SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

YUDELKA BRAVO, OMAR CLARKE, PEGGY MANSANET and ONIKA WILLIAMS, Plaintiff-Petitioners, v. BILL DE BLASIO, in his official capacity as MAYOR of the City of New York, and the CITY OF NEW YORK, Defendant-Respondents.	:	Index No. 522638/2021

REPLY MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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POINT I

ARTICLE 78 DOES NOT COUNTENANCE IMPOSING PERPETUAL EMERGENCY MEASURES IN THE ABSENCE OF AN EMERGENCY

The City's Key to NYC Program (Emergency Executive Order ["EEO"] #225) (the "Program") fails to pass muster even under the "arbitrary, capricious and abuse of discretion" standard.

First, New York State Executive Order section 24 does not support the issuance of EEO #225. The decision and order of the court in *Independent Restaurant Owner's Association Rescue et al. v. De Blasio*, Richmond County Supreme Court Index No. 85155/2021 (September 20, 2021), called the EEO into serious question.[1] It stated that it was not aware of "any common law power in New York State granting an individual acting in the capacity as the local Executive branch the 'authority' [claimed in the EEO] to 'protect the public in the event of an emergency'." *Id*. at p. 3-4. It further points out that the gubernatorial order permitting local action in New York City was by its own terms extending authority only for the limited time period of 30 days, and finally emphasized that even within a limited time period "the current pandemic status, despite its worldwide impact, does not seem to meet the first element necessary to declare a state of emergency" (namely a flagrant act of defiance of public authority). This is so, the court made clear, because:

> "[w]hile the use of an executive order may be permitted; its use is strictly limited. The purported actions taken in Emergency Executive Order No. 225 seeking to affect the public health and welfare of the people within New York City are opaque. Still Emergency Executive Order No. 225 issued by the government dictates affirmative steps effectively deputizing private individuals to curtail the freedom of movement and association of their neighbors and patrons or face significant fines. An official record justifying the government's fiat does not exist.

[1] The decision is attached as Exhibit B to the Affirmation of Sheldon Karasik which accompanies this Reply Memorandum.

> Public testimony from public health care scholars and practitioners supporting these steps do not exist. The people's representatives are not on record questioning the decisions, conclusions, and guidance of health care scholars and practitioners."

Second, *W.D. v. Rockland Cty.*, 2021 U.S.Dist. LEXIS 33515 (S.D.N.Y. 2021), the principal case the City relies upon as authority to establish that Key to NYC is a lawful emergency order under Executive Law Section 24, profoundly undermines its position. There, the executive branch tried to exclude students who were unvaccinated for measles on religious grounds from attending school during an outbreak. Presented with an Article 78 proceeding, the Supreme Court and the Second Department invalidated the executive action, holding that the executive could not obliterate religious rights by personal fiat, forcing the legislature to pass a statute negating a religious exemption for the measles vaccine. Moreover, the entire period of restriction lasted less than one year and applied only to students attending schools, not to all residents and all aspects of public life ad infinitum, since Key to NYC has no termination date.

In short, an "emergency" commenced with an executive order issued twenty months ago in March 2020 cannot justify imposing far more restrictive measures a year and a half later. The City offers no legal authority for the proposition that a perpetual state of emergency can be maintained regardless of the facts on the ground. What are those facts? According to the City (see Paragraph 16. of Dr. Jay Varma Affidavit), in "the spring of 2020, New York City was the epicenter of the COVID-19 pandemic in the U.S. . . ." How does that "fact" comport with imposing the most onerous infringement on personal freedom anywhere in the country twenty months later, particularly when, as Dr. Varma states in paragraph 17 of his affidavit, "New York City is no longer experiencing the widespread crisis that marked the spring of 2020 . . ."

Another fact emphasized by Dr. Varma in paragraph 13 of his affidavit is that "almost all New York City cases are now primarily of the Delta variant." As the Reply Declaration of Dr.

Paul Alexander (attached as Exhibit A to the Affirmation of Sheldon Karasik) makes clear, these vaccines have no effectiveness in preventing transmission of a variant in play after the vaccines were developed. Indeed, there is nothing in Dr. Varma's Affidavit to the contrary. Tellingly, in paragraph 22, Dr. Varma states that "all three vaccines are more than 90% effective at preventing severe illness and death [emphasis supplied]." In other words, even if any of the vaccines were effective in helping mitigate the effects of a mutated version created after the vaccines were developed, vaccination would not prevent transmission, it would only reduce the severity of the symptoms.

If these facts are not sufficient to demonstrate the arbitrary and capricious nature of EEO #225, consider the "fact" that every New Yorker and visitor to the City who cannot be vaccinated for medical or religious reasons is essentially deprived of the basics of life. That seems to be okay however since the City conducted research (see Dr. Varma Affidavit paragraph 32) proving that people needed to eat and otherwise engage in normal activity. Thus, starvation and deprivation of life are permissible tactics to enforce mandatory vaccination.

In short, nothing herein even comes close to justifying draconian restrictions on freedom of commerce and movement and the ability to live one's life. By any measure, EEO #225 is arbitrary and capricious.[2]

[2]Should the Court so wish, it could certainly hold an evidentiary hearing to determine whether there is any sound scientific basis for the Program to be imposed on all those living, working and visiting New York City.

POINT II

NEW YORK CITY IS PREEMPTED FROM REGULATING COMMUNICABLE DISEASES

The City does not dispute that it is not exempt from Title 8, which expressly addresses COVID-19. It claims, however, that the fact Title 8 deals only with contract tracing "is indicative of an intent not to assume full regulatory responsibility for all facets of management of communicable diseases." Opp. at 7-8.

The City ignores the fact that Article 21, Titles 1-8 of the Public Health Law expressly regulate the "control of ***acute communicable diseases***," including COVID-19. (Emphasis added.) It also overlooks the fact that Title 8, Section 2182 – from which the City is not exempt – *requires* the Commissioner of Public Health to "make regulations as reasonably necessary to implement [Title 8]," which deals only with COVID-19. That mandatory language is not limited in any fashion; thus, it extends to all aspects of the management of COVID-19. Simply because the Commissioner has *not* made any other regulations to date does not mean further regulations will not be issued. Rather, section 2182 *requires* the Commissioner to make any other necessary regulations to address COVID-19, including whether an immunization requirement should be implemented in any facet of society. That requirement, therefore, confers on the Commissioner the exclusive and regulatory responsibility over the management of COVID-19.

The City cites no authority for its argument. The two cases on which it relies concerning preemption address the limited focus of *local* laws, not whether the limited reach of a state law indicates it is not a comprehensive and detailed regulatory scheme. *See* Opp. at 7-8.

Likewise, the City's reliance on the directive in 10 CRR-NY 2.6(a) that local health authorities "shall take any other steps to reduce morbidity and mortality that the local health authority determines to be appropriate" is unavailing. *See* Opp. at 9. The Commonwealth Court

of Pennsylvania (one of the state's two intermediate appellate courts) rejected a nearly identical argument last week in *Jacob Doyle Corman, III, et al. v. Acting Secretary of the Pennsylvania Department of Health*, No. 294 M.D. 2021 (Nov. 10, 2021) (slip op. attached as Exhibit C to the affirmation of Sheldon Karasik). In that case, the Court declared an order by the Acting Secretary of the Pennsylvania Department of Health directing all students, teachers, staff, and visitors in schools in the Commonwealth to wear face coverings, regardless of vaccination status, was void and unenforceable. Ex. 3 at 30-33. The Court reached this conclusion, in part, because the Acting Secretary did not have the authority to issue the order. *Id.* at 21-28. The Court rejected the Acting Secretary's argument that the masking order was an order promulgated pursuant to certain authorities the Acting Secretary claimed "allow the Department to implement *any* disease control measure appropriate to protect the public from the spread of infectious disease." *Id.* at 21. Among those authorities was a health regulation on which the Acting Secretary relied for authority to issue the masking order. *Id.* at 25-26. That regulation provides "[t]he Department or local health authority shall direct isolation of a person or an animal with a communicable disease or infection; surveillance, segregation, quarantine or modified quarantine of contacts of a person or an animal with a communicable disease or infection; **and any other disease control measure the Department or the local health authority considers to be appropriate for the surveillance of disease**, when the disease control measure is necessary to protect the public from the spread of infectious agents." *Id.* (quoting 28 Pa. Code § 27.60(a)) (emphasis added). The Court concluded this general language that allows the Department to implement "any other disease control measure the Department . . . considers to be appropriate" "does not provide blanket authority to create new rules and regulations out of whole cloth." *Id.* at 27.

Here, the language in 10 CRR-NY 2.6(a) that local authorities "shall take any other steps to reduce morbidity and mortality that the local health authority determines to be appropriate" similarly does not provide the City with blanket authority to fabricate new rules or regulations out of thin air, including the vaccine requirement at issue. In any event, that provisions goes on to clarification such steps only involve the investigation of the circumstances of death and the right to collect samples.

The City's reliance on 10 CRR-NY 2.13(2) to show it is empowered to issue "isolation and quarantine procedures" is similarly misguided. 10 CRR-NY 2.13(3) and (4) limit "isolation orders" and "quarantine orders" to "home" or other "residential" locations in very specific circumstances and are completely different from regulation of life as we know it, imposed by EEO #225.

POINT III

THE PROGRAM DENIES PROCEDURAL DUE PROCESS

The City argues that it is not barred by constitutional proscriptions from denying procedural due process to black New Yorkers in regard to the Program; but these arguments are entirely moot because the City's own rules governing its conduct unequivocally require procedural due process for long-term emergency orders, due process which undisputedly has not been provided here. In *Independent Restaurant Owner's Association Rescue et al. v. De Blasio*, *supra*, the court pointed out that an "emergency" order must be accompanied by procedural due process (notice and a hearing) when its duration extends past 60 days. Id. at 7, citing NYC Adm. Code Section 1043i(2). The cited section of the Code reads in pertinent part:

> "A rule adopted on an emergency basis shall not remain in effect for longer than sixty days unless the agency has initiated notice and comment otherwise required by this section within such sixty day period and publishes with such notice a statement that an extension of such rule on an emergency basis is necessary for an additional sixty days to afford an opportunity for notice and comment and to adopt a final rule as required by this section; provided that no further such finding of an emergency may be made with respect to the same or a substantially similar rule".

Here, then, the City has violated its own regulations and completely ignored the procedural due process requirement. As such, the Program is expired, null and void.

POINT IV

THE PROGRAM VIOLATES NEW YORK STATE CONSTITUTIONAL RIGHT OF PRIVACY AND BODILY INTEGRITY.

EEO225 erects a prison around the bodies of the unvaccinated, including Petitioners, preventing them from freely engaging in the basic aspects of public life such as dining, entertainment, and exercise. The City then offers a "Key" in the form of a coercive choice for Petitioners: undergo a *permanent* medical procedure and then the government will unlock the normal life and liberty previously enjoyed as New York City residents. The City defends this governmental attack on a fundamental right primarily by way of three flawed arguments: Jacobson is dispositive, no fundamental right is implicated, and the mandate merely provides a choice to be vaccinated. Each position lacks merit. Petitioners, as Black Americans, highlight the necessity of preventing the City from mandating what must be injected into their body to avoid a functionally imprisoned, second-class citizen status.

A. *Jacobson* is Outdated and Inapplicable.

This Court must uphold the Constitution of New York which, as explained below, protects an individual's right to refuse unwanted medical treatments. Predictably, the City clings to the 100+ year old case of *Jacobson* as his primary legal justification. Since the 1905 case of *Jacobson*, two World Wars, a Cold War, and generations of jurisprudence have passed which establish the importance and substantial legal protections afforded to an individual's rights of privacy and bodily integrity.

Jacobson is inapposite given that it arose before the 14th Amendment explicitly incorporated federal constitutional rights against states, and due to recent decisions denoting the tiers of legal scrutiny. *See Roman Catholic Diocese*, 208 L. Ed. 2d at 208-09. Indeed, not a single Justice in *Roman Catholic Diocese*, whether in the majority or dissenting, took the position that *Jacobson* provided the operative framework for Covid-19 regulations.

Equally important, federal jurisprudence in the decades since *Jacobson* firmly established the fundamental right of privacy including recognition that compelled physical intrusion into the human body is an invasion of bodily integrity that implicates significant, constitutionally protected privacy interests. *Missouri v. McNeely*, 569 U.S. 141, 143 (2013). The fundamental right of privacy as pertaining to maintenance of bodily integrity is necessary to almost every well-recognized fundamental privacy right and other protected individual rights. Indeed, bodily integrity touches on such fundamental decisions as: determining the course of a person's medical treatment; when medical treatment can be refused; when life sustaining treatment can be discontinued; what acts consenting adults can perform in the sanctity of a bedroom; whether or not to utilize contraceptives; and the ability to engage in procreative choice.

The U.S. Supreme Court in *Planned Parenthood v. Cas*ey recognized "the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy." *Planned Parenthood v. Casey,* 505 U.S. 833, 112 S. Ct. 2791 (1993). The *Casey* Court commented upon the line of cases articulating the right of privacy noting that "if *Roe* is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power to **mandate** medical treatment or to bar its rejection, this Court's post-*Roe* decisions accord with *Roe's* view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims." *Id.* (Emphasis added).

When *Jacobson* was decided in 1905 there was no such constitutional concept as unenumerated rights which, as noted above, are recognized protections for privacy interests and personal autonomy. Thus, *Jacobson's* analysis of the Fourteenth Amendment due process was based in then existing outdated case law. Indeed, the Supreme Court did not even consider strict scrutiny until 1938 in *United States v. Carolene Products Co.* decision, 304 U.S. 144, 152 n. 4. It is a decision (and others like it) issued a hundred or so years later, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), which governs present day vaccine mandates, not a decision rendered at the turn of the twentieth century. *Cruzan* held that a fundamental constitutional right to refuse medical treatment exists. If, after *Roe v. Wade*, 410 U.S. 113 (1973) a right to take another's life exists, the right to preserve one's own certainly does as well. *Cruzan* at 169-170.

Jacobson states that vaccine deference would only apply "to prevent the spread of contagious diseases[.]" 197 US at 35. All credible scientific experts and world leaders, from the CDC Director to the NIAID Director (Dr. Fauci), from President Joe Biden to the Honorable

Boris Johnson, from the WHO and the Harvard School of Public Health, agree that the shots do not stop transmission of the virus. See Reply Declaration of Dr. Paul Alexander and appendix thereto.The scientific controversy is that while many scientists believe the shots are beneficial in reducing symptoms and severity, many other scientists believe that shots are high risk with no benefit. This places the shots entirely in the category of personal medical treatment choices only and not "enacted to protect the public health," which is the Constitutional requirement in *Jacobson*. And under *Cruzan* 497 U.S. 261, it is wholly unconstitutional to mandate personal medical treatment.

Jacobson's irrelevance to present day jurisprudence was eloquently summarized by Justice Gorsuch in *Roman Catholic Dioceses of Brooklyn v. Cuomo*, 141 S.Ct.63, 70 (2020): "Why have some mistaken this Court's modest decision in Jacobson for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do".

B. The Key to NYC Locks Up a Foundational Fundamental Right

The City argues that "there is no fundamental right to refuse vaccination." *See* Memorandum at 17. Ironically, the City was forced to acknowledge that the New York Court of Appeals explained that New York common law and constitutional law made it so that "it is the individual who must have final say in respect to decisions regarding [the individual's] medical treatment." What the City ignored is that fact that the *Rivers* Court also clearly articulated that such decisions rested upon a person's "right to determine what shall be done with [the person's] own body"' and the right to control medical treatment. *Id.* at 341.

The City attempt to side-step *Rivers* by claiming it is "highly distinguishable." However, they remain tellingly silent about the fundamental constitutional issue the New York Court of Appeals recognized: "right to determine what shall be done with his own body…[is a] **fundamental** common-law right is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution." *Id.* at 341. In the particular facts of *Rivers*, that liberty interest arose with respect the State's efforts to impose medical treatment, a transient dose of antipsychotic medication. Yet, the City brazenly claims "[i]t is well-established that there is no fundamental right to refuse vaccination." *See Memorandum* at pg. 17. This is the crux of the issue before this Court: are Petitioners endowed with a fundamental right to determine what is injected into their bodies without governmental coercion, penalty, or exclusion from public life.

The established law in New York is that there *is* a fundamental right to refuse medical treatment and this right is protected by the New York State Constitution. There is no debate that a vaccine is a medical treatment that is *permanent* in nature. The *Rivers* Court is clear that infringement upon Petitioners' fundamental privacy and bodily integrity through coerced imposition of an unwanted medical treatment requires the government to show a compelling interest by clear and convincing evidence that an intrusion was narrowly tailored to give as much effect as possible to the patient's wishes. Id. at 497.

C. Coercive Choice is Government Infringement.

Given that both federal and state law clearly favor the rights of an individual against unwanted medical procedures, the City retreats into the fantasy that the Key to NYC simply "provides petitioners with a choice of whether or not to be vaccinated." *See Memorandum* at pg. 17. Through this line of argument, the City seeks to convince this Court that there is no actual infringement upon Petitioners' privacy and bodily integrity. This falsehood shows the lengths the

City will go to in forcing medical procedures upon New Yorker City residents such as Petitioners. There is no free choice in the face of coercion.

There is no way the City's Key to NYC represents a compelling government interest that is narrowly tailored given that it is both overinclusive and underinclusive. It is overinclusive in that it includes those who recently had COVID and thus cannot be vaccinated; it includes those who had COVID much earlier and therefore now have COVID immunity; it includes those who have natural immunity; and includes those whose religious beliefs, and potentially their life if there is a contradistinction to the vaccine, will be compromised if vaccinated. It is underinclusive in that it excludes anyone under the age of 12, people that go inside "for a quick and limited purpose", kids older than 12 who are participating in a school activity, people trying to vote, and certain out of town visitors, entertainers and professional athletes. Clearly, these carve outs have no bearing on the supposedly *medical* purpose of Key to NYC. Respondents offer zero evidence that the program is effective in combating COVID-19 or how targeting recreational activity is an important disease transmission vector. The only thing Key to NYC does effectively is use the force of the government to bludgeon away Petitioners and millions of others fundamental right to refuse unwanted medical procedures.

POINT V

THE PROGRAM ILLEGALLY DENIES BLACK RESIDENTS EQUAL ACCESS TO PUBLIC LIFE

The City offers no evidence to refute Petitioners' showing that its Program disproportionately excludes black residents from City life, no evidence to show that it could not rectify this problem before implementing the Program, no evidence that alternative protective measures such as testing, masks and social distancing cannot substitute for racially

discriminatory measures and no evidence that it was not fully aware that the Program would have stark racial consequences. In fact, as shown in the Declarations submitted in support of the Petition and in Dr. Alexander's Reply Declaration, the Program is essentially useless. The City's circular argument to justify it is to make vaccination itself the end, rather than a means to the end of public health and safety. Based on that logic, and that logic alone, the Program is justified. Based on the real goal of advancing public health and safety, it clearly is not. For these reasons, and as further shown below, the Program violates the New York City Human Rights Law and cannot continue.

The principal legal authority cited by the City in support of its disparate impact policy is the human rights code itself, namely Section 8-107(17)(a)(2), which states: "a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where the commission or such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available to the covered entity and the covered entity fails to prove that such alternative policy or practice would not serve the covered entity as well." This statutory provision also provides for another alternative, i.e., the City can assume in the first instance the burden of presenting evidence that alternative policies would not serve its interests well. Petitioners win under either scenario. They have provided such evidence as per the Reply Declaration of Dr. Alexander and the City has not produced <u>any</u> evidence as to the ineffectiveness of alternatives.

The Reply Declaration of Dr. Alexander explains why vaccination is ineffective in preventing transmission of the virus. As such, any of the alternatives previously in place in NYC and already provided for in paragraph 2 of EEO #225 with respect to those exempt from the

vaccine mandate will work better: wearing masks, social distancing, testing periodically and frequent hand washing.

CONCLUSION

For the foregoing reasons, the Key to NYC program is unconstitutional and violative of New York statutory law and its further enforcement should be enjoined, or in the alternative this matter should be set down for evidentiary hearing.

Dated: November 17, 2021

Respectfully submitted,

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UNIFORM CIVIL RULE 202.8-b CERTIFICATION

According to Microsoft Word 2010, the portions of this Memorandum of Law which must be included in the word count contains 4136 words and therefore complies with Uniform Civil Rule 202.8-b.

Dated: November 17, 2021

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