SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

YUDELKA BRAVO, OMAR CLARKE, PEGGY MANSANET and ONIKA WILLIAMS, Plaintiff-Petitioners, v. BILL DE BLASIO, in his official capacity as MAYOR of the City of New York, and the CITY OF NEW YORK, Defendant-Respondents.	**VERIFIED PETITION PURSUANT TO ARTICLE 78** Index No.:

PRELIMINARY STATEMENT

1. New York courts stand as constitutional sentinels able to quell an aggressive assault unleashed by Mayor Bill de Blasio against New Yorkers' basic human and constitutional rights. This Court must wake Mayor Bill de Blasio from his authoritarian fantasy and affirm that New York City residents, and Black residents, in particular, are protected from a city's attempt to mandate medical procedures in the form of COVID-19 vaccines. Plaintiff-Petitioners seek a permanent injunction against Mayor de Blasio's Emergency Executive Order #225 ("EEO225") to prevent its irreparable damage and to redress its violation of CPLR Article 78O3.2, in that the City is proceeding without and in excess of jurisdiction, and CPLR Article 78.O3.3, in that a determination was made in violation of lawful procedure, was affected by an error of law and is arbitrary and capricious, and an abuse of discretion.

STATEMENT OF FACTS

"Our mission is to root out systemic racism across New York City."

- Mayor de Blasio

2. On August 16, 2021, New York City Mayor Bill de Blasio issued EEO225. Under the guise of what should be limited and temporary emergency authority, de Blasio's EEO225

represents the gravest and most **permanent** measure taken by a major city in the United States: mandatory vaccination.

3. New York City residents and workers have just recently been able to return to some semblance of normal life after facing almost 18 months of lockdowns and mandates imposed by federal, state, and particularly city government. New Yorkers were forced to withstand some of the most draconian restrictions in the country.

4. Moreover, many New York City small business establishments faced months of forced closure followed by seemingly arbitrary, yet onerous, capacity constraints. These hardships caused many to shutter. Among those that remain, some struggle to survive, disparately those which are run by or cater to Blacks.

5. Given this backdrop, it defies comprehension that any further—let alone, severe and permanent—limitations would be imposed at this time of nascent recovery. Yet, EEO225 does precisely this in a putative effort to curb the spread of the COVID-19 "Delta" variant and other "new variants." This EEO225, effective August 17, 2021, prohibits "a patron, full- or part-time employee, intern, volunteer, or contractor" from entry into any New York "indoor entertainment and recreational setting," "indoor food service" or "indoor gyms and fitness setting" unless vaccinated with "at least one dose of a COVID-19 vaccine authorized for emergency use or licensed for use by the U.S. Food and Drug Administration or authorized for emergency use by the World Health Organization."

EEO225's Unequivocal Goal to Mandate an Invasive, Permanent Medical Treatment

6. EEO225 targets the lifeblood of a resident's (or nonresident's) experience in New York City: "[I]ndoor entertainment, recreation, dining and fitness settings generally involve groups of

unassociated people interacting for a substantial period of time" which are targeted by "requiring vaccination for all individuals in these areas, including workers . . .” Struggling restaurants, bars, coffee shops, night clubs, movie theaters, music venues, fitness centers, exercise studios are some of the establishments “covered” by the mandate.

7. EEO225 requires residents to present “proof of vaccination” as well as “identification” to be admitted into the normal course of city life. Astonishingly, as a result of EEO225, many New York City businesses will now face the added burden of being the Mayor's enforcer for this onerous policy. Indeed, the same businesses struggling to survive will be forced to turn away patrons unable to provide proof of vaccination or simply unwilling to receive the vaccine due to health, privacy, religious, age, or other legitimate reasons. If they fail, de Blasio’s EEO225 threatens them with severe financial penalties including $1,000 fines per violation, which increase to $2,000 if a secondary violation occurs within 12 months of the first violation, with a further increase to $5,000 if a third violation occurs within 12 months of the secondary violation—a penalty scheme indicative of the years-long, **permanent** nature of EEO225.

8. The message is clear: your body, my choice.

Mandated Vaccinations Target Minorities: A History of Abuse

9. As devastating as this is for all New Yorkers, including New York City’s small business community, minority groups are affected most. Over 37% of the city’s 8,230,290 residents remain unvaccinated. Blacks make up the largest portion of the unvaccinated demographic with 62% not vaccinated. Indeed, according to recent data from the CDC, Blacks have the lowest COVID-19 vaccination rate of all ethnicities — only 28.4% of Blacks in the U.S. have received one dose of the vaccine and only 25.1% have received both doses. Therefore, 75% of Black Americans may be affected based upon vaccine status. Consequently, a sizable majority of Blacks have, by the

stroke of de Blasio's pen, been relegated to second-class citizenship—excluded from all public life without any access to dining, exercise, or entertainment.

10. Dr. Robin Armstrong provides compelling testimony regarding how this country's medical history illustrates that EEO225 represents a discriminatory leap backwards. See Dr. Armstrong's Declaration, attached as Exhibit A. Any suggestion that Black Americans should simply get vaccinated without question demonstrates ignorance of how this country's government agencies effected substantial harms on minority communities without their knowledge through callous misrepresentation.

11. Perhaps the most well-known example is the Tuskegee Syphilis Study ("Tuskegee"). This "study" spanned **four decades** at the direction of the CDC. It involved misrepresentations and half-truths provided to *hundreds* of impoverished Black males believed to have syphilis. Instead of providing correct diagnoses, available treatment, and relevant timelines, the CDC, in concert with the United States Public Health Service (PHS), watched as many "participants" died and experienced severe complications. This bioethics abomination ended only after word of the "study" leaked to the press in 1972.

12. The horrific Tuskegee experience is by no means the only example of medically-imposed racial discrimination. There are innumerable examples from the beginning of our nation right up until present day. *See* Kevin Jenkins Declaration, attached as Exhibit B. Only seven years ago, it was revealed by a senior scientist CDC whistleblower (who is still employed at the CDC) that the CDC destroyed and withheld data showing that vaccinated Black children had a three to four times higher rate of autism.

13. Mayor Kim Janey, a Black woman governing Boston, Massachusetts, a city whose population is 25% Black, broke with fellow Democrats by resisting a vaccine mandate for public

workers and likened compulsory vaccination to racist post-Civil War policies that required Black Americans to show their identification papers.

14. "There's a long history in this country of people needing to show their papers — whether we are talking about this from the standpoint of … during slavery, post-slavery, and as recent as what the immigrant population has to go through..." For example, experimental operations were performed on enslaved Black women in the 1840s. James Marion Sims, the father of modern gynecology, perfected his surgical techniques through often deadly experiments on Black slaves in the 1800s without the use of anesthesia.

15. Tony Muhammad of the Nation of Islam mentioned that after the Tuskegee experiment was exposed and discontinued in 1972, the CDC promised to "never let it happen again." However, he pointed out a case reported in the L.A. Times in 1989 where the CDC experimented on 1,500 Black and Latino boys without their parents' knowledge. They had issued a measles vaccine that was 4 times as potent and dangerous as one that was approved.

16. Given this historical context, it is easy to see how a New York City resident—particularly Black Americans—can decide that the risks of vaccination outweigh the benefits and reject the **permanent** intrusion of a city, state, or federal government into a person's sacred bodily autonomy under the guise of "safety."

PARTIES TO THIS ACTION

17. All Plaintiff-Petitioners are either residents of Brooklyn or other boroughs of New York City and/or small business owners in the City who are directly, severely, and irreparably harmed by EEO225. *See* Onika Williams's Affidavit attached as Exhibit 1, Omar Clarke's Affidavit attached as Exhibit 2, and Peggy Mansanet's Affidavit attached as Exhibit 3.

18. Defendant-Respondents are the Mayor of New York City, Bill de Blasio, and the City of New York itself.

AS FOR THE FIRST CAUSE OF ACTION

New York City is Preempted from Regulating Communicable Diseases and its Attempt to Do So Must Thus Fail

19. Article IX, § 2(c)(ii)(10) of the New York Constitution states local governments "shall have power to adopt and amend local laws not inconsistent with the provisions of [the] [C]onstitution or any [state] law relating to" various subjects, including "[t]he government, protection, order, conduct, safety, health and wellbeing of persons or property therein."

20. "To implement Article IX, the Legislature enacted the Municipal Home Rule Law." *DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 94 (N.Y. 2001). "The Municipal Home Rule Law sets forth the general powers of local governments to adopt and amend local laws in accordance with article IX of the N.Y. Constitution." *Boening v. Nassau Cnty. Dep't of Assessment*, 69 N.Y.S.3d 666,669 (N.Y. App. Div. 2018). This includes the power to adopt and amend local laws concerning "[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein." Municipal Home Rule Law § 10(1)(ii)(a)(12); *see also DJL Restaurant Corp.*, 96 N.Y.2d at 94 ("It specifically gives a municipality, such as the City of New York, the power to enact local laws for the "protection and enhancement of its physical and visual environment" and for the 'government, protection, order, conduct, safety, health and well-being of persons or property therein.'"). "In keeping with Article IX, however, the Municipal Home Rule Law prohibits the City from adopting local laws inconsistent with the State Constitution or any general law of the State." *DJL Restaurant Corp.*, 96 N.Y.2d at 94.

21. "Local laws that conflict with State statutes are preempted." *Id.* at 95. "Broadly speaking,

State preemption occurs in one of two ways — first, when a local government adopts a law that directly conflicts with a State statute . . . and second, when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility." *Id.* "An implied intent to preempt may be found in a 'declaration of State policy by the State Legislature * * * or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area.'" *Id.* "In that event, a local government is 'precluded from legislating on the same subject matter unless it has received `clear and explicit' authority to the contrary.'" *Id.* "[A] local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe * * * or (2) imposes additional restrictions on rights granted by State law." *Id.*

22. For example, in *People v. De Jesus*, 54 N.Y.2d 465 (N.Y. 1981), the Court of Appeals held the Alcoholic Beverage Control Law was preemptive because it "is exclusive and State-wide in scope and that, thus, no local government may legislate in this field." *Id.* at 470. The Court noted "the regulatory system it installed is both comprehensive and detailed." *Id.* at 469. It "endows the State Liquor Authority with the power to grant licenses under defined circumstances and it provides for criminal sanctions against unauthorized purveyors of alcoholic beverages," specifies when such beverages may be sold, "carries its own provision against disorderliness being permitted on such premises," "imposes its own direct controls at the local level by creating local alcoholic beverage control boards and by, for example, granting these administrative instrumentalities the power to further restrict the hours during which alcoholic beverages may be sold at retail." *Id.* Also, "[s]ection 2 of the Alcoholic Beverage Control Law declares it the goal of the State 'to regulate and control the manufacture, sale and distribution within the state of alcoholic

beverages for the purpose of fostering and promoting temperance * * * and obedience to law.'" *Id.* at 470. The Court held the Law conflicted with and, thus, preempted a municipal code ordinance regulating when people may patronize an establishment selling or offering for sale alcoholic beverages. *Id.* at 467-68.

23. Likewise, the state of New York has an exclusive, state-wide regulatory scheme addressing communicable diseases, including COVID-19. Article 21, Titles 1-8 of the Public Health Law regulates the "control of acute communicable diseases." Title 8 specifically addresses the "Novel Coronavirus, COVID-19." Title 8, Section 2182 empowers Commissioner of Public Health to "make regulations as reasonably necessary to implement this title."

24. Chapter 1, Part 2 of the State Sanitary Code regulates "communicable diseases." 10 CRR-NY 2.1 expressly includes the "novel coronavirus" in its definition of the term "infectious, contagious or communicable disease." 10 CRR-NY 2.6 specifies detailed procedures for local health authorities to investigate the circumstances of cases or outbreaks of any diseases and "implement appropriate actions to prevent further spread of a disease" and "take any other steps to reduce morbidity and mortality that the local health authority determines to be appropriate." 10 CRR-NY 2.6(a)(7)-(8). The Code contains a specific reporting obligation: a city must "report immediately . . . the existence of such an outbreak to the State Department of Health" and "exercise due diligence in ascertaining the existence of such outbreaks or the unusual prevalence of diseases, and shall immediately investigate the causes of same" and provide a report to the State Department of Health within 30 days. 10 CRR-NY 2.16. The Code also contains robust isolation and quarantine procedures: "Whenever appropriate to control the spread of a highly contagious communicable disease, the State Commissioner of Health may issue and/or may direct the local health authority to issue isolation and/or quarantine orders." 10 CRR-NY 2.13(a)(1).

25. Here, EEO225 prohibits individuals from patronizing indoor entertainment, recreational, food services, or fitness establishments without providing proof of having received at least one shot of the vaccine. The State's regulatory scheme concerning communicable diseases preempts EEO225 because it attempts to legislate in a field (communicable diseases and, more specifically, COVID-19) where the state has assumed full regulatory responsibility. The City has not received "clear and explicit" authority to enact specific restrictions in this area. EEO225 is inconsistent with the state's overriding interests because it prohibits conduct (patronizing and frequenting various indoor business establishments) that the state has not expressly forbidden in these circumstances. For these reasons, EEO225 is preempted by state law, represents an unlawful exercise of home rule and, as such, must be overturned in full.

AS FOR THE SECOND CAUSE OF ACTION

EEO225 Violates the New York State Constitution

A. EEO225 Violates the State Constitutional Right of Procedural Due Process

26. EEO225 blatantly violates Article 1, Section 6 of New York's state constitutional guarantee that: "No person shall be deprived of life, liberty or property without due process of law." Procedural due process requirements are imposed by courts to make certain that executive policymakers have sufficient information to make prudent decisions. *See, e.g, Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases"); *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). It accomplishes this by providing a process by which a proposed policy can be challenged. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). Courts have also recognized the dignitary importance of procedural rights, *i.e*., the value of being able to defend one's interests even if one cannot change the result. *Carey*, *supra*, 435 U.S. at 266–67 (1978); *Marshall v. Jerrico, Inc*., 446

U.S. 238, 242 (1980); *Nelson v. Adams*, 529 U.S. 460 (2000). It goes without saying that such dignitary concerns are of greatest importance when those adversely affected by executive action are historically oppressed minorities. Here, New York City's Mayor has barged ahead to implement a sweeping restriction of liberty and property interests without obtaining any information not just as to the "prudence" of the decision but, more importantly, as to its wide-ranging deleterious effect on the Blacks of New York City.

27. Procedural due process is required when the challenged action deprives one of a life, liberty, or property interest; when it does so, procedural due process requires notice and an opportunity to be heard **before** the action can be taken. *Sharrock v. Dell Buick*, 45 N.Y.2d 152, 163 (N.Y. 1978) *citing Wynehamer v People*, 13 N.Y. 378, 392-393 (1856); *Stuart v Palmer*, 74 N.Y. 183, 191 (1878); *Memphis Light, Gas Water Div. v Craft*, 436 U.S. 1 (1977); *Armstrong v Manzo*, 380 U.S. 545, 552 (1965). Even temporary deprivations require procedural due process. *Sharrock*, 45 N.Y. 2d at 164. In *Sharrock*, the Court of Appeals held that, by inserting itself into the field of garagemen's liens, "New York has delegated to private parties functions traditionally associated with sovereignty" and that this triggered procedural due process protections with which the State made no attempt to comply. The same is true here. The State has delegated police functions to private places of accommodation, ordering them to deny business access to unvaccinated persons. Both liberty and property interests of the plaintiffs are abridged, indeed eviscerated, by this action.

28. EEO225 is a direct assault on personal liberty. It literally bans residents from entering public places, restricting the daily life of affected persons across a wide range of venues. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the court invalidated a statutory scheme in which persons could be labeled "excessive drinkers" without any opportunity for a hearing and

rebuttal, where such persons could then be barred from places where alcohol was served. The court noted that the governmental action impugned the individual's reputation, honor, and integrity. And in *Ingraham v. Wright*, 430 U.S. 651 (1977), the court unanimously agreed that school children had a liberty interest in freedom from wrongfully or excessively administered corporal punishment, whether or not such interest was protected by statute. EEO225 is fatally defective on procedural due process grounds for the same reason. It is inflicting a punishment on the dignity and liberty of Black New Yorkers, stigmatizing large percentages of them as "unwelcome" and shutting them out from city life without notice and a hearing to challenge the reasoning behind, possible exemptions from, the discriminatory effect of, and the harsh penalties imposed for violations of what is "Jim Crow Redux."

29. EEO225 is just as direct an assault on property rights. It literally bans residents from entering into contracts for goods and services from places of public accommodation, and it prevents them from using such places to conduct business with third-parties. Thus, for instance, the U.S. Supreme Court has held that a citizen has a property interest in his driver's license since it is essential to his livelihood, such that it cannot be summarily taken away without due process. *Bell v. Burson*, 402 U.S. 535 (1971). In a city like New York, where relatively few get around by automobile, access to places of public accommodation is a far more important pathway to a livelihood than a license. In *Goss v. Lopez*, 419 U.S. 565 (1975), the court found that a student who has a right to an education cannot have that right interrupted without due process by the state, and similarly in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the court held that a destitute person who has a right to claim welfare benefits cannot have that right interrupted without due process. So too, Plaintiff-Petitioners here clearly have the right to engage in business transactions in places of public accommodation. As such, they cannot be restricted from doing so without due process.

30. As the court recently explained in *Bols v. Newsom*, 515 F.Supp. 3d 1120 (S.D.Cal. 2021), in refusing to dismiss an action for violation of procedural due process rights against the Governor of California for barring the opening of hair and nail salons in order to combat the spread of COVID-19, while actions that are legislative in character have substantial protection from due process claims, "pure executive action" enjoys no such protection, and the question of whether adequate due process safeguards have been provided "is a subject to be decided upon evidence or the lack of a genuine issue of fact." Here, EEO225 is entirely and unilaterally executive in character and it was not prefaced by notice or a hearing, or any other mechanism by which its wisdom could be questioned. In fact, EEO225 fails to provide for any means by which an affected person could challenge, or even question it, either before or after. This type of defect was judged fatal in *Sharrock*, *id*. at 45 N.Y. 2d at 164. Not only does EEO225 fail to provide for a post-deprivation challenge, it tramples upon the rights of those affected to be heard **before** its permanent and draconian deprivations of liberty and property take effect.

B. EEO225 Infringes Upon the State Constitutional Rights of Privacy and Bodily Integrity

31. Constitutional protections pertaining to one's own personal decisions free from interference from the state demonstrate the sanctity of freedom, autonomy, and life. Protection of that sanctity is found in Article 1, Section 6 which guarantees that "No person shall be deprived of life, liberty to property without due process of law." Besides providing for procedural protections, *see infra* A., this provision also grants substantive rights.

32. Such rights are *broader* than those guaranteed under the Fourteenth Amendment of the U.S. Constitution by, *inter alia,* extending protection against violations from individuals, not just the state. This is particularly important insofar as Mayor Bill de Blasio uses EEO225 to weaponize private business owners in an effort to mandate vaccination.

33. The inveterate commitment to protection of individual liberties is a hallmark of New York jurisprudence and New York courts have long recognized that the State provides *additional* constitutional safeguards in excess of the protections afforded by the U.S. Constitution. *Beach v. Shanley*, 62 N.Y.2d 241, 255-256 (1984) (Wachtler, J., concurring); *see also Matter of Holmes v. Winter*, 22 N.Y.3d 300, 316 (2013), *cert. den.* 572 US. 1135 (2014). New York courts apply state constitutional principles and protections particularly where the New York Constitution and related case law highlight the State's own "exceptional history and rich tradition" in a given constitutional domain. *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 250-252 (1991). Stated differently, federal constitutional standards are viewed as minimum levels of protection. *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986); *see also People v. Alvarez*, 70 N.Y.2d 375, 378, 515 N.E.2d 898, 899, 521 N.Y.S.2d 212, 213 (1987) ("regardless of whether there exists a federal constitutional provision parallel to a state provision, we must undertake a 'non-interpretive' analysis, proceeding from a 'judicial perception of sound policy, justice and fundamental fairness'") (quoting *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986), cert. den., 479 U.S. 1091 (1987)).

34. The New York Court of Appeals explained that the U.S. Constitution and New York State Constitution are different in that the U.S. Constitution delimits the power of the federal government whereas the New York State Constitution "long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose." *Sharrock*, 45 N.Y.2d at 160, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44.

35. In *Rivers v. Katz*, the New York Court of Appeals annunciated the constitutional protections afforded to bodily integrity in holding that involuntarily committed mental patients have the right to refuse antipsychotic medication. *Rivers v. Katz,* 67 N.Y.2d 485, 495 N.E.2d 337,

504 N.Y.S.2d 74 (1986). Plaintiffs were involuntarily committed to a state psychiatric facility and forced antipsychotic drugs. The court determined that the common law of New York afforded "every individual of adult years and sound mind 'a right to determine what shall be done with his own body'" and the right to control his medical treatment. *Id.* at 341. Critically, the Court announced that "this fundamental common-law right is coextensive with the patient's liberty interest protected by the due process clause of our State Constitution." *Id.* In the face of this substantial protection, the state needed to demonstrate a compelling interest by clear and convincing evidence that the proposed treatment was narrowly tailored to give substantive effect to the patient's liberty interest, the adverse side effects associated with the treatment, and any less intrusive alternative treatments. *Id.* at 497.

36. This Court must declare that New York City residents, and, particularly, the Black population, are fundamentally free from a City Mayor *mandating* a permanent medical procedure because EEO225 strikes at the very heart of a person's liberty interest in their right of bodily integrity found in New York common law and New York Constitutional law. Decades of abuse and bioethical disasters highlight the critical importance of Black Americans asserting—and New York courts enforcing—their New York State Constitutional right of privacy against government or individual threats to the sanctity of bodily integrity.

AS FOR THE THIRD CAUSE OF ACTION

EEO225 Violates New York City's Human Rights Law

A. The New York City Human Rights Law is to be Construed as Broadly as Possible to Effectuate its Remedial Purpose

37. The purpose of the New York City Human Rights Law (the "City Law") is to eliminate the presence of invidious discrimination in New York City. It seeks to do so by purging considerations

of race and other protected characteristics from the City's economic and social life. It is a zero-tolerance statute. *See* N.Y.C. Admin. Code §8-101.

38. Courts have repeatedly emphasized that the City Law is to be construed "as liberally as reasonably possible in favor of Plaintiff-Petitioners to the end that discrimination should not play a role in decisions", *Melman v. Montefiore Medical Center*, 946 N.Y.S.2d 27 (App. Div. 1st Dep't 2012). New York courts are emphatic that the provisions of the City Law "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed." *Albunio v. City of New York*, 16 N.Y.3d 472, 477 (2011). In *Williams v. N.Y.C. Hous. Auth.,* 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dep't 2009), the First Department noted: "[t]he City HRL now explicitly requires an independent liberal construction analysis in all circumstances, even where state and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's uniquely broad and remedial purposes, which go beyond those of counterpart state or federal civil rights laws." *Id*. 61 A.D.3d at 68.

39. Toward that end, the City Law seeks to eviscerate discrimination in all walks of public life in New York City, including but not limited to places of public accommodation, §8-107(4), employment, §8-107(1), housing, §8-107(5) and licensing §8-107(9). The City Law prohibits not only the actions of those who directly discriminate, but also actions of those who aid and abet discrimination, §8-107(6), and actions taken in retaliation for complaints of discrimination, §8-107(7).

B. The City Human Rights Law Applies to the City of New York in All Capacities

40. The City Law applies to the City of New York as much as to any other perpetrator or facilitator of racial discrimination. *See, e.g., Albunio*, *supra* (holding City's police department liable for retaliating against police officers who opposed acts of discrimination by the department) and *Teasdale, infra,* involving the City's fire department. Indeed, as noted above the City Law expressly includes within its sweep all licensing activity in which the City engages, and holds accountable for such discrimination all those who aid and abet it. For instance, in *Brooklyn Center for Independence of the Disabled v. Bloomberg*, 980 F.Supp.2d 588 (2013), the court held that the Mayor had violated the City Law "by failing to provide people with disabilities meaningful access to its emergency preparedness program in several ways."

1. The Mayor and his Officers are Liable under §8-107(4)

41. As noted, the City Law prohibits discrimination on grounds of race in places of public accommodation. Such places include, but are not limited to "providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available." *See* §8-102. All indoor venues covered under the Order constitute places of public accommodation. Those liable under §8-107(4)(a) of the City Law for discrimination in places of public accommodation include owners, lessors, lessees, proprietors, managers, superintendents, agents or employees of any place or provider of public accommodation ("Covered Persons"). The City operates places of public accommodation and employs Covered Persons, including the Mayor, who are liable, along with the City itself, for discrimination under the City Law to operate such places. *See Doe v. Bloomberg*, L.P. et al, 2019 WL 4605568 (1st Dept. 2019) (confirming that any individual who encourages, condones or approves the specific discriminatory conduct giving rise

to the claim is liable along with the entity that employs them). The City either owns, operates, leases or manages numerous places of public accommodation. All such indoor venues currently bar access to Blacks at disproportionately higher rates than Whites due to lack of vaccination.

2. EEO225 Contravenes City Law

42. The Mayor lacks authority to issue an executive order in contravention of the City Law, but Plaintiff-Petitioners can hardly take legal action against the owners of private places of public accommodation who are bound to comply with the Order, no matter how unlawful, until it is struck down. Because these privately owned places of public accommodation are being required to violate the City Law, Plaintiff-Petitioners are entitled to a permanent injunction directing the City not to enforce an Order which violates the City Law against any private places of public accommodation (as well as city–connected places of public accommodation).

C. *EEO225 Violates the City Law in that it has a Disparate Impact on Black New Yorkers*

43. In order to obtain relief from this Court, Plaintiff-Petitioners need only show that the Order treats Black New Yorkers less well in terms of access to public accommodation than it treats White New Yorkers as a matter of statistical fact (*i.e.*, show what is termed "disparate impact"). At that point, the Order violates the City Law regardless of the intent underlying it.

44. In *Griggs v Duke Power Co.*, 401 U.S. 424 (1970), the Black employees of a utility company alleged that the employer had implemented a policy that required all applicants for certain positions to have earned a high school diploma and/or pass a standardized test. Plaintiffs argued that the policy was discriminatory not because it targeted Blacks but because, statistically, it disqualified Blacks at a higher rate than White candidates. The lower courts held that the defendant's policy was not contrary to law because it was keyed solely to educational achievement, and there had been no showing of discriminatory intent. The U.S. Supreme Court reversed, holding

that facially neutral hiring and promotional requirements operated to exclude Blacks at a significantly higher rate than similarly situated White applicants and this established the plaintiffs' *prima facie* case of discrimination.

45. As the New York State Supreme Court held years later in *Levin v. Yeshiva University*, 96 N.Y. 2d 484 (2001):

> [I]n 1991, the City of New York enacted Human Rights Law § 8-107(17), explicitly creating a disparate impact cause of action for petitioners who can demonstrate "that a policy or practice of a covered entity or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any [protected] group" (Administrative Code *493 § 8-107 [17] [a]). Unlike the State Human Rights Law, the City law both specifies a right of action for policies or practices that have a disparate impact and specifically prohibits any form of discrimination based on sexual orientation. The New York City Council also explicitly made "disparate impact" applicable to discrimination claims outside of the employment context (Administrative Code § 8-107 [17]). A claim of discrimination based on sexual orientation can be stated where a facially neutral policy or practice has a disparate impact on a protected group (Administrative Code § 8-107 [17] [a] [1]-[2]). Under that section, a claim is established where a plaintiff demonstrates that a defendant's policy or practice "results in a disparate impact to the detriment of any group protected" under the City Human Rights Law (id.).

46. Here, the City of New York may claim that its Order on its face applies equally to all races. But when the plaintiff can show, as here, that the implementation of the order falls harshly on Blacks and less harshly on Whites, facial neutrality is no defense.

47. As demonstrated by the Declaration of Dr. Alexander, (attached hereto as Exhibit C) a Kaiser Family Foundation study has found that Black Americans are being vaccinated at a rate that is nearly one-third lower than the rate for White Americans, with only about a quarter of the African-American population having been fully vaccinated to date. *See* Exhibit C, p. 7. The data shows a clear explanation for this disparity: Black Americans were nearly 50% more likely to decline vaccination until they had time to observe the effects on the general vaccinated population. *See* Exhibit C, p. 8. And the reason for this inclination is equally clear, having been explained by

Mayor Kim Janey, the African-American Mayor of Boston, Massachusetts; Mayor Janey declined to require vaccination for her employees, likening the compulsory vaccination rules of cities like New York to racist post-Civil War policies that required Black Americans to show identity papers. In fact, Black Americans are well aware of a long history of medical experimentation by which they have been victimized for more than a century, including most infamously the Tuskegee Syphilis Study of the 1930's. *See* Declaration of Dr. Parks, attached hereto as Exhibit D.

48. The foregoing undisputed facts regarding the tragic history of medical abuse of Black Americans experienced based on race establishes beyond cavil that the refusal of vaccination by Black Americans is not voluntary in any sense of the word. Even if there were no documented medical risks associated with vaccination, and to the contrary numerous fatalities and other medical complications are well-documented, it is simply unreasonable -- indeed, reflective of racism -- to expect (indeed, to require) African-American acceptance of vaccination at the same rate as White American's acceptance. Just as affirmative action was required to bring Blacks' participation in university education into parity with White's participation, so too affirmative action is required in regard to vaccination. Instead of pursuing such affirmative action, New York City has chosen to do the opposite, the equivalent of barring Blacks from university participation until their objective qualifications warrant it.

49. The standard for establishing a *prima facie* case of disparate impact under the NYCHRL is lower than the standard for analogous claims under federal laws such as the ADA or Title VII, or the New York State Human Rights Law. *Teasdale v. N.Y.C. Fire Dep't*, FDNY, 574 F. App'x 50, 52 (2d Cir. 2014). Once the standard has been met, the defendant can establish an affirmative defense only by showing (1) the policy or practice complained of bears a significant relationship to a significant objective or (2) the policy or practice does not contribute to the disparate impact.

However, this defense is defeated if the plaintiff produces substantial evidence of an available alternative policy or practice with less disparate impact, and the covered entity is unable to establish that an alternative policy or practice would not serve its business objective as well as the complained-of policy or practice. N.Y.C. Admin. Code §8-107(17)(2)(b).

50. The drive to ensure that people are vaccinated in New York City as well as the rest of the country -- indeed, the world -- is to protect the populace from contracting COVID-19 irrespective of how it is transmitted. Only vaccinated persons are protected, we are told. Thus, the vaccinated are at no risk from the unvaccinated and those who feel otherwise, despite everything our government professes, are free to wear masks, maintain social distancing and take other available protective measures (such as outdoor dining), as are the unvaccinated, if they so choose. At the very least, therefore, masking and distancing are available alternate policies with less disparate impact. And, because as noted above in the Affidavit of Dr. Parks, Exhibit D, the requirement of vaccination causes disparate impact on Blacks' access to places of public accommodation, the City has no defense to this cause of action for disparate impact under City Law.

D. The Order Violates the City Law Through its Disparate Treatment of Black New Yorkers

51. Even if Plaintiff-Petitioners here were unable as a matter of law to rely on statistical evidence showing the disparate impact of the Order, which is not the case for the reasons shown above, they can readily demonstrate that the Order intentionally treats Black New Yorkers less well than their White counterparts since White New Yorkers are documented to have far more access to and participation in the vaccination scheme that the Mayor is setting up as the entry ticket for access to public accommodation.

52. The City Law imposes no obligation on Plaintiff-Petitioners to show that Defendant-Respondents bear any animus whatsoever towards Black New Yorkers, only that they intentionally

treated them less well than Whites. *Melman, supra* ("the law has long been clear that intentional discrimination simply involves intentionally treating one person less well than another because of protected class status; it does not require evidence of animus"). To the contrary, New York courts emphatically hold that the purpose of the City Law is to "prevent not only intentional discrimination . . . but also—indeed, primarily—discrimination that results from "benign neglect'" and that "the law requires that a government entity do more than provide a program on equal terms . . . ; [it requires] 'affirmative accommodations to ensure that facially neutral rules do not in practice discriminate against individuals with disabilities.'" *Brooklyn Center for Independence of the Disabled, supra,* 980 F.Supp.2d at 640. While that court was discussing issues faced by those with disabilities, its logic is especially applicable here. The defendants have hinged access to public accommodation on vaccination, but they have totally failed to take any affirmative action to assure that vaccination is received equally by all New Yorkers, and failing that have not taken any affirmative action to provide alternate means of public accommodation for those not vaccinated.

53. It is anticipated that the City will argue, in response to Plaintiff-Petitioners' prima face case of disparate treatment discrimination, that the need to vaccinate is a valid non-discriminatory reason for any disparate treatment reflected in the Order. The City's position is not supported by the facts, as shown above, either as to the necessity of vaccination in public places or as to the lack of alternatives. But even if the City's position is established, Plaintiff-Petitioners can rebut it by showing evidence of intentional discrimination. Under well-established New York law, the standard for assessing the Plaintiff-Petitioners' evidence is very flexible and liberal, and readily met here. As the Court held in *Bennett v. Health Mgmt. Sys., Inc*., 92 A.D.3d 29, 40-41 (1st Dep't 2011): "a plaintiff's response to a defendant's showing of nondiscriminatory reasons for its actions

can take a variety of forms. In some cases, the plaintiff may present evidence of pretext and independent evidence of the existence of an improper discriminatory motive. In other cases, the plaintiff may leave unchallenged one or more of the defendant's proffered reasons for its actions, and may instead seek only to show that discrimination was just one of the motivations for the conduct. In addition, evidence of an unlawful motive in the mixed motive context need not be direct, but can be circumstantial—as with proof of any other fact."

54. It is simply not possible that those who govern New York City, whose population of Blacks is more than twice the size of any other city in the nation and equals that of the next three largest urban populations combined, could profess to be unaware of the history of medical abuse Blacks have endured in the United States, abuse which dates back well over a century. The City's leaders knew when they enacted the Order that it would mean excluding vast numbers of Blacks from the City's public life indefinitely. They knew that the City had managed the COVID-19 crisis for more than a year without widespread vaccination. They heard the State Governor bragging to the nation and the world about his success in doing so. Knowing all this, without even trying any alternative, they proceeded forward to impose the Order and violate the City Law. A permanent injunction is required to reverse this course of discriminatory conduct.

WHEREFORE, Plaintiff-Petitioners demand judgment against Defendant-Respondents as follows:

With respect as to the FIRST CAUSE OF ACTION, a permanent injunction from the New York City Emergency Executive Order #225.

With respect as to the SECOND CAUSE OF ACTION, a permanent injunction from the New York City Emergency Executive Order #225.

With respect as to the THIRD CAUSE OF ACTION, a permanent injunction from the New York City Emergency Executive Order #225.

DATED this 1st day of September, 2021.

Attorneys for Plaintiff-Petitioners

By: _____

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VERIFICATION

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

Omar Clarke, a Plaintiff-Petitioner in this action, swears that he has read the foregoing Article 78 Petition, dated September 7st, 2021, and knows the content thereof, and that it is true to the best of his knowledge, based upon the information they possess and their first-hand knowledge of the circumstances.

Omar Clarke

IN WITNESS WHEREOF I have hereunto set my hand and official seal.

Notary Public/Commissioner of Oath

DESMOND CLARKE
Notary Public, State of New York
No. 01CL4837205
Qualified in Queens County
Commission Expires September

My Commission Expires_____

VERIFICATION

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

Onika Williams, a Plaintiff-Petitioner in this action, swears that he has read the foregoing Article 78 Petition, dated September 1, 2021, and knows the content thereof, and that it is true to the best of her knowledge, based upon the information they possess and their first-hand knowledge of the circumstances.

SIGNATURE: _____
Onika Williams

DATE 9/1/2021

IN WITNESS WHEREOF I have hereunto set my hand and official seal.

_____
Notary Public/Commissioner of Oath

My Commission Expires MARCH 12 2023

ETHAN A SMYTHE
Notary Public, State of New York
No. 01SM6056059
(SEAL) Qualified in Kings County
Commission Expires March 12, 2023