

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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C.F., on her own behalf and on behalf of her minor children; M.F., on her own behalf and on behalf of her minor children; B.D. on her own behalf and on behalf of her minor children; M.N., on her own behalf and on behalf of her minor child, and A.L, on her own behalf and on behalf of her minor child,

Index No. _____

Petitioners,

-against-

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE and DR. OXIRIS BARBOT, M.D. in her Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene,

Respondents.

AS AND FOR A PROCEEDING BROUGHT PURSUANT TO ARTICLE 78 OF THE CPLR

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COMBINED MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78, DECLARATORY RELIEF AND ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Petitioners respectfully submit this combined Memorandum of Law in support of their Article 78 requesting the Court to vacate the emergency Orders promulgated by respondents as arbitrary, capricious, illegal and unconstitutional. Petitioners submit this Memorandum of Law in support of their Order to Show Cause for a Temporary Restraining Order and for a Preliminary Injunction.

INTRODUCTION

On April 9, 2019, the above-captioned respondents issued several Orders that imposed onerous and highly unusual mandates on all persons who reside or work within certain zip codes in the Williamsburg section of Brooklyn.

The emergency Orders command that all persons over six months of age who work, reside or attend school in specified zip codes “*shall be vaccinated against measles*” if they are not vaccinated and not immune to the measles. The emergency Orders deem any unvaccinated person a “nuisance,” as defined in New York City Administrative Code §17-142. The emergency Orders are annexed to the Krakow Affirmation as Exhibit 1.

The emergency Orders warn that “failure to comply with this Order is a violation of §3.05 of the New York City Health Code, and a misdemeanor for which you may be subject to civil and/or criminal fines, forfeitures and penalties, including imprisonment.” Order, Exhibit 1 at 3.¹ For reasons specified below, the terms of these emergency Orders exceed the authority of the respondents because, among other reasons, the grounds upon which these Orders are predicated are insufficient to justify the drastic and extraordinary emergency measures contained in the Orders and because respondents failed to employ the least restrictive measures to end the measles outbreak.

¹ Exhibit 1, the first Order, which specified persons in zip code 11221 as subject to the Order was found at url: <https://www1.nyc.gov/assets/doh/downloads/pdf/press/2019/emergency-orders-measles> (last accessed 4/9/19 at 6:11 p.m.). However, the pdf now posted at the same URL, which is annexed to the Krakow Affirmation as Exhibit 3, is a different Order with zip code 11211 substituted for 11221. A third version of the Order, annexed as Exhibit 2, contained zip code 11237 in the “It is Further Ordered” sections on page 2 of the document. See Exhibit 2 annexed to the Krakow Affirmation. The Order as modified, presumably in its corrected final form, is annexed to the Krakow Affirmation as Exhibit 3.

The emergency Orders, Exhibit 1, 2 and 3, are predicated on the respondents' claim that there is "...an active outbreak of measles among people residing in zip codes 11205, 11206, 11221 and 11249. Since September 2018, more than 250 cases of measles have been documented among people living in Williamsburg..." Order, Exhibit 1 at 1. While asserting that the "number continues to grow as new cases are still occurring," respondents failed to state the number of active cases. Respondents have also failed to disclose the number of cases that have been caused by MMR vaccination, i.e. vaccine-strain measles cases that occur because of viral transmission from those recently vaccinated.

Rather than using available legal mechanisms such as isolation and quarantine under Public Health Law § 2100, respondents have imposed not only severe criminal and civil penalties for not vaccinating but have stated that persons not vaccinated "shall be vaccinated against measles," thus introducing the specter of unjustifiable forced vaccination to Williamsburg and the City of New York.

In addition, the respondents' emergency Orders unnecessarily override the petitioners' and their children's religious practices and the children's lawful exemptions from vaccination to attend school, which they have obtained in full compliance with Public Health Law §2164(9).

In addition to being unnecessary and disproportionate, respondents' command that people "shall" vaccinate with the MMR vaccine is inappropriate because the MMR vaccine indisputably carries the risk of severe injury and death to some individuals. Forced vaccination contravenes the principle of informed consent, which has been a cornerstone of public health ethics in post WWII democracies and is enshrined in the laws of the State of New York, the Nuremberg Code, the Helsinki Declaration, and the UNESCO Declaration on Human Rights and Bioethics, governing biomedical treatment. See Exhibit 5, para 6, annexed to the Krakow Affirmation.

Under the factual circumstances of the emergency Orders, respondents have overreached their authority and have promulgated Orders that promise to fail to check the spread of measles. The emergency Orders, moreover, inject into the community an intervention, compelled MMR vaccination, that can itself cause harm.

Plaintiffs therefore respectfully seek temporary and permanent injunctive relief to merely maintain the *status quo*, to avoid deprivation of constitutional rights and to prevent irreparable physical, economic, and social harms to parents and their children.

ARGUMENT

A preliminary injunction is appropriate where petitioners show “a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor.” *Gerald Modell Inc. v. Morgenthau*, 196 Misc. 2d 354, 359 (Sup. Ct. N.Y. County 2003); *see also* CPLR §§ 6301, 7805. Plaintiffs amply satisfy those factors here. Based on the evidence that they have produced in their expert affidavits, Exhibits 6, 8, 9, 10, 11 and 12 that respondents have failed to consider many public health considerations that strongly argue against the extreme action taken in their Orders.

I. THERE EXISTS NO IMMINENT PUBLIC HEALTH THREAT – PETITIONERS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

Petitioners have demonstrated that they should prevail on the merits as set out in detail in their Verified Petition and the Affirmation of Robert J. Krakow, which are incorporated in this Memorandum as if fully set forth herein.

Petitioners seek a temporary restraining order, preliminary injunction, and a declaratory judgment vacating the Orders as beyond the powers of the Commissioner or *ultra vires* because the emergency Orders have an insufficient factual predicate. There is insufficient evidence of a measles epidemic or dangerous outbreak to justify the respondents’ extraordinary measures.

including forced vaccination. The Orders are, therefore, arbitrary, capricious, contrary to law and in violation of petitioners' rights under the United States Constitution and New York State law.

In directing that petitioners must take the MMR vaccine or be subject to severe penalties, criminal and civil, including imprisonment, respondents have relied on authority that is silent on the extraordinary directives in the emergency Orders.

The respondents have predicated their authority to declare a public health emergency and issue the emergency Orders on Section 3.01 of the New York City Health Code. Section 3.01(d) provides, as follows:

§3.01 General powers of the Department.

- (a) Where urgent public health action is necessary to protect the public health against an imminent or existing threat, the Commissioner may declare a public health emergency. Upon the declaration of such an emergency, and during the continuance of such emergency, the Commissioner may establish procedures to be followed, issue necessary orders and take such actions as may be necessary for the health or the safety of the City and its residents. Such procedures, orders or actions may include, but are not limited to, exercising the Board's authority to suspend, alter or modify any provision of this Code pursuant to subdivision b of section 558 of the New York City Charter, or exercising any other power of the Board of Health to prevent, mitigate, control or abate an emergency, provided that any such exercise of authority or power shall be effective only until the next meeting of the Board, which meeting shall be held within five business days of the Commissioner's declaration if a quorum of the Board can be convened within such time period. If a quorum of the Board cannot be so convened, then said meeting shall be held as soon as reasonably practicable. At its next meeting, the Board may continue or rescind the Commissioner's suspension, alteration, modification of Health Code provisions or exercise of power. An order issued pursuant to this subdivision shall be effective from the time and in the manner prescribed in the order and shall be published as soon as practicable in a newspaper of general circulation in the city and transmitted to the radio and television media for publication and broadcast. In the alternative, in circumstances where the order is directed at a finite number of known persons, the Commissioner may transmit the order to such persons in a manner the Commissioner deems practicable under the circumstances, including but not limited to mail, electronic mail, facsimile, closed electronic network, in person, or by telephone. Copies of orders

issued pursuant to this subdivision shall be immediately circulated to and filed with the Board, and the Department shall maintain records attesting to the manner and timing of their publication or transmittal.

The issue, then, is whether “urgent public health action is necessary to protect the public health against an imminent or existing threat.”

A. Issuing Emergency Orders with Incorrect Zip Codes Itself Shows Lack of Emergency

The respondents’ recklessness in issuing orders with incorrect zip codes affecting tens of thousands of people and then failing even to inform the public or explain the errors reeks of carelessness that betrays the emptiness of respondent’s claim of a public health emergency. A *Newsweek* article that describes the exceedingly confusing zip code discrepancies in the respondents’ three Orders is annexed to the Krakow Affirmation as Exhibit 5.²

The first published Order further mandated “that the parent or guardian of any child older than six months of age who lives, works or resides within the 11205, 11206, 11221 and/or 11237 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this order being signed by me *shall* cause such child to be vaccinated against measles unless such parent or guardian can demonstrate that the child has immunity to the disease or document that he or she should be medically exempt from this requirement.” Exhibit 1, Order.

When initially issued, the first emergency Order specified in its first paragraph that “there is an active outbreak of measles among people” who reside in zip codes 11205, 11206, 11221, and 11249. Zip code 11221 is not located in Williamsburg, but rather is part of Bushwick. The

² The *Newsweek* article that describes with references to Tweets from New York residents is titled, “NYC Officials Listed Wrong Zip Code For Measles Vaccination Order Then Changed It Without Telling Anyone,” *Newsweek*, 4/10/19 at 9:45 AM, URL: <https://www.newsweek.com/nyc-measles-vaccine-vaccination-irder-zip-1391831> (Accessed 4/13/19, 1:29 AM).

first Order directed that every person who “lives works or resides” in zip codes 11205, 11206, 11221 and 11249 must be vaccinated with the MMR within 48 hours of the Order’s signing unless the person can “demonstrate immunity to the disease” or “document to the satisfaction of the Department” that he or she should be “medically exempt.” The first Order also directed parents of children in zip codes 11205, 11206, 11221 and 11249 to have their children vaccinated with the MMR vaccine. The first Order issued on April 9, 2019 is annexed to the Krakow Affirmation as Exhibit 1.

Without explanation from respondents, sometime after the first Order was issued on April 9, 2019, respondents issued a second emergency Order. The second Order is annexed as Exhibit 2. The second Order specifies zip codes 11205, 11206, 11211, and 11249. This Order includes zip codes 11211 and 11249, in the “whereas” clauses of the emergency Order, which the first Order did not include. This second Order omits zip code 11221, which was included in the first Order. This second Order, however, names a non-Williamsburg zip code, 11237, which is located in Bushwick, in the crucial “It is Further Ordered” paragraph on page 2, which directs that people “shall” be vaccinated. This second Order is annexed to the Krakow Affirmation as Exhibit 2. Finally, a third emergency Order was issued that removed both zip codes 11211 and 11237 and included zip codes 11211 and 11249. The respondents thereby inconsistently specified the zip codes to which their emergency mandate applies. The respondents have failed to clarify the glaring inconsistencies among their three Orders. These glaring inconsistencies have caused confusion, anxiety and fear among residents of at least two zip codes who cannot determine whether an Order applies to them and if they face “civil and/or criminal fines, forfeitures and penalties, including imprisonment” for non-compliance. Exhibits 1, 2 and 3.

Thus, respondents have not taken the required care or exercised the most minimal due diligence to get the zip codes right in these unusual emergency Orders. It should be expected that the Health Department would exercise appropriate care in issuing these extraordinary emergency public health directives, rare in New York City's history, commanding New Yorkers to be vaccinated under penalty of imprisonment. To compound respondents' malfeasance in executing their duty to protect public health, the respondents, having initially failed to identify the correct zip codes, issued second and third emergency Orders, without telling New York City residents about their mistakes and the changes in the zip codes specified in the Orders. Whether due to typographical, geographical, or other ineptness, the zip code errors affect the lives of all New Yorkers. Such malfeasance by respondents, especially coupled with the lack of planning for enforcement of the Orders, reveals that the emergency Orders are arbitrary, capricious and contrary to law *ab initio*.³

The respondents' conduct in issuing orders that incorrectly affect tens of thousands of people belies the credibility of their claim that there is an imminent threat to public health.

B. The Respondents' Admitted Lack of Planning Shows There is No Public Health Emergency

The respondents' actions are disproportionate to the provable factual circumstances and fail to use the least restrictive means that would likely control measles yet balance the rights to individual autonomy, informed consent and free exercise of religion. The respondents have taken these dramatic steps without a blueprint for implementation, itself suggesting that a true public

³ The New York Civil Liberties Union has been reported to have "blasted" the Health Department Orders as "illegal" because, "[m]easures such as quarantine or penalties for non-vaccination may be permissible, but forced vaccination is not." See Exhibit 18, annexed to the Krakow Affirmation. The NYCLU is published by the *Daily Beast* on April 9, 2019, at 5:15 p.m. The *Daily Beast* article is published at URL: <https://www.thedailybeast.com/measles-crisis-new-york-civil-liberties-union-blasts-forced-vaccination-in-nyc> (last accessed 4/13/19, 2:43 PM).

health emergency does not exist. The respondents have admitted that they have no “blueprint” and no plan for enforcement of the emergency Orders.

Amazingly, *after* issuing the emergency Orders the respondents said that would require legal counsel to construct a plan of enforcement. See Exhibit 3 to Krakow Affirmation.⁴

The respondents’ lack of planning and lack of a plan reveals that there exists no emergency requiring the extraordinary measures in the emergency Orders. To force vaccination on human beings in such circumstances is unnecessary and cruel. To threaten criminal sanctions against people whose only criminal conduct would be to object on religious grounds to having vaccines injected betrays the most fundamental principles of American Democracy. To do all this without a plan is thoughtless, reckless, arbitrary and capricious.

For these reasons alone the Court should grant a temporary restraining order enjoining respondents from further reckless conduct.

C. Failure to Use the Least Restrictive Legally Available Means Shows Lack of Emergency

The respondents’ actions that are disproportionate to the provable factual circumstances and that fail to use the least restrictive means that would likely control measles yet balance the rights to individual autonomy, informed consent and free exercise of religion. The respondents have taken these dramatic steps without a blueprint for implementation, itself suggesting that a true public health emergency does not exist. See Exhibit 3 to Krakow Affirmation.

⁴ Mayor De Blasio’s spokesperson, Marcy Miranda, was quoted in the *New York Post* on April 9, 2019, the day the emergency Orders were issued, as follows: “Because we have not done this before it’s not like we have a path set out. We’d have to confer with our legal team.” See Exhibit 3 annexed to Krakow Affirmation, *Williamsburg residents could face ‘forcible vaccinations’ amid measles outbreak*, *New York Post*, April 9, 2019 at 7.59 p.m., online edition, URL: <https://nypost.com/2019/04/09/williamsburg-residents-could-face-forcible-vaccinations-amid-measles-outbreak/> (accessed 4/10/19)

Rather than using available legal mechanisms such as isolation or quarantine under Public Health Law § 2100, respondents have imposed not only severe criminal and civil penalties for not vaccinating but have stated that persons not vaccinated “shall be vaccinated against measles,” thus introducing the specter of unjustifiable forced vaccination to Williamsburg and the City of New York.

1. Public Health Law section 2100 reads as follows:

Communicable diseases; local boards of health and health officers; powers and duties Communicable diseases; local boards of health and health officers; powers and duties.

1. Every local board of health and every health officer shall guard against the introduction of such communicable diseases as are designated in the sanitary code, by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases.
2. Every local board of health and every health officer may:
 - (a) provide for care and isolation of cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health and,
 - (b) subject to the provisions of the sanitary code, prohibit and prevent all intercourse and communication with or use of infected premises, places and things, and require, and if necessary, provide the means for the thorough purification and cleansing of the same before general intercourse with the same or use thereof shall be allowed.

Public Health Law 2100 allows respondent's Commissioner of Health to isolate persons who have a communicable disease like measles. She has not used that authority. The same law allows her to prohibit and prevent all intercourse with infected premises, places and things and require their purification. She has not used that authority either.

The respondents' failure to use legal available least restrictive means to control a public health concern and, instead, use virtually unprecedented and unnecessary threats of criminal prosecution and forced vaccination shows that there is no imminent threat to public health and safety.

For these reasons, the emergency Orders are arbitrary, capricious, contrary to law and exceed the authority vested in respondents.

II. THE RISK OF IRREPARABLE HARM FROM THE MMR VACCINATION IS SUFFICIENT TO ISSUE IMMEDIATE INJUNCTIVE RELIEF AND VACATE THE EMERGENCY ORDERS

A. The Petitioners Face Imminent Harm Due to the Severe Penalties Imposed by the Emergency Orders

By their very terms, threatening imprisonment and fines for noncompliance, the emergency Orders pose an immediate threat of irreparable harm to petitioners. By doing nothing – simply by continuing to parent the way they have for years, with approval from the State under Public Health Law §2164(9) that recognizes their religious exemptions, petitioners will be harmed. Petitioners will be punished for their status as persons who choose not to vaccinate.

In addition, the utter disrespect for petitioners’ religious beliefs will irreparably damage petitioners.

The petitioners are irreparably harmed by the stigma that has attached to petitioners by the emergency Order’s labeling them a legal “nuisance” and rendering petitioners prone to scorn from their neighbors and other members of the community. As set forth below, the reports of the petitioners’ experts show that petitioners are not a threat to anyone. They have not contracted measles, nor can they transmit measles. The respondents’ failure to quarantine those who do have measles has needlessly permitted the panic among public health officials, which has transmitted panic to the public.

Petitioners will thus be harmed in their standing in the community, in their legal standing as law-abiding citizens who have been criminalized for their status, and in the damage and persecution heaped upon them, all unnecessarily, by the emergency Orders.

B. There Is A Risk of Harm To the Petitioners

As Dr. Richard Moskowitz explains in his Affidavit (Exhibit 11), people who are not vaccinated with measles pose no threat to people who are vaccinated. Dr. Moskowitz explains that because people who are recently vaccinated “shed” the virus, which can infect other people, they are likely a greater threat to public health than people who are unvaccinated.

Dr. Moskowitz explains that “small localized outbreaks of ordinary childhood diseases, including the current outbreaks in Brooklyn” are insufficient to override the rights of individuals, including the right to informed consent regarding medical interventions, and including the right to practice their religion, which are enshrined in the public laws of New York, the Nuremberg Code of Human rights, the Helsinki Code.

Dr. Tina Kimmel, a former long-time and experienced public health official and research scientist in California, explains in her affidavit, Exhibit 8, that unvaccinated people who have not been exposed to measles cannot possibly spread the virus to the general population, especially persons who have been vaccinated. She also explains that the “Commissioner’s arbitrary order that all residents be vaccinated contravenes the principle of Informed Consent.” The “arbitrary order also contravenes the international norms of cooperation between the government and the governed.” Dr. Kimmel points out that “[b]y arbitrarily criminalizing families being sensitive to their own medical needs, the Commissioner runs the risk of MMR being given to people for who the vaccine is known to be dangerous to their life and health.” Dr. Kimmel states:

According to the vaccine manufacturer’s own package insert, this includes any individual with a hypersensitivity or anaphylactoid reaction to eggs, gelatin, neomycin or any other component of the vaccine; anyone with a fever above a low-grade fever, or with an individual or family history of cerebral injury, convulsions, or any other condition of stress due to fever; anyone who is nursing pregnant, or will become pregnant within three months of receiving the vaccine; anyone with blood dyscrasia, leukemia, lymphoma of any type, or other malignant neoplasm; anyone who is immunosuppressed or receiving any of several kinds of immunosuppressive therapy, or with a family history of congenital or hereditary immunodeficiency; anyone with dys- or

hypogammaglobulinemia, or with current or a history of thrombocytopenia; anyone with untreated tuberculosis or who will be having a tuberculin test in the near future; or anyone who has had a blood or plasma transfusion or administration of human immune globulin within the last three months. https://www.merck.com/product/usa/pi_circulars/m/mmr_ii/mmr_ii_pi.pdf.

Dr. Kimmel also states that the Commissioner lacks the authority to override an individual's religious beliefs.

Dr. Kimmel states:

Rather than issuing pointless and overbroad impositions, NYC Department of Health (DOH) should be working to end the measles outbreak by following standard public health practices. Strangely, these practices do not appear to have been implemented. They include: enforced isolation of cases until they are, no longer infectious (in the case of measles, four days after the rash appears); contact tracing; with vaccination only of nonimmune contacts ("ring vaccination"). The Commissioner could suggest or even order a quarantine of these contacts for the maximum incubation period, although measles is not considered a dangerous enough disease to be quarantinable by the US Federal Centers for Disease Control and Prevention. All of these measures are simple and effective ways that would actually stop the spread of measles in NYC, which do not abridge the civil rights of families who had had no exposure to the virus.

Dr. Jane Orient explains in her Affidavit, Exhibit 9, that the current measles outbreak in Brooklyn is not "a clear and present danger to the public health. Violations of medical ethics and human rights are neither necessary nor sufficient to prevent or contain measles outbreaks. It is contrary to public policy, medical ethics and respect for human rights to force vaccination on persons who do not give their voluntary informed consent."

Dr. Orient and Dr. Fitzpatrick explain that vaccines themselves cause injuries, as recognized by the Supreme Court of the United States in enacting the Vaccine Injury Compensation Program, which has paid more than \$4 billion dollars to vaccine-damaged persons. The Verified Petition

presents facts documenting the existence of vaccine injury and the risks and contraindications of the MMR vaccine, as set forth in the manufacturer's own package insert. (Exhibit 7).

Dr. Shira Miller states in her Affidavit, Exhibit 10, that "It has not been proven that the MMR vaccine is less of a nuisance {New York Code§ 17-142 " ... dangerous to human life or detrimental to health ... ") than measles infection". Dr. Miller explains, as follows:

It has not been scientifically demonstrated that the MMR vaccine poses less risk of death or permanent disability than measles because it has not been proven that the risk of death or permanent disability from the MMR vaccine is less than 1 in 10,000.

Dr. Miller explains that for the reasons outline in her affidavit:

it has not been proven that the MMR vaccine is safer than measles, and there is insufficient evidence to demonstrate that mandatory measles mass vaccination in the United States results in a net public health benefit. Furthermore, vaccinating others with the MMR vaccine is not necessary in order to protect immunocompromised persons. As such, governmental mandatory measles vaccination orders are both unscientific and unethical and have no justification s a method for managing measles outbreaks.
It is the law and policy of the United States that vaccines carry known risks of harm.

The legislative history of the National Childhood Vaccine Injury Act shows that as of 1983 it "was known that about one half of one percent of apparently normal infants experience a serious adverse reaction to vaccine. *See* S. Hrg. 98-1060, at 21 (1984)." *Oliver v. Sec'y of Health & Human Servs.*, 900 F.3d 1357, 1364 (Fed. Cir. 2018). In 1983, one half of one percent of children translated to approximately 20,000 children whom Congress acknowledged would be seriously harmed by routine vaccination.

The fact that the MMR can cause injury to children and adults is well-recognized. In the Vaccine Injury Compensation Program formed under the 1986 National Childhood Vaccine

Injury Act (NCVIA or the “Vaccine Act”), there is a Table promulgated by rule by the Secretary of Health and Human Services. 42 U.S.C.A. § 300aa-14; 42 C.F.R. § 100.3.

The Vaccine Injury Table includes the following serious adverse outcomes or injuries resulting from the MMR vaccine, causation for which is presumed under the Vaccine Act: anaphylaxis, encephalopathy, encephalitis, shoulder injury related to vaccine administration, vasovagal syncope, chronic arthritis, thrombocytopenic purpura, and vaccine-strain measles viral disease in an immunodeficient recipient. 42 C.F.R. § 100.3(a) III and IV.

According to statistics of the Federal Health Resources & Services Administration (“HRSA”), the sub-agency within the Department of Health and Human Services that administers the Vaccine Injury Compensation Program (“VICP”), more than \$4.1 Billion dollars have been paid to 6,465 vaccine-injured persons since 1988. Source HRSA, URL: <https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/monthly-stats-april-2019.pdf>.

This significant number of compensated vaccine injury cases exists even though the Department of Health and Human Services has failed to comply with its statutory mandate to publicize the VICP. The Vaccine Act directs: “The Secretary shall undertake reasonable efforts to inform the public of the availability of the Program.” 42 U.S.C.A. § 300aa-10. Furthermore, a 2014 Government Accountability Office (“GAO”) report to Congress found the following:

In its 2006 VICP strategic plan, HRSA noted that one of the critical issues facing the program from 2005 to 2010 was that many parents, the general public, attorneys, and health care professionals were not aware VICP existed.

GAO Report on VICP: <https://www.gao.gov/assets/670/667136.pdf> at 31.

The GAO report found, “Without awareness of the program, individuals who might otherwise receive compensation for a vaccine-related injury or death could be denied compensation because of a failure to file their claim within the statutory deadlines.” *Id.* The GAO report also found that because HRSA’s mission of promoting vaccines conflicts with its statutory mission to promote the VICP, efforts at promotion have been limited. *Id.* As a result, there are likely far fewer vaccine injury claims submitted to the VICP than otherwise would be the case because the public is unaware of it.

In addition, a study of the Vaccine Adverse Event Reporting System (“VAERS”), the voluntary vaccine injury reporting system established under the Vaccine Act, reported to HHS that “ fewer than 1% of vaccine adverse events are reported.” See Exhibit 21 annexed to Krakow Affirmation at 6.

Thus, the true incidence of vaccine injuries in the United States is unknown. It is well-documented, however, that vaccine injuries are grossly underreported. The fact that vaccine injuries occur, including MMR vaccine-caused injuries, is undisputed and uncontroversial.

The United States Court of Federal Claims has found that the understanding of vaccine injury is a “field [of medicine] bereft of complete and direct proof of how vaccines affect the human body.” *Althen v. Sec’y of Health & Human Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

Pursuant to the Vaccine Act, the Supreme Court of the United States has held that because vaccines are “unavoidably unsafe,” vaccine manufacturers are immune from liability for design defects. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

For this reason, lawsuits for vaccine injury against vaccine manufacturers are all but nonexistent in the United States, despite the fact that tens of thousands of vaccine injuries occur every year. Against this backdrop evidencing vaccine injury, and notwithstanding the risk of

serious harm from vaccination, and without any reference to such risk, the emergency Orders have declared that the MMR vaccine is “safe and effective,” a patently and dangerously misleading statement.

The manufacturer’s package insert for the MMR vaccine lists multiple risks of adverse effects. See Exhibits 6 and 7 to the Krakow Affirmation. The MMR vaccine insert contains information suggesting that giving the MMR vaccine before 12 months of age is neither effective nor safe. See Exhibits 6 and 7 to the Krakow Affirmation. The package insert for the MMR vaccine actually states, “Safety and effectiveness of mumps and rubella vaccine in infants less than 12 months of age have not been established.” See Exhibits 6 and 7 to the Krakow Affirmation.

The MMR package insert warns against MMR vaccination of adolescent and young adult females who may be or are about to become pregnant. (“Women of childbearing age should be advised not to become pregnant for 3 months after vaccination....”). Exhibit 7 at 3, which is referenced in Exhibit 6, an exhibit to the Krakow affirmation.

The MMR package insert states that the vaccine presents the risk of adverse reactions affecting the nervous system, including seizures and brain injury. See Exhibit 6 and Exhibit 7 at 7, annexed as exhibits to the Krakow affirmation.

Contrary to representations by respondents and public health authorities, the data show that in the 1970’s, at a time when measles vaccination was nearly as widespread as it is today and when outbreaks were more common and widespread than the Williamsburg outbreak, measles deaths were “estimated to be approximately 1.0 deaths per 10,000 measles cases.” See Exhibit 19 in the Krakow Affirmation, a medical journal article titled, *Measles Mortality: A*

Retrospective Look At the Vaccine Era, American Journal of Epidemiology, The Johns Hopkins University, 1975.

According to the CDC, there have been two deaths from measles in 2012 and none thereafter throughout the United States. By comparison, there have been 13 deaths from pertussis and 141 deaths from tetanus during the same period. Notably, there were 667 measles cases in 2014. See Exhibit 23 annexed to Krakow Affirmation, also at URL:

<https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/E/reported-cases.pdf>

By contrast, the Centers for Disease Control reports the following mortality rate from smallpox on its website: "Smallpox was a devastating disease. On average, 3 out of every 10 people who got it died. Those who survived were usually left with scars, which were sometimes severe." URL: <https://www.cdc.gov/smallpox/history/history.html>.

The World Health Organization ("WHO") has classified adverse drug events that occur at a frequency of 1:1000 to 1:10,000 as "rare." It considers an adverse drug event that happens at a frequency of less than 1:10,000 as "very rare." It classifies an adverse event that happens at a frequency greater than 1:1000 but less than 1:100 as "uncommon (infrequent)."

URL:https://www.who.int/medicines/areas/quality_safety/safety_efficacy/trainingcourses/definitions.pdf.

The rate for measles mortality at 1 in 10,000 infections, which likely prevails today given contemporary standards of nutrition and sanitation by WHO classifications for drugs adverse events, would be a "rare" to "very rare," or at the very worst "uncommon (infrequent)." Thus, the rate of measles mortality, which is rare or very rare under WHO definitions, or at the worst uncommon or infrequent, cannot be easily compared with the death rate of 1 in 3 people infected with smallpox during outbreaks, as the CDC reports.

Respondents have reported no deaths associated with the Williamsburg measles outbreak or in the zip codes named in the emergency Orders.

The risk of harm associated with measles infection for a healthy preschool child in the United States is less than the risk of harm associated with the MMR vaccine. See Exhibit 6 to the Krakow Affirmation, Affidavit of Dr. Hendrieka Fitzpatrick, M.D. Unvaccinated people pose no increased risk of measles to people who have been vaccinated. Exhibit 5 at para. 2.

By forcing children to receive the MMR vaccination, especially those under 12 months of age, the emergency Orders enhance the risk of harm from injury by the MMR vaccination. By forcing adults to receive the MMR vaccination, the emergency Orders enhance the risk of harm from injury by the MMR vaccination. By forcing children and adults to receive the MMR vaccination, the emergency Orders fail to reduce the risk of measles to people who have been vaccinated.

Vaccinating people with the MMR vaccine and allowing them to associate immediately with other people in public actually enhances the risk of harm to the public because the measles can spread through viral shedding of those recently vaccinated. See Exhibit 5, para. 4, annexed to the affirmation of Robert Krakow.

The emergency Orders' mandate of measles vaccination restricted to four shifting and ill-defined zip codes is medically nonsensical, will fail to prevent measles outbreaks, and thus represents an irrational public health intervention. See Exhibit 5 at para. 7.

For these reasons, to promote and serve public health the emergency Orders should be immediately and permanently enjoined

III. THE BALANCE OF THE EQUITIES FAVORS PETITIONERS

There is an insufficient predicate for the extraordinary emergency measures taken by

respondents. Correspondingly, there is risk of harm to petitioners in multiple ways.

The balance of the equities favors petitioners.

IV. RESPONDENTS HAVE CRIMINALIZED UNVACCINATED PEOPLE AS “NUISANCES”

The emergency Orders state that the mere “presence of any person in Williamsburg” who has not received the MMR vaccine or is not immune to measles “creates an unnecessary and avoidable risk of continuing the outbreak and is therefore a nuisance” under New York City Administrative Code Section 17-142. Respondents thus not only stigmatize those who refuse to vaccinate, they criminalize them.

Petitioners’ decisions to refuse vaccination are lawful and not subject to arbitrary and capricious criminal sanction. Section 3.07 of the New York City Health Code explicitly recognizes that acting pursuant to law is an exception to its command to “fail to do any reasonable action or take any necessary precaution to protect human life and health.” The petitioner parents are under no obligation to vaccinate themselves with the MMR and petitioner children all have lawful religious exemptions.

As the Verified Petition makes clear, protecting human life and health is far more complicated than the maxim “the MMR vaccine is good and non-vaccination is bad.” Both the disease and the MMR vaccine carry potential risks, and such risks are not uniform for all. Some people may be more susceptible to harm from the disease; others may be more vulnerable to harm from the vaccine. Some hold religious and conscientious convictions making all vaccines unacceptable. These highly personal choices are best left to parents and their healthcare practitioners, not City health officials. While respondents can recommend, exhort, and cajole people to vaccinate, and can isolate and quarantine those who are infectious, they cannot

arbitrarily criminalize the lawful choice not to vaccinate, even in the context of a disease outbreak. Such criminalization of lawful choices violates their duty to uphold the law.

New York State case law offers no precedent where individuals have been branded criminals for failing to vaccinate. On the contrary, New York precedent specifically states that even an individual who is contagious with smallpox may not be considered a nuisance. “We cannot admit that a person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding house, is a *nuisance*.” *Boom v. Utica*, 2 Barb. 104, 109 (1848). In light of this unchallenged precedent, it is inconceivable that perfectly healthy individuals making lawful choices may be treated as criminals for nuisance.

Respondents have twisted New York State nuisance law to novel and potentially dangerous ends. Precedent cases regarding nuisance are about buildings and human acts of commission and omission, not biological status. *Copart Indus. V. Consolidated Edison Co.* of N.Y. 41 N.Y.2d 564, 568 (1977). Conduct that courts have found to constitute nuisance includes permitting excessive emissions from power plants, improper use of pesticides, pollution of waterways, and making unreasonably loud noise. *See, e.g., id., State v. Fermenta ASC Corp.*, 630 N.Y.S.2d 884 (1995), *Leo v. General Elec. Co.*, 145 A.D.2d 290 (1989), *State v. Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d 40. None of the precedents resemble respondents’ use of the definition here.

If this Court were to permit respondents to apply this novel and expansive definition for nuisance, where would it end? Would those who fail to get annual flu shots be criminally liable for nuisance? What about the parents of children with attention deficit disorder? Should they be criminally liable if the children are not on pharmaceutical medications? This Court should not permit respondents to criminalize non-vaccination by executive fiat.

V. **SMALLPOX IS NOT MEASLES and JACOBSON V. MASSACHUSETTS IS NOT C.F. v. THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE**

Respondents seem to assume that their measles vaccination mandate in 4-6 zip codes in Brooklyn sits squarely within the *Jacobson v. Massachusetts* landmark precedent. 197 U.S. 11 (1905). It does not. The distinctions between *Jacobson* and this case far outweigh the similarities.

As the Verified Petition makes clear, a measles outbreak is a far cry from a smallpox epidemic. The smallpox fatality rate was 1 in 3 cases. The measles fatality rate in the United States is 1 in 10,000. While courts have interpreted *Jacobson* liberally in the context of school vaccination mandates, there have been few recent occasions for courts to interpret *Jacobson* in light of a mandate for a whole population as here. *Jacobson* sets a high bar for such a mandate. There must be “an emergency,” “imminent danger,” and “an epidemic of disease...[that] threatens the safety of [society’s] members.” The epidemic must “imperil...an entire population.” *Id.*, 27-31. While the measles outbreak of 250 cases in Brooklyn is of concern, it does not rise to the level of a deadly epidemic that characterized *Jacobson*.

Mr. Jacobson faced a penalty for non-compliance of a \$5 fine. No imprisonment; no forced vaccination; just a fine that would be approximately \$145 in today’s dollars. By contrast, respondents seek to impose draconian punishment on petitioners: \$1,000 fines, forced vaccination, and potential imprisonment and civil forfeitures. And respondents seek to impose these harsh punishments on 48 hours’ notice for the exercise of lawful rights.

In Massachusetts of the early 1900’s, there were no lawful religious exemptions to vaccination. By contrast, the petitioner children all have lawful exemptions. While petitioner

children have accepted the risk that in the event of disease outbreaks in their schools they must remain at home, they are not criminal pariahs, as respondents seek to paint them.

Finally, law and science have evolved greatly since the Supreme Court's 1905 decision. The petition and expert affidavits outline what the medical and scientific community now know about the risks of vaccination that were not known in the early 1900's. In the area of law, there have been arguably even greater transformations. The right to prior, free and informed consent to medical intervention is now accepted around the globe. The New York Court of Appeals articulated one of the important first statements of this right in *Schloendorff v. Soc'y of New York Hosp.*, 211 N.Y. 125, 135 (1914) (“[e]very human being of adult years and sound mind has a right to determine what shall be done with his [or her] own body.”)

In the area of privacy, the U.S. Supreme Court has identified a right of privacy that did not exist at the time of *Jacobson*. In *Roe v. Wade*, the Court applied strict scrutiny to find that a woman may terminate her pregnancy in the first trimester based on her right to privacy. *Roe v. Wade*, 410 U.S. 113, 154 (1973). In a similar vein, the Court recognized a prisoner's right to refuse unwanted medical care under the due process clause of the Fourteenth Amendment. *Washington v. Harper*, 494 U.S. 210 (1990) (recognizing significant liberty interest in avoiding the unwanted administration of drugs under the due process clause of the Fourteenth Amendment), *see also Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (“[a]t common law, even the touching of one person by another without consent and without legal justification was a battery.”).

More recent Supreme Court decisions have articulated a right to autonomy in intimate relations, decriminalizing homosexuality based on Fourteenth Amendment due process and equal protection clauses. *Lawrence v. Texas*, 539 U.S. 558, 585 (2003), (citing *Ry. Express Agency*,

Inc. v. New York, 336 U.S.106, 112-13 (1949)) (“[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”)

In addition to these new developments related to bodily integrity, privacy, and autonomy, the Supreme Court continues to uphold individuals’ rights to free exercise of religion under the First Amendment and parental rights to raise children and to teach religious as they choose with minimal restriction. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (“The Fourteenth Amendment guarantees the right of the individual ... to establish a home and bring up children, to worship God according to his own conscience.”) While respondents’ measles mandate may appear on the surface to resemble the facts and context of *Jacobson*, that similarity is skin deep.

More than one-hundred years of legal and scientific developments divide these cases, making the distinctions outweigh the analogies between them.

VI. CONCLUSION

The facts presented in the Verified Petition, as supported by Petitioners’ exhibits, and the emergency Orders themselves, demonstrate that there is no “imminent or existing threat.” The emergency Orders themselves state that cases of measles were first identified in September 2018, almost seven months ago. The respondents have pointed to no significant upsurge in cases of measles. that presents an imminent threat to public health. Respondents have carelessly issued emergency Orders containing inconsistencies that confuse the public and have failed to communicate effectively with the same public it purports to serve. Respondents have admitted that they have no blueprint and plan to implement their reckless emergency Orders and conceded

that to determine how they should proceed with implementation *after* issuing the emergency Orders they would need to consult with legal counsel.

The petitioners, therefore, have shown that the emergency Orders are arbitrary, capricious, and contrary to the law and the Constitution. There is a significant likelihood that petitioners will prevail on the merits.

Respondents have invented novel and dangerous legal concepts to weaponize public health measures when existing legally tested measure like quarantine have been ignored. They have irreparably harmed petitioners by criminalizing benign conduct, stigmatizing and demeaning religious beliefs that are recognized by law, and forcing vaccinations that have a risk of harm. Respondents have undermined petitioners right to informed consent and their right to bodily autonomy.

Absent the issuance of immediate injunctive relief petitioners and their children will be irreparably harmed by the continuation of respondents' extreme, unnecessary, disproportionate, illegal and unnecessary emergency Order.

VII. RELIEF REQUESTED

Petitioners, therefore, respectfully request that this Court enter an Order:

- (a) Enjoining and permanently restraining respondents and any of their agents, officers and employees from implementing or enforcing the emergency Orders of the Commissioner issued and dated on or around April 9, 2019; and
- (b) Declaring the Orders arbitrary, capricious and contrary to law, the imposition of which is beyond respondents' authority, and
- (c) Vacating the mandatory vaccination Orders issued on and around April 9, 2019, and

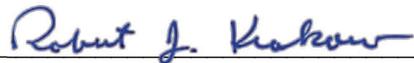
(d) Granting such other and further relief which it deems just and proper.

Dated: New York, New York

April 15, 2019

Respectfully submitted,

LAW OFFICE OF ROBERT J. KRAKOW



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