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

Ascher Berkowitz, Chava Biederman, Beila Englander, Israel Fishman, Judith Fried, Malka Friedman, Chanie Fulop, Rachel Guttman, Simon Josef, Baila Klein, Malky Roth-Tabak,

Plaintiffs-Petitioners,

v.

Dept. of Health & Mental Hygiene of the City of New York,

Defendant-Respondent.

VERIFIED ARTICLE 78 AND DECLARATORY JUDGMENT PETITION

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Plaintiffs-Petitioners, by and through their undersigned counsel, respectfully allege the following based on their own knowledge as to themselves, and on information and belief as to all other matters:

PRELIMINARY STATEMENT

1. In the spring of 2019, New York City experienced a rise in measles cases. Measles is a childhood infection caused by a virus that, before the 1960s, nearly all children contracted before the age of 15. Most measles cases are benign and are not reported. (**Ex. A**).[1] The mortality rate from measles declined by over 98% between 1900 and 1962 as living conditions improved in the United States. (**Exs. A and B**). In 1962, a year before the first measles vaccine, when there were approximately 4 million cases of measles each year, the Centers for Disease Control ("**CDC**") reported a total of 408 deaths from measles in the entire United States.

2. Between September 2018 and August 2019, 649 cases of measles were confirmed in New York City. Since 2000, the annual number of reported measles cases for all of the United States ranged from 37 people in 2004 to 667 people in 2014. While 600 cases in New York City alone was, relatively speaking, an unexpected increase in cases, it was a very small number in a city of over 8,000,000. While over 1,200 cases of measles were reported in the tri-state area and likely far more unreported cases, there were no deaths. This is the expected result since, for the majority of people, measles is a relatively benign childhood infection.

3. Despite the small outbreak, the New York City Department of Health ("**DOH**") overreacted to the 2019 increase in measles cases. On Friday, April 9, 2019, Oxiris Barbot, the then New York City Commissioner of Health and Mental Hygiene (the "**Commissioner**") issued

[1] All Exhibits referenced in this Petition, and in the jointly filed Affirmation of Elizabeth A. Brehm, are exhibits admitted without objection at the OATH hearing, described further herein, or are otherwise part of the administrative record.

an Order mandating that people receive the M-M-R-II, also known as the measles, mumps, rubella vaccine ("**MMR**") manufactured and sold by Merck & Co., within forty-eight hours (the "**Commissioner's Order**"). (**Ex. C**). The Commissioner's Order though, was limited to only selected people in certain zip codes and was not evenly applied across the city. Specifically, the Order required MMR vaccination only of certain people: any person "older than six months of age who live[d], work[ed], or reside[d] within the 11205, 11206, 11211 and/or 11249 zip codes." *Id*.

4. By its terms, the Commissioner's Order expired on April 17, 2019. (**Ex. D at 56:23-57:7; 63:23-64:2**). On that day, the Department of Health and Mental Hygiene of the City of New York Board of Health (the "**Board**") created a resolution which, like the Commissioner's Order, required administration of the MMR, but differed from the Commissioner's Order in myriad ways. These differences included: how it defined what the "nuisance" was that it was targeting, what categories of individuals it applied to, the age ranges to which it applied, the penalties for failure to vaccinate, and other material differences as detailed below (the "**Resolution**"). (**Ex. E**).

5. Between April 23, 2019, and June 14, 2019, the New York City Department of Health and Mental Hygiene ("**DOH**") issued a Summons to each of the Plaintiffs-Petitioners, asserting that each had failed to have one of their minor children injected with the MMR (the "**Summonses**"). The Summonses clearly and prominently alleged that this failure to vaccinate violated the Commissioner's Order, not the Resolution. However, the DOH issued each of the Summonses after the Commissioner's Order expired, making each Summons facially invalid. (**Ex. F**).

6. Plaintiffs-Petitioners had a reasonable and well-founded belief that they should not administer the MMR to their children (the "**children**") for many reasons, including, *inter alia*:

a. The clinical trials conducted on the MMR were severely lacking in adequate

safety studies because (i) the studies did not test the product against a placebo, (ii) the studies did not test the product on a large enough group of children of an appropriate age range, (iii) the studies did not review safety for an adequate time period, and, (iv) during the minimal safety review period, the safety studies showed concerning adverse events;

b. Medical studies have shown that depriving children of having naturally occurring measles increases their risks of other adverse health outcomes; and

c. The medical community has documented high rates of hospitalization and emergency room visits subsequent to MMR administration.

Based on these concerns, Plaintiffs-Petitioners made the decision that the risks of the product outweigh the benefit, and that administering MMR to their children is not medically appropriate.

7. Given the facial defects in the Summonses and their well-founded concerns about the MMR product, Plaintiffs-Petitioners fought the Summonses in OATH where, despite making compelling arguments and presenting unrebutted evidence supporting the above issues, the hearing officer upheld the Summonses, and the OATH Appeals Unit affirmed those decisions on April 24, 2020. (**Ex. G**).

8. The hearing record, however, reflects that the Summonses should have been dismissed and that the Hearing Officer deprived Plaintiffs-Petitioners of full and fair hearings, made errors of law, and issued arbitrary and capricious decisions. (*Infra* § First Cause of Action.)

9. The OATH Appeals Unit should also have dismissed the Summonses in the interest of justice pursuant to NYCC § 1049(5)(a) because the undisputed evidence at the hearing demonstrated that the risk of administering the MMR to these children outweighed the benefits

and therefore it was not medically appropriate to inject them with this product. (*Infra* § Second Cause of Action).

10. By requiring the injection of a product whose risks outweigh the benefits for these children, Respondent's Order and Resolution also violated Plaintiffs-Petitioners' rights under the United States Constitution and New York State Constitution, including the right to bodily integrity, informed consent, parental choice, privacy, and other substantive due process and unenumerated rights. (*Infra* § Third Cause of Action.)

11. Plaintiffs-Petitioners thus bring this hybrid petition pursuant to CPLR §§ 7801-7806 to set aside and vacate the Summonses.

PARTIES

12. Plaintiffs-Petitioners Ascher Berkowitz, Chava Biederman, Beila Englander, Israel Fishman, Judith Fried, Malka Friedman, Chanie Fulop, Rachel Guttman, Simon Josef, Baila Klein, and Malky Roth-Tabak (collectively "**Plaintiffs-Petitioners**") reside in Brooklyn, NY and were issued a Summons for their respective child: Z.B., 4 years old; B.B., 2 years old; Z.E., 1 year old; A.F., 3 years old; H.F., 7 months old; Y.F., 5 years old; D.F., 11 months old; E.G., 2 years old; P.J., 4 years old; Z.K., 11 months old; C.R., 1 year old. Many of the Plaintiffs-Petitioners have more than one child and many of the Plaintiffs-Petitioners vaccinate their other children.

13. Defendant-Respondent the New York City Department of Health and Mental Hygiene ("**Department of Health**" or "**DOH**" or "**Respondent**") is an administrative agency in the executive branch of the New York City.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803 because the decisions made by the OATH Appeals Unit are final determinations made in

violation of lawful procedure, affected by an error of law, and are arbitrary and capricious. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001.

15. This Court has personal jurisdiction over Respondent pursuant to CPLR § 302(a)(1) and venue lies in New York County pursuant to CPLR § 506(b) and §7804(b) because it is where material events giving rise to the petition took place; specifically, the OATH appellate decisions that are being challenged here were rendered in New York County.

FIRST CAUSE OF ACTION: THERE WERE ERRORS OF LAW IN RESPONDENT'S FINAL DETERMINATIONS

(Relief Under Article 78 of the CPLR)

16. Plaintiffs-Petitioners repeat and reallege the preceding paragraphs as though fully set forth herein.

17. It is black letter law that a summons must identify the exact law, regulation, or order that the charging officer claims the recipient violated. RCNY § 6-08(c)(2) and (c)(3). It is equally well established that such a law, regulation, or order must be in effect at the time of the alleged violation. Here, the Summonses failed on both accounts.

18. The DOH issued the Summonses between April 23, 2019 and June 14, 2019. The charging language of the Summonses provides that Plaintiffs-Petitioners were in violation of the Commissioner's Order. However, the Commissioner's Order by its terms expired on April 17, 2019. Given this defect, the OATH Appeals Unit reasoned that the Summonses were actually issued under the Board's Resolution, but that is not what the Summonses say, and the Resolution is significantly different from the Order in a number of ways. Thus, the Summons either cite an order that had expired, or they cited to the wrong order. Either way, the Summonses are facially deficient and should have been dismissed.

19. The narrative portions of the Summonses specifically reference both the Commissioner's April 9, 2019 Order, which they define as the "Order", and the Board's April 17, 2019 resolution, defining it as the "Resolution." (**Ex. F**). [2] Nevertheless, the charging language of the Summonses identifies the violation as being a violation of the *Order*, providing in full that: "Respondent has failed to vaccinate child [] or otherwise submit acceptable proof of immunity in violation of the *Order*." *Id.* (emphasis added.) As such, the summonses are clear that they allege a violation of the Order, and not of the Resolution. (**Ex. F**).

20. During the hearings on the Summonses, the DOH conceded that the Commissioner's Order expired on April 17, 2019. (**Ex. D at 56:34-57:7; 63:23-64:2**). The Commissioner's Order expired because the New York City Health Code provides that an emergency action "shall be effective only until the next meeting of the Board, which meeting shall be held within five business days of the Commissioner's declaration[.]" Health Code of the City of New York, 24 RCNY § 3.01(d). The Board convened on April 17, 2019; thus, the Commissioner's Order expired on that date.

[2] The full text of the "Violation Description" provides as follows and clearly defines both the Resolution and the Commissioner's Order, recognizing them as separate, but then choose to only state that the Plaintiffs-Petitioners are in violation of the Order: "In response to the active measles outbreak in certain parts of Brooklyn, the NYC Commissioner of Health declared a public health emergency on April 9, 2019 and published a Commissioner's Order ("Order") pursuant to Article 3 of the NYC Health Code ordering all persons who live, work or attend school within ZIP codes 11205, 11206, 11211 and 11249 to be vaccinated against measles within forty eight hours of the Order. On April 17, 2019, the NYC Board of Health unanimously approved a Resolution ("Resolution") continuing the public health emergency and requirement that all persons living, working or attending school in these affected ZIP codes be vaccinated against measles. The Resolution further provides that any person who is not vaccinated, or the parent and/or guardian of a child who is not vaccinated, shall be fined unless they demonstrate proof of immunity or that immunization is not medically appropriate. A copy of the Order and Resolution are attached to this Summons for reference. A review of Department records shows that Respondent's child, [initials], who is at least six months old, lives at: [address] which is located in one of the affected zip codes listed in the Order. On [date], a review of the Department's Citywide Immunization Registry, which collects immunization records for all children receiving vaccines in NYC and is required to be updated by medical providers, found that child [initials] has no record of measles immunization. Respondent has failed to vaccinate child [initials] or otherwise submit proof of immunity *in violation of the Order*." (**Ex. F**) (emphasis added).

21. The Summonses each listed a "Date and Time of Occurrence" after April 17, 2019.[3] (**Ex. F**). Therefore, the Order had expired by the time the Summonses were issued, and it was an error of law for the Hearing Officer and Appeals Unit to affirm the Summonses because the Commissioner's Order had expired by the date of the occurrence listed on the Summonses. (**Exs. C and F**). On this basis, the Summonses must be dismissed.

22. During the hearing, the DOH argued that despite the fact that the Order expired before the Summonses were issued, the Resolution continued the Commissioner's Order, and thus the Commissioner's Order was still valid on the date of occurrence on the Summons. This argument is plainly incorrect. The New York City Health Code provides that "the Board may *continue* or *rescind*" the Order. Health Code of the City of New York, 24 RCNY § 3.01(d) (emphasis added). On its face, that section allows the Board only to continue the order "as is" or to rescind the order and issue a new order. Nothing in that section states that the Board may *amend* the emergency order.

23. In this instance, the Board did not continue the Commissioner's Order. Even though the Resolution acknowledges the Commissioner's Order in the preamble, nothing in the Resolution states it is continuing the Commissioner's Order. Instead, the Board allowed the Commissioner's Order to expire and subsequently issued the Resolution, which was a new order, with materially different terms. Even a cursory examination of a few of these terms establishes that the Commissioner's Order and the Resolution, although they address the same topic, are two different directives, and as such, one is not a continuation of the other.

[3] Plaintiffs-Petitioners' Summonses listed the following "Date and Time of Occurrence:" Berkowitz Summons: June 4, 2019; Biederman Summons: April 29, 2019; Englander Summons: May 1, 2019; Fishman Summons: June 12, 2019; Fried Summons: May 10, 2019; Friedman Summons: June 4, 2019; Fulop Summons: May 22, 2019; Guttman Summons: June 13, 2019; Josef Summons: June 4, 2019; Klein Summons: May 1, 2019; Roth-Tabak Summons: April 21, 2019. (**Ex. F**).

24. *First*, the Resolution redefines what constitutes a nuisance. The Order defines the nuisance as the presence of a person who was not vaccinated with MMR.[4] The Resolution defines the nuisance as the measles outbreak.[5]

25. *Second*, the Resolution materially changed who must receive an MMR vaccination, as well as the grounds and method for being excluded from this requirement:

a. The Commissioner's Order does not include children who attend school, preschool, or child care in the affected zip codes (it only includes "any child older than six months of age who *live[], work[] or reside[] within* the" affected zip codes), whereas the Resolution explicitly includes children who "attend[] school, preschool or child care within the affected zip codes." (**Ex. C**).

b. The Commissioner's Order applies to children "older than six months," but the Resolution applies to children "six months of age and older." (**Exs. C and E**). Therefore, under the Commissioner's Order, children who were six months old were not required to be vaccinated, whereas under the Resolution, six-month-old babies were required to be vaccinated.

c. The Commissioner's Order includes people who "live, work, or reside[]" in the affected zip codes, but the Resolution only includes individuals who "live[] or work[]" in the affected zip codes. (**Exs. C and E**). The Board's decision to not include people who "reside" in the zip code is important. Merriam-Webster's

[4] "WHEREAS, 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[.]" (**Ex. C**).

[5] "WHEREAS, the Board of Health regards the aforesaid reports of over 300 cases of measles as sufficient proof to authorize the declaration that an outbreak of measles is occurring in Williamsburg that threatens the health and safety of New Yorkers and is immediately dangerous to human life and health and constitutes a public nuisance[.]" (**Ex. E**).

dictionary defines "reside" to mean: "to dwell permanently or continuously: occupy a place as one's legal domicile."[6] Conversely, that same dictionary defines "live" as: "to pass through or spend the duration of[.]"[7] Thus, the Commissioner's Order, by use of the term "reside," includes people who were not actually living in the zip codes at the time of the Order, but who maintain their legal domicile there (*e.g.*, people who were away for the summer, or who live abroad for a period of time); in contrast, the Resolution is limited to the people who are physically present in the area.

d. The Commissioner's Order exempts children whose parents or guardians provide documentation showing that MMR is not medically appropriate, whereas the Resolution is more onerous and requires that such documentation meet the satisfaction of the DOH.[8]

26. *Third*, the penalties for the Commissioner's Order are different than the penalties for the Resolution. The Commissioner's Order includes a "warning" that "[f]ailure 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." (**Ex. C**). The Resolution, however, did not include this language and opted to enhance the civil penalty by adopting the provision of NY City Health Code, 24 RCNY § 3.11(a), and subjecting violators to fines for each family member and for each day a person violates the

[6] Merriam-Webster's Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/reside.

[7] Merriam-Webster's Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/live.

[8] The terminology may seem similar between the Commissioner's Order and the Resolution; however, it has a legal distinction. Otherwise, the Board would not have gone through the effort of amending the language in its Resolution.

Resolution. This "enhanced" civil penalty did not appear in the Commissioner's Order but is included in the "resolved" language of the Resolution. [9]

27. In sum, the Resolution materially changed the Commissioner's Order, including the prohibited conduct, the population subject to the order, and the penalty. This is precisely why nowhere in the Resolution does it ever state that it is continuing the Commissioner's Order. The Resolution plainly created a new and distinct order, which means that per the requirements of the Health Code of the City of New York, 24 RCNY § 3.01(d) , the Commissioner's Order expired on April 17, 2019.[10] Thus, the Board's assertion that the Plaintiffs-Petitioners violated the Order was *per se* unlawful.

28. Despite the clear differences between the Order and the Resolution, the Hearing Officer still held in his written decision that the "April 17, 2019 Resolution continued the Commissioner's exercise of emergency authority, which operated to continue the validity of the Commissioner's April 9, 2019 Order." (**Ex. G**). As shown, this finding is not supported by the facts and law. The Hearing Officer could not even quote any language from the Resolution stating it continues the Order, because such language does not exist; that is why he resorted to stating that the "Resolution continued the Commissioner's exercise of emergency authority." As noted, that

[9] "RESOLVED, that any person required by this declaration to be immunized against measles, or any parent or guardian required by it to immunize his or her child, shall be violating this order and be subject to the fines authorized by applicable law, rule and regulations each day that he, she, or such child continues to reside, work or attend school, preschool or child care in any of the affected zip codes without having been vaccinated against measles until such time that this outbreak is declared to be over by the Commissioner of the Department of Health and Mental Hygiene." (**Ex. E**).

[10] The Summons issued to one of the Plaintiffs-Petitioners was not properly served. The Summons issued to Plaintiff-Petitioner Chava Biederman ("**Ms. Biederman**") should be dismissed because Ms. Biederman does not reside at the address listed on the Summons as the "Place of Occurrence" and Ms. Biederman was not present at the "Place of Occurrence" when the alleged violation took place on April 29, 2019. Ms. Biederman presented sufficient and reliable evidence at the hearing that she did not live or reside at the "Place of Occurrence" as listed on the Summons and was not present at that location on the time and date of occurrence. (**Ex. H)**. Therefore, it was an error of law for the Hearing Officer and Appeals Unit to sustain the Summons because no violation existed as alleged, and thus the Summons issued to Ms. Biederman must be dismissed.

is not what the law provides. The Order as it was written must either be continued or rescinded; the Board cannot choose to continue the Order in concept while changing most of its terms.

29. This case provides a ready example of why the Board was not allowed to amend an existing order, because otherwise a summons recipient could be told he or she violated one order, choose to mount a defense to that order, but only later learn that they actually are being charged with violating and being punished under a materially different order. This presents a problem here because the Order and the Resolution provided conflicting provisions as to, *inter alia*, the individuals who were required to receive MMR, the penalties for not receiving the MMR, and the method and grounds for obtaining a medical exemption. As a matter of both fact and common sense, they both cannot exist in the same time and space. This bait-and-switch version of justice, where a litigant does not have proper notice of what they are accused of, flies in the face of the basic presumptions of due process.

30. Tellingly, the OATH Appellate Unit did not affirm the OATH Hearing Officer's flawed conclusion that the Resolution continued the Order. The OATH Appellate Unit apparently found it to be without merit. Instead, the OATH Appellate Unit decided that since the children presumably did not have the MMR during the period the Order *was* in effect (giving no consideration to the period after the Order expired), then it would uphold the Summonses by effectively rewriting them; instead of the "Date and Time of Occurrence" for the violation listed on the Summonses, the OATH Appellate Unit decided it would simply find the Plaintiffs-Petitioners in violation for a completely different time period: the 48 hours specified in the Order.

31. The problem with the OATH Appellate Unit's decision is that it apparently changed the Summonses that were being adjudicated ex post facto - after the hearing record was closed - which it cannot do.

32. It is elementary and critical to due process that a respondent only be judged on and punished for what the summons charges. Here, that charge was for violation of the Order on a date after it expired, not for a violation that occurred on some other date first raised in a decision by an appellate body. That is the antithesis of due process and the orderly manner in which justice is supposed to proceed.

SECOND CAUSE OF ACTION: NYCC § 1049(5)(a) CALLS FOR THE DISMISSAL OF THE SUMMONSES IN THE INTEREST OF JUSTICE
(Relief Under Article 78 of the CPLR)

33. Plaintiffs-Petitioners repeat and reallege the preceding paragraphs as though fully set forth herein.

34. Section 1049(5)(a) of the NYCC provides:

> An administrative law judge or *hearing officer may dismiss a notice of violation in the interest of justice when*, even though there may be no basis for dismissal as a matter of law, *such dismissal is appropriate as a matter of discretion* due to the existence of one or more compelling factors, considerations, or circumstances clearly demonstrating that finding the respondent in violation of the provision at issue *would constitute or result in injustice*.

35. The Summonses should have been dismissed pursuant to NYCC § 1049(5)(a) because the undisputed evidence entered at the hearing reflected that the risk of injecting the MMR into these children outweighs any benefits. Plaintiffs-Petitioners presented significant evidence establishing this as a fact, and the DOH never once objected to or refuted any of that evidence. Therefore, for purposes of this matter, it is an established fact that MMR presents greater dangers than the benefits it brings. If the interest of justice does not tip in favor of dismissal when the evidence incontrovertibly reflects the injustice of a risk of increased harm to a child, then the safeguard afforded by NYCC § 1049(5)(a) is meaningless.

36. The first vaccine for measles was licensed in the United States in 1963. (**Ex. A**). According to the CDC, the mortality rate from measles declined by over 98% between 1900 and 1962. (**Exs. A and B**). In 1962, the CDC reported a total of 408 deaths from measles in the United States. (**Ex. D at 207:18-21**). The CDC reported a similar total number of measles deaths in the United States for a number of years prior to 1962. (**Ex. B**). What this means is that prior to 1962, at a time when virtually every American had the measles, the CDC's data makes clear that the annual death rate from measles was 1 in 500,000 Americans.

37. There would likely be even fewer deaths from measles today, since medical care has made significant advances since 1962. But even assuming the same medical care today as in 1962, the unrebutted science admitted at the hearing makes clear that the measles vaccine MMR causes more deaths every year than the 400 individuals lives it theoretically saves annually.

38. Indeed, eliminating measles has demonstrably and measurably increased certain cancer rates as well as the risk of heart disease.[11] The International Agency for Research on Cancer has confirmed that those who never had measles had a 66% increased rate of Non-Hodgkin Lymphoma and a 233% increased rate of Hodgkin Lymphoma. (**Exs. L-P**). These two cancers killed 20,960 Americans in 2018. *Id*. Plaintiffs-Petitioners presented copious evidence supporting this conclusion at the hearing without objection and the DOH never attempted to rebut that evidence.

39. Likewise, researchers at the Department of Health Care and Epidemiology at the University of British Columbia and the Department of Biology at the University of Victoria have confirmed that those who never had measles had a 50% increased rate of ovarian cancer, which

[11] Additionally, **Exs. I-K** reflect that children who have had measles have far less allergies and atopic diseases, such as asthma, and adults who had measles have a reduced risk of Parkinson's Disease. It is not medically appropriate or just to increase an individual's risk of allergies, atopic diseases, or Parkinson's Disease.

killed 14,070 Americans in 2018. (**Exs. Q-R**). Again, this was accepted at the hearing without objection and remained unrebutted.

40. Even more troubling was the fact that the nation of Japan concluded, after tracking over 100,000 of its citizens for more than 22 years, that having measles and mumps was "associated with lower risks of mortality from heart disease," which killed 610,000 Americans in 2018. (**Exs. S-T**). Once again, Plaintiffs-Petitioners presented the evidence establishing this fact on the record without objection, and Defendant-Respondent never once presented anything to rebut that evidence.

41. Until the introduction of the vaccine, measles was considered a mild childhood infection, like the chickenpox used to be. The ecological relationship humans developed with measles over millennia did not eliminate measles or ensure that only those that survived were those that were immune to the disease because it conferred benefits for survival that exceeded its negative effects.

42. Hence, the unrebutted evidence shows that eliminating measles has likely caused far more deaths annually in the United States from cancer and heart disease than the potentially few hundred lives saved from the elimination of measles.

43. The foregoing facts presented at the hearing demand that the Summonses be dismissed because the accepted and unrebutted evidence demonstrates an increased, not decreased, risk of mortality from complying with the Order. The DOH was given every opportunity to rebut this evidence yet it chose not to do so.[12]

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[12] The DOH and Dr. Rosen objected to none of the admitted evidence at the hearing nor did they rebut any evidence. They had myriad opportunities to oppose, contest, or dispute this evidence being entered into the record and they did not:

> MR. LEUNG: Well, let me just say something. These are both hearings and attorney statements. When you come in, it is testimony to the extent that your introducing these documents. And you can testify in place of your client.

44. The DOH brought Dr. Jennifer Rosen to the OATH hearings to testify as the agency's physician.[13] Dr. Rosen's resume shows that she had significant training and experience in childhood immunization, including through her work at the Howard Hughes Medical Institute, and the CDC. Since 2009, Dr. Rosen has been at the New York City Department of Health and is currently the Director of Epidemiology and Surveillance for the Bureau of Immunizations. There, she oversees surveillance and outbreak investigations for vaccines and preventable diseases, including measles.

> MR. SIRI: Okay.
> MR. LEUNG: You can testify in place of the client's doctor. You can testify -- triple hearsay is permitted. Whatever you need to say, I'm taking into consideration. Everything is testimony
> …
> MR. LEUNG: …. The documents that have been admitted so far all the way up to Respondent's 39. Department of Health, any objections? Any objections to those being admitted into evidence?
> MR. MERRILL: No objections.
> MR. LEUNG: Okay. They're admitted into evidence.
> …
> MR. LEUNG: But you spoke at length and I want to give the Department of Health, Mr. Merrill, an opportunity to address all the issues that they have. Is there anything else that you want to add?
> MR. MERRILL: No.
> …
> MR. LEUNG: … I have given a chance to the Department of Health to review that. Any objection going up to R-45?
> MR. MERRILL: No, your Honor.
> MR. LEUNG: Hearing no objections, these are admitted into evidence. And hearing nothing further from either parties; is that correct.
> MR. MERRILL: That's right.
> (**Ex. D at 211:7-20; 226:24-227:11; 239:2-9; 242:9-243:7**).

[13] Because of the proven potential for adverse events following this product, and because the Summons calls for a fine to Plaintiffs-Petitioners "unless they demonstrate…that immunization is not medically appropriate," counsel for Plaintiffs-Petitioners proffered that cross-examination of the issuing officer was necessary in order to establish whether the MMR was medically appropriate for the child and whether proof of a medical exemption was requested before the Summons was issued. "A respondent may request the [issuing officer's] appearance if it makes an offer of proof to refute the allegations on a summons and it persuades the Hearing Officer that cross-examining the [issuing officer] about a disputed fact would be helpful." *NYC v. Vantage Associates, Inc*. (Appeal No. 1100746, October 27, 2011). The Defendant-Respondent objected and argued the issuing officer was not necessary since Dr. Rosen was available and could answer any questions. (**Ex. D at 9:1-9:20**). Based on same, the Hearing Officer declined Plaintiffs-Petitioners' application to cross-examine the issuing officer, holding that Dr. Rosen was available and could answer any questions regarding these disputed facts. (**Ex. D at 14:4-22).**

45. Not only did the DOH and Dr. Rosen not object to, nor provide any evidence to contradict, what Plaintiffs-Petitioners presented during the first hearing date, August 28, 2019, but they also did not do so when they had a second bite at the apple during the follow-up hearing date, September 25, 2019.

46. The fact that this evidence went unrebutted means that, based on the record presented during the hearing, Plaintiffs-Petitioners established that the Order requires Plaintiffs-Petitioners to inject a product into their children that has been medically established to increase mortality, and will expose their children to far greater risks of a number of conditions later in their lives.

47. In addition, the following facts regarding the harms from this product also remained unrebutted.[14]

48. The Order requires injection of M-M-R-II,[15] a product which was licensed by the FDA based on clinical trials which had a total of 834 children, had no placebo control, and only reviewed safety for 42 days after injection. (**Ex. BB**). Putting aside the lack of placebo control, even if the clinical trials were properly controlled, they did not have enough individuals to assess safety; nor did they review safety for long enough. They also included children of limited ages: most were ages 11 months to 8 years old, while the Order is seeking to have M-M-R-II used by children aged 6 months.[16]

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[14] Physicians have separately detailed the benefits and risks of the MMR in **Ex. A**.

[15] **Ex. V** lists the excipient and media contained in the MMR, including but not limited to, chick embryo cell culture, WI-38 human diploid lung fibroblasts, human albumin, bovine calf serum, and neomycin. **Exs. W-Y** are product descriptions and history of the use of these ingredients and excipients. **Ex. Z-AA** explain the existence of aborted fetal cells' use in vaccines and the potential adverse effects of such use.

[16] It was, therefore, arbitrary and capricious for the Hearing Officer to sustain the Summonses mandating the MMR for a child less than twelve months old. Plaintiff-Petitioner Judith Fried's ("**Ms. Fried**") child was 9 months old at the time of the alleged violation. (**Ex. CC**). However, the Food and Drug Administration ("**FDA**") has not licensed MMR for children less than twelve months old. Ms. Fried presented undisputed evidence at the hearing that the MMR is not licensed for this age group and that the "safety and effectiveness of mumps and rubella vaccine in infants

49. Despite the fact that approximately a third of the children in the clinical trials developed gastrointestinal issues and respiratory issues within 42 days of receiving the MMR, due to their underpowered size and lack of follow-up, they were able to avoid this being a roadblock to licensure. Despite MMR being licensed, the clinical trials clearly did not, as they could not, confirm that the product was safe, and certainly not for any period longer than 42 days, nor for even the 42 days they did review safety. For example, the below table is the safety data from one of the largest clinical trials, which had a total of just 102 children injected with MMR, relied upon to license MMR:

less than 12 months of age have not been established." (**Ex. DD**). Therefore, the Summons and the Hearing Officer's order are both saying that Ms. Fried's child must receive the MMR even though the FDA has not determined that it is safe or effective for the child. This is patently arbitrary and capricious because there is no reasonable basis for the Hearing Officer to uphold a violation for failure to inject a child with MMR where the vaccine is not licensed for use in the child. Finally, the Hearing Officer failed to address this argument in his written decision, further making the decision arbitrary and capricious.

Table 10

Clinical Complaints Reported Among Children Who Received a 0.5 Ml Dose of Combined Live Measles-Mumps-Rubella (RA 27/3) Virus Vaccine, Lot No. 621/C-0763 (Study 0443)

Clinical Complaint	Total Vaccinees (102 Children) Days Post-Vaccination 0-4	5-12	13-18	19-28	29-42	No. with Complaint	Initially Seronegative to: Measles, Mumps and Rubella (68 Children) Days Post-Vaccination 0-4	5-12	13-18	19-28	29-42	No. with Complaint
Soreness at Injection Site	4 (4.2%)			1 (1.0)		5	2 (3.0)					2
Lymphadenopathy	2 (2.1)	3 (3.1)		2 (2.1)	2 (2.1)	6	1 (1.5)	1 (1.5)		2 (3.0)	2 (3.0)	3
Measles-Like Rash	1 (1.0)	9 (9.4)	6 (6.2)	1 (1.0)		11	1 (1.5)	7 (10.4)	5 (7.5)	1 (1.5)		9
Arthralgia			1 (1.0)	1 (1.0)		1			1 (1.5)	1 (1.5)		1
Myalgia		1 (1.0)				1		1 (1.5)				1
Irritability	3 (3.0)	3 (3.0)	1 (1.0)	1 (1.0)	1 (1.0)	4	2 (2.9)	2 (2.9)	1 (1.5)	1 (1.5)		3
Headache	2 (2.1)	2 (2.1)				2	2 (3.0)	2 (3.0)				2
Upper Respiratory Illness	38 (39.6)	37 (38.5)	24 (25.0)	35 (36.5)	32 (33.3)	64	28 (41.8)	27 (40.3)	20 (29.8)	25 (37.3)	20 (29.8)	46
Otitis	1 (1.0)	7 (7.3)	2 (2.1)	5 (5.2)	4 (4.2)	14	1 (1.5)	4 (6.0)	2 (3.0)	3 (4.5)	2 (3.0)	9
Ophthalmopathy	2 (2.1)	3 (3.1)	2 (2.1)	4 (4.2)	2 (2.1)	6	2 (3.0)	3 (4.5)	2 (3.0)	4 (6.0)	2 (3.0)	6
Gastrointestinal Illness	18 (18.7)	24 (25.0)	9 (9.4)	17 (17.7)	15 (15.6)	43	14 (20.9)	19 (28.4)	9 (13.4)	14 (20.9)	11 (16.4)	35
Anorexia	13 (13.5)	19 (19.8)	8 (8.3)	10 (10.4)	13 (13.5)	28	10 (14.9)	12 (17.9)	6 (9.0)	9 (13.4)	11 (16.4)	20
Fatigue				1 (1.0)		1				1 (1.5)		1
Rash-Chafing, Diaper, Heat, Herpes	4 (4.2)	4 (4.2)	1 (1.0)	4 (4.2)	5 (5.2)	12	3 (4.5)	4 (6.0)	1 (1.5)	3 (4.5)	3 (4.5)	9
Allergy, Asthma	1 (1.0)	2 (2.1)	3 (3.1)	2 (2.1)	3 (3.1)	6		1 (1.5)	2 (3.0)	1 (1.5)		3
Fever	1 (1.0)	1 (1.0)		2 (2.1)	1 (1.0)	4		1 (1.5)		1 (1.5)		2
Sudoresis	1 (1.0)					1	1 (1.5)					1
Teething	3 (3.0)			1 (1.0)	3 (3.0)	6	3 (4.4)			1 (1.5)	3 (4.4)	6
Persons with Complaints:	50 (52.1)	50 (52.1)	33 (34.4)	43 (44.8)	44 (45.8)	78	38 (56.7)	38 (56.7)	29 (43.3)	32 (47.8)	30 (44.8)	58
Persons with No Complaints:	46 (47.9)	46 (47.9)	63 (65.6)	53 (55.2)	52 (54.2)	18	29 (43.3)	29 (43.3)	38 (56.7)	35 (52.2)	37 (55.2)	9
Negative Physician Surveillance	6	6	6	6	6	6	1	1	1	1	1	1

5/6/77

The table above shows that of 102 children injected with MMR, 64 of them, or nearly 63%, experienced gastrointestinal illness and that 43, or 42%, of the children experienced upper respiratory illness within the first 42 days following administration. All of the foregoing was accepted without objection during the hearing.

50. The following unrebutted facts confirm that there are also numerous safety issues with this product that have arisen after licensure.[17]

[17] **Exs. EE-II** are reports from the IOM which looked at the components of the MMR. The IOM looked at the 22 most commonly claimed serious adverse reactions after the MMR and reported that, for 18 of the 22, the they were *not able to determine* whether or not the MMR components caused them due to a lack of science. The IOM stated: "The lack of adequate data regarding many of the adverse events under study was a major concern to the committee." The IOM further explained that "most individuals who experience an adverse reaction to vaccines have a preexisting

51. Federal law expressly provides that the package insert for a vaccine like M-M-R-II should include "*only* those adverse events for which there is some basis to believe there is a causal relationship between the drug and the occurrence of the adverse event." (**Ex. D at 217:19-218:16**). The package insert for M-M-R-II lists approximately 60 such adverse reactions that Merck has identified, many of which are serious and debilitating. (**Ex. DD**). For instance, during the hearing, Plaintiffs-Petitioners introduced into evidence two examples of Merck recently adding adverse reactions to its M-M-R-II package insert. The first was the addition of "transverse myelitis" (neurological dysfunction of the spinal cord) which was added to the list in 2014; and "Henoch-Schonlein purpua" (a vascular disease that primarily affects small blood vessels) and "acute hemorrhagic edema of infancy" (a type of leukocytoclastic vasculitis which manifests with fever, large palpable purpuric skin lesions, and edema) which were added to the list in 2017. (**Ex. JJ**).

52. The CDC even discloses that MMR can cause deafness, long term seizure, coma, and brain damage.[18] (**Ex. KK**). An example of such an injury was presented at the hearing involving a $100 million award to the victim of an MMR injury was presented at the hearing. (**Ex. LL**). The CDC and FDA also jointly operate the Vaccine Adverse Events Reporting System ("**VAERS**") which, as an example provided at the OATH hearing, reflected 1,256 hospitalizations and/or emergency room visits in one year following MMR vaccination. A report from Harvard researchers, under a federal grant, stated that VAERS reflects fewer than 1% of vaccine adverse events.

53. This high rate of hospitalization and emergency room visits from MMR is likewise confirmed in a study conducted by Canadian health authorities of 271,495 children after their 12-

susceptibility" yet no studies have been conducted to identify those who are susceptible.

[18] And like most vaccines, the MMR has never been evaluated for its potential to cause cancer, to mutate genes, or to cause infertility. (**Ex. DD**).

month MMR. The Canadian health authorities set out to confirm the safety of MMR, but what they found instead was that "[t]here was a significantly elevated risk of primary emergency room visits approximately one to two weeks following 12- and 18-month vaccination." (**Ex. MM**). This amounted to an additional "one event for every 158 vaccinated" children receiving MMR. Extrapolating these figures to the United States, it means that 63,291 additional children would be going to the hospital each year from MMR after their MMR vaccine (based on the CDC's representation that, each year in the United States, nearly 10 million doses of MMR are distributed).

54. Dr. Rosen also did not refute or even dispute any of the evidence regarding post-marketing safety issues with MMR at the hearing; in fact, all this evidence was accepted without objection.[19]

55. After the current MMR's licensure in 1978, its use in children steadily increased and lawsuits from injuries from this product also began to snowball. Indeed, by the mid-1980s – when the only two commonly injected childhood vaccines were MMR and DTP – pharmaceutical companies were facing crippling liability from their vaccine products due to lawsuits brought by parents whose children were injured by these products. (**Ex. D at 184:24-186:18, Ex. NN**). As the United States Supreme Court explained in *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 227 (2011): "by the mid-1980's … the remaining [vaccine] manufacturer estimated that its potential tort liability exceeded its annual sales by a factor of 200."

56. Instead of letting the usual market forces drive pharmaceutical companies to

[19] *See* paragraphs 42-45, supra. Additionally, Dr. Rosen was not able to rebut that the risks outweigh the benefits for these children even though most of the hearing time was devoted to the Hearing Officer improperly interjecting to protect Dr. Rosen from difficult questions and/or Dr. Rosen refusing to provide responsive answers to questions. (**Ex. D at 153:14-18 and generally**).

develop safer vaccines, Congress passed the National Childhood Vaccine Injury Act, codified at 42 U.S.C. §§ 300aa-1 through 300aa-34 (the "**1986 Act**"), in 1986, which virtually eliminated economic liability for pharmaceutical companies for injuries caused by their vaccine products.[20]

57. While the manufacturers of the MMR and other childhood vaccines have paid billions of dollars for misconduct and injuries related to their drug products, these same companies cannot be held accountable for misconduct and injuries resulting from their vaccine products, including the MMR. (**Ex. OO**). Dr. Jennifer Rosen, the DOH's physician who testified at the OATH hearing and who the DOH said could answer any questions Plaintiffs-Petitioners had, was not aware of this fact.[21]

58. When provided an opportunity to rebut any of the foregoing evidence, the DOH declined to proffer any evidence in rebuttal, accepted the foregoing evidence without objection, and despite prodding from the Hearing Officer, neither the DOH nor Dr. Rosen had any additional argument, statement or evidence to present to rebut any of the foregoing.

59. Indeed, when provided multiple opportunities to object to any of this evidence, the DOH declined to do so. The Hearing Officer repeatedly asked for objections: "Department of Health, any objections? Any objections to those being admitted into evidence?" DOH's attorney repeatedly responded: "No objections." (**Ex. D at 227:6-11**). After additional evidence was

[20] 42 U.S.C. § 300aa-11 ("No person may bring a civil action for damages in the amount greater than $1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death."); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011) ("we hold that the National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects").

[21] "Q. So you are not aware that the manufacturer of the MMR vaccine, Merck, cannot be sued for injuries caused by their MMR vaccine? A. I am not familiar with the process for manufacturing companies. Q. Are you aware -- but are you aware that -- if you could answer yes or no on that one. A. No, I am not aware. Q. You are not aware of that. So you are not aware that Merck can[not] be sued for injuries caused by the MMR vaccine? A. No." (**Ex. D at 101:24-102:12**).

entered, the Hearing Officer again gave the DOH the chance to object: "Any objection going up to R-45?" DOH's attorney responded, "No, your Honor." (**Ex. D at 242:9-17**).

60. Thus, the undisputed evidence reflects that the mandated MMR was not medically appropriate for the children, as the risks of injecting this product into the children outweigh the benefits.[22]

61. For these reasons, the record here reflects that the DOH is seeking to mandate injection of a liability-free product that has not been proven to be safe and whose risks outweigh any believed benefit. The potential adverse events that can follow the administration of the MMR and the lack of support for their benefit overshadow any rash overreaction by the DOH. Imposing a fine on these families for choosing what the evidence reflects is best for their children's overall health is unjust. The Court should, therefore, find that Respondent's final determinations are affected by an error of law and are arbitrary and capricious.[23]

THIRD CAUSE OF ACTION: REQUIRING INJECTION OF M-M-R-II VIOLATES THE UNITED STATES AND THE NEW YORK CONSTITUTIONS
(Declaratory Relief Under Article 30 of the CPLR)

62. Plaintiffs-Petitioners repeat and reallege the preceding paragraphs as though fully set forth herein.

63. The Commissioner's Order and Resolution violate the New York and United States Constitutions.

[22] Indeed, the one study that looked at health outcomes of children who were vaccinated versus children who were not vaccinated found that vaccinated individuals had a higher rate of several forms of chronic illness and neurodevelopmental disorders than the unvaccinated. *See* **Ex. PP**. It is not medically appropriate or just to force an individual to trade avoidance of a limited infection for a chronic health condition.

[23] Plaintiffs-Petitioners admitted additional, unrebutted evidence at the OATH hearings. Those exhibits are appended at **Exs. QQ-XX**.

64. Because the unrebutted record reflects that the risk of injecting a medical product outweigh its benefits, including a significant increased risk of mortality from being injected with the product, the United States Constitution and New York State Constitution extend their shield of protection to prevent the government from requiring such an injection.

65. Specifically, requiring injection of M-M-R-II into the bodies of the Plaintiffs-Petitioners' children violates both federal and state constitutional rights to substantive due process, bodily integrity, informed consent, parental choice, privacy, unlawful search and seizure, other unenumerated rights, and the First Amendment protection of freedom of religion.

A. Substantive Due Process and Fundamental Rights to Life and Liberty

66. The United States and the New York State Constitutions guarantee substantive due process rights to life and liberty which cannot be infringed upon without a compelling state interest that is implemented in the least restrictive means.

67. The absence of any effective exemption to the Order or the Resolution denies Plaintiffs-Petitioners and their children of these rights to life and liberty.

68. It is a deprivation of the right to liberty, of both Plaintiffs-Petitioners and their children, to coerce a parent, under threat of a violation and civil punishment, to inject their child with a product when their informed decision based on review of the existing literature regarding this product, their religious beliefs, and their intimate knowledge of their child, including the child's medical and familial history, is to not inject their child with this product.

69. Threatening a violation and civil punishment upon the refusal to inject a product that a parent has not consented to and, where the unrebutted science reflects it will increase mortality, infringes upon Plaintiffs-Petitioners' and their children's substantive right to life.

B. Fourth Amendment

70. The Fourth Amendment to the United States Constitution, as well as the New York State Constitution, guarantee Plaintiffs-Petitioners the right "to be secure in their persons…against unreasonable searches and seizures."

71. It is a deprivation of the right to protection from an unreasonable seizure to force an injection by piercing the skin in order to inject a product that was licensed without inadequate clinical trials. It is an unreasonable seizure of one's person and one's naïve immune system when a parent's informed decision – based on review of the existing literature regarding this product, their religious beliefs, and their intimate knowledge of their child, including the child's medical and familial history – is to not inject their child with this product.

72. Threatening a violation and civil punishment upon the refusal to inject a product that a parent has not consented to, and one for which the unrebutted record reflects an increased risk of mortality, infringes upon Plaintiffs-Petitioners' and their children's right to freedom from unreasonable seizure.

C. Excessive Fines

73. Both the United States and New York Constitutions prohibit excessive fines.

74. The offense alleged here is the refusal of parents to inject their child with a product that a parent has not consented to, and one for which the record reflects will increase mortality, was not proven safe prior to licensure, and has numerous serious post-licensure adverse reactions. The mandate is not related to any privilege the parents or the children wish to enjoy; it is quite plainly a mandate for them to simply continue existing in their homes with their families. The civil penalty – here, a fine of $1,000 – is a hefty one for Plaintiffs-Petitioners who are working-class families and generally live paycheck to paycheck. The fine bears no relationship to the gravity of the offense: existing in their homes without injecting their children.

D. Unenumerated Rights

75. The Ninth Amendment to the United States Constitution guarantees that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

i. The Right to Privacy

76. One of those unenumerated rights retained by the people is the right to privacy. Plaintiffs-Petitioners were issued Summonses at their homes – some with police officers delivering them, others with Summonses taped to their doors for all to see – alleging a violation for a private choice made by their families or in consultation with their doctors or religious leaders.

77. The Commissioner's Order and the Resolution invaded that privacy, made Plaintiffs-Petitioners' children's vaccination statuses widely known, and attempted to commandeer the private decisions of these families.

78. Violating Plaintiffs-Petitioners' right to privacy in their medical and religious decisions is a violation of the Ninth Amendment.

ii. The Right to Informed Consent

79. Holding the Plaintiffs-Petitioners in violation for simply existing in their homes in the state in which they were born and for not injecting their children with a product that is not medically appropriate against their informed consent violates additional unenumerated constitutional rights, including the right to informed consent under the New York State Constitution and the United States Constitution. It further violates the long upheld constitutional rights to parental choice and bodily integrity under the New York State Constitution and the United States Constitution.

80. The United States Constitution and the New York State Constitution guarantee the right to informed consent prior to administering a medical procedure. This right cannot be infringed upon without a compelling state interest that is implemented in the least restrictive means.

81. Informed consent requires that an individual be informed of the risks and benefits of a medical procedure and then be provided the uncoerced discretion to decide whether to consent to the medical procedure. Plaintiffs-Petitioners have reviewed the risks and benefits of the MMR and, based on that review and their intimate knowledge of their child, including their child's medical and family history, cannot consent to injecting this product into their children.

82. Threatening violations and civil penalties upon the refusal to inject a child with MMR where the child's parent has made an informed decision to not administer this product to their child infringes upon the well-established and valuable right to informed consent.

iii. The Right to Parental Choice

83. The United States Constitution and the New York State Constitution guarantee the recognized right to parental choice, which cannot be infringed upon without a compelling state interest that is implemented in the least restrictive means.

84. Coercing a parent to vaccinate their child by threatening violations and civil penalties upon the refusal to inject the MMR, where the child's parent has chosen to not administer this product to their child, infringes upon their protected right to parental choice.

iv. The Right to Bodily Integrity

85. The United States Constitution and the New York State Constitution guarantee the right to bodily integrity. That right cannot be infringed upon without a compelling state interest that is implemented in the least restrictive means.

86. Plaintiffs-Petitioners are each fully competent and able to make decisions based on the best interests of their child. Based on their intimate knowledge of their child, including their child's individual medical and familial histories, their religious beliefs, and their knowledge regarding the MMR, Plaintiffs-Petitioners and their children oppose injecting this product into their bodies.

87. Threatening violations and civil penalties by way of the Commissioner's Order and the Resolution conditioned upon the injection of MMR, when the child and the child's parents object to this injection, infringes upon the right to bodily integrity.

E. First Amendment Right to Free Exercise of Religion

88. The First Amendment to the United States Constitution unequivocally protects the right to the free exercise of religion. Likewise, the New York State Constitution provides that the free exercise of religion "shall forever be allowed in this state to all mankind."

89. The free exercise clauses recognize the right of each person to engage in the free exercise of his or her religion and not to be compelled to engage in affirmative acts which violate their religious beliefs. A key feature of this right is that it grants a religious individual an exemption from statutes or regulations which impose a burden on his or her beliefs.

90. Many of the Plaintiffs-Petitioners have sincerely held religious beliefs which prevent them from engaging in an act that they believe will harm their children.[24]

91. The research has not yet been done to know which children are susceptible to be seriously injured or die from this product. Plaintiffs-Petitioners' informed assessment is that the risk of serious injury or death from this product to their child is greater than the risk of serious

[24] Plaintiffs-Petitioners that hold religious beliefs against vaccination are Plaintiffs-Petitioners Ascher Berkowitz, Chava Biederman, Israel Fishman, Judith Fried, Malka Friedman, Chanie Fulop, Rachel Guttman, Simon Josef, and Malky Roth-Tabak.

injury or death from measles and hence, administering this product to their child violates their religious beliefs.

92. At the time of the supposed violations, many of the Plaintiffs-Petitioners held statutorily protected religious exemptions from vaccinations from their children's schools.

93. Mandating an injection that directly contradicts Plaintiffs-Petitioners' religious beliefs is compelling them to act in a manner that plainly violates their right to freely exercise their religion; both the United States and the New York State Constitution protect Plaintiffs-Petitioners in refraining from an action that their religious beliefs prevent them from taking.

94. Indeed, Plaintiffs-Petitioners were held in violation for simply existing in their homes, with their families, in the state that God created them.

RELIEF REQUESTED

WHEREFORE, Plaintiffs-Petitioners request that this Court enter an Order:

(a) Declaring, pursuant to CPLR § 7803, that Defendant-Respondent acted arbitrarily, capriciously, and contrary to law by issuing its final determinations in the manner described herein;

(b) Declaring, pursuant to CPLR § 3001 and all other grounds by which a state act can be declared unconstitutional, that the Commissioner's Order and the Resolution violate the New York and United States Constitutions;

(c) Setting aside and vacating the Summonses;

(d) Awarding Plaintiffs-Petitioners reasonable attorney's fees, costs and disbursements pursuant to CPLR § 8101, 42 U.S.C.A. § 1983, any other applicable statutory, common law or equitable provision, and that any defense as to the validity of the Summonses is without merit; and

(e) Granting such other and further relief as the Court deems just and proper.

Dated: August 24, 2020

SIRI & GLIMSTAD LLP

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ebrehm@sirillp.com

Counsel for Plaintiffs-Petitioners

VERIFICATION

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

Pursuant to CPLR § 3020, ISRAEL FISHMAN, being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to ISRAEL FISHMAN and my minor child, 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.

Sworn to me this 24 day
of August, 2020

Notary Public

TSABIKOS FOUTOULIS
Notary Public, State of New York
No. 01FO6245404
Qualified in Richmond County
Commission Expires July 18, 2023

VERIFICATION

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

Pursuant to CPLR § 3020, Judith Fried, being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to Judith Fried and my minor child, 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.

J. F

Judith Fried

Sworn to me this 22 day
of August, 2020

Notary Public

SOLOMON ITZKOWITZ
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01IT4795441
Qualified in Kings County
Commission Expires July 30, 2022

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF)

Pursuant to CPLR § 3020, RACHEL GUTTMAN, being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to RACHEL GUTTMAN and my minor child, 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.

Rachel Guttman

Sworn to me this 24th day
of August, 2020

Notary Public

PADRAM FEJAL
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01FE6305764
Qualified in Kings County
Commission Expires June 9, 2022

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF)

Pursuant to CPLR § 3020, CHANIE FULOP, being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to CHANIE FULOP and my minor child, 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.

C. Fulop

Sworn to me this 20 day
of August, 2020

Notary Public

SOLOMON ITZKOWITZ
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01IT4795441
Qualified in Kings County
Commission Expires July 30, 2022

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF)

Pursuant to CPLR § 3020, SIMON JOSEF, being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to SIMON JOSEF and my minor child, 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.

Simon Josef

Sworn to me this 21 day
of August, 2020

Notary Public

ZVI FISCH
Notary Public - State of New York
Reg. No. 01FI6326389
Qualified in Kings County
My Commission Expires June 15 20 23

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF Sullivan

Pursuant to CPLR § 3020, BAILA KLEIN, being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to BAILA KLEIN and my minor child, 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.

Baila Klein

Sworn to me this 21st day
of August, 2020

Notary Public

ROSEMARIE LEE
Notary Public, State of New York
No. 01LE6018825
Qualified in Dutchess County
Commission Expires June 29, 2023

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF)

Pursuant to CPLR § 3020, MALKY ROTH-TABAK, ~~being duly sworn,~~ affirms deposes and says:

I have read the foregoing petition and know the contents thereof as to MALKY ROTH-TABAK and my minor child, 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.

Malky Roth

~~Sworn~~ Affirmed to me this 24 day of August, 2020

Jo Ann Beddoe

Notary Public

JO-ANN BEDDOE
NOTARY PUBLIC-STATE OF NEW YORK
No. 01BE6172751
Qualified in Queens County
My Commission Expires 08-13-2023