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,

Petitioners,

Index No.

VERIFIED PETITION

For a Judgment Pursuant to Article 78 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.

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Petitioners, CHARLES HOLDEN and ALBERTO FRIAS, by their undersigned attorneys, for their Verified Petition allege and aver as follows:

PRELIMINARY STATEMENT

1. It is well-known and undisputed that people working and living together are at heightened risk for infection by COVID-19, the pandemic killing and profoundly harming hundreds of thousands of people in the United States and millions around the world.

2. Because of how COVID-19 is transmitted, individuals living and working in congregate settings—such as jails and prisons—are at higher risk for COVID-19 exposure and infection. Since the start of the pandemic, American prisons and jails have been uniquely vulnerable to outbreaks of COVID-19—upon entering a facility, the virus can sweep 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, jails and prisons have not only become hotbeds themselves but have fueled the spread of COVID-19 through the larger community.

3. Recently, vaccines have been developed to inoculate against COVID-19—vaccines that will help to stop illness and death. Yet despite the fact that Petitioners face a heightened risk of contracting COVID-19 due to their congregate conditions of confinement, Respondents have excluded them from access in their current vaccine distribution plan.
4. Respondents' decision to exclude incarcerated individuals from their vaccine distribution plan is in contravention of guidance, on which they purport to rely, from the Centers for Disease Control and Prevention ("CDC") and other leading public health and medical experts: Incarcerated people are extremely vulnerable to COVID-19 and should be prioritized for vaccination.
5. These same experts have also explicitly counseled states to vaccinate staff and incarcerated/detained persons of correctional or detention facilities ***at the same time*** because of their shared increased risk of disease.
6. Respondents' decision to exclude incarcerated people from prioritization is also in contradiction to their stated goal of ensuring equitable access to the vaccine regardless of factors such as wealth or social status. And it contradicts Respondents' public recognition that vaccine access for Black and brown communities must be ensured, as those communities have suffered disproportionate rates of infection and death from the virus. Petitioners are, overwhelmingly, low-income, and mostly from Black and Latinx communities. Notably, the most recent public reporting identifies over 90% of the people

housed in New York City Department of Correction ("DOC") "Confirmed or Symptomatic" or "Likely Exposed" COVID-19 units as either Black or Hispanic.

7. In excluding incarcerated people as a group from their current vaccine priority phases, Respondents have irrationally ignored medical and public health expertise, and drawn distinctions—between incarcerated people and people in other congregate settings, as well as between incarcerated people and workers in correctional facilities—that serve no legitimate public health purpose. In short, Respondents have deprioritized the lives of people living in the dangerous conditions of New York's jails and prisons.
8. Petitioners bring this Article 78 Petition to direct the Respondents to immediately authorize incarcerated people for vaccine eligibility as a group in priority category 1b, so that they may be offered the opportunity for vaccination and protection from the serious illness and death that can result from contracting COVID-19.

PARTIES

9. Petitioner Charles Holden is a 52 year-old man who is currently incarcerated in the custody of the New York City Department of Correction, and who has not been offered the COVID-19 vaccination.
10. Petitioner Alberto Frias is a 24 year-old man who is currently incarcerated in the custody of the New York City Department of Correction, and who has not been offered the COVID-19 vaccination.
11. Petitioners bring this Article 78 on behalf of all individuals who are or will be incarcerated in New York City Department of Correction custody who have not been offered access to the COVID-19 vaccination.

12. Respondent Howard A. Zucker is the Commissioner of Health of the State of New York ("Commissioner of Health") and oversees the functions of the New York State Department of Health ("DOH"), a state governmental agency established by the Legislature and charged with promoting the public health. See N.Y. Pub. Health Law §§ 200, 201, 206. The Commissioner of Health is responsible for establishing immunization programs "necessary to prevent or minimize the spread of disease and to protect the public health." Id. § 206(l).

13. Andrew M. Cuomo is the Governor of the State of New York and in that capacity is responsible for overseeing and directing governmental agencies including the DOH, and for issuing emergency orders and directives in response to the COVID-19 pandemic.

14. Respondents Zucker and Cuomo are responsible for establishing the COVID-19 vaccine distribution plans, including the timing of when certain categories of individuals within each phase are authorized to receive vaccinations.

VENUE

15. Venue is proper pursuant to Sections 503(a), 506(b) and 7804(b) of the Civil Practice Laws and Rules as Bronx County holds jurisdiction over Rikers Island, where all of the named Petitioners and the majority of Class members are presently confined, and where the material events took place.

STATEMENT OF FACTS

16. The basis for this Article 78 Petition is the Respondents' failure to include petitioners in COVID-19 eligibility group 1b with similarly situated individuals.

Respondents Created Phased Priority Categories for COVID-19 Vaccine Eligibility Purportedly Based on CDC and NASEM Recommendations and Equity Principles

17. New York State's vaccine distribution and implementation program was promulgated by Respondent Commissioner Zucker in coordination with Respondent Governor Cuomo. DOH's COVID-19 Vaccination Program ("the Vaccination Program"), published in October 2020, describes in detail the State's plan for distribution and the bases for that program.[1] Under the Vaccination Program, Respondents purported to prioritize groups for COVID-19 vaccination based "solely on clinical and equitable standards."[2]

18. In determining what priority groups are dictated by clinical standards, DOH states in the Vaccination Program 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)."[3] The Advisory Committee on Immunization Practices ("ACIP") is a committee within the CDC comprised of medical and public health experts that develops recommendations on how to use vaccines to control diseases in the United States.[4]

19. In justifying its priority group determinations, DOH specifically cites in the Vaccination Program 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

[1] N.Y. STATE DEP'T OF HEALTH , NEW YORK STATE'S COVID-19 VACCINATION PROGRAM, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_COVID_Vaccination_Program_Book_10.16.20_FINAL.pdf (last accessed Feb. 2, 2021).
[2] *Id.* at 10.
[3] *Id.* at 27.
[4] *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

transmitting COVID-19" alongside "[p]eople experiencing homelessness/living in shelters" and "[p]eople living and working in other congregate settings".[5]

20. In explaining its reliance on equity principles, DOH purports that the Vaccine Program is based on "equitable standards that 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."[6]

21. In addressing health equity, the Vaccine Program recognizes that "[h]eightened COVID-19 mortality among Black and Hispanic communities" is well established.[7] The Vaccine Program also recognizes that "compared to white non-Hispanic adults, racial/ethnic minority populations had disproportionately higher per population likelihoods of COVID-19 diagnosis and hospitalization."[8] The Program 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."[9]

22. And Governor Cuomo himself has declared that:

> 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.[10]

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[5] N.Y. STATE DEP'T OF HEALTH, *supra* note 2, at 79.
[6] *Id.* at 10.
[7] *Id.* at 31.
[8] *Id.*
[9] *Id.* at 27.
[10] 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),

23. New York State DOH began its phased distribution of COVID-19 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 COVID-19 vaccine, included, among other groups: residents and staff at nursing homes and other congregate care facilities; and staff and residents at Office for People with Developmental Disabilities ("OPWDD"), Office of Mental Health ("OMH"), and Office of Addiction Services and Supports ("OASAS") facilities.[11]

24. OPWDD, OMH, and OASAS residential centers are located throughout the state and house people who have applied and have been found eligible for their services. It should be noted that just as with correctional facilities, most residents live full-time in these facilities and share living spaces.[12]

25. 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."[13]

26. The 1b subcategory entitled "Corrections" specifically includes:

    a. State Department of Corrections and Community Supervision Personnel, including correction and parole officers;

    b. Local Correctional Facilities, including correction officers;

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https://www.governor.ny.gov/news/governor-cuomo-ag-james-national-urban-leagues-morial-naacp-s-johnson-federal-covid-vaccine (last accessed Feb. 2, 2021).

[11] *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 accessed Feb. 2, 2021).

[12] Housing, N.Y. State Off. for People With Developmental Disabilities, https://opwdd.ny.gov/types-services/housing (last accessed Feb. 3, 2021); Licensed Program Type Definitions, N.Y. State Off. of Mental Health, https://omh.ny.gov/omhweb/licensing/definitions.htm (last accessed Feb. 3, 2021); Treatment, Off. of Addiction Services & Support, https://oasas.ny.gov/treatment (last accessed Feb. 3, 2021).

[13] *Id.*

c. State Department of Corrections and Community Supervision Personnel, including correction and parole officers;

d. Local correction facilities, including correction officers;

e. Local Probation Departments, including probation officers;

f. State Juvenile Detention and Rehabilitation Facilities; and

g. Local Juvenile Detention and Rehabilitation Facilities.

Incarcerated Individuals are Excluded from Priority Category Phase 1b

27. Although 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, incarcerated individuals are currently excluded from eligibility in category 1b.[14]

28. Notably, although individuals working within correctional facilities are covered in category 1b, those who are ***confined and living*** in such facilities are excluded from the category.[15]

29. Despite public pressure from advocates, elected officials, and medical professionals, among others, Respondents have not made a plan for making vaccines available to all incarcerated individuals throughout the state.[16] In fact, spokespeople from Respondent

[14] 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 accessed Feb. 2, 2021) (reporting Zucker and Schwartz told lawmakers incarcerated people would be in Phase 1b).

[15] *N.Y. State Phased Distribution*, *supra* note 11.

[16] Troy Closson, The High Risk Group Left Out of New York's Vaccine Rollout, N.Y. TIMES (Jan. 26, 2021), at https://www.nytimes.com/2021/01/26/nyregion/new-york-vaccine-prisons.html (last accessed Feb. 2, 2021) (stating spokesperson for Governor Cuomo indicated only that plan for incarcerated individuals was still being developed); *see also* Nicole Javorsky, *Confusion Persists Around State's Vaccine Plans for Incarcerated New Yorkers*, CITY LIMITS (Jan. 7, 2021), https://citylimits.org/2021/01/07/confusion-persists-around-states-vaccine-plans-for-

Cuomo's office have indicated that there is not currently any plan for vaccinating incarcerated people.[17]

30. Dr. Robert Cohen, a member of the Board of Correction of New York City ("BOC") which oversees the conditions of confinement in NYC DOC facilities, said of the State's current exclusion of incarcerated people from vaccine eligibility, "I really don't understand it. But the consequences will be quite severe."[18]

31. As Dr. Patricia Yang, Senior Vice President for Correctional Health Services ("CHS"), stated at the January 12, 2021 BOC public meeting: "We continue to advocate that all our patients should be eligible to be offered the vaccine, not necessarily because of their health status, but because of the nature of the congregate setting." Dr. Yang noted that CHS has "not yet received that approval [from the state], but we will continue to argue for it."[19]

32. With the exception of residents of congregate facilities for youth, who are not clinically eligible for COVID-19 vaccination, residents of all government operated, licensed, or regulated facilities designated by DOH as congregate facilities are explicitly included in Phases 1a and 1b, except for persons incarcerated in correctional facilities.[20]

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incarcerated-new-yorkers/ (last accessed Feb. 2, 2021) (stating DOH spokesperson declined to confirm state's plans for vaccinating incarcerated individuals).

[17] Closson, *supra* note 14.

[18] *Id.*

[19] January 12, 2021 Public Meeting, New York City Board of Correction, available at https://www1.nyc.gov/site/boc/meetings/january-12-2021.page (relevant segment 1:32:33-1:32:47).

[20] *Id.*; *see also* N.Y. STATE DEP'T OF HEALTH, HEALTH ADVISORY: ALL RESIDENTIAL CONGREGATE FACILITIES (Oct. 23, 2020), https://forward.ny.gov/system/files/documents/2020/10/congregate_facility_visitation_in_zones_10_23_2020.pdf (last accessed Feb. 2, 2021); N.Y. STATE DEP'T OF HEALTH, *supra* note 11.

The CDC and Public Health Experts Advise That Correctional Workers and Incarcerated People Should be Vaccinated Simultaneously

33. The CDC has not only called for the vaccination of incarcerated individuals, it has also recommended that States should "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).[21] Public health experts beyond the CDC have likewise uniformly recommended that both correctional workers and incarcerated people be prioritized within the same phase of vaccination.

34. Specifically, the National Academy of Science, Engineering and Medicine ("NASEM") released a report recommending prioritization of various populations at severe risk of COVID-19, based upon an evaluation of their risk of: (1) acquiring infection, (2) severe morbidity and mortality, (3) negative social impact, and (4) transmitting infection to others. NASEM ranked both incarcerated people and correctional staff as having the same high level of risk, and therefore prioritized both groups in the same vaccine distribution phase.[22] Accordingly, NASEM's phased guidance includes people incarcerated in prisons, jails, and detention centers in the same phase as "people in homeless shelters or group homes…with the expectation that they have limited

[21] *Vaccine FAQs in Correctional and Detention Centers*, CTR. FOR DISEASE CONTROL AND PREVENTION (Jan. 11, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/vaccine-faqs.html (last accessed Feb. 2, 2021) (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.").

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

opportunity to follow public health measures such as maintaining physical distance, putting them at significant risk of acquiring and transmitting COVID-19."[23]

35. Moreover, the American Medical Association ("AMA") has also affirmed that designating *both* correctional staff *and* incarcerated people as high-priority populations for the 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."[24] This policy recommendation was shared with the federal government's Advisory Committee on Immunization Practices.[25]

36. 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."[26]

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[23] *Id.* at 110.
[24] Preliminary Report of Am. Med. Ass'n House of Delegates Reference Comm. D Meeting (Nov. 2020), 12–13 https://www.ama-assn.org/system/files/2020-11/nov20-ref-com-d-annotated.pdf (last accessed Feb. 2, 2020).
[25] Brendan Murphy, *AMA to Help Shape Clear Criteria for Compassionate Release of Inmates*, AM. MED. ASS'N (Nov. 17, 2020), https://www.ama-assn.org/delivering-care/population-care/ama-help-shape-clear-criteria-compassionate-release-inmates (last accessed Feb. 2, 2021); *see also* Preliminary Report of Am. Med. Ass'n House of Delegates Reference Comm. D Meeting (Nov. 2020), https://www.ama-assn.org/system/files/2020-11/nov20-ref-com-d-annotated.pdf (last accessed Feb. 2, 2020).
[26] 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 (last accessed Feb. 2, 2020).

37. In reality, the COVID-19 risk for incarcerated individuals is *higher* than for correction staff.[27] According to NASEM, "[p]eople who are incarcerated tend to have multiple risk factors that can increase their risk of contracting [COVID-19]".[28]

38. Incarcerated people are both more at risk of becoming infected with COVID-19 and more at risk of serious complications from COVID-19 than correction staff. The annexed Affirmation of clinicians Victoria Adewunmi, M.D. and Mark Fenig, M.D. and epidemiologist Gregg Gonsalves, Ph.D. explain that incarcerated people lack the authority and autonomy to compel those around them to abide by measures to protect against the transmission of COVID-19. (Affirmation of Victoria Adewunmi, M.D. and Mark Fenig, M.D. ("Adewunmi and Fenig Aff.") ¶ 27); Affirmation of Gregg Gonsalves, Ph.D. ("Gonsalves Aff.") ¶ 6). Incarcerated people are also more likely to have underlying conditions that predispose them to having a more serious course of COVID-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.[29] Moreover, the correctional environment itself has a deleterious impact on the health of those in custody.[30] It is now well-documented that certain pre-existing diseases predispose individuals to a more severe course of COVID-19 disease and that the health vulnerabilities of the incarcerated

[27] Emily Wang et al., *Recommendations for Prioritization and Distribution of COVID-19 Vaccine in Prisons and Jails*, COLUMBIA JUST. LAB 3 (Dec. 16, 2020), https://justicelab.columbia.edu/sites/default/files/content/COVID_Vaccine_White_Paper.pdf (last accessed Feb. 2, 2020).
[28] Helene Gayle et al., *supra* note 20, at 37-38.
[29] *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).
[30] David H. Cloud et al., *Addressing Mass Incarceration: A Clarion Call for Public Health*, 104 AM. J. PUB. HEALTH 389 (2014).

population therefore render them particularly susceptible to serious illness from a COVID-19 infection. (Adewunmi and Fenig Aff. ¶ 31-33; Gonsalves Aff. ¶ 14-19).

39. Finally, authorizing the vaccine for correction staff will not abate the risk of SARS-CoV-2 transmission to everyone in the jail and prison systems 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 also unknown whether people who are vaccinated still transmit the virus. (Adewunmi and Fenig Aff. ¶ 26).[31]

The CDC and Public Health Experts Recommend Prioritizing Vaccine Eligibility for People in Congregate Settings and Including Carceral Settings as High-Risk Congregate Settings

40. In recommending priority for vaccine eligibility, the CDC has additionally included both incarcerated individuals and others living in congregate settings in the same high-risk category. Specifically, given the increased rates of COVID-19 transmission in congregate living settings, the CDC has advised that states should consider authorizing vaccinations for individuals in congregate living facilities, including those in correction or detention facilities during the 1b vaccination phase.[32]

41. In its recommendation, the CDC includes correction and detention facilities in the category of "congregate living facilities" that also includes homeless shelters, group homes, and employer-provided shared housing units. The NASEM similarly places

[31] *Frequently Asked Questions About COVID-19 Vaccination*, CTR. FOR DISEASE CONTROL AND PREVENTION (Jan. 25, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html (last accessed Feb. 2, 2021) ("We also don't yet know whether getting a COVID-19 vaccine will prevent you from spreading the virus that causes COVID-19 to other people, even if you don't get sick yourself."); *COVID-19 Vaccine: What You Need to Know*, JOHNS HOPKINS MEDICINE (Jan. 21, 2021), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-19-vaccine-what-you-need-to-know (last accessed Feb. 2, 2021).

[32] CTR. FOR DISEASE CONTROL AND PREVENTION, COVID-19 VACCINATION INTERIM PLAYBOOK FOR JURISDICTION OPERATIONS 15 (Oct. 29, 2020), https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf (last accessed Feb. 2, 2021).

"[p]eople who are incarcerated or detained and people who live in group homes and homeless shelters" in the same priority group, and "[w]ith respect to these groups, [the] committee stresses the importance of recognizing their reduced autonomy and the difficulty of preventing spread in such settings should COVID-19 be introduced."[33]

42. The CDC and other public health experts recommend prioritizing congregate residential settings because they pose a very high risk of COVID-19 transmission due to the physical realities of shared spaces and the inability of inhabitants to control their environments and ensure adherence to self-protective public health measures. (Adewunmi and Fenig Aff. ¶ 19, 42; Gonsalves Aff. ¶ 6, 24). People in these settings share common spaces to eat, bathe, socialize, and even sleep. (Adewunmi and Fenig Aff. ¶ 21; Gonsalves Aff. ¶ 26, 28).

43. Moreover, congregate settings increase the likelihood of airborne transmission because, as the CDC has stated, high-risk airborne droplet transmission of SARS-CoV-2 occurs in enclosed spaces, during prolonged exposure to respiratory particles, and in settings with inadequate ventilation or air handling.[34] (Adewunmi and Fenig Aff. ¶ 20; Gonsalves Aff. ¶ 5).

44. According to a report on COVID-19 and the U.S. Criminal Justice System written by professors from Johns Hopkins School of Public Health for the National Commission on COVID-19 and Criminal Justice, the dynamic nature of correctional settings makes them a public health risk because "[i]ncarcerated individuals can transmit the SARS-CoV-2

[33] 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 (last accessed Feb. 2, 2021).
[34] *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission*, CTR. FOR DISEASE CONTROL AND PREVENTION (Oct. 5, 2020), https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html (last accessed Feb. 2, 2021).

virus through interaction with other incarcerated people in the facility or through transfers."[35] 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. (Adewunmi and Fenig Aff. ¶ 21; Gonsalves Aff. ¶ 20).

45. Public health experts acknowledge prisons and jails as particularly high-risk congregate settings in part because incarcerated people cannot protect themselves against contracting COVID-19. Incarcerated people are most often powerless to control or respond with autonomy to the reckless behavior of others. While wearing one's mask provides some protection against virus particles, for example, individuals are reliant on those around them to also wear masks to minimize virus spread. (Adewunmi and Fenig Aff. ¶ 22; Gonsalves Aff. ¶ 6). In settings where social distancing is limited or impossible, such as congregate living settings, the full effectiveness of masks relies on every person complying with masking policies. (Adewunmi and Fenig Aff. ¶ 22). These congregate realities are ever-present for people in custody.

46. Detention settings pose an additional layer of risk: people in custody are forced to rely on the facility to provide every basic human need and are subject to security measures as the facility provides them. (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 the jail setting pose even greater risk than shelters, settings rightfully authorized for vaccine access by New York State:

> 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

[35] 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), https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/20201015-covid-19-criminal-justice-system.pdf (last accessed Feb. 2, 2021).

> 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 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).[36]

47. There is wide agreement among public health authorities that correctional facilities pose particular 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."[37] Other experts in the field agree that these risk factors are both highly present and of grave concern.[38] Dr. Homer Venters, an epidemiologist and the former Chief Medical Officer and Assistant Vice President of CHS, describes the design and operation of jails as "basically a system designed to spread communicable disease."[39]

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[36] 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 (last accessed Feb. 2, 2021).

[37] Megan Wallace, et al., *COVID-19 in Correctional and Detention Facilities*, CTR. FOR DISEASE CONTROL AND PREVENTION: MORBIDITY AND MORTALITY EARLY REPORT (May 15, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm (last accessed Feb. 2, 2020).

[38] *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 (2015), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf (last accessed Feb. 2, 2021); 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. 2, 2020), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf (last accessed Feb. 2, 2021).

[39] 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 (last accessed Feb. 2, 2021).

48. Experienced practicing clinicians also attest that widespread vaccination of 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 that the staff and people in custody interact with when they leave the jails. (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). The broader New York City community may not have widespread vaccine access for months, and some may be ineligible to receive it due to medical reasons. (Adewunmi and Fenig Aff. ¶ 39). 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, as Senior Vice President of CHS Dr. Yang acknowledged to the BOC in a public meeting on January 12, 2021.[40] (See also Adewunmi and Fenig Aff. ¶ 39). It is therefore sound public health practice to expand access to all people within a particular setting to decrease the risk to everyone therein. (Adewunmi and Fenig Aff. ¶ 39; Gonsalves Aff. ¶ 33).

49. As Drs. Adewunmi and Fenig affirm, "[e]xcluding 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 distinction is, at best, arbitrary. It certainly does not align with

[40] *See 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 (last accessed Feb. 2, 2021).

available COVID-19 literature and CDC guiding principles of phased vaccine distribution." (Adewunmi and Fenig Aff. ¶ 42).

50. Dr. Gonsalves, an epidemiologist and global health expert, similarly affirms, "[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).

DOC Facilities are Congregate Settings Where Incarcerated People Face Increased Risk of Infection Similar to, or Greater than, Residents of Other Congregate Facilities

51. DOH defines correctional facilities as congregate facilities for purposes of COVID-19.[41] Previous DOH guidance for congregate facilities regarding COVID-19 risk includes correctional facilities along with other facilities that are already included in Phases 1a and 1b, specifically nursing homes, adult care facilities and adult homes. [42]

52. And per the New York City Department of Health, congregate settings include "an environment 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."[43]

[41] N.Y. STATE DEP'T OF HEALTH, HEALTH ADVISORY: ALL RESIDENTIAL CONGREGATE FACILITIES (Oct. 23, 2020), https://forward.ny.gov/system/files/documents/2020/10/congregate_facility_visitation_in_zones_10_23_2020.pdf (last accessed Feb. 2, 2021).
[42] *Id.*
[43] 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 (last accessed Feb. 2, 2021).

53. New York City's DOC facilities are quintessentially congregate settings.[44] And without a doubt, Petitioners in these congregate settings are particularly vulnerable to COVID-19.

54. NYC DOC facilities share the trademark characteristics of congregate residential settings: shared sleeping spaces, whether in a dorm or a cell, shared eating spaces, and shared toilets, sinks, and showers. (Adewunmi and Fenig Aff. ¶ 25; Gonsalves Aff. ¶ 6, 24). Common areas include, but are not limited to, housing unit day rooms where there are benches for communal seated gathering, shared phones, and televisions; areas where people in custody are expected to line up, such as food or medication; and the mess hall where they dine. (Adewunmi and Fenig Aff. ¶ 25); Affidavit of Petitioner Charles Holden ("Petitioner Holden Aff.") ¶ 4); Affidavit of Petitioner Alberto Frias ("Petitioner Frias Aff.") ¶ 3,4).

55. As with other congregate facilities, DOC facilities create an increased risk of community transmission from the fact that staff move back and forth from the facility to 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 exposing dozens to contagion."[45](See also Petitioner Holden Aff. ¶ 6, Petitioner Frias Aff. ¶ 7).

56. Other physical realities of NYC DOC facilities also comport with the risks of other congregate residential settings: congregate settings have increased likelihood of airborne transmission because, as the CDC has stated, high risk airborne droplet transmission of SARS-CoV-2 occurs in enclosed spaces, during prolonged exposure to respiratory particles, and in settings with inadequate ventilation or air handling. (Fenig and

[44] *See* Nicole Javorsky, *supra* note 17.
[45] 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.html (last accessed Feb. 2, 2021).

Adewunmi Aff. ¶ 29). The elevated risk of airborne transmission is present in NYC DOC facilities. Correctional facilities in New York City are older buildings with poor ventilation, primarily constructed in the 1970s and 1980s.[46] Communal eating, which necessitates removal of a mask, is a particularly perilous activity for airborne transmission, as there is no barrier to mitigate the viral spread. (Fenig and Adewunmi 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. (Fenig and Adewunmi Aff. ¶ 38; Petitioner Holden Aff. ¶4; Petitioner Frias Aff. ¶ 4).

57. People incarcerated in DOC facilities are also at high risk because they have no authority to require others in their housing units to wear masks, nor can they ensure that other people will maintain, at a minimum, six feet of distance, or move their bed to gain more distance from others. (Fenig and Adewunmi Aff. ¶ 36; Gonsalves Aff. ¶ 6; Petitioner Holden Aff. ¶ 5; Petitioner Frias Aff. ¶ 8). They are constricted from leaving settings in which others are not complying with public health guidance, or where the setting itself is dangerous, such as a closed, poorly ventilated space. (Fenig and Adewunmi Aff. ¶ 36; Petitioner Holden Aff. ¶5; Petitioner Frias Aff. ¶ 8.) This inability to control the environment puts incarcerated people in NYC jails at inevitable risk.

58. Indeed, in New York City jails, it is virtually impossible to engage in the necessary social distancing required to mitigate the risk of transmission. People in DOC custody have limited control over their own movements and no control over the movements of others

[46] *Facilities Overview*, NEW YORK CITY DEP'T OF CORR., https://www1.nyc.gov/site/doc/about/facilities.page/ (last accessed Feb. 2, 2021).

with whom they are required to congregate on a daily basis. Many of those incarcerated live in dormitory-like arrangements, where many people sleep in one room, mere feet apart. (Petitioner Holden Aff. ¶ 4; Johns Aff. ¶ 6). As of January 22, 2021, over 40% of dormitory units in DOC facilities exceeded 50% of capacity, preventing even the ability to practice alternate bed spacing at night.[47] During the day, people in dorm and cell units must share common areas like dayrooms, phone banks, and showers. (Petitioner Holden Aff. ¶ 4; Petitioner Holden Aff. ¶ 9). It follows that the more people in each unit, the less opportunity a person has to maintain adequate physical distance between themselves and other people in custody or staff. As of January 22, 2021, 3,353 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.[48]

59. And the inability of people in DOC custody to practice social distancing only grows more difficult as the jail population steadily increases. As of January 22, 2021, there were 5,225 people in the city jails—almost as many people as were incarcerated at the beginning of the pandemic in March 2020.[49] The New York City Board of Correction ("BOC") is an independent oversight board mandated by the City Charter to regulate, monitor, and inspect the correctional facilities of New York City.[50] BOC warns that the number of individuals in DOC custody and DOC housing density has steadily increased

[47] *Weekly COVID-19 Update, Week of January 16 – January 22, 2021*, NEW YORK CITY BD. OF CORR. 25 (Jan. 26, 2021), https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-01-16-01-22-21.pdf (last accessed Feb. 2, 2021).
[48] *Id.* at 30.
[49] *Id.* at 4–5.
[50] NEW YORK CITY CHARTER § 626, https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-2217 (last accessed Feb. 2, 2021).

throughout the pandemic, thereby preventing the implementation of effective social distancing measures.[51]

60. 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 and then spread it throughout the facility.[52]

61. Unsurprisingly, COVID-19 has spread rapidly within the DOC facilities and since March 2020, has continued to threaten its population. This spread, however, does not only impact those inside the facilities. Correctional facilities are incubators for the virus and those working in the facility spread it beyond the facilities' walls. Researchers have documented spikes in communities near correctional facilities.[53] For example, a community outbreak in Greene County in the fall of 2020 was tied directly to a COVID-19 outbreak at nearby Greene Correctional Facility, a New York State prison.[54]

62. To date, the COVID-19 pandemic has caused at least 2,856 infections and at least 18 deaths among incarcerated people and jail staff within DOC, and the conditions in the

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[51] *Housing Area Capacity Data Summary, January 1 – October 31, 2020*, NEW YORK CITY BD. OF CORR. (Nov. 3, 2020), 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 (last accessed Feb. 2, 2021).

[52] *Local Law 59: Report for Week of January 11, 2021 – January 17, 2021*, NEW YORK CITY CORR. HEALTH SERVS. 6, https://hhinternet.blob.core.windows.net/uploads/2021/01/report-for-the-week-of-january-11-2021-to-january-17-2021.pdf. (last accessed Feb. 2, 2021).

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

[54] 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 accessed Feb. 2, 2021).

New York City jails grow more dangerous every day.[55] As of January 22, 2021, 21% of the entire city jail population was housed in a unit with a COVID-related designation: either likely exposed, symptomatic, or confirmed positive.[56]

63. Importantly, 58.9% of the NYC DOC population currently in custody are Black and 27.9% of the population are Hispanic.[57] As of January 22, 2021 over 90% of the people housed in an NYC DOC "Confirmed or Symptomatic" or "Likely Exposed" COVID-19 units are either Black or Hispanic.[58] Early data reports about demographics of vaccine distribution make clear 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,[59] the population of New York City adults who have received at least one dose of the vaccine is 11% Black and 15% Hispanic as of

[55] *See Local Law 59: Report for Week of October 12, 2020 – October 18, 2020*, NEW YORK CITY CORR. HEALTH SERVS. 5, https://hhinternet.blob.core.windows.net/uploads/2020/10/report-for-the-week-of-october-12-2020-to-october-18-2020.pdf (last accessed Feb. 2, 2021) (573 cumulative COVID-19 infections among NYC jail population since March 13, 2020); *Weekly COVID-19 Update, Week of January 16 – January 22, 2021*, NEW YORK CITY BD. OF CORR. 13, https://www1.nyc.gov/assets/boc/downloads/pdf/covid-19/BOC-Weekly-Report-01-16-01-22-21.pdf (last accessed Feb. 3, 2021) (3 cumulative COVID-related deaths among NYC jail population, 209 infections among CHS staff, and 1,446 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 accessed 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).

[56] *Id.* at 23.

[57] *Id.* at 10.

[58] *Id.* at 10.

[59] *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 accessed Feb. 2, 2021).

January 31, 2021.[60] The failure to authorize people in custody to receive vaccines takes the State farther from its goal to combat the racially disparate impact of this pandemic.

64. NYC DOC facilities are congregate residential settings that share the same characteristics and risk factors that make it appropriate to prioritize them for vaccine access. Leadership at CHS, the entity responsible for providing medical care to people in NYC DOC custody, highlighted the congregate nature of the setting and its inherent risks in the most recent BOC public meeting on January 12, 2021; as noted above, CHS Dr. Yang told the Board, "we continue to advocate that all our patients should be eligible to be offered the vaccine – not necessarily because of their health status but because of the nature of the congregate setting."[61] (See also Gonsalves Aff. ¶ 33).

INDIVIDUAL ALLEGATIONS

65. Petitioner Charles Holden ("Petitioner Holden") is a 52-year-old man who is currently incarcerated in the custody of the New York City Department of Correction. (Petitioner Holden Aff. ¶ 2).

66. Petitioner Holden is currently incarcerated in the Anna M. Kross Center on Rikers Island. (Petitioner Holden Aff. ¶ 2).

67. Presently, Petitioner Holden is residing in a dormitory with the capacity to house 50 individuals. (Petitioner Holden Aff. ¶ 3). Forty-eight of those beds are currently filled. (Petitioner Holden Aff. ¶ 3).

[60] *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 accessed Feb. 2, 2021).
[61] *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) (relevant segment 1:32:33-1:32:47) (last accessed Feb. 2, 2021.

68. He shares eating spaces, toilets, sinks, showers, televisions, telephones and recreational spaces with dozens of other incarcerated men. (Petitioner Holden Aff. ¶ 4). At meal times, he eats at a communal table surrounded by other incarcerated people unable to wear masks while they eat. (Petitioner Holden Aff. ¶ 4). He, and the other men incarcerated in his housing unit, sleep on beds that are only inches apart from one another. (Petitioner Holden Aff. ¶ 4).

69. Every aspect of his daily life in AMKC is communal, and he is not able to practice social distancing. (Petitioner Holden Aff. ¶ 5). DOC employees are always present in his housing area and their identities change with every shift. (Petitioner Holden Aff. ¶ 6).

70. Petitioner Holden is not able to make others around him, including other incarcerated people or corrections staff, abide by measures to protect me against COVID-19 infection, such as wearing masks. (Petitioner Holden Aff. ¶ 5).

71. To Petitioner Holden's knowledge, no one in his housing unit, including himself, has been offered the COVID-19 vaccination. (Petitioner Holden Aff. ¶ 7).

72. Petitioner Alberto Frias is a 24-year-old man who is currently in the custody of the New York City Department of Correction. (Petitioner Frias Aff. ¶ 2).

73. Petitioner Frias is currently incarcerated at the Otis Bantum Correctional Center on Rikers Island. (Petitioner Frias Aff. ¶ 2). He has been incarcerated in the custody of the New York City Department of Correction since April 26, 2020. (Petitioner Frias Aff. ¶ 2).

74. Petitioner Frias is currently residing in cell housing. (Petitioner Frias Aff. ¶ 3). Although he sleeps in a cell, the set-up of his housing unit requires him to spend time outside of his cell to meet basic daily needs. (Petitioner Frias Aff. ¶ 3). When he showers,

eat meals, or uses the phone it is in shared space in close quarters with other incarcerated men and jail staff. (Petitioner Frias Aff. ¶ 3). During the day, he and the people in his unit spend significant time in a shared dayroom. (Petitioner Frias Aff. ¶ 3).

75. At meal time he must congregate with other incarcerated people to obtain food from the worker who hands out the food trays. His unit eats meals at tables that are in the dayroom. Each table seats six people, and he is often shoulder to shoulder with other incarcerated people while eating. No one wears a mask while eating meals. In general, the incarcerated people in his unit do not wear masks in the shared spaces of the housing area. (Petitioner Frias Aff. ¶ 4).

76. Any time Petitioner Frias leaves his housing area, such as for an attorney visit, teleconference, medication, or medical care, he is escorted by corrections officers. (Petitioner Frias Aff. ¶ 6). One officer walks closely on each side of him, often touching him. (Petitioner Frias Aff. ¶ 6). If he needs to go to the clinic to access medical care, the clinical space is shared space with medical staff, jail staff, and other people in custody. (Petitioner Frias Aff. ¶ 6). While waiting to visit the clinic he must often share clinic holding cells with other incarcerated people. (Petitioner Frias Aff. ¶ 6). The holding cells are small, and he cannot maintain social distance when there is anyone else in the holding cell. (Petitioner Frias Aff. ¶ 6).

77. Correction officers rotate through Petitioner Frias's housing unit in shifts, with additional staff covering when the regular staff take breaks for meals or are out sick or on vacation. (Petitioner Frias Aff. ¶ 7). Other staff enter his unit regularly for maintenance, repairs, social services, grievances and programs. (Petitioner Frias Aff. ¶ 7).

78. During the day, Petitioner Frias is unable to maintain social distance from other inmates and correction staff. (Petitioner Frias Aff. ¶ 8). His housing area is small and is generally at full capacity. (Petitioner Frias Aff. ¶ 8). Most of the time he has little to no control over how close other people in custody or jail staff come to him. (Petitioner Frias Aff. ¶ 8). If jail staff or other people in his housing unit fail to wear masks, practice social distancing, or follow other public health guidance, which is common, he cannot choose to leave the housing unit. (Petitioner Frias Aff. ¶ 8).

79. To Petitioner Frias' knowledge, no one in his housing unit, including himself, has been offered the COVID-19 vaccination. (Petitioner Frias Aff. ¶ 9).

CLASS ALLEGATIONS

80. Pursuant to CPLR § 901, Petitioners Holden and Frias seek to represent a class of individuals representing all persons who are, or will be, incarcerated in New York City Department of Correction facilities who do not fall in vaccine priority category 1a or 1b by virtue of a status other than their incarceration and have not been authorized to receive the COVID-19 vaccination ("Class").

81. The members of this Class are so numerous as to render joinder impracticable. As of January 22, 2021, there were 5,225 individuals in New York City DOC custody.[62] Upon information and belief, only a very small portion of this population has been authorized to be vaccinated due to status other than their incarceration, such as age or special authorization under Phase 1a. Accordingly, it is estimated that thousands of individuals fall within the Class. Furthermore, upon information and belief, the vast majority of these

[62] *Weekly COVID-19 Update, Week of January 16 – January 22, 2021*, *supra* n. 655.

individuals are unable to obtain an individual attorney to prosecute their claims due to barriers to communication while incarcerated as well as legal fees.

82. There are questions of law and fact common to the Class that predominate over questions affecting only individual members, and the claims of the parties are typical of the Class claims. Specifically, all members of the Class are, or will be, incarcerated in New York City DOC facilities, facing a common threat due to COVID-19, and unable to access the vaccination. The common legal issue among all Class members is whether the failure to include members of the Class in vaccine priority level 1b was arbitrary and capricious, an abuse of discretion, and contrary to law.

83. The named Petitioners will fairly and adequately protect the Class because they seek the same relief as all Class members—to be authorized for inclusion in category 1b and offered access to the COVID-19 vaccination.

84. Finally, a class action is superior to other available methods for the fair and efficient adjudication of this matter because it will promote judicial economy by avoiding multiple suits that would raise the same issues.

FIRST CAUSE OF ACTION

85. Petitioners incorporate by reference each preceding allegation as if fully set forth herein.

86. Respondents' determination excluding incarcerated individuals from current vaccine priority status 1b, despite including correction staff and others living in congregate settings, is arbitrary and capricious because it lacks a rational basis, was made without regard to the facts and represents an abuse of discretion pursuant to CPLR Article § 7803(3).

SECOND CAUSE OF ACTION

87. Petitioners incorporate by reference each preceding allegation as if fully set forth herein.

88. Respondents' determination excluding incarcerated individuals from current vaccine priority status 1b, despite including others living in congregate settings, is an abuse of discretion and contrary to law, in violation of the Equal Protection Clause of the 14th Amendment and of Article 1 § 11 of the New York State Constitution, pursuant to CPLR Article § 7803(3).

PRIOR APPLICATION

89. No prior application has been made for the relief requested herein.

REQUEST FOR RELIEF

WHEREFORE, Petitioners respectfully requests a Judgment pursuant to Article 78 of the Civil Practice Law and Rules:

a. Vacating and annulling Respondents' determination excluding incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to modify current eligibility of category 1b and immediately authorize incarcerated individuals as a group for vaccination, upon finding the exclusion arbitrary and capricious and an abuse of discretion pursuant to CPLR § 7803(3);

b. Vacating and annulling Respondents' determination excluding incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to modify current eligibility of category 1b and immediately authorize incarcerated individuals as a group for vaccination, upon finding the exclusion in violation of the Equal Protection Clause of the 14th Amendment to the United States

Constitution and Article 1 § 11 of the New York State Constitution, pursuant to CPLR § 7803(3);

c. Awarding Petitioners reasonable costs and disbursements incurred in prosecuting this proceeding, in an amount to be determined by the Court; and

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

DATED: February 4, 2021
New York, New York

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Andrew M. Cuomo
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Albany, NY 12224

VERIFICATION

STATE OF NEW YORK
):
ss:
COUNTY OF BRONX
):

Charles Holden being duly sworn, deposes and states:

1. I am the Petitioner in this proceeding.
2. I have read the contents of the foregoing Petition.
3. The information stated therein is true to my own knowledge except to those matters specifically alleged by other named petitioners or those alleged to be upon information and belief, and as to those matters, I believe the information to be true.

Charles Holden

Sworn to before me this
29th day of January, 2021

E Fischer
NOTARY PUBLIC

ELIZABETH ANNE FISCHER
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02FI6380252
QUALIFIED IN NEW YORK COUNTY
MY COMMISSION EXPIRES SEPTEMBER 4, 2022

VERIFICATION

STATE OF NEW YORK
):
ss:
COUNTY OF BRONX
):

Alberto Fris, being duly sworn, deposes and states:

1. I am the Petitioner in this proceeding.
2. I have read the contents of the foregoing Petition.
3. The information stated therein is true to my own knowledge except to those matters specifically alleged by other named petitioners or those alleged to be upon information and belief, and as to those matters, I believe the information to be true.

Alberto Fris

Sworn to before me this
3rd day of February 2021

Fischer
NOTARY PUBLIC

ELIZABETH ANNE FISCHER
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02FI6380252
QUALIFIED IN NEW YORK COUNTY
MY COMMISSION EXPIRES SEPTEMBER 4, 2022