ 67–70, 74–78. Petitioners report having to share eating spaces, toilets, sinks, showers, and recreational spaces with dozens of other people, many of whom never wear a mask. At meal times, Petitioners are surrounded by other incarcerated people and unable to wear masks while they eat. In short, the conditions of their confinement put Petitioners at the same, if not greater, risk, as compared to other congregate settings.

72. The vast majority of those incarcerated in New York's jails and prisons come from the Black and Latinx communities that Respondents have recognized as disproportionately devastated by this pandemic. Importantly, 59.1% of the NYC DOC population currently in custody are Black, and 33% of the population are Hispanic.[76] *See* V. Pet. ¶ 63. And 87.1% of those currently housed in a "Confirmed or Symptomatic" and 75.7 of those housed in a "Likely Exposed" COVID-19 unit are either Black or Hispanic. *See id.* Respondents' decision to exclude incarcerated people as a priority group in Phase 1b directly contradicts—without explanation—their statement that "prioritization decisions will be made

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[76] *Weekly COVID-19 Update, Week of February 13-February 19, 2021,* NEW YORK CITY BD. OF CORR. *Id.* at 10.

mindful of the disparate impact of COVID-19 on communities of color, and the health disparities present in underrepresented and marginalized communities, and those with historically poor health outcomes." *See* V. Pet. ¶ 20–22.

73. New York's vaccine prioritization program's failure to include incarcerated people as a priority group is clearly "contrary to the guide published by [the state]" for how vaccine prioritization phases should be determined and therefore violates equal protection. *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 340 (rejecting a local tax assessment scheme under rational basis review where the scheme was contrary to the state's published guide). Because the facts and law favor this claim, Petitioners are likely to succeed on the merits.

D. Mandatory Action Is Required Because this is an Extraordinary Circumstance and Relief is Essential to Maintaining Status Quo

74. As outlined above, mandatory injunctive relief is necessary here to ensure that the health and well-being of those facing infection within a carceral setting is preserved while Petitioners' claims are pending. An injunction directing a party to perform an affirmative act will be granted where relief is essential to maintaining the status quo pending trial. *Second on Second Cafe, Inc.*, 66 A.D.3d at 265. And a mandatory preliminary injunction is warranted where the status quo is "a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant." *Bachman*, 184 N.Y. at 464 (1906). This is precisely the scenario here: the "condition of rest" during which Respondents refuse to grant vaccine access to incarcerated individuals inflicts irreparable harm to Petitioners who remain at high risk of contracting COVID-19, suffering serious medical complications or even death.

75. Because mandatory preliminary injunctive relief tends to confer some form of

the ultimate relief sought, it is appropriate upon a showing of "unusual" or "extraordinary" circumstances, in addition to satisfaction of the three-pronged test for a preliminary injunction. *See Second on Second Cafe, Inc.*, 66 A.D.3d at 264; *Bd. of Managers of Wharfside Condo. v. Nehrich*, 73 A.D.3d 822, 824 (2d Dep't 2010). Petitioners have clearly established that they are likely to prevail on their claims; that they face immediate irreparable harm if relief is not granted; and that the balance of equities is in favor of granting relief. On top of these factors, COVID-19's remarkable contagion and rapid transmission within correction and detention facilities, and the recent availability of a vaccination against this virus, certainly constitute "unusual circumstances" that raise novel challenges for preserving inmate health during litigation that can otherwise take months. The extraordinary harm wrought by COVID-19's spread within congregate facilities, including jails and prisons, dictates that immediate relief in the form of mandatory preliminary injunctive relief should be granted.

76. Courts have granted mandatory preliminary injunctions in circumstances where, as here, the status quo presents a serious and imminent danger to the health and safety of a party. In a suit brought by a class of inmates at Bedford Hills Correctional Facility alleging constitutional violations arising from inadequate dental care — including "pain, loss of teeth, discomfort, weight loss, and infection . . . all forms of irreparable harm" — the court granted a mandatory preliminary injunction requiring Bedford Hills to provide a "dental access system that assures prompt diagnosis and treatment for inmates with serious dental needs." *Dean v. Coughlin*, 623 F.Supp. 392, 405 (S.D.N.Y. 1985). The Bedford Hills inmates were deemed to be at risk of suffering "extreme and serious damage" were they

denied access to dental care during the ongoing litigation—an extraordinary circumstance that warranted a mandatory preliminary injunction. *Id.* at 400. In *New York County Lawyers' Ass'n v. State*, No. 102987/00, 2002 WL 34435661 (Sup. Ct., N.Y. Co. May 03, 2002), the trial court issued a mandatory preliminary injunction increasing the rate for payment of assigned counsel for in- and out-of-court work. The court found that "evidence that minors and indigent adults will likely receive ineffective assistance of counsel in the family and criminal courts in New York City is sufficient to warrant judicial intervention in the form of a preliminary injunction." *Id.* The extraordinary circumstance posed by the crisis in indigent defense representation and the state's failure to act merited immediate relief.

77. Moreover, mandatory preliminary injunctions have been upheld requiring defendants to maintain plaintiff's access to medical coverage that would prevent irreversible neurological injury, *see Egan,* 266 A.D.2d at 601–02; and mandating a local Board of Supervisors to provide for reapportionment during pending litigation to avoid disenfranchising constituents, *see Graham v. Bd. of Sup'rs, Erie Cty.*, 49 Misc. 2d 459, 468 (Sup. Ct. Erie Co. 1966), *modified sub nom. Graham v. Bd. of Sup'rs*, 25 A.D.2d 250 (4th Dep't 1966). Mandatory preliminary injunctions have also been granted in cases involving harms that are not as grave as those posed here such as those involving property damage. *See, e.g., McMahon v. Cobblestone Lofts Condominium*, 161 A.D.3d 536, 537 (1st Dep't 2018) (affirming order granting plaintiff's motion for a preliminary injunction requiring condominium "to make all necessary repairs to prevent further infiltration of water in plaintiffs' unit"); *The Brooklyn Tabernacle v. Thor 180 Livingston LLC*, No. 518739/2019,

2020 WL 2557882, at *4 (Sup. Ct., N.Y. Co. May 20, 2020) (requiring defendants to make repairs to abate ongoing mold, water and sewage contamination). In each of these cases, the mandatory preliminary injunction was required because the status quo posed a serious risk of harm to petitioner's health, property, or liberty—just as the current ineligibility of incarcerated individuals to access the COVID-19 vaccine poses a grave ongoing risk of serious illness or death to Petitioners.

78. Respondents' continued refusal to offer vaccination to incarcerated individuals will almost certainly result in the spread of COVID-19 within city correctional facilities. Incarcerated people are more at risk than correctional staff of contracting COVID-19 (Adewunmi and Fennig Aff. ¶ 27) and more likely to have underlying conditions that predispose them to a serious course of COVID-19 (Adewunmi and Fennig Aff. ¶ 27). The life-altering harm that will befall Petitioners while they await access to a vaccine—the possibility of a serious course of illness, lingering symptoms, and even death—cannot be remedied by future injunctive relief or monetary damages, and constitute the sort of extraordinary circumstances that plainly warrant affirmative relief. A mandatory preliminary injunction is thus required to maintain the status of the parties. And a TRO is appropriate while this injunction is litigated given the extraordinary risk to Petitioners.

CONCLUSION

Given the immediate and grave harm Petitioners face every day while incarcerated, that the balance of equities swings in Petitioners' favor, and Petitioners likelihood of success on the merits of one or more of their claims; this Court should grant a temporary restraining order and mandatory injunction directing Respondents to include Petitioners in Phase 1b and offer Petitioners this life-saving medicine.

Dated: February 25, 2021
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