

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of AYEISHA
WOODS, TYRONE MCCALLA, and :
MICHAEL WILLIAMS, :

Petitioners, :

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

VERIFIED PETITION

- against - : Index No.

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

Respondents.

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Petitioners, AYEISHA WOODS, TYRONE MCCALLA, and MICHAEL WILLIAMS, by
their undersigned counsel, hereby allege:

PRELIMINARY STATEMENT

1. It is well-known and undisputed that people working and living together are at
heightened risk for infection by COVID-19, the pandemic killing and profoundly harming
hundreds of thousands of people in the United States and millions around the world.

2. Since the start of the pandemic, American prisons and jails have been uniquely
vulnerable to outbreaks of COVID-19. Upon entering a facility, the virus can sweep rapidly and
mercilessly through its population. In the last year, hundreds of thousands of people in jails and
prisons have been infected, and many thousands have died as the virus sweeps rapidly through
these congregate residential settings. And that is just the reported cases. Further, with the daily flow
of people into and out of these facilities, jails and prisons have not only become hotbeds themselves, but

have fueled the spread of COVID-19 through the larger community.

3. We now have COVID-19 vaccines that will help prevent serious illness and death. Yet, despite the fact that Petitioners face an extraordinary risk of contracting COVID-19 because they live in congregate residential settings, a risk Respondents have recognized and reportedly considered in developing their phased plan for vaccine distribution, Respondents have omitted incarcerated adults as a priority group from the current Phase 1b of the plan, which includes other congregate residential facilities.

4. Respondents have authorized vaccine access for populations living in every other congregate residential setting—juvenile correctional facilities, homeless shelters, nursing homes and supportive housing—without regard to age or medical condition.

5. Respondents’ decision to omit incarcerated adults from the current Phase 1b of their plan for vaccine distribution contravenes medical and public health expertise, on which they purport to rely, including specific guidance from the Centers for Disease Control and Prevention (“CDC”).

6. Respondents’ decision to omit incarcerated people as a group to be prioritized undermines both the individual and the public health benefits of vaccination. It also contradicts their stated goal of ensuring equitable access to the vaccine regardless of factors such as wealth or social status. And it wholly contradicts Respondents’ public recognition that vaccine access for Black and brown communities must be ensured, as those communities have suffered disproportionate rates of infection and death from the virus. Incarcerated people like Petitioners are, overwhelmingly, low-income, and mostly from Black and Latinx communities: over 70% of the people housed in New York State Department of Corrections and Community Supervision (“DOCCS”) prisons are identified as Black or Latino.¹

¹ *People Incarcerated in New York: population profile and recent trends*, Correctional Association of New York at 1,

7. By omitting incarcerated people as a group from current vaccine prioritization, Respondents have irrationally drawn a distinction between incarcerated people and people in other congregate residential settings, as well as between incarcerated people and workers in correctional facilities—on no scientific basis. In short, Respondents have deprioritized the lives of people living in the dangerous conditions of New York’s jails and prisons in defiance of both public health considerations and the equity guidance upon which Respondents also purport to rely.

8. Petitioners bring this Article 78 Petition to direct the Respondents to immediately authorize incarcerated people, regardless of age or comorbidity, for vaccine eligibility by including them, as a group, within the current COVID-19 vaccine prioritization Phase 1b, so that they may be offered the opportunity for vaccination and associated protection from serious illness and death that can result from contracting COVID-19.

PARTIES

9. Petitioner Ayeisha Woods is a 26-year-old woman who is currently incarcerated in the custody of the New York State Department of Corrections and Community Supervision at Bedford Hills Correctional Facility who has not been offered the COVID-19 vaccination and who does not believe she is currently eligible to receive the vaccine.

10. Petitioner Tyrone McCalla is a 33-year-old man who is currently incarcerated in the custody of the New York State Department of Corrections and Community Supervision at Wende Correctional Facility who has not been offered the COVID-19 vaccination and who does not believe he is currently eligible to receive the vaccine.

11. Petitioner Michael Williams is a 35-year-old man who is currently incarcerated in the custody of the New York State Department of Corrections and Community Supervision at Mid-

6, (2019) available at

<https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c5ae47a971a184de7158ad9/1549460603410/CA+NY+Issue+Brief+-+Population+Profile.pdf> (last accessed March 17, 2021).

State Correctional Facility who has not been offered the COVID-19 vaccination and who does not believe he is currently eligible to receive the vaccine.

12. Respondent Howard A. Zucker is the Commissioner of Health of the State of New York (“Commissioner of Health”) and oversees the functions of the New York State Department of Health (“DOH”), a state governmental agency established by the Legislature and charged with promoting public health. *See* N.Y. Pub. Health Law §§ 200, 201, 206. The Commissioner of Health is responsible for establishing immunization programs “necessary to prevent or minimize the spread of disease and to protect the public health.” *Id.* § 206(l).

13. Andrew M. Cuomo is the Governor of the State of New York and in that capacity is responsible for overseeing and directing governmental agencies including the DOH, and for issuing emergency orders and directives in response to the COVID-19 pandemic.

14. Respondents Zucker and Cuomo are responsible for establishing the COVID-19 vaccine prioritization plans, including the timing of when certain categories of individuals within each phase are authorized to receive vaccinations.

VENUE

15. Venue is proper pursuant to Sections 503(a), 506(b) and 7804(b) of the Civil Practice Laws and Rules as Albany County holds jurisdiction over the principal offices of the New York State Department of Health and the Office of the Governor of New York State, where Respondents made the determination at issue, and all material events took place.

STATEMENT OF FACTS

16. The basis for this Article 78 Petition is the Respondents’ omission of incarcerated people as a group in the current Phase 1b of New York State’s Phased Prioritization Plan for the COVID-19 vaccination.

Widespread Vaccines Are Necessary to Avert Further Illness and Death from COVID-19

17. SARS-CoV-2, first identified in December 2019, is a highly infectious respiratory virus that causes the illness COVID-19. (Affidavit of Arthur Reingold, M.D. (“Reingold Aff.”) ¶¶ 11-12). Those infected with COVID-19 can experience a range of respiratory and other symptoms that can escalate into serious, life-threatening complications, sometimes leading to death. (Affirmation of Victoria Adewunmi, M.D. and Mark Fenig, M.D. (“Adewunmi and Fenig Aff.”) ¶ 20; Reingold Aff. ¶ 12). Some people with COVID-19, even those who initially present with mild symptoms, suffer long-term and in some cases serious consequences of infection (including lung function abnormalities, acute kidney injury and neurological impairments, as well as ongoing fatigue and breathlessness) long after the initial onset of the illness. (Adewunmi and Fenig Aff. ¶¶ 20-21; Reingold Aff. ¶ 13). While anyone can become infected with the virus, older individuals and those with certain underlying conditions are at greater risk of severe illness or death; Black and Latino individuals who contract COVID-19 also have higher rates of hospitalization and death (Reingold Aff. ¶ 14; *see also* Adewunmi and Fenig Aff. ¶ 41). New York State has experienced 1.6 million cases and over 47,000 deaths from the virus thus far, and the virus continues to pose a significant threat to all those within the state—as well as the rest of the world—even with falling rates. (Adewunmi and Fenig Aff. ¶ 17; Reingold Aff. ¶ 11). This is especially true for those at increased risk of infection, such as those in high-risk congregate residential settings like prisons, and the increased risk of severe illness or death should infection occur. (Adewunmi and Fenig Aff. ¶ 17).

18. The virus will continue to pose a significant risk until we achieve widespread use of COVID-19 vaccines and a sufficient percentage of the population is as a result immune.

(Adewunmi and Fenig Aff. ¶ 17; Reingold Aff. ¶¶ 26, 32). Additionally, the recent emergence of

more transmissible variants that may have higher incidence of poor health outcomes and may evade immune responses underscores the need for widespread vaccination, particularly among those who are more likely to become infected and spread the virus. Preventing transmission is key to preventing opportunities for the virus to mutate and create variants. (Adewunmi and Fenig Aff. ¶¶ 18-19; Reingold Aff. ¶¶ 32-37). Accordingly, “targeting vaccines to high-transmission settings like prisons is particularly important from a public health and epidemiological perspective as a preventative measure against the ongoing threat of emerging variants.” (Reingold Aff. ¶ 37).

**Respondents Created Priority Categories for COVID-19 Vaccine Eligibility
Citing Clinical Expertise, Public Health Considerations, and Equity Principles,
Yet Excluded Incarcerated People as A Group**

19. When New York State announced a statewide COVID-19 vaccine distribution and implementation program five months ago,² Respondent Governor Cuomo, who coordinated with Respondent Commissioner Zucker of the New York State Department of Health in developing the plan,³ stated that the vaccination program “prioritizes vaccination recipients based on science, clinical expertise, and public health.”⁴ The New York State COVID-19 Vaccine Program (“the Vaccine Program” or “the Program”), as announced and as documented in an October 2020 published report, listed “[e]quitable and clinically driven distribution” among its “guiding principles to be adhered to through the vaccine process” and promised to “prioritize access to persons at higher risk of exposure, illness and/or poor outcome, regardless of other unrelated factors, such as wealth or social status.”⁵

² Governor Cuomo Announces Draft New York State COVID-19 Vaccination Administration Program (October 18, 2020), *available at* <https://www.governor.ny.gov/news/governor-cuomo-announces-draft-new-york-state-covid-19-vaccination-administration-program>.

³ *Id.*; Sydney Pereira, *Cuomo Details COVID Vaccination Plan to Ensure Safety and Equitable Distribution—But Details Remain Sparse*, Gothamist (Oct. 19, 2020) <https://gothamist.com/news/cuomo-details-covid-vaccination-plan-to-ensure-safety-and-equitable-distributionbut-details-remain-sparse>.

⁴ Governor Cuomo Announces Draft New York State Covid-19 Vaccination Administration Program, *supra* n. 2.

⁵ *Id.*; New York State Department of Health, New York State’s COVID-19 Vaccination Program (“Vaccination Program Book”) at 10; *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_COVID_Vaccination_Program_Book_10.16.20_FINAL.pdf (last accessed March 17, 2021).

20. The Program also stated health equity considerations in developing its phased priority groups. It stated that priority decisions would be mindful of the disparate impact of COVID-19 on communities of color.⁶ Respondent Cuomo echoed these concerns, acknowledging that the COVID-19 infection rate and mortality rate were higher in Black and brown populations and pledging to prioritize them for vaccine access.⁷

21. Incarcerated persons were acknowledged as a high-risk group at the time of the Program's inception. In the Program's initial five-phase plan, Phase 1 included health care workers and those working in long term care facilities.⁸ Phase 2 included first responders, teachers, long-term care facility patients and "those living in other congregate settings."⁹ The published Program report named in its Appendix of Priority Group Justifications "People who are incarcerated/detained in correctional facilities" as a group "at risk for COVID-19 illness or acquiring or transmitting COVID-19"¹⁰

22. Though there is no definition of congregate settings in the Vaccination Program, correctional facilities share the relevant characteristics with other facilities that were explicitly added to the currently eligible phases (the "Prioritization Plan"), as documented and updated on the New York State website, when vaccinations began.¹¹

23. On December 14, 2020, Respondents began the phased distribution of COVID-19 vaccines to people in Phase 1, including residents and staff at nursing homes and "all long-term and

⁶ Vaccination Program Book. at 27, 31.

⁷ Press Call with Governor Andrew M. Cuomo, et al., *Federal COVID Vaccine Plan Fails to Adequately Serve Communities of Color Who Were Disproportionately Impacted by Pandemic* (Nov. 1, 2020), <https://www.governor.ny.gov/news/governor-cuomo-ag-james-national-urban-leagues-morial-naacp-s-johnson-federal-covid-vaccine> (last accessed March 15, 2021).

⁸ Vaccination Program Book, *supra* n. 5, at 29.

⁹ *Id.*

¹⁰ *Id.* at 79.

¹¹ The Vaccination Program Book published in October 2020, *supra* n. 5, was not updated as the prioritization groups changed. Instead, the current Prioritization Plan is reflected on the COVID-19 portion of the New York State website under "Phased Distribution of the Vaccine": <https://covid19vaccine.health.ny.gov/phased-distribution-vaccine> (last accessed March 17, 2021).

congregate care residents and staff.”¹² By December 28, 2020, the categories had been expanded to include all staff and residents at residential congregate settings overseen or funded by the Office for People with Developmental Disabilities (“OPWDD”), Office of Mental Health (“OMH”), and the Office of Addiction Services and Supports (“OASAS”).¹³

24. Most people residing in OPWDD, OMH, and OASAS residential centers live there full time, and share living spaces therein.¹⁴ For example, of the various supportive housing models overseen by OMH, almost all of them are described as congregate facilities with shared sleeping areas, shared bathrooms and, less frequently, shared kitchens.¹⁵

25. When Phase 1b began on January 11, 2021, residents and staff at homeless shelters became eligible; this included all “individuals living in a homeless shelter where sleeping, bathing or eating accommodations must be shared with individuals and families who are not part of the same household.”¹⁶

26. Earlier, on January 5, 2021, Respondent Commissioner Zucker and Larry Schwartz, head of New York State’s vaccination planning, had told members of the Democratic conference in the state legislature that incarcerated individuals would be eligible for the COVID-19 vaccine along

¹² See archived webpage from December 16, 2020 at <https://web.archive.org/web/20201216210331/https://covid19vaccine.health.ny.gov/phased-distribution-vaccine#phase-1a---phase-1b> (last accessed March 17, 2021).

¹³ See archived webpage from December 31, 2020 at <https://web.archive.org/web/20201231021837/https://covid19vaccine.health.ny.gov/phased-distribution-vaccine> (last accessed March 17, 2021).

¹⁴ See Supportive Housing Options NYC, a guide to supportive housing models for individuals living with mental illness (“Supportive Housing Options”) (2016); available at <https://www.cucs.org/wp-content/uploads/2016/11/Supportive-Housing-Options-NYC-Guide-2016.pdf> (last accessed March 17, 2021); Housing, New York State Office for People with Developmental Disabilities, <https://opwdd.ny.gov/types-services/housing> (last accessed March 17, 2021); Licensed Program Type Definitions, New York State Office of Mental Health, <https://omh.ny.gov/omhweb/licensing/definitions.htm> (last accessed March 17, 2021); Treatment, Office of Addiction Services & Support, <https://oasas.ny.gov/treatment> (last accessed March 17, 2021).

¹⁵ Supportive Housing Options, *supra* n. 14.

¹⁶ Governor Cuomo Announces Additional New Yorkers, Individuals 75 and Older Can Begin Scheduling with Providers COVID-19 Vaccination Appointments (January 11, 2021), available at <https://on.ny.gov/30TD6jS> (last accessed March 17, 2021).

with correctional officers.¹⁷ This did not happen: instead, the Prioritization Plan omitted individuals in DOCCS custody from Phase 1b,¹⁸ which is limited to individuals *working* in DOCCS facilities.¹⁹

27. A Phase 1b subcategory entitled “Corrections” was added to the Prioritization Plan, which listed the following groups as eligible beginning January 11, 2021:

- State DOCCS Personnel, including correction and parole officers;
- Local Correctional Facilities, including correction officers;
- Local Probation Departments, including probation officers;
- State Juvenile Detention and Rehabilitation Facilities; and
- Local Juvenile Detention and Rehabilitation Facilities²⁰

28. Phases 1a and 1b have been expanded to include additional groups several times over the past two months. Respondents expanded vaccine access on January 12 to people over age 65²¹, and again on February 15, to all people with specific comorbidities.²² The age requirement was reduced to 60 on March 10, 2021.²³

29. Most notably, in February 2021 Respondents provided guidance to agencies operating OCFS residential programs that teenagers 16 and older in juvenile detention centers,

¹⁷ Morgan McKay, *Confusion Over When New York Inmates Will be Vaccinated*, Spectrum News NY1 (Jan. 6, 2021), available at <https://www.ny1.com/nyc/all-boroughs/ny-state-of-politics/2021/01/06/confusion-over-when-new-york-inmates-will-be-vaccinated> (last accessed March 17, 2021) (reporting Zucker and Schwartz told lawmakers incarcerated people would be next to receive the COVID-19 vaccine along with correctional officer as part of the state’s 1b phased plan); *See also* Troy Closson, *The High Risk Group Left Out of New York’s Vaccine Rollout*, N.Y. TIMES (Jan. 26, 2021), available at: <https://www.nytimes.com/2021/01/26/nyregion/new-york-vaccine-prisons.html> (last accessed March 17, 2021).

¹⁸ *See* Closson, *The High Risk Group Left Out of New York’s Vaccine Rollout*, *supra* n. 17 (spokesperson for Governor Cuomo indicated “that a plan for incarcerated people was still being developed”); *see also* Nicole Javorsky, *Confusion Persists Around State’s Vaccine Plans for Incarcerated New Yorkers*, City Limits (Jan. 7, 2021), available at <https://citylimits.org/2021/01/07/confusion-persists-around-states-vaccine-plans-for-incarcerated-new-yorkers/> (reporting the director of public information for DOH declined to confirm what the state’s plans are for vaccinating incarcerated persons) (last accessed March 17, 2021).

¹⁹ Prioritization Plan, *supra* n.11, reflecting groups currently eligible for vaccination, updated frequently. *See* archived webpage from January 11, 2021 at:

<https://web.archive.org/web/20210111194004/https://covid19vaccine.health.ny.gov/phased-distribution-vaccine>.

²⁰ *Id.*

²¹ Will Feuer, *New York state will open Covid vaccinations to everyone 65 and over, Gov. Cuomo says*, CNBC (Jan 12, 2021), available at: <https://cnb.cx/3vD6iK7> (last accessed March 17, 2021).

²² *Covid-19 New York to Expand Vaccine Access to People with Chronic Conditions*, New York Times (Feb. 22, 2021), <https://www.nytimes.com/live/2021/02/05/world/covid-19-coronavirus> (last accessed March 17, 2021).

²³ Governor Cuomo Announces New Yorkers 60 Years of Age and Older and Additional Public Facing Essential Workers will be Eligible to Receive Covid-19 Vaccine, (March 9, 2021), available at <https://on.ny.gov/2OYhqjM> (last visited March 17, 2021).

homeless shelters, and foster care facilities, were eligible for vaccination under Phase 1b of the Prioritization Plan, as “residents in congregate, residential facilities.”²⁴

30. Despite public pressure from advocates, elected officials, and medical professionals, including local medical providers working in New York correctional facilities, Respondents have not authorized vaccines for all incarcerated individuals throughout the state.²⁵ Spokespeople from Respondent Cuomo’s office have indicated that there is not currently any plan for vaccinating incarcerated adults.²⁶

31. With the inclusion of residents of congregate facilities for youth, residents of all government operated, licensed, or regulated facilities designated by DOH as congregate facilities are included in Phases 1a and 1b, *except* for persons incarcerated in correctional facilities.²⁷

32. Doctors and medical staff who treat incarcerated people in New York have implored Respondents to reverse this course and allow them to provide the vaccine to all incarcerated people. As Dr. Patricia Yang, Senior Vice President for Correctional Health Services (“CHS”), the provider of healthcare in the New York City jails, stated at the March 9, 2021 Board of Correction public meeting: “We think vaccination is the game changer and critical, and since December of last year CHS has been advocating for state approval to offer vaccination to everyone in custody, again

²⁴ See Marlene Lenthag, *New York teens 16 and older who are homeless, jailed or in foster care, now eligible for COVID-19 vaccine*, ABC News (Feb. 24, 2021), available at <https://abcnews.go.com/Health/york-teens-16-older-homeless-jailed-foster-care/story?id=76084995> (last accessed March 17, 2021); Guidance for COVID-19 Vaccine Access for Persons Age 16 and Over Residing in Programs or Facilities Licensed or Certified by the New York State Office of Children and Family Services (OCFS), Memo from Office of Children and Family Services, dated February 22, 2021, to provider agencies operating OCFS licensed or certified residential programs, available at <https://ocfs.ny.gov/main/news/2021/COVID-19-2021Feb22-Guidance-Vaccine-Access.pdf>.

²⁵ See Closson, *The High-Risk Group Left Out of New York’s Vaccine Rollout*, *supra* n. 17; see also Nicole Javorsky, *Confusion Persists Around State’s Vaccine Plans for Incarcerated New Yorkers*, *supra* n. 17.

²⁶ See Closson, *The High-Risk Group Left Out of New York’s Vaccine Rollout*, *supra* n. 17; See also Melissa Jeltsen, *New York’s Incarcerated Need the Vaccine. Cuomo Isn’t Giving It to Them*, Huffington Post, available at https://www.huffpost.com/entry/cuomo-vaccine-plan-incarcerated-people-die_n_603ffdeac5b682971504fe6a (last accessed March 17, 2021).

²⁷ See New York State Department of Health, Health Advisory: All Residential Congregate Facilities (Oct. 23, 2020), available at https://forward.ny.gov/system/files/documents/2020/10/congregate_facility_visitation_in_zones_10_23_2020.pdf (last accessed March 17, 2021).

not related to their health or age, but due to the characteristics and the nature of the environment in a congregate carceral setting. We are remaining hopeful that the state will approve that ... We have not been successful yet.”²⁸

33. Including DOCCS staff in Phase 1b but not incarcerated people is inconsistent with the CDC’s recommendation that the states “vaccinate staff and incarcerated/detained persons of correctional or detention facilities **at the same time** because of their shared increased risk of disease (emphasis in original).”²⁹ Other medical and public health experts, including the National Academy of Science, Engineering and Medicine (“NASEM”) and the American Medical Association, have issued reports and recommendations that designate correctional staff and incarcerated persons as occupying the same level of vaccine priority based on their shared risk of acquiring infection and of suffering severe morbidity and mortality, as well as the risk of transmitting infection to others within the congregate setting and to the broader community.³⁰

34. Not including incarcerated persons as a group designated for priority vaccine access is also inconsistent with Respondents’ reported equity considerations. Roughly 48% of the DOCCS population currently in custody are Black and 24% of the population are Hispanic.³¹ Early data

²⁸ March 9, 2021 Public Meeting, New York City Board of Correction, available at <https://www1.nyc.gov/site/boc/meetings/january-12-2021.page> (relevant segment 3:23:08-3:23:50).

²⁹ Vaccine FAQs in Correctional and Detention Centers, Centers for Disease Control and Prevention (Jan. 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/vaccine-faqs.html> (last accessed March 17, 2021) (supporting this recommendation by explaining that “[o]utbreaks in correctional and detention facilities are often difficult to control given the inability to physically distance, limited space for isolation or quarantine, and limited testing and personal protective equipment resources. Incarcerated or detained persons living in correctional and detention facilities may also be older or have high-risk medical conditions that place them at higher risk of experiencing severe COVID-19. COVID-19 outbreaks in correctional and detention facilities may also lead to community transmission.”).

³⁰ Helene Gayle et al., *Framework for Equitable Allocation of COVID-19 Vaccine*, National Academy of Sciences, Engineering and Medicine (2020), available at: <https://www.nap.edu/catalog/25917/framework-for-equitable-allocation-of-covid-19-vaccine>; Preliminary Report of Am. Med. Ass’n House of Delegates Reference Comm. D Meeting (Nov. 2020), 12–13, available at: <https://www.ama-assn.org/system/files/2020-11/nov20-ref-com-d-annotated.pdf> (last accessed March 17, 2020).

³¹ *People Incarcerated in New York: population profile and recent trends*, Correctional Association of New York (2019), available at <https://static1.squarespace.com/static/5b2c07e2a9e02851fb387477/t/5c5ae47a971a184de7158ad9/1549460603410/CA-NY+Issue+Brief+-+Population+Profile.pdf> (last accessed March 17, 2021).

reports about demographics of vaccine distribution make clear that Black and Latinx communities are already underserved by the current vaccine effort, in contradiction to Respondents' professed guiding principle that vaccine distribution should focus on ensuring access to the communities hardest-hit by COVID-19. Though New York State's population is estimated by the U.S. Census Bureau to be 17.6% Black and 19.3% Hispanic,³² the population of New York State adults who have received at least one dose of the vaccine is 8.7% Black and 10% Hispanic or Latino as of March 2, 2021.³³ The failure to authorize people in custody to receive vaccines stands in direct opposition to Respondents' stated intention to combat the racially disparate impact of this pandemic.

Incarcerated Individuals Should be Prioritized for COVID-19 Vaccination Because Prisons, including DOCCS Facilities, are High-Risk Congregate Residential Settings

35. The immutable characteristics of congregate residential settings, including the physical realities of shared living spaces, render these settings at high risk of COVID-19 transmission. (Adewunmi and Fenig Aff. ¶¶ 22-28; Reingold Aff. ¶ 23). Transmission of SARS-CoV-2 occurs through droplet transmission (that is, from an infected person to anyone in their vicinity when the infected person talks, breathes, coughs, or otherwise expels droplets), as well as through aerosol transmission (where aerosolized virus droplets can remain airborne for extended periods and even reach distances of 7 to 16 feet) (Reingold Aff. ¶¶ 17-18). The virus is also believed to be spread through the touching of contaminated surfaces, though this form of transmission is thought to be less common. (Reingold Aff. ¶ 19). As a result, the virus can spread rapidly in enclosed spaces, during prolonged exposure to respiratory particles, and in settings with

³² United States Census Bureau QuickFacts New York, Population estimates as of July 1, 2019, available at: <https://www.census.gov/quickfacts/NY> (last accessed March 17, 2021).

³³ Governor Cuomo Announces Over 15 Percent of New Yorkers Have Received at Least One Dose of the COVID-19 Vaccine (March 2, 2021), available at: <https://www.governor.ny.gov/news/governor-cuomo-announces-over-15-percent-new-yorkers-have-received-least-one-dose-covid-19> (last accessed March 17, 2021).

inadequate ventilation or air handling.³⁴ (Adewunmi and Fenig Aff. ¶¶ 23-24, 35; Reingold Aff. ¶ 22).

36. Congregate residential settings increase the likelihood of transmission because people in these settings share common spaces to eat, bathe, socialize, and sleep. (Adewunmi and Fenig Aff. ¶¶ 24, 29; Reingold Aff. ¶ 23; Allegations of Petitioner Woods (“Woods”), *infra* ¶¶ 53-57; Allegations of Petitioner McCalla (“McCalla”), *infra* ¶¶ 61-64; Allegations of Petitioner Williams (“Williams”), *infra* ¶¶ 68, 70-74). Staff enter and exit the facilities every day and interact with residents, carrying a risk of exposure and transmission. (Adewunmi and Fenig Aff. ¶ 24; Woods, *infra* ¶ 58; McCalla, *infra* ¶ 62; Williams, *infra* ¶¶ 69-72).

37. The New York State Department of Health defines correctional facilities as congregate facilities for purposes of COVID-19.³⁵ Previous DOH guidance for congregate residential facilities regarding COVID-19 risk includes New York State correctional facilities along with other facilities that are already included in Phases 1a and 1b, specifically nursing homes, juvenile justice facilities, and facilities operated by OMH, OPWDD, and OASAS.³⁶

38. There is wide agreement among public health authorities that correctional facilities are congregate settings with a particularly heightened risk for COVID-19 transmission. As recognized by the CDC, incarcerated people are at a unique risk for contracting and spreading COVID-19 because of the features of correctional settings, including “crowded dormitories, shared lavatories, limited medical and isolation resources, daily entry and exit of staff members and visitors, continual introduction of newly incarcerated or detained persons, and transport of

³⁴ *Scientific Brief: SARS-CoV-2 and Potential Airborne Transmission*, Centers for Disease Control and Prevention (Oct. 5, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/more/scientific-brief-sars-cov-2.html> (last accessed March 17, 2021).

³⁵ New York State Department of Health, Health Advisory: All Residential Congregate Facilities (Oct. 23, 2020), available at https://forward.ny.gov/system/files/documents/2020/10/congregate_facility_visitation_in_zones_10_23_2020.pdf (last accessed March 17, 2021).

³⁶ *Id.*

incarcerated or detained persons in multi-person vehicles for court-related, medical, or security reasons.”³⁷ (See also Adewunmi and Fenig Aff. ¶ 29; Reingold Aff. ¶¶ 23, 28). Other experts in the field agree that these risk factors are both highly present and of grave concern.³⁸ Dr. Homer Venters, an epidemiologist and the former Chief Medical Officer and Assistant Vice President of Correctional Health Services, describes the design and operation of jails as “basically a system designed to spread communicable disease.”³⁹

39. DOCCS correctional facilities share the trademark characteristics of congregate residential settings: shared sleeping spaces, whether in a dorm or a cell, shared eating spaces, and shared recreational spaces; those incarcerated in DOCCS facilities frequently also share toilets, sinks, and showers. (Woods, *infra* ¶¶ 53-57; McCalla, *infra* ¶¶ 61-64; Williams, *infra* ¶¶ 68, 70-74). Many of those incarcerated in DOCCS facilities live in dormitories and some facilities also have double-cells (i.e. two people in one cell) and multiple occupancy rooms;⁴⁰ even those in single

³⁷ Megan Wallace, et al., *COVID-19 in Correctional and Detention Facilities – United States, February-April 2020*, Centers for Disease Control and Prevention: Morbidity and Mortality Early Report (May 15, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm> (last accessed March 17, 2020).

³⁸ See Letter from Hanna Ehrlich, et al., *Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States* (Mar. 2, 2020), available at https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf (last accessed March 17, 2021).

³⁹ Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, The New Yorker (Mar. 14, 2020), available at <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus> (last accessed March 17, 2021). See also Crystal Watson, et al., *COVID-19 and the US Criminal Justice System: Evidence for Public Health Measures to Reduce Risk*, Johns Hopkins Center for Health Security (Oct. 2020), https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/20201015-covid-19-criminal-justice-system.pdf (last accessed March 17, 2021) (the dynamic nature of prisons correctional settings makes them a public health risk because “[i]ncarcerated individuals can transmit the SARS-CoV-2 virus through interaction with other incarcerated people in the facility or through transfers.”).

⁴⁰ See, e.g., Albion Correctional Facility, DOCCS Directive #0043, available at <https://doccs.ny.gov/system/files/documents/2020/11/0043.pdf> (housing at Albion Correctional Facility includes “multiple occupancy rooms” and dormitories); Altona Correctional Facility, DOCCS Directive #0042, available at <https://doccs.ny.gov/system/files/documents/2020/11/0042.pdf> (housing includes dormitories); Bare Hill Correctional Facility, DOCCS Directive #0089, available at <https://doccs.ny.gov/system/files/documents/2020/11/0089.pdf> (housing includes dormitories); Collins Correctional Facility, DOCCS Directive #0061, available at <https://doccs.ny.gov/system/files/documents/2021/01/0061.pdf> (housing includes dormitories and multiple occupancy rooms); Eastern Correctional Facility, DOCCS Directive #0049, available at <https://doccs.ny.gov/system/files/documents/2020/11/0049.pdf> (housing includes dormitories); Gouverneur Correctional Facility, DOCCS Directive #0022, available at <https://doccs.ny.gov/system/files/documents/2020/11/0022.pdf> (housing includes dormitories and double cells); Greene

cells sleep within close proximity of their neighbors. (McCalla, *infra* ¶ 63; Williams, *infra* ¶ 74). Common areas and shared facilities include, but are not limited to, housing unit day rooms for communal, seated gathering; shared telephones; shared internet kiosks; and the mess hall where they dine. (Woods, *infra* ¶¶ 54-57; McCalla, *infra* ¶¶ 61-62; Williams, *infra* ¶¶ 70-74). Communal eating, which necessitates removal of a mask, is a particularly perilous activity for airborne transmission, as there is no barrier to mitigate the viral spread. (Adewunmi and Fenig Aff. ¶ 34). Incarcerated persons must frequently line up in close proximity to one another, sometimes in holding cells, while waiting for necessities like food and medicine, or while being escorted from one area of the prison to another. (Woods, *infra* ¶¶ 54, 56-58; Williams, *infra* ¶¶ 72-73). Individuals also engage in program or job placements that place them in close proximity with others. (Woods, *infra* ¶¶ 54, 56-58; Williams, *infra* ¶¶ 72-73).

40. People in carceral settings, including those in DOCCS facilities, have limited control over their own movements and no control over the movements of others with whom they are required to congregate on a daily basis. They are forced to rely on the facility to provide every basic human need and are subject to operational or security measures as the facility provides them. (Adewunmi and Fenig Aff. ¶ 35; Reingold Aff. ¶ 23). Incarcerated individuals also have no authority to require others in their housing units to wear masks or social distance, nor can they remove themselves at will from the unsafe congregate residential setting. (Adewunmi and Fenig Aff. ¶ 32; Reingold Aff. ¶ 23; Woods, *infra* ¶ 55). Further, they frequently do not have the agency or ability to sanitize their living quarters when they choose to, and often share cleaning supplies. (McCalla, *infra* ¶ 64; Williams, *infra* ¶ 75).

41. As with other congregate residential facilities, staff enter and exit correctional

Correctional Facility, DOCCS Directive #0065, available at <https://doccs.ny.gov/system/files/documents/2020/11/0065.pdf> (housing includes dormitories and double cells).

facilities every day, carrying a risk of exposure and transmission to others. (Adewunmi and Fenig Aff. ¶ 25). This is certainly the case in DOCCS facilities. DOCCS employs more than 19,000 security staff members (Lieutenants, Sergeants, and Officers),⁴¹ in addition to civilian staff, including medical care providers, clerical staff, maintenance workers, and teachers and vocational instructors, among others.⁴² All of these people may contract the virus in the community or at a jail and then spread it throughout the facility. Indeed DOCCS reports that as of today 4,845 staff are confirmed to have been infected with the virus and eight individuals have died.⁴³ Individuals incarcerated within DOCCS facilities frequently come into contact with staff during use-of-force incidents, pat frisks, cell searches, program instruction, being escorted by staff throughout the facility, and during staff rounds, creating opportunities for virus transmission. (Adewunmi and Fenig Aff. ¶ 33; Woods, *infra* ¶ 58; McCalla, *infra* ¶ 62; Williams, *infra* ¶ 69, 72). Moreover, even brief interactions between prison staff and incarcerated individuals—where personal protective equipment is appropriately used—have been shown to be sufficient to result in transmission of the virus between them. (Adewunmi and Fenig Aff. ¶ 33).

42. This spread, however, does not only impact those inside the facilities. Correctional facilities are incubators for the virus, and those working in the facility spread it beyond the facilities' walls. Researchers have documented spikes in infection in communities near correctional facilities.⁴⁴ Indeed, DOCCS facilities create an increased risk of community transmission from the

⁴¹ New York State Corrections and Community Supervision Fact Sheet (March 1, 2020), *available at* <https://doccs.ny.gov/system/files/documents/2020/03/doccs-fact-sheet-march-2020.pdf> (last visited March 17, 2021).

⁴² Employment Opportunities, New York State Corrections and Community Supervision, <https://doccs.ny.gov/employment-opportunities> (last visited March 17, 2021).

⁴³ DOCCS COVID-19 Report, New York State Department of Corrections and Community Supervision, <https://doccs.ny.gov/doccs-covid-19-report> (last accessed March 17, 2021).

⁴⁴ See Eric Reinhart & Daniel L. Chen, *Incarceration And Its Disseminations: COVID-19 Pandemic Lessons From Chicago's Cook County Jail*, Health Affairs (2020), *available at* <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2020.00652> at 1416 (last accessed March 17, 2021) (finding that “as of April 19, 2020 COVID-19 case rates in Chicago were significantly higher in ZIP codes with higher rates of arrests and released jail inmates from the Cook County Jail” and that “jail-community cycling far exceeds, race, poverty, public transit use, and population density as a predictor of variance” in case rates across zip codes in Chicago

fact that staff move back and forth from the facility to the community on a daily basis. For example, a community outbreak in Greene County in the fall of 2020 was tied directly to a COVID-19 outbreak at nearby Greene Correctional Facility.⁴⁵ Additionally, outbreaks in correctional facilities put additional strain on hospitals in the community that may already be overwhelmed. (Reingold Aff. ¶ 30).

43. The experiences of New York State prisons have shown how vulnerable they are to virus transmission and how quickly the virus can spread once it enters prison walls.⁴⁶ Greene Correctional Facility had reported only two positive cases as of September 28, 2020, but approximately two weeks later, the facility reported over 90. Elmira Correctional Facility had only reported one positive case as of September 28, 2020 – one month later, the facility reported 590 reported cases. As of December 1, 2020, Woodbourne Correctional Facility had zero cases and zero deaths since the start of the pandemic. By December 22, 2020, three weeks later, the facility had reported 121 total positive cases; a month later, 125 *more* cases and two deaths. Auburn, Bare Hill, Coxsackie, Gouverneur, and Groveland Correctional Facilities also reported between zero to two total positive cases as of December 1, 2020, less than two months later, these facilities together reported a total of 744 positive cases and five deaths.

44. To date, the COVID-19 pandemic has caused at least 6,160 infections and at least 34 deaths among incarcerated people and jail staff within DOCCS, as numbers continue to rise.⁴⁷

and Illinois.); *see also* Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW: Stateline (Jul. 1, 2020), *available at* <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities> (last accessed March 17, 2021).

⁴⁵ Mikhaela Singleton, *Greene County, Columbia County leaders call out NYS prison system claiming mishandled cases*, ABCNews10 (Oct. 20, 2020), <https://www.news10.com/news/local-news/greene-county-columbia-county-leaders-call-out-nys-prison-system-claiming-mishandled-covid-cases/> (last accessed March 17, 2021)

⁴⁶ DOCCS publishes daily reports detailing, *inter alia*, the total number of positive cases at each of its facilities. *See* DOCCS, *supra* note 43.

⁴⁷ DOCCS COVID-19 Report, New York State Department of Corrections and Community Supervision, <https://doccs.ny.gov/doccs-covid-19-report> (last accessed March 17, 2021).

Sound Public Health Policy Dictates that All Incarcerated Individuals be Prioritized for Vaccination Alongside Those Living and Working in other Congregate Residential Settings

45. Leading public health experts agree that congregate residential settings pose an elevated risk of COVID-19 transmission, and that prisons and jails are particularly high-risk congregate residential settings. The CDC places incarcerated individuals alongside those living in homeless shelters and “[p]eople living and working in other congregate settings” as “critical populations” to prioritize for vaccinations because of their increased risk of acquiring or transmitting COVID-19.⁴⁸ NASEM similarly places “[p]eople who are incarcerated or detained and people who live in group homes and homeless shelters - congregate settings - ... along with the staff who work in such settings” in the same priority group, and stresses that individuals in these groups are particularly vulnerable as a result of “the difficulty of preventing spread in such settings should COVID-19 be introduced.”⁴⁹ A December 2020 white paper written by experts from several top universities also advised prioritizing incarcerated persons in an early phase of vaccine distribution because “they too reside in congregate settings and are subject to a risk of exposure to COVID-19 in jails and prisons that is extremely high, on par with that of other congregate living facilities that have been prioritized.”⁵⁰

46. Dr. Arthur L. Reingold, an epidemiologist and infectious disease expert, similarly affirms, “there is no public health basis on which to distinguish” individuals incarcerated in jails and prisons from those in “other congregate settings, like homeless shelters and juvenile justice facilities.” (Reingold Aff. ¶ 43). Dr. Reingold stresses that while there may be differences in the

⁴⁸ COVID-19 Vaccination Interim Playbook for Jurisdiction Operations Centers for Disease Control and Prevention at 15 (Oct. 29, 2020), https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf (last accessed Feb. 2, 2021).

⁴⁹ Dr. Helene Gayle, *A Framework for Equitable Allocation of Covid-19 Vaccine* at 110 (2020), available at <https://www.nap.edu/catalog/25917/framework-for-equitable-allocation-of-covid-19-vaccine#resources> (last accessed March 13, 2021).

⁵⁰ Wang, Emily, Lauren Brinkley-Rubenstein, PhD, Lisa Puglisi, MD; and Bruce Western, PhD, *Recommendations for Prioritization and Distribution of COVID-19 Vaccine in Prisons and Jails*, at 2, available at https://justicelab.columbia.edu/sites/default/files/content/COVID_Vaccine_White_Paper.pdf (March 17, 2021).

populations and in the operations of different congregate settings, these are immaterial to the question of vaccine prioritization: “[t]o the extent that there are characteristics of the prison or jail environment that are distinguishable from the other congregate residential settings already authorized for vaccine access, those characteristics do not provide a public health or epidemiological basis to exclude them from vaccine prioritization.” (*Id.* ¶ 40).

47. Moreover, making distinctions among subsets of a prison population—for instance prioritizing older persons or those with certain medical conditions—“is not a sound approach to accomplish the public health goals of widespread vaccination, and does not sufficiently ameliorate the clinical risk of COVID-19 to people detained and working in the setting.” (Adewunmi and Fenig Aff. ¶ 46; *see also* Reingold Aff. ¶ 45). Such an approach is also undercut by the fact that prisons are often not well positioned to identify those with comorbidities. (Reingold Aff. ¶¶ 16, 45). It is sound public health practice to expand vaccine access to all people within a particular setting to decrease the risk to everyone therein. (Adewunmi and Fenig Aff. ¶ 46; Reingold Aff. ¶¶ 44, 45).

48. For these reasons it also defies logic to prioritize staff of a congregate residential facility and not the individuals living there. As Drs. Adewunmi and Fenig affirm, “[e]xcluding people in custody from the current vaccine eligibility structure is irrational from a medical and public health perspective. New York State is prioritizing staff and residents of one risky setting but only prioritizing staff in another, despite a body of evidence that the latter setting is at least as dangerous as the former. The distinction is, at best, arbitrary. It certainly does not align with available COVID-19 literature and CDC guiding principles of phased vaccine distribution.” (Adewunmi and Fenig Aff. ¶ 47; *see also* Reingold Aff. ¶ 43).⁵¹

⁵¹ *See also* Arthur Caplan, Professor of Bioethics at New York University Grossman School of Medicine, who noted in an interview with *The Lancet* medical journal, his disagreement with vaccinating only correctional staff, stating that “if they’re in conditions that don’t allow them to isolate, they should get vaccinated. I see no reason to distinguish.”

49. To offer vaccination to staff, but not those in DOCCS custody also does not comport with Respondents' stated goal of prioritizing those who have traditionally been underserved and those who are at highest risk for infection and severe illness. COVID-19 infection brings with it higher risks for incarcerated individuals than for correction staff.⁵² According to NASEM, "People who are incarcerated tend to have multiple risk factors that can increase their risk of contracting SARS-CoV-2 infection and experiencing worse outcomes upon developing COVID-19."⁵³ The prevalence of chronic health conditions for individuals in prisons and jails is higher than in the general population.⁵⁴ (Adewunmi and Fenig Aff. ¶ 36, Reingold Aff. ¶ 15). Moreover, the correctional environment itself has a deleterious impact on the health of those in custody.⁵⁵ Because incarcerated people are more likely to have certain underlying health conditions or comorbidities they are more likely to experience a rapid and severe, often fatal, course of disease. (Adewunmi and Fenig Aff. ¶¶ 36-38; Reingold Aff. ¶¶ 15, 27, 39). Further, correctional facilities are frequently ill-positioned to identify these underlying conditions and comorbidities, including diabetes, hypertension, coronary artery disease, and asthma. (See Reingold Aff. ¶¶ 16, 45). This is *yet another* reason why it is insufficient to prioritize certain incarcerated groups with documented

Nayanah Silva, *Experts Call to Include Prisons in COVID-19 Vaccine Plans*, THE LANCET (Dec. 12, 2020), available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)32663-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)32663-5/fulltext) (last accessed Feb. 2, 2020).

⁵² Emily Wang et al., Recommendations for Prioritization and Distribution of COVID-19 Vaccine in Prisons and Jails, *supra* n. 50, at 3.

⁵³ Helene Gayle et al., *Framework for Equitable Allocation of COVID-19 Vaccine*, *supra* n. 49, at 6.

⁵⁴ See Andrew Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, American Journal of Public Health 99(666), available at <https://ajph.aphapublications.org/doi/10.2105/AJPH.2008.144279> (last accessed March 17, 2021); Jennifer R. Bai et al., Prevalence and Predictors of Chronic Health Conditions of Inmates Newly Admitted to Maximum Security Prisons, *Journal of Correctional Health Care* (2015) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4491502/> (last accessed March 17, 2021); See also Laura M. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, U.S. Department of Justice, Bureau of Justice Statistics (October 4, 2016), available at <https://www.bjs.gov/content/pub/pdf/mpsfj1112.pdf> (last accessed March 17, 2021).

⁵⁵ David H. Cloud et al., Addressing Mass Incarceration: A Clarion Call for Public Health, *American Journal of Public Health* 104(389) (2014), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953768/> (last accessed March 17, 2021).

health conditions: “vaccinating everyone in prisons and jails, rather than vaccinating only those who have been identified as having particular underlying conditions – is the best way to protect all medically vulnerable people in correctional facilities.” (Reingold Aff. ¶ 16).

50. Authorizing the vaccine for correction staff will not abate the risk of SARS-CoV-2 transmission to everyone in the jail and prison systems any time in the near future—including risks to staff. Correction staff have only begun to be vaccinated in New York State, may decline vaccination, or may be medically ineligible for vaccination, and it also is also unknown whether people who are vaccinated can still transmit the virus. (Adewunmi and Fenig Aff. ¶ 30).⁵⁶

51. Experienced practicing clinicians attest that widespread vaccination of people in jails and prisons helps to make everyone safer, including not only the jail staff and people in custody, but the members of the community that the staff and people in custody interact with when they leave the correctional setting. (Adewunmi and Fenig Aff. ¶ 46). As Dr. Reingold stated, “it undermines public health objectives to prioritize COVID-19 vaccination among prison staff and not prison detainees.” (Reingold Aff. ¶ 44).

INDIVIDUAL ALLEGATIONS

52. **Petitioner Ayeisha Woods** is a 26-year-old woman who is currently incarcerated by DOCCS at the Bedford Hills Correctional Facility in Bedford Hills, New York.

53. Petitioner Woods resides in a housing unit with approximately 50 other individuals in a housing unit with a capacity to house 60 people. Petitioner Woods resides in a cell but must leave her cell to complete tasks of daily living and programs.

54. Petitioner Woods has to leave her cell to shower and attend indoor recreation. When

⁵⁶ See also *Key Things to Know About COVID-19 Vaccines*, Centers for Disease Control and Prevention, (March 13, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (last accessed March 17, 2021); *COVID-19 Vaccine: What You Need to Know*, Johns Hopkins Medicine (Jan. 21, 2021), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-19-vaccine-what-you-need-to-know> (last accessed Feb. 2, 2021).

she leaves her cell to shower, Petitioner Woods must enter into a line with other incarcerated people outside of the showers, in a small corridor with no available space to distance safely. The shower facility itself is a room with four shower stalls where individuals shower concurrently; the stalls are separated by walls that do not reach the floor or the ceiling. At indoor recreation, there are three tables and stacks of additional chairs. There is no limit to how many people sit at one table or how many people are allowed into the small room at once. At indoor recreation, tablet kiosks are available, and up to 30 people line up back to back. In the phone room, three phones are separated by 3-4 feet, but the room is very small.

55. Petitioner Woods has observed commingling of individuals from different housing units in various spaces throughout Bedford Hills Correctional Facility, including in the mess hall, at commissary, the medical clinic, while traveling to programs, and at outdoor recreation. In these spaces she is exposed to individuals from other housing units and is unable to physically distance herself. Petitioner Williams cannot compel others to practice public health guidance such as wearing a mask and physical distancing, nor can she remove herself from the unsafe congregate residential setting.

56. In the mess hall, Petitioner Woods is required to stand in a 2x2 line, back-to-back, to obtain meal trays. Individuals are seated two seats apart, but there is always someone sitting diagonally from her. Multiple housing units are allowed into the mess hall at once. While working her job in the mess hall, Petitioner Woods serves food and cleans surfaces, coming into contact with countless individuals from multiple housing units in a setting where masks are frequently not worn.

57. At the medical clinic, Petitioner Woods is required, twice a day, to wait in a holding cell with up to 40 other people from different housing units at once. To attend programs, Petitioner Woods has to walk in a group with dozens of other people from other housing units every morning,

afternoon, and evening. The walk takes place outside, but not many people wear masks because they choose to smoke. At outdoor recreation, Petitioner Woods has access to one bathroom, which is shared by up to 200 incarcerated individuals, and to her knowledge, is not regularly sanitized.

58. Corrections officers rotate through Petitioner Woods' housing unit throughout the day. The officers assigned to her unit remain the same through the week, but on the weekend, officers are assigned to her unit seemingly at random. All movement throughout the facility requires an escort officer. These are officers who do not regularly staff the unit but are assigned as escort officers for multiple units. When attending programs, Petitioner Woods must go through a metal detector before entering her assigned building. The bins that hold clothes are not sanitized, and officers do not change their gloves between pat downs.

59. Petitioner Woods has not been offered the COVID-19 vaccine. Petitioner Woods is aware that older individuals and those with certain comorbidities are eligible to receive the vaccine, but she does not believe she is eligible under those criteria. She would like the opportunity to be vaccinated.

60. **Petitioner Tyrone McCalla** ("Petitioner McCalla") is a 33-year-old man who is currently incarcerated by DOCCS at Wende Correctional Facility, located in Alden, New York.

61. Petitioner McCalla resides in a cell-block company with the capacity to house 24 individuals. Eighteen of the cells in the company are currently filled. There is one telephone and one kiosk on his gallery for all residents of that gallery. The kiosk is an interactive display screen, which allows incarcerated individuals to send and receive emails, as well as download applications to use on their electronic tablets.

62. There are also six phones in the yard, which is shared by at least one block of over one-hundred individuals. Petitioner McCalla participates in a program that requires him to be in a small room twice a week with usually eight other classmates and two facilitators.

63. Petitioner McCalla is unable to practice physical distancing in his living area.

Petitioner McCalla, and the other men incarcerated on his company, are in cells right next to one another—cells with gates and not doors. When Petitioner McCalla is standing at his cell gate, and his neighbor is standing at their own, they are able to hand each other items and even touch.

Petitioner McCalla attempted to put a bed sheet over the exposed entrance of his cell in an attempt to protect himself from the airborne virus, but a correction officer threatened to write him a ticket if he did not take it down. There are vents on the floor of each cell, but no air comes out of them. His entire company shares two showers.

64. Petitioner McCalla is also unable to practice proper handwashing or cell cleaning.

There is no hot water in the cells on his block. In order to access hot water, Petitioner McCalla has to go to areas where there are likely to be several other persons in close proximity. There are hand sanitizer dispensers in various locations throughout the facility, but they are not consistently filled. Petitioner McCalla recently attempted to get hand sanitizer near the yard to no avail for three days in a row. He and the rest of his block receive two reusable cloth masks a month. He is provided with diluted bleach to clean his cell every few weeks at best. There is one mop that his company shares.

65. Petitioner McCalla has not been offered the COVID-19 vaccine. Petitioner McCalla is aware that older individuals and those with certain comorbidities are eligible to receive the vaccine, but he does not believe he is eligible under those criteria. He would like the opportunity to be vaccinated.

66. **Petitioner Michael Williams** (“Petitioner Williams”) is 35 years old and is currently incarcerated in the custody of the DOCCS.

67. Petitioner Williams is currently incarcerated in Sing Sing Correctional Facility, located in Ossining, New York.

68. Petitioner Williams resides in a cell-block company with the capacity to house approximately 86 individuals. There are six companies on his block, B-block. Petitioner Williams approximates that all but four of the cells on his company are occupied.

69. The correctional officers working on his block are not consistently the same. They work in various areas of the prison. They often do not wear masks, and often eat and drink on the block as they work, moving around the housing unit, unmasked, with food and drinks. Correctional officers conduct routine cell searches and pat frisks. Incarcerated individuals, when their cells are searched, must strip down to their underwear and undergo pat frisks. Petitioner Williams witnesses at least one of these cell searches occur every day.

70. Petitioner Williams shares a mess hall, telephones, recreational spaces, bathrooms, and showers with the entirety his block. Petitioner Williams is unable to practice physical distancing in these shared spaces, and mask use is highly inconsistent and not consistently enforced while on the block, including on the companies, in the mess hall, or in the yard. B-block has its own mess hall, and usually three companies utilize it at once. If it is an especially popular meal, four companies might be there at once. The majority of people do not wear masks at any point while in the mess hall. Petitioner Williams must wait in a line to be served while shoulder to shoulder with mostly unmasked people. When sitting down at a communal table, no one wears masks to eat. Petitioner Williams approximates that there is often only one foot between him and the individuals sitting closest to him.

71. Petitioner Williams entire block goes to recreation together each day. Recreation usually consists of choosing among three options: inside phone area, yard, or gym. There are nine phones in the inside phone area, and there are usually scores of inconsistently masked individuals waiting at once to use them. In the B-block yard, there are approximately 20 phones outside in the B-block yard, which are in constant use. There are also six showers in the yard and two bathroom

stalls that are also in high demand. When Petitioner Williams showers in the yard, he is so close to the other showers that he can feel the water of the person showering next to him. The gym recently reopened after being closed due to COVID-19 restrictions; however, Petitioner Williams does not go to the gym given his concerns regarding further potential exposure to the virus.

72. When Petitioner Williams leaves his block for any call out—such as, for example, to go to the commissary, the chapel, and the indoor bathhouse, or to see his counselor, take legal phone calls, and attend medical or mental health appointments—he must mingle with scores of other incarcerated individuals. Petitioner Williams and everyone else with a call out, sometimes upwards of 80 people, must wait on the first floor of the block, or “the flats,” with no physical distancing enforced and mask use inconsistent. Then Petitioner Williams and the other individuals waiting are escorted in groups by correctional officers to their respective destinations. When escorting, the correctional officers walk behind each group of incarcerated people until they reach their destination. Mask use is also not consistently enforced when moving around the prison. When he returns to his block, Petitioner Williams and anyone else returning to the area must line up in order to reenter the block.

73. In order to use the indoor showers, Petitioner Williams must leave his block and go to the bathhouse which is shared with one other block. He travels to the bathhouse with a large number of others living on his block; sometimes, upwards of half of the block elects to go to the bathhouse at one time. Because there are only approximately 30 showers in the bathhouse, Petitioner Williams must wait on bleachers with scores of other individuals, who more often than not are not wearing masks.

74. Everyone on his company are in cells right next to one another. Their cells have gates and not doors, and mask use is not enforced inside cells. When Petitioner Williams is standing at his cell gate, and his neighbor is standing at their own, they are able to touch each other.

There are also two kiosks per company, located in what Petitioner Williams describes as what used to be a cell. They are used by all 86 people on his company, and they are not cleaned between uses. The kiosk is an interactive display screen which allows incarcerated individuals to send and receive emails, as well as download applications to use on their electronic tablets.

75. Petitioner Williams is also unable to practice good personal hygiene or cell cleaning. There is no hot water in the cells on his block. There are hand sanitizer dispensers in various locations throughout the facility, but they are often empty. Watered down bleach is provided only sporadically, and Petitioner Williams shares cleaning supplies, such as mops, with others on his company.

76. Petitioner Williams has not been offered the COVID-19 vaccine. Petitioner Williams is aware that older individuals and those with certain comorbidities are eligible to receive the vaccine, but he does not believe he is eligible. He would like the opportunity to be vaccinated.

CAUSE OF ACTION

Petitioners incorporate by reference each preceding allegation as if fully set forth herein. Respondents' determination to omit incarcerated individuals from current vaccination prioritization Phase 1b, despite including correction staff and others living in congregate residential settings, is arbitrary and capricious because it lacks a rational basis, was made without regard to the facts, and represents an abuse of discretion pursuant to CPLR Article § 7803(3).

PRIOR APPLICATION

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

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request a Judgment pursuant to Article 78 of the Civil Practice Law and Rules:

- a) Annuling Respondents' determination to omit people who are incarcerated in New York State prisons, as a group, from the current COVID-19 vaccination prioritization Phase 1b, upon a finding that this exclusion is arbitrary and capricious in violation of CPLR § 7803 [3]; and
- b) Directing Respondents to immediately include people who are incarcerated in New York State prisons, as a group, in the current COVID-19 vaccination prioritization Phase 1b, upon a finding that their exclusion is arbitrary and capricious in violation of CPLR § 7803 [3]; and
- c) Granting such other and further relief as the Court may deem just and equitable.

Dated: March 17, 2021
New York, New York

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/s/ Veronica Vela

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VERIFICATION

VERONICA VELA, an attorney duly admitted to practice before the courts of this state, do hereby affirm under penalty of perjury that the following statements are true:

1. I am a Supervising Attorney at the Prisoners' Rights Project of The Legal Aid Society and one of the attorneys of record herein.
2. I have written the foregoing Verified Petition and know its contents.
3. The contents of the foregoing Verified Petition are true to my knowledge, except as to matters alleged upon information and belief. As to those matters, I believe them to be true.
4. The sources of the aforesaid information and belief are conversations had with petitioners, publicly available information, and documents prepared by the State of New York.
5. I make this verification on Petitioners' behalf because they are presently incarcerated outside the county in which my office is located.

Dated: March 17, 2021

/s/ Veronica Vela

Veronica Vela