

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. _____

ARTICLE 78
VERIFIED PETITION

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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Petitioners, by and through their undersigned counsel, respectfully allege as follows:

PRELIMINARY STATEMENT

1. Petitioners bring this proceeding pursuant to CPLR Articles 78 and 3001 to challenge as arbitrary, capricious and *ultra vires*/contrary to law Orders of the Commissioner of Health and Mental Hygiene, Oxiris Barbot, M.D., (the “emergency Orders”) issued on or about April 9, 2019.

2. The emergency Orders command that all persons over six months of age who work, reside or attend school within specified zip codes “*shall be vaccinated against measles*” if they are not vaccinated or 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 Exhibits 1, 2 and 3.

3. 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.

BACKGROUND AND SUMMARY OF PETITION

4. 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 these drastic emergency measures and because respondents have 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.

5. The emergency Order, Exhibit 1, is 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.

6. 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.

7. This Petition seeks relief for 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.²

² 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)

8. 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. In addition, the MMR combination vaccine is the only available measles vaccine, thus the Order commands vaccination for mumps and rubella, which are unnecessary and carry risk of harm. Forcing 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 UN 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.

9. 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).

10. For the reasons set forth above and upon the facts and circumstances alleged herein, Respondents' emergency Orders are arbitrary, capricious, contrary to law, exceed their lawful authority and should be vacated.

PARTIES

11. Petitioners are individuals and their children who reside in one of the zip codes identified in the three Orders made available on Commissioner's website.

12. The petitioners – 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; A.L., on her own behalf and on behalf of her minor child; and M.N., on her own behalf and on behalf of her minor child – are residents of the zip codes specified in the emergency Orders who are subject to or whose children are subject to forced vaccination and civil and criminal penalties, including imprisonment, by the authority of the orders issued by respondents. Petitioners seek injunctive relief against respondents for their arbitrary and capricious actions, described below.

13. C.F. resides in zip code 11211, which is a zip code covered in the Orders. She and her minor children, who have religious exemptions to vaccination for school attendance, are subject to the forced or mandated vaccination provision in the Orders. While the first Order initially posted on the Department of Health's web site did not include the zip code 11211, a subsequent version did. Thus, depending on the version of the respondents' Orders that apply, something only known to respondents, the first Order applies to C.F.

14. M.F. resides in zip code 11249, which is a zip code covered by the Orders. She and her minor children, who have religious exemptions to vaccination, are subject to the forced or mandated vaccination provision in the emergency Orders. While the first emergency Order initially posted on the Department of Health's web site did not include the zip code 11249, a subsequent version did include 11249. Thus, depending on which version of the Orders apply, something only known to respondents, M.F. is required to comply.

15. B.D. resides in zip code 11205, which is a zip code covered by the Orders. She and her minor child, who has a religious exemption to vaccination, are subject to the forced or mandated vaccination provision in the emergency Orders.

16. A.L. resides in zip code 11206, which is a zip code covered by the Orders. She and her minor child, who has a religious exemption to vaccination, are subject to the forced or mandated vaccination provision in the emergency Orders.

17. M.N. resides in zip code 11205, which is a zip code covered by the emergency Orders. She and her minor child, who has a religious exemption to vaccination, are subject to the forced or mandated vaccination provision in the emergency Orders.

18. The petitioners are all adversely affected by the emergency Orders issued April 9, 2019 because they command that petitioners “shall” vaccinate themselves or their children in contravention of their religious beliefs or be subject to criminal and civil penalties, including imprisonment.

19. The petitioners are all adversely affected by the emergency Orders, which require vaccination irrespective of whether the petitioners give informed consent or receive the information required under the National Childhood Vaccine Injury Act. 42 U.S.C. § 300aa-26.³

³ The relevant provision of the National Childhood Vaccine Injury Act provides, as follows:

d) Health care provider duties

On and after a date determined by the Secretary which is--

(1) after the Secretary develops the information materials required by subsection (a), and

(2) not later than 6 months after the date such materials are published in the Federal Register,

each health care provider who administers a vaccine set forth in the Vaccine Injury Table *shall provide* to the legal representatives of any child or to any other individual to whom such provider intends to administer such vaccine a copy of the information materials developed pursuant to subsection (a), supplemented with visual presentations or oral explanations, in appropriate cases. Such materials shall be provided prior to the administration of such vaccine.

42 U.S.C.A. § 300aa-26 (West). (Emphasis added).

The respondents have thus failed to account for these requirements in the recklessly short 48-hour period during which the emergency Orders command that people “shall” be vaccinated, thereby ignoring statutory safeguards against the risk of harm from vaccination and overriding fundamental principles of informed consent.

20. Respondent, the New York City Department of Health and Mental Hygiene (“Department of Health” or “DOH”), includes an administrative agency in the executive branch of the New York City government. The Department of Health also comprises the Board of Health (the “Board”), which has eleven individual members appointed by and serving at the pleasure of the Mayor pursuant to sections 551 and 553-54 of the N.Y.C. Charter. Respondent Dr. Oxiris Barbot, M.D. is Commissioner of the Department of Health and serves as Chair of the Board of Health.

JURISDICTION AND VENUE

21. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803.2. and 3. This jurisdiction is because respondents issued the emergency Orders and have proceeded and are proceeding without or in excess of jurisdiction, and the emergency Orders are in violation of lawful procedure, affected by an error of law, and are arbitrary, capricious and an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001, on the ground that the Orders are arbitrary, capricious and contrary to law.

22. This Court has personal jurisdiction over petitioners pursuant to CPLR § 301.

23. This Court has personal jurisdiction over respondents pursuant to CPLR § 302(a)(1).

24. Venue lies in Kings County pursuant to CPLR § 506(b) and § 7804(b) because it is the county within the judicial district “where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place.”

**AS AND FOR A FIRST CAUSE OF ACTION
(RELIEF UNDER ARTICLE 78 OF THE CPLR – ORDERS ARE ULTRA
VIRES AND OUTSIDE SCOPE OF AUTHORITY)**

25. On or about April 9, 2019, acting through Commissioner Oxiris Barbot, respondents declared a state of emergency and issued emergency Orders that mandate “any person 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 the order “*shall be vaccinated against measles,*” unless the person can demonstrate immunity to the measles.

26. The first published Order also 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.

27. 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 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.

28. 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" 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. A *Newsweek* article that describes the exceedingly confusing zip code discrepancies in the respondents' three Orders is annexed to the Krakow Affirmation as Exhibit 5.⁴

⁴ 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

29. 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*.⁵

30. The emergency Orders report, "[s]ince September 2018, more than 250 cases of measles have been documented amount people living in Williamsburg," but the Orders conspicuously failed to specify the number of active cases of measles when respondents issued the emergency Orders. In a notice posted on the New York City Health Department web site after the emergency Orders were issued, the Health Department states, "[a]s of April 8, 2019,

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).

⁵ 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).

there have been 285 confirmed cases of measles in Brooklyn and Queens since October.” The Health Department website, as of April 14, 2019, specifies cases by location, but that information was not available from respondents on April 9, 2019. It is important to note that according to CDC data, there have been hundreds of measles cases in the United States in recent years, including 667 cases in 2014. While petitioners are not suggesting that measles is of no concern, the question is whether 285 measles cases over the last 7 months, and a much smaller number of cases in recent weeks, justifies the extraordinary directives in the emergency Orders. Petitioners strongly believe that the existing circumstances do not justify the unusual directives contained in the emergency Orders. ⁶ See Exhibit 22 annexed to Krakow affirmation, also at <https://www1.nyc.gov/site/doh/health/health-topics/measles.page> (accessed 4/14/19 @ 1 p.m.).

31. When Commissioner Barbot issued the Orders, likely there were far fewer active cases of measles than 250. The number of active cases is insufficient to constitute an epidemic and does not justify the emergency Orders.

32. At the time Commissioner Barbot issued the emergency Orders, the respondents had failed to use the authority they have under Public Health Law Section 2100 to isolate and quarantine those infected with measles and those living in close proximity to them.

33. New York City Health Code §3.01(d) provides, “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.”

⁶ The Notice that is posted on the Health Department web site contains information that was not posted at the time the emergency Orders were issued on April 9, 2019. Some of the information posted on respondents’ web site is inconsistent with the emergency Orders. For example, the web site statement says, “[i]nfants ages 6-11 months should also receive MMR vaccine before traveling internationally” whereas the emergency Orders command that all children older than six months must be vaccinated within 48 hours of the issuance of the emergency Orders or their parents will face civil and criminal penalties, including imprisonment. Exhibits 1, 2, 3 annexed to Krakow Affirmation.

34. Neither Code §3.01(d) nor other relevant provisions of the New York City Health Code mention vaccination or specify the circumstances under which the Commissioner may compel vaccination or require civil and criminal penalties for failure to do so.

35. Moreover, New York State law provides means for dealing with contagious disease outbreaks, including measles, specifically authorizing both the exclusion of non-vaccinated students from a school in which a case of measles has been reported and/or the quarantining of a person or place infected by the disease.

36. Neither the Commissioner of Health nor the Governor of New York State has declared any public health emergency regarding measles. In fact, it has been reported in the New York Post on April 9, 2018, that the Governor has questioned the Constitutional basis for the respondents' emergency Orders.⁷

37. Each petitioner has been irreparably harmed by Commissioner Barbot's emergency Orders, which subject them to criminal prosecution, severe fines and imprisonment for non-compliance.

38. Respondents' emergency orders impermissibly extinguish the force of religious exemptions for each of the petitioners' children, which they obtained in full compliance with Section 2164(9) of the Public Health Law, and which the State of New York continues to recognize, irrespective of whether the child could attend school since September 2018, when the measles outbreak began.

39. The emergency Orders are arbitrary and capricious because they fail to state how many active cases of measles existed at the time of the issuance of the Orders, instead specifying

⁷ "Cuomo questions legality of enforced vaccinations in Brooklyn," *New York Post*, April 9, 2019, 12:08pm, URL: <https://nypost.com/2019/04/09/cuomo-questions-legality-of-enforced-vaccinations-in-brooklyn/> (last accessed 4/13/19).

only that, “[s]ince September 2018, more than 250 cases of measles have been documented among people living in Williamsburg,” a period of more than six months. The Orders, therefore, fail to justify the emergency basis for circumstances that have existed since at least September 2018.

40. The emergency Orders are arbitrary and capricious because they contemplate mandating or forcing people to receive vaccines without any plan for implementation. The respondents have stated publicly that “there’s no blueprint for how City officials could forcibly vaccinate people.” A spokesperson for the respondents stated, “[b]ecause 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.” A *New York Post* article quoting the respondent Mayor Bill De Blasio’s spokesperson making these statements is annexed to the Krakow Affirmation as Exhibit 3.⁸ The respondents have thus issued Orders without an enforcement plan, despite the claimed emergency. The only purpose for the Orders, therefore, appears to be to instill fear among the people in the affected zip code areas, many of whom belong to an insular, self-segregated community that already faces stigmatization.

41. The emergency Orders are arbitrary and capricious in prescribing mandatory vaccination because administration of the MMR vaccine carries the risk of harm to both children and adults. Parents of children receiving the MMR, and adults, together with their individual healthcare practitioners, are in the best position to assess risk.

42. The emergency Orders are arbitrary and capricious in prescribing mandatory vaccination, thus violating the fundamental principle of informed consent to any medical intervention that carries a documented risk of harm, as does the MMR vaccine.

⁸ *New York Post*, April 9, 2019, “Williamsburg residents could face ‘forcible vaccinations’ amid measles outbreak”, url: <https://nypost.com/2019/04/09/williamsburg-residents-could-face-forcible-vaccinations-amid-measles-outbreak/> (accessed April 10, 2019).

43. The emergency Orders are arbitrary and capricious by imposing mandatory vaccination by executive fiat, without the authority of law or sufficient basis in fact.

44. The emergency Orders are arbitrary and capricious because the incidence of measles cited in the Orders is insufficient to justify the declaration of a public health emergency pursuant to section 3.01 of the New York City Health Code.

45. The emergency Orders are arbitrary and capricious in finding that any person who lacks the measles vaccine or immunity to measles is a “nuisance,” as defined in the New York City Administrative Code §17-142. Respondents have provided no legal authority or precedent for finding an unvaccinated person in any context to be a nuisance.

46. The emergency Orders are arbitrary and capricious by providing only 48 hours before imposing severe penalties, including making non-vaccination a criminal offense, without authority in statute, rule or law.

47. The emergency Orders exceed reasonable authority by imposing civil and criminal sanctions for people’s failure to comply with the Orders’ prescribed 48-hour window.

The emergency Orders provide as follows:

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.

Exhibits 1 at 3; Exhibit 2 at 3.

WHEREFORE, for the several reasons set forth *supra*, this Honorable Court should declare that respondents’ declaration of emergency and emergency Orders issued on or about April 9, 2019, commanding, mandating and forcing people to receive the MMR vaccine within 48 hours of the Orders’ issuance are arbitrary, capricious and contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A SECOND CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
ORDERS ARBITRARY AND CAPRICIOUS BECAUSE THEY IGNORE
RISK OF HARM DUE TO COMPULSORY VACCINATION)**

48. Petitioners incorporate paragraphs 1-47 as if set forth fully and repeated herein.

49. None of the petitioners' children have measles.

50. Nevertheless, some of petitioners' children have been barred from attending school.

51. By the terms of the emergency Orders, petitioners' children will be forced to receive an MMR vaccination, the only vaccination available for measles, and will thereby be exposed to live virus mumps and rubella vaccinations, which carry risk of harm.

52. Respondents have an insufficient basis to compel or force a measles vaccination, let alone mumps and rubella vaccinations.

53. As there are zero reported cases of mumps or rubella in the covered zip codes, there exists no justification whatsoever for exposing petitioners' children via the MMR vaccine to mumps and rubella, which carry risk of harm.

WHEREFORE, because the mumps and rubella components of the MMR vaccine carry a risk of harm and there exists no justification to expose children to the mumps and rubella vaccinations *supra*, the Honorable Court should declare respondents' declaration of emergency and the emergency Orders issued on or around April 9, 2019 to be arbitrary, capricious and contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A THIRD CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
ORDERS ILLEGALLY DECLARE PERSONS A NUISANCE DUE TO
UNVACCINATED STATUS)**

54. Petitioners incorporate paragraphs 1-53 as if set forth fully and repeated herein.

55. The emergency Orders provide:

I also find that the presence of any person in Williamsburg lacking the MMR vaccine, unless that vaccine is otherwise medically contra-indicated or such person has demonstrated immunity against measles, creates an unnecessary and avoidable risk of continuing the outbreak and is therefore a nuisance, as defined in New York City Administrative Code §17-142.

56. There is no authority in Administrative Code §17-142 to declare presence of a person in a specified geographical location to be a “nuisance” within the definition of the law.

57. There is no factual basis, other than the baseless assertions of the emergency Orders, to declare a person a “nuisance” under the law.

WHEREFORE, because there is no basis in fact or law for the emergency Orders’ declaration that a person is nuisance, the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A FOURTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
ILLEGAL DE FACTO OVERRIDING OF STATE LAW GOVERNING
RELIGIOUS EXEMPTIONS)**

58. Petitioners re-allege the foregoing paragraphs 1-57 as if more fully stated herein.

59. There is no public health emergency in New York City of the extreme magnitude required under the New York City Health Code to invoke an emergency and to issue and enforce the emergency Orders requiring forced vaccination of children and adults.

60. The emergency Orders improperly invalidate the petitioners’ children’s religious exemptions obtained in full compliance with Public Health Law §2164(9).

WHEREFORE, because the emergency Orders improperly and without justification

override New York State Law governing religious exemptions, thereby operating as an

unjustifiable and unnecessary override of Public Health Law § 2164(9), the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A FIFTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
ARBITRARINESS DUE TO ORDER’S RISK OF HARM)**

61. Petitioners re-allege the foregoing paragraphs 1-60 as if more fully stated herein.

62. The emergency Orders’ claims regarding the safety and effectiveness of the MMR vaccine and the risk of harm to vaccinated people are exaggerated, inaccurate and misleading.

63. It is the law and policy of the United States that vaccines carry known risks of harm.

64. 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.

65. 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.

66. 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.

67. 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>.

68. 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.

Vaccine Injury Compensation: Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives: <https://www.gao.gov/assets/670/667136.pdf> at 31.

69. 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.

70. 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.

71. 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.

72. 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).

73. 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).

74. 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.

75. 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.

76. The manufacturer's package insert for the MMR vaccine lists multiple risks of adverse effects. See Exhibits 6 and 7 to the Krakow Affirmation.

77. The manufacturer's package insert for the MMR vaccine 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.

78. The manufacturer's package insert for the MMR vaccine 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.

79. 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.

80. The manufacturer's package insert for the MMR vaccine 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.

81. 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>

82. 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>.

83. 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.

84. 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)."

85. 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.

86. Upon information and belief, respondents have reported no deaths associated with the Williamsburg measles outbreak.

87. 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.

88. Unvaccinated people pose no increased risk of measles to people who have been

vaccinated. Exhibit 5 at para. 2.

89. By forcing children to receive the MMR vaccination, the emergency Orders enhance the risk of harm from injury by the MMR vaccination.

90. By forcing adults to receive the MMR vaccination, the emergency Orders enhance the risk of harm from injury by the MMR vaccination.

91. 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.

92. 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.

93. 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.

WHEREFORE, because the emergency Orders grossly understate the risk of harm to children, adults and the general public from the MMR vaccine, while at the same time overstating the benefits, the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A FIFTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
DUE PROCESS)**

94. Petitioners re-allege the foregoing paragraphs 1-93 as if more fully stated herein.

95. The emergency Orders violate the First and Fourteenth Amendments to the United States Constitution and violate the New York State Constitution by imposing civil and criminal penalties for the petitioners' free exercise of their religious practices and beliefs.

96. The emergency Orders violate the First and Fourteenth Amendments to the United States Constitution and violate the New York State Constitution by imposing civil and criminal penalties, including imprisonment, in violation of the petitioners' rights to due process under law.

WHEREFORE, because the emergency Orders violate the First and Fourteenth Amendments to the United States Constitution (due process) and the applicable provisions of the New York State Constitution, the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A SIXTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
EQUAL PROTECTION)**

97. Petitioners re-allege the foregoing paragraphs 1-965 as if more fully stated herein.

98. Despite the language of the third emergency Order, there are six zip codes covered in the three emergency Orders issued by respondents: 11205, 11206, 11221, 11249, 11211, and 11237. A chart showing the population and square mileage of the affected zip codes taken from web sites that compile such data is annexed to the Krakow Affirmation as Exhibit 20.

99. The data show that 438,929 people live in the affected zip codes.

100. At the time of their issuance, the respondents' emergency Orders provide no data to the affected residents and workers on the number of active measles cases in the population of

these zip codes.

101. The respondents, therefore, provided no rational basis let alone a compelling state interest to restrict the free exercise of religion and fundamental interests in bodily autonomy of the 438,929 affected residents (plus an untold number of people who work in the zip codes but do not reside there), as compared with any of the other 8.6 million New York City residents.

102. The aforementioned data beg the question: do the number of cases justify the extraordinary measures contained in the emergency Orders?

103. Even if there are active cases located in the identified zip codes, the Department of Health cannot show that it has narrowly tailored its emergency Orders to address a compelling state interest.

104. Under New York State Public Health Law §2100 the Department of Health has the statutory authority to isolate or quarantine, or both, people who pose a threat of infectious disease to others.

105. Whether or not measles is a serious infection disease is open to question, as measles is not even on the federal list of quarantinable diseases published by the Centers for Disease Control. *See Legal Authorities for Isolation and Quarantine*, URL: <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

106. Accordingly, the respondents' emergency Orders bear no rational or compelling relationship to the known facts about the people affected in the geographical areas.

107. Under these circumstances, by issuing the emergency Orders, the respondents have violated the rights of the petitioners and people in the affected areas and have denied equal protection of the governing law of petitioners and others in violation of the Due Process Clause as applied to New York State under the Fourteenth Amendment's Equal Protection Clause.

WHEREFORE, because the emergency Orders violate the Fifth and Fourteenth Amendments to the United States Constitution (equal protection) and the applicable provisions of the New York State Constitution, the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A SEVENTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
COLLATERAL CONSEQUENCES OUTSIDE IDENTIFIED ZIP CODES)**

108. Petitioners re-allege the foregoing paragraphs 1-106 as if more fully stated herein.

109. Upon information and belief, the source of which is a Williamsburg resident and her child who together reside in one of the affected zip codes, the child has been excluded from a school located in a New York City county outside of Kings County.

110. As a direct result of the respondents' alarmist emergency Orders, the child has been excluded from school for the sole reason that the child lives in an affected Williamsburg zip code.

111. The school that is located outside of Kings County has used the presumed authority of the emergency Orders to illegally override the child's lawful religious exemption from vaccination under New York State Public Health Law §2164(9).

112. The child is healthy, does not have the measles and poses no threat to vaccinated or unvaccinated persons.

113. Upon information and belief, the source of which is a parent in one of the affected zip codes, a school administrator in New York County has advised that many schools in New York City that are located outside the zip codes identified in the emergency Orders are excluding children who live in zip codes identified in the emergency Orders.

114. The children are being excluded from their schools because they live in an affected zip code, notwithstanding their longstanding duly approved religious exemptions to vaccination that were obtained in full compliance with Public Health Law §2164(9).

115. These actions of school administrators to exclude students located outside the zip codes specified in the emergency Orders is occurring despite the fact that such actions are outside the scope of the Orders.

WHEREFORE, because the emergency Orders have collateral effects beyond the already broad and *ultra vires* scope of respondents' authority, this Court should find that the emergency Orders are without foundation in law and fact, are creating confusion, and unnecessary actions well beyond the zip codes where active measles infections exist, if any. The emergency Orders are creating an environment that goes against the public interest of the City of New York. This Court should, therefore, find the emergency Orders to be arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

NO PRIOR APPLICATION

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

RELIEF REQUESTED

WHEREFORE, Petitioners 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 emergency Orders arbitrary, capricious and contrary to law, the imposition of which is beyond respondents' authority, and

(c) Vacating the mandatory vaccination emergency Orders dated 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, P.C.

By: 

ROBERT J. KRAKOW

LAW OFFICE OF ROBERT J. KRAKOW, P.C.

Attorney for Petitioners

233 Broadway, Suite 2320

New York, New York 10279

(212) 227-0600

Of Counsel:

ROBERT F. KENNEDY, JR.

Kennedy & Madonna, LLP

48 Dewitt Mills Road

Hurley, New York 12443

(845) 481-2622

PATRICIA FINN, Esq.

Patricia Finn, Attorney P.C.

58 Route East 59, Suite 4

Nanuet, New York 10954

(845) 398-0521

VERIFICATION

STATE OF NEW YORK

COUNTY OF KINGS)

Pursuant to CPLR §3020, A.L., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to A.L. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged of information and belief, and that as to those matters I believe them to be true.


A.L.

Sworn to before me this 13th
Day of April 2019


Notary Public

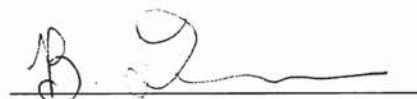
SUNNY PHONG
Notary Public, State of New York
Reg. No. 01PH6387923
Qualified in Kings County
Commission Expires 02/25/2023

VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF KINGS)

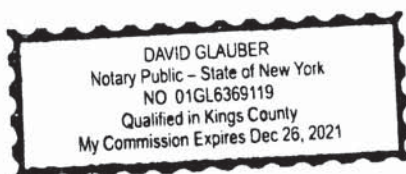
Pursuant to CPLR §3020, B.D., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to B.D. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to e true.


B.D.

Sworn to before me this 12
day of April 2019


Notary Public




VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF KINGS)

Pursuant to CPLR §3020, C.F., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to C.F. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to e true.

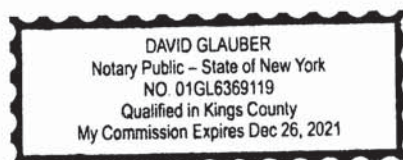


C.F.

Sworn to before me this 11
Day of April 2019



Notary Public




VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF KINGS)

Pursuant to CPLR §3020, M.F., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to M.F. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to e true.

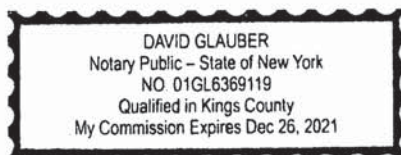


M.F.

Sworn to before me this 11
Day of April 2019



Notary Public




VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF KINGS)

Pursuant to CPLR §3020, M.N., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to M.N. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to be true.


M.N.

Sworn to before me this 12th
Day of April 2019


Notary Public

