SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---X

In the Matter of the Application of
CHARLES HOLDEN and ALBERTO FRIAS on behalf of themselves and all others similarly situated,

Index No.

Petitioners,

AFFIRMATION IN SUPPORT

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

- against -

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

Respondents.

---X

THE UNDERSIGNED, attorneys duly admitted to practice law before the Courts of the State of New York, affirm, under penalties of perjury, the truth of the following:

1. We are attorneys from The Bronx Defenders and Neighborhood Defender Service of Harlem. We are counsel for Petitioners. As such, we are familiar with the facts and circumstances of the proceeding.
2. We write this affirmation in support of Petitioners' Order to Show Cause and Petition seeking an order:
    a. Vacating and annulling Respondents' determination excluding incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to modify current eligibility of category 1b and immediately authorize incarcerated individuals as a group for vaccination, upon finding the exclusion arbitrary and capricious and an abuse of discretion pursuant to CPLR § 7803(3);

b. Vacating and annulling Respondents' determination excluding incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to modify current eligibility of category 1b and immediately authorize incarcerated individuals as a group for vaccination, upon finding the exclusion in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution and Article 1 § 11 of the New York State Constitution, pursuant to CPLR § 7803(3); and

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

FACTUAL AND PROCEDURAL HISTORY

3. For a full recitation of the facts, the Court is respectfully referred to the annexed Verified Petition (hereinafter "V. Pet."). These facts are incorporated by reference below.
4. The Petitioners in this proceeding are all presently incarcerated in New York City Department of Correction facilities, where COVID-19 rates continue to soar, and over 20 percent of the 5,225 individuals incarcerated in these facilities are currently housed in a COVID-19 designated unit due to exposure, symptoms, or confirmed positive tests. See V. Pet. ¶ 62, 81.

New York State's Vaccination Program Purports to Prioritize Recipients Based on "Science, Clinical Expertise, Federal Guidelines" and Equity Considerations

5. Respondents Commissioner Zucker and Governor Cuomo, in their official capacities, are responsible for New York State's designations of phases for the COVID-19 vaccine eligibility. See V. Pet. ¶ 12–13, 17.

6. In October 2020, Respondents released their Vaccination Program ("Program"). See V. Pet. ¶ 17. The Program sets forth the standards that guide Respondents' decisions about who to prioritize for vaccine eligibility. See V. Pet. ¶ 17–21. The Program declares that

"New York State will prioritize vaccination recipients based on science, clinical expertise, and federal guidelines. See V. Pet. ¶ 18. Critical populations will be identified and recommended by the Advisory Committee on Immunization Practices[63] (with input from the National Academies of Sciences, Engineering, and Medicine ("NASEM"))." See id. The program goes on to state that "prioritization decisions will be made mindful of the disparate impact of COVID-19 on communities of color, and the health disparities present in underrepresented and marginalized communities, and those with historically poor health outcomes." See V. Pet. ¶ 21.

7. Respondents' Program highlights the acute risk of COVID-19 to communities of color, stating that "heightened COVID-19 mortality among Black and Hispanic communities" is well established. See V. Pet. ¶ 21. The Program also recognizes that "compared to white non-Hispanic adults, racial/ethnic minority populations had disproportionately higher per population likelihoods of COVID diagnosis and hospitalization." See id. In short, Respondents are aware of the devastating disparate racial impact of the COVID-19 pandemic, and have claimed to prioritize vaccine distribution with the goal of alleviating that disparity. See V. Pet. ¶ 17–22.

Federal Scientific and Clinical Guidance Prioritizes Incarcerated People for Vaccination Access in the Same Category as other Congregate Living Facilities, and at the Same Time as Correctional Staff

8. In recommending vaccination priority, the CDC includes incarcerated individuals in the same heightened risk category of "congregate living facilities" that also encompasses homeless shelters and group homes. See V. Pet. ¶ 40. The NASEM report, released prior to the issuance of New York State's Vaccination Program, similarly placed "[p]eople

[63] The Advisory Committee on Immunization Practices or "ACIP," is a CDC committee.

who are incarcerated or detained and people who live in group homes and homeless shelters—congregate settings" in the same priority group, and "[w]ith respect to these groups, [] stressed the importance of recognizing their reduced autonomy and the difficulty of preventing spread in such settings should COVID-19 be introduced." See V. Pet. ¶ 41. Accordingly, NASEM's phased guidance includes people incarcerated in prisons, jails, and detention centers in the same phase as "people in homeless shelters or group homes…with the expectation that they have limited opportunity to follow public health measures such as maintaining physical distance, putting them at significant risk of acquiring and transmitting COVID-19." See V. Pet. ¶ 34. Further, the CDC specifically advised that states should vaccinate individuals in congregate living facilities, *including* those in correctional or detention facilities, during the 1b vaccination phase. See V. Pet. ¶ 40.

9. In January 2021, the CDC issued FAQs encouraged states to "vaccinate staff and incarcerated/detained persons of correctional or detention facilities **at the same time** because of their shared increased risk of disease." (emphasis in original). See V. Pet. ¶ 33. NASEM also released a report evaluating various populations at severe risk of COVID-19, based upon an evaluation of their risk of (1) acquiring infection, (2) severe morbidity and mortality, (3) negative social impact, and (4) transmitting infection to others. See V. Pet. ¶ 34. NASEM ranked both incarcerated people and correctional staff as having the same high level of risk, and therefore prioritized both groups in the same phase for vaccine distribution. See id.

Equity Considerations Favor Including Incarcerated People as a Group in Phase 1b

10. The New York Vaccination Program, and the CDC and NASEM vaccine distribution guidance that the Program purports to rely on, each identify equity concerns as a fundamental guiding principle. See V. Pet. ¶ 17–21. Currently, 58.9% of the NYC DOC population in custody are Black, and 27.9% of the population are Hispanic. And over 90% of those currently house in a "Confirmed or Symptomatic" or "Likely Exposed" COVID-19 unit are either Black or Hispanic. See V. Pet. ¶ 63.

Respondents Have Excluded Incarcerated People as a Group from Phase 1b Eligibility for Vaccination

11. New York State's Phase 1a and Phase 1b prioritization categories collectively encompass every government- run or contracted congregate living facility for adults, *except* carceral settings. See V. Pet. ¶ 32. The exclusion is stark. Phase 1a of New York State's Plan includes "residents at OPWDD, OMH and OASAS facilities."[64] See V. Pet. ¶ 23. These agencies administer government-run or contracted congregate housing in New York State for individuals with developmental disabilities, mental health issues, and substance use disorders. See id. These congregate facilities are analogous to prisons and jails in every material way. See V. Pet. ¶ 24. Residents are generally not permitted to leave freely, and are confined to settings where they must share bathrooms, eating spaces, and sleeping spaces. See id. Similarly, Phase 1b of New York State's Plan includes "individuals living in a homeless shelter where sleeping, bathing or eating accommodations must be shared with individuals…who are not part of the same household." See V. Pet. ¶ 25.

[64] It is worth noting that this category simultaneously priorities both "staff and residents" of these facilities. In contrast, Phase 1b includes corrections staff only, excluding residents of correctional facilities.

12. Respondents have additionally included correctional staff in Phase 1b. See V. Pet. ¶ 25–26.

13. However, Respondents have excluded incarcerated people from Phase 1b. See V. Pet. ¶ 27–32. As reported as recently as January 26, 2021, despite public pressure from advocates, elected officials, and medical professionals, among others, Respondents have not made a plan for making vaccines available to all incarcerated individuals throughout the state and incarcerated individuals continue to be omitted from Phase 1b eligibility. See V. Pet. ¶ 29.

14. Petitioners have brought this Petition by Order to Show Cause seeking an order declaring that this failure to prioritize incarcerated individuals as a group for vaccination is arbitrary and capricious, an abuse of discretion, and contrary to law, and enjoining Respondents to immediately prioritize Petitioners for vaccination in Phase 1b.

LEGAL STANDARD

Standard Under Article 78

15. Article 78 of the Civil Practice Law and Rules provides for judicial review of a governmental agency's discretionary determination through a writ of mandamus challenge. CPLR § 7801. Such review is appropriate where the agency's decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR § 7803(3); Matter of Poster v. Strough, 299 A.D.2d 127, 142 (2d Dept. 2002).

16. In an Article 78 proceeding, "[t]he judgment may grant the petitioner the relief to which he is entitled" and "[i]f the proceeding was brought to review a determination, the

judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent." CPLR § 7806. When "[m]andamus to review [is] invoked, Supreme Court [is] empowered to annul the [challenged] determinations and fashion a proper remedy." Matter of Garrett v. Coughlin, 128 A.D.2d 210, 212 (3d Dept. 1987). This remedy can require the agency to take affirmative action to repair the harm done, prevent future improper government action, or grant a benefit. See id. at 212–13; Bower Assocs. v. Planning Bd. of Town of Pleasant Valley, 289 A.D.2d 575, 575–76 (1st Dept. 2001) (directing the respondent to act and grant a benefit where the original determination was arbitrary and capricious and record revealed no proper justification to deny the benefit); Pantelidis v. New York City Bd. of Standards & Appeals, 43 A.D.3d 314, 315–16 (1st Dept. 2007), aff'd, 10 N.Y.3d 846, 889 N.E.2d 474 (2008) (even where agency's arbitrary and capricious decision failed to consider relevant factors, if record is "sufficiently developed to permit informed judicial review," then court may properly order that petitioner is entitled to a benefit). A court also has the authority, where an agency has improperly treated two similar groups differently, to "vacate[] and annul[]" the distinction and require the agency to redetermine the issue "consistent with [the court's] decision." Buffalo Civic Auto Ramps, Inc. v. Serio, 21 A.D.3d 722, 722 (1st Dept. 2005).

Standard for Agency Determination

17. The New York Public Health Law vests the Commissioner of Health with the authority to "establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health." N.Y. Pub. Health Law § 206(l). COVID-19 vaccines must be distributed according to the

prioritization plan established by the New York State Department of Health. The vaccine cannot be used for any other populations or groups other than those listed as eligible in DOH guidance, pursuant to the Governor's Executive Order 202.88.[65] Upon information and belief, it was pursuant to authority under N.Y. Pub. Health Law § 206(l) and E.O. 202.88 that the Commissioner of Health developed and implemented vaccine eligibility categories including jail and prison facility staff, but not those confined therein, despite also prioritizing individuals residing in other government-run congregate facilities.

LEGAL ARGUMENT

18. People who are incarcerated are among a select group of those most vulnerable to the spread of COVID-19, and the existence of COVID-19 in jails and prisons not only poses individual risk, but also represents a threat to the public health. See V. Pet. ¶ 33–50.

19. By failing to include incarcerated individuals in category 1b, while making the vaccine available to those living and working in other congregate settings, as well as those working in correctional settings, Respondents have taken action that is arbitrary and capricious, an abuse of discretion, and contrary to law. Such action is thus subject to review pursuant to Article 78 of the CPLR.

I. RESPONDENTS' DETERMINATION WAS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION BECAUSE IT LACKS REASONED EXPLANATION, IS WITHOUT REGARD TO THE FACTS, AND IRRATIONALLY DISTINGUISHES BETWEEN SIMILARLY SITUATED CLASSES

20. A decision is arbitrary and capricious where "it is taken without sound basis in reason or regard to the facts." Matter of Peckham v Calogero, 12 N.Y.3d 424, 431 (2009). "The

[65] *See* Guidance for the New York State COVID-19 Vaccination Program, Effective Jan. 19, 2021, *available at* https://coronavirus.health.ny.gov/system/files/documents/2021/01/covid19guidanceforfacilitiesreceivingvaccine1.19.211046.pdf (last accessed Feb. 3, 2021).

arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact." Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). It is further incumbent on a government agency to provide a reasoned, factual basis for its exercise of discretion. See Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs., 77 N.Y.2d 753, 758 (1991). "[A] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." Knight v. Amelkin, 68 N.Y.2d 975, 977 (1986) (citing Matter of Field Delivery Serv., 66 N.Y.2d 516, 517 (1985)). A decision may also be arbitrary and capricious where two classes are treated differently despite being "so similar as to require the same treatment." Serio, 21 A.D.3d at 725 (citing Matter of Klein v. Levin, 305 A.D.2d 316, 317–18 (1st Dept. 2003).

A. *Respondents' Departure from Their Stated Vaccine Program Principles and Objectives, and Their Failure to Provide a Reasoned Justification for Excluding Incarcerated People from Phase 1b was Arbitrary and Capricious.*

21. Respondents' exclusion of incarcerated people from the current Phase 1b of vaccine eligibility neither accords with the principles and priorities laid out in Respondents' own Vaccination Program, nor do Respondents provide any justification for this departure. The decision is therefore arbitrary and capricious. "[A] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." Knight, 68 N.Y.2d at 977 (1986) (citing Field Delivery Serv., 66 N.Y.2d at 517). Furthermore, Respondents have completely "fail[ed] to adequately state a factual basis for…[their] conclusion[]" to exclude incarcerated people from Phase 1b eligibility, which

itself renders the exclusion arbitrary and capricious. Council of Trade Waste Ass'ns, Inc. v. City of New York, 179 A.D.2d 413, 415–16 (1st Dept. 1992); see also Scherbyn,77 N.Y.2d at 758 (1991); Matter of Montauk Improvement v. Proccacino, 41 N.Y.2d 913, 914 (1977).

22. First, in excluding people who are incarcerated from vaccine eligibility in Phase 1b, Respondents are departing from the guidance they have purported to use in making decisions about access to the COVID-19 vaccine. See V. Pet. ¶ 17–50. The Program indicated DOH would follow the CDC and NASEM's guidance, and that prioritization decisions would be made mindful of the disparate impact of COVID-19 on communities of color. See id. Respondents followed this guidance in prioritizing other congregate facilities, as well as correctional officers. See V. Pet. ¶ 23–26. But the CDC and NASEM have also indicated that incarcerated people should be highly prioritized for vaccination, in the same phase as those in other congregate living settings, and in the same phase as correctional staff who work in the same high-risk environments where Petitioners are incarcerated. See V. Pet. ¶ 33–50. Respondents' Program itself incorporates this guidance, placing "people who are incarcerated/detained in correctional facilities" within a section on "Priority Groups for COVID-19 Vaccine" alongside "People experiencing homelessness/living in shelters" and "People living and working in other congregate settings." See V. Pet. ¶ 19. Furthermore, the communities of color that Respondents have identified to be at highest risk of infection and death from COVID-19 are disproportionately represented in the incarcerated population. See V. Pet. ¶ 19–22, 63. The decision, then, to exclude incarcerated people from Phase 1b clearly does not adhere to Respondents' "own prior precedent" of following CDC and NASEM guidance and

appropriately weighing equity considerations in prioritizing other vulnerable groups, such as other congregate facility residents and correctional staff. Excluding incarcerated people from New York's Phase 1b, when the CDC and NASEM's guidance direct that they should be included (and where serious equity concerns are implicated), is therefore arbitrary and capricious. See V. Pet. ¶ 33–50.

23. Furthermore, Respondents' exclusion of incarcerated people from Phase 1b is entirely without explanation or justification. See Scherbyn, 77 N.Y.2d at 758. Indeed, Respondents' website setting out the priority groups is silent as to the basis for distinguishing incarcerated people, and their ultimate determination to exclude them. See V. Pet. ¶ 10–11. Meanwhile, Respondents' Vaccination Program, which purports to provide the foundation for Respondents' phased vaccination plan, identifies incarcerated individuals alongside homeless individuals living in shelters and others living and working in congregate settings in laying out vaccination priority groups. See V. Pet. ¶ 19. Respondents have simply failed to provide any "reasoned explanation" for their actions. St. Vendor Project v. City of New York, 10. Misc. 3d 978, 986 (Sup. Ct. 2005), aff'd, 43 A.D.3d 345, 346 (1st Dept. 2007); *cf.* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.") (citations omitted).

24. Respondents' failure is particularly troubling given that they "alter[ed their] prior stated course" without explanation. Goldstein v. Brown, 189 A.D.2d 649, 651 (1st Dept. 1993) ("[W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so." (quoting Field Delivery Serv., 66 N.Y.2d at 520)). Respondents clearly

changed course from their October plan to follow CDC and NASEM guidance in deciding whether and when to prioritize incarcerated people for vaccination eligibility. At a press conference on January 29, 2021, Respondent Governor Cuomo, discussing vaccine rollout, said the following, in apparent contradiction to the State's published Vaccination Program: "[w]hen I say 'experts' in air quotes, it sounds like I'm saying I don't really trust the experts … Because I don't. Because I don't."[66] Before that, in early January, Respondent Commissioner Zucker and Larry Schwartz reportedly represented that people incarcerated in state prisons would be offered the vaccine along with correctional officers. See V. Pet. ¶ 27. Such "erratic and unexplained changes" are the "antithesis" of the requirement of rational decision-making. 20 Fifth Ave., LLC v. New York State Div. of Hous. & Cmty. Renewal, 109 A.D.3d 159, 165 (1st Dept. 2013) (citing Field Delivery Serv., 66 N.Y.2d at 516-17).

25. Respondents' failure to adhere to their own stated course of action, without any explanation or justification, is wholly irrational and arbitrary and capricious.

B. The Decision to Exclude Incarcerated People from Phase 1b Eligibility is Without Regard to the Facts that They are Similarly Situated to People Residing in Other Congregate Facilities.

26. Excluding incarcerated people as a group from Phase 1b eligibility, while including staff and residents of other congregate facilities, as well as correctional staff, is a decision "without sound basis in reason or regard to the facts." Murphy v. New York State Div. of Hous. & Comty. Renewal, 21 N.Y.3d 649, 652 (2013); see also LaGreca Rest, Inc. v. New York State Liquor Auth., 33 A.D.2d 537, 538 (1969) (holding failure to consider

[66] J. David Goodman, Joseph Goldstein, and Jesse McKinley, "9 Top Health Officials Have Quit As Cuomo Scorns Expertise," N.Y. Times (Feb. 1, 2021), at https://www.nytimes.com/2021/02/01/nyregion/cuomo-health-department-officials-quit.html?referringSource=articleShare (last accessed Feb. 3, 2021).

crucial factors rendered decision arbitrary and capricious). Even where deference is afforded, "[c]ourts must scrutinize" agency action "for genuine reasonableness and rationality in the specific context presented by a case." Murphy, 21 N.Y.3d at 654–55 (internal citation and quotation marks omitted). Where, as here, Respondents' decision runs contrary to "overwhelming evidence" and there is a "lack of relationship" between Respondents' stated rationale and their decision, the court must reverse their exclusion of incarcerated people from vaccine eligibility in Phase 1b. Id. at 655.

27. In making their determination, Respondents entirely ignored the overwhelming evidence that incarcerated people should be prioritized for vaccine access in at least the same phase as congregate facilities such as homeless shelters. This evidence has been provided not only by the CDC and NASEM, but by countless other medical and public health experts across the country, including those who have submitted affirmations in support of Petitioners in this case. These entities have identified the importance of prioritizing incarcerated people for vaccine eligibility because of their own heightened risks of infection as well as in the interest of public health, because of the community spread fueled by outbreaks in prisons and jails. See V. Pet. ¶ 40–50.

28. Furthermore, as the First Department has held, "[w]here two cases are so similar as to require the same treatment, to treat them differently would be evidence that the determination should be considered arbitrary and capricious." Serio, 800 N.Y.S.2d at 689 (citing Matter of Klein, 305 A.D.2d at 317–18). There is "no appreciable distinction" between the risk of infection that incarcerated people face, and the risk of infection that people living in other congregate facilities, such as homeless shelters, face. Id. (finding that a distinction drawn between two groups for worker's compensation purposes was

arbitrary and capricious where "no appreciable distinction" existed between two groups facing the same level of risk). The CDC, NASEM, and other public health experts all recognize this plainly evident reality. See V. Pet. ¶ 40–52. Respondents have not shown and cannot show that incarcerated people in jails and prisons are in a different risk category from other groups where identical risk factors are present. See V. Pet. ¶ 51–58. In prioritizing others in congregate living facilities for vaccination, Respondents have acknowledged that congregate living arrangements pose a public health threat. Indeed, for individuals in homeless shelters, Respondents explicitly prioritized shelters with the explanation they were doing so because "sleeping, bathing or eating accommodations must be shared with individuals and families who are not part of the same household"—the identical activities that must occur in congregate settings in New York City DOC facilities. See V. Pet. ¶ 25, 42, 45–50.

29. Therefore, Respondents' decision to exclude incarcerated people is without regard to the facts, has no sound basis in reason, and is arbitrary and capricious.

II. RESPONDENTS' DETERMINATION WAS CONTRARY TO LAW BECAUSE IT VIOLATES EQUAL PROTECTION UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE 1 § 11 OF THE NEW YORK STATE CONSTITUTION

30. Respondents' distinction between incarcerated individuals and others residing in congregate settings for vaccine priority is irrational and therefore in violation of federal and state Constitutional guarantees to equal protection under the law.

31. "Our constitutional rights are not suspended during a crisis. On the contrary, during difficult times we must remain the most vigilant to protect the constitutional rights of the powerless. Even when faced with limited resources, the state must fulfill its duty of protecting those in its custody." Maney et al. v. Brown et al., 6:20-cv-00570-SB, Dkt.

178 , at 3 (D. Or. Feb. 2, 2021) (holding Oregon's exclusion of incarcerated people from COVID-19 vaccine eligibility, while including other congregate settings and correctional workers, was unconstitutional). [67]

32. Under the Equal Protection Clause of the 14th Amendment and Article 1§ 11, the State classification at issue must bear "some fair relationship to a legitimate public purpose." Plyler v. Doe, 457 U.S. 202, 216 (1982); Congregational Rabbinical Coll. Of Tartikov Inv. v. Vill. of Pomona, 945 F.3d 83, 110 N 211 (2d Cir. 2019) (citing People v. Kern, 75 N.Y.2d 638, 649 (1990) ("The equal protection guarantees under the New York Constitution are coextensive with those under the U.S. Constitution.")). A state may not "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985). Further, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." Plyler, 457 U.S. at 227 (citing Graham v. Richardson, 403 U.S. 365, 374–75 (1971)). And when considering whether a rational basis exists in the context of an equal protection claim, a court will consider the "countervailing costs" to those who are being excluded. Plyler, 457 U.S. at 223-24.

33. New York State's Phase 1a and Phase 1b prioritization categories collectively encompass every government run or contracted congregate living facility for adults, *except* carceral settings. See V. Pet. ¶ 23–25. The exclusion is stark. Phase 1a of New York State's Plan includes "residents at OPWDD, OMH and OASAS facilities."[68] These agencies

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

[68] It is worth noting that this category simultaneously priorities both "staff and residents" of these facilities. In contrast, Phase 1b includes corrections staff only, excluding residents of correctional facilities.

administer government-run or contracted congregate housing in New York State for individuals with developmental disabilities, mental health issues, and substance abuse issues. See V. Pet. ¶ 23. These congregate facilities are analogous to prisons and jails in every material way. See V. Pet. ¶ 40-60. Residents are generally not permitted to leave freely, and are confined to settings where they must share bathrooms, eating spaces, and sleeping spaces. Phase 1b of New York State's Plan includes "individuals living in a homeless shelter where sleeping, bathing or eating accommodations must be shared with individuals…who are not part of the same household." See V. Pet. ¶ 25.

34. Under almost identical circumstances, in Maney, a federal court in Oregon has held that the Oregon Governor's decision to include those living and working in congregate care facilities and those working in correctional settings in Oregon's vaccine priority phase 1A, while excluding individuals who live in correctional settings, constitutes deliberate indifference under the 8th Amendment. See Maney et al. v. Brown et al., 6:20-cv-00570-SB, Dkt. 178, at 3 (D. Or. Feb. 2, 2021). The court found defendants' prioritization of correctional workers ahead of incarcerated people "[un]persua[sive]…belied by their own Vaccination Plan." Id. at 26. It found that defendants' failure to follow CDC guidelines regarding prioritization amounted to deliberate indifference to inmates' serious medical harm. See id. at 29. That court therefore found Oregon's policy defective under an even higher standard than either "arbitrary and capricious" or "rational basis" review, which Petitioners seek in this case. It ordered the Governor of Oregon to offer vaccines to incarcerated individuals, as if they had been included in Phase 1A, Group 2 (analogous to New York's Phase 1b).

35. Respondents in this case have irrationally distinguished between incarcerated people and people living in every other type of adult congregate facility, at great risk to incarcerated people's lives during this pandemic, in violation of state and federal equal protection guarantees, and their decision should be vacated and modified to allow incarcerated individuals as a group to access vaccine eligibility in Phase 1b.

A. *Respondents Contradicted Their Own Stated Objectives, and the Information They Purported to Rely on, in Excluding Incarcerated People from Phase 1b.*

36. "Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the [government]." Romer v. Evans, 517 U.S. 620, 632 (1996). The touchstone, then, for analyzing whether the Respondents' decision to exclude incarcerated people from Phase 1b violates their rights to equal protection under the law, is this: What was the government's stated objective in creating the vaccine prioritization phases? And what information did it purport to rely on in creating the phases?

37. Respondents published the New York State Vaccination Program in October 2020, making public its framework for vaccine prioritization. See V. Pet. ¶ 17. The Program made clear that the sources for guidance on vaccine prioritization would be based in science, clinical expertise, and federal guidelines, in addition to equity concerns for addressing the disparate impact of COVID-19 in communities of color. See V. Pet. ¶ 18, 20–21. Specifically, the Program stated that groups for vaccine prioritization would be based on the recommendations of the CDC and NASEM. See V. Pet. ¶ 18. The Program also highlighted the acute risk of COVID-19 to communities of color, recognizing

"heightened COVID-19 mortality among Black and Hispanic communities." See V. Pet. ¶ 7.

38. Respondents' decision to include residents of homeless shelters and residents of OPWDD, OMH and OASAS facilities in its initial prioritization phases is consistent with this stated framework. But Respondents' inexplicable exclusion of incarcerated people from Phase 1b bears no fair relationship to their stated purposes in promulgating New York's Vaccination Program phases.

39. Prior to Respondents' determination of the currently eligible Phase 1b groups, the CDC and NASEM both recommended including incarcerated individuals in the same heightened risk category of "congregate living facilities" that also includes homeless shelters, group homes, or employer-provided shared housing units. See V. Pet. ¶ 40–41. They did so recognizing the variety of environmental factors putting incarcerated people "at significant risk of acquiring and transmitting COVID-19," just like those living in homeless shelters or group homes. Incarcerated people reside in congregate settings—"environment[s] in which a group of usually unrelated persons reside, meet, or gather either for a limited or extended period of time in close physical proximity." See V. Pet. ¶ 40–41. Petitioners' lived realities reflect the CDC and NASEM's concerns. Petitioners reside in DOC housing where they are confined throughout the day and night in enclosed spaces, regularly coming into close proximity with others. See V. Pet. ¶ 67–70, 74–78. Petitioners share eating spaces, toilets, sinks, showers, and recreational spaces with dozens of other people. At meal times, Petitioners are surrounded by other incarcerated people and unable to wear masks while they eat. In short, the conditions of their

confinement put Petitioners at the same, if not greater, risk, as compared to other congregate settings.

40. The vast majority of those incarcerated in New York's jails and prisons come from the Black and brown communities that Respondents have recognized as disproportionately devastated by this pandemic. Importantly, 58.9% of the NYC DOC population currently in custody are Black, and 27.9% of the population are Hispanic. See V. Pet. ¶ 63. And over 90% of those currently house in a "Confirmed or Symptomatic" or "Likely Exposed" COVID-19 unit is either Black or Hispanic. See id. In short, Respondents' decision to altogether exclude incarcerated people from Phase 1b directly contradicts—without explanation—the Vaccination Program's declaration that "prioritization decisions will be made mindful of the disparate impact of COVID-19 on communities of color, and the health disparities present in underrepresented and marginalized communities, and those with historically poor health outcomes." See V. Pet. ¶ 20–22. Where, as here, New York's vaccine prioritization program's total exclusion of incarcerated people "seems contrary to the guide published by [the state]" for how vaccine prioritization phases should be determined, the decision violates equal protection. Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster, 488 U.S. 336, 340, 343 (1989) (rejecting a local tax assessment scheme under rational basis review where the scheme was contrary to the state's published guide).

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

41. Respondents' decision to exclude incarcerated people from Phase 1b must bear "some fair relationship to a legitimate public purpose." Plyler, 457 U.S. 202, 216 (1982).

Rational basis analysis "is not meant to be toothless." Windsor v. United States, 699 F.3d 169, 180 (2d Cir. 2012), aff'd, 570 U.S. 744 (2013) (internal quotation marks omitted). "Equal protection requires the government to treat all similarly situated persons alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). It prohibits the government from drawing "distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." Lehr v. Robertson, 463 U.S. 248, 265 (1983).

42. In this case, Respondents have failed to treat the similarly situated people in jails and prisons in the same way they have treated those in *every other* adult congregate living facility. See V. Pet. ¶ 23–32. Respondents have included all other residents of congregate living facilities in its COVID-19 vaccination prioritization phases 1a and 1b, while categorically excluding those living in jails and prisons—defying the fundamental principles of equal protection. See Felder v. Foster, 71 A.D.2d 71, 74 (4th Dept. 1979) ("[denying] to a class of needy persons public assistance which is available to all other categories of needy persons…is not justifiable as rationally related to any legitimate state interest.").

43. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." Romer v. Evans, 517 U.S. 620, 633 (1996). Where, as here, "[t]he relation between the classification adopted and the object to be attained" simply does not bear out, the exclusion violates equal protection. Id at 632–33. The exclusion systematically "produce[s] dramatic differences" in vaccine access "between petitioners…and otherwise comparable [groups]" living in homeless

shelters and other congregate facilities. Allegheny Pittsburgh, 488 U.S. at 343; see also Juleah Co. v. Incorporated Village of Roslyn, 88 Misc.2d 809, 816 (Sup. Ct. Nassau Cty. 1976), aff'd 56 A.D.2d 483 (2d Dept.1977) (holding under rational basis that municipality had "burden to fairly apportion" a garbage removal scheme required "on a regular basis for health and safety reasons" amongst "comparable users" and "it is not equitable" to exclude a comparable class of users); Merit Oil of N.Y. v. N.Y. State Tax Comm'n, 111 Misc.2d 118, 119–20 (Sup. Ct. Albany Cty. 1981) (finding no rational basis for "complete exemption" of one class of retailers from taxing statute). The classification "as written eliminates a large portion of [the programmatically] identified [priority] group" of those living in congregate settings "without setting forth a rational basis for doing so." Goldman v. Fay, 8 Misc. 3d 959, 965 (Civ. Ct. Richmond Cty. 2005).

44. Respondents cannot, and have not, articulated any reason for their exclusion of incarcerated people from the vaccine prioritization phases, while including those in other congregate living settings. That is because there is no material distinction between individuals living in prisons and jails, and individuals in other congregate living facilities, when it comes to their shared risk of infection from COVID-19. See V. Pet. ¶ 40–50. And Respondents can point to no distinction in the authorities they claim to rely on (the CDC and NASEM) and the underlying goal of the program (equitable access). To the extent that Respondents, as compared to individuals living in other congregate settings, are being excluded from access to the COVID-19 vaccine in Phase 1b because of their having been accused or convicted of a crime, this "difference [is] irrelevant to a legitimate governmental objective" in distributing the vaccine for public health purposes. Lehr, 463 U.S. at 265 (1983).; see also U.S. Dep't of Agric. v. Moreno, 413 U.S. 528,

534 (1973) ("[I]f the constitutional conception of 'equal protection under the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). And given the fact that the majority of Petitioners are Black and Hispanic, the decision to categorically exclude incarcerated people from Phase 1b must be closely scrutinized, even under rational basis review. See Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1, 10 (1st Cir. 2012) ("Without relying on suspect classifications, Supreme Court equal protection decisions have both intensified scrutiny of purported justifications where minorities are subject to discrepant treatment and have limited the permissible justifications.").

45. The "countervailing costs" of being excluded from access to the vaccine could not be higher. Plyler, 457 U.S. at 223–24. For some, delay in receiving this vaccine may result in struggling through serious illness and facing unknown long-term side effects. For others, the delay is a matter of life and death.

46. In sum, Respondents' decision to exclude incarcerated people from Phase 1b bears no fair relationship to any legitimate state interest and violates Petitioners' rights to equal protection under state and federal law.

CONCLUSION

WHEREFORE, it is respectfully requested that Petitioner's application and motion be granted in its entirety as well as for such other and further relief as this Court may deem just and proper.

Dated: February 4, 2021
New York, New York

The Bronx Defenders
Attorneys for Petitioners
By: Ilona Coleman,
Ann Mathews, and
Thomas Scott-Railton
360 E. 161st Street
Bronx, New York 10451
(718) 838-7878

Neighborhood Defender Service of Harlem
Attorneys for Petitioners
By: Elizabeth Fischer,
Meghna Philip, and
Emily Ponder Williams
317 Lenox Avenue, 10th Floor
New York, New York 10027
(212) 876-5500

Brooklyn Defender Services
Of Counsel
By: Brooke Menschel and
Hanna Perry
177 Livingston Street, 7th Floor
Brooklyn, New York 11201
(718) 254-0700

Prisoners' Rights Project
The Legal Aid Society
Of Counsel
By: Kayla Simpson,
Mary Lynne Werlwas, and
Veronica Vela
199 Water Street, 6th Floor
New York, New York 10038
(212) 577-3300

New York Civil Liberties Union Foundation
Of Counsel
By: Antony P. F. Gemmell, Esq.,
and Jordan Laris Cohen, Esq.
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300