NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA-5

In the Matter of the Application of

CHARLES HOLDEN and ALBERTO FRIAS on behalf of themselves and all similarly situated,

Petitioners,

For a Judgment Pursuant CPLR Article 78 of the Civil Practice law and Rules

-against-

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

Respondents.

INDEX NUMBER: **801592/2021E**

Present:
HON. ALISON Y. TUITT
JUSTICE

The following papers numbered 1- 4,

Read on this Article 78 Petition, Petitioners' Order to Show Cause for a Preliminary Injunction and Respondents' Cross-Motion to Dismiss the Petition

On Calendar of **3/22/2021**

Notice of Petition, Order to Show Cause - Exhibits, Affirmation, Affidavits 1

Order to Show Cause - Exhibits, Affirmation, Affidavits 2

Notice of Cross-Motion - Affidavits, Memorandum of Law 3

Affirmation in Opposition to Cross-Motion 4

Upon the foregoing papers, the Petition pursuant to Article 78 of the CPLR to vacate and annul Respondents' determination excluding incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to modify current eligibility of category 1b,

and directing Respondents to modify current eligibility of category 1b and immediately authorize incarcerated individuals as a group for vaccination; Petitioners' Order to Show Cause for a temporary restraining order and preliminary injunction mandating that Respondents immediately modify current COVID-19 vaccine eligibility category 1b to authorized incarcerated individuals for vaccination; and, Respondents' cross-motion to dismiss the Petition against Respondents pursuant to CPLR §§3211(a)(2), (3) and (7) and 7804(f) for lack of subject matter jurisdiction, lack of standing, and failure to state a cause of action are consolidated for purposes of this decision. For the reasons set forth herein, the Petition is granted, Petitioners' Order to Show Cause for a preliminary injunction is granted, and Respondents' cross-motion to dismiss the Petition is denied.

Relief Sought

Petitioners seek an Order vacating and annulling Respondents' determination which excluded incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to immediately authorize incarcerated individuals as a group for vaccination, upon finding their exclusion arbitrary and capricious and an abuse of discretion pursuant to CPLR §7803(3); vacating and annulling Respondents' determination excluding incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to modify current eligibility of category 1b and immediately authorize incarcerated individuals as a group for vaccination, upon finding the exclusion in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution and Article 1 § 11 of the New York State Constitution, pursuant to CPLR §7803(3). Petitioners also seek a preliminary injunction, pursuant to CPLR §6301, mandating that Respondents immediately modify current COVID-19 vaccine eligibility category 1b to authorized incarcerated individuals for vaccination.

The Parties

Petitioner Charles Holden ("Holden") is a 52 year-old man who is currently incarcerated in the custody of the New York City Department of Correction ("DOC"), at the Anna M. Kross Center on Rikers Island. Petitioner Holden states that he has not been offered the COVID-19 vaccination, and to his knowledge, no one in his housing unit has been offered the vaccination. Petitioner Holden resides in a dormitory with the capacity of 50 individuals, and 48 of those beds are currently filled. He shares with these individuals eating

spaces, toilets, sinks, showers, televisions, telephones and recreational spaces of other incarcerated men. At meal times, he eats at a communal table surrounded by other incarcerated people, who cannot wear masks while they eat. Petitioner Holden and the other men incarcerated in his housing unit sleep on beds that are only inches apart from one another. Every aspect of his daily life at the facility is communal, and he is not able to practice social distancing. DOC employees are always present in his housing area and their identities change with every shift. Thus, there are numerous staff members from the outside that come into the facility daily. Petitioner Holden is not able to make others around him, including other incarcerated people and corrections staff, abide by measures to protect him against COVID-19 infection, such as wearing masks and social distancing.

Petitioner Alberto Frias is a 24 year-old man who is currently incarcerated in the custody of the DOC at the Otis Bantum Correctional Center on Rikers Island and has not been offered the COVID-19 vaccination. Petitioner Frias is currently residing in cell housing. Although he sleeps in a cell, the set-up of his housing unit requires him to spend time outside of his cell to meet basic daily needs. When he showers, eats meals, or uses the phone, it is in shared space in close quarters with other incarcerated men and jail staff. During the day, he and the people in his unit spend significant time in a shared dayroom. At meal time, he must congregate with other incarcerated people to obtain food, and his housing unit eats meals at tables that are in the dayroom. Each table seats six people, and he is often shoulder to shoulder with other incarcerated people while eating. No one wears a mask while eating meals. He states that in general, the incarcerated people in his unit do not wear masks in the shared spaces of the housing area.

Whenever Petitioner Frias leaves his housing area, such as for an attorney visit, teleconference, medication, or medical care, he is escorted by corrections officers. One officer walks closely on each side of him, often touching him. If he needs to go to the clinic to access medical care, the clinical space is shared space with medical staff, jail staff, and other people in custody. While waiting to visit the clinic, he must often share small clinic holding cells with other incarcerated people, and he cannot maintain social distance when there is anyone else in the holding cell. Correction officers rotate through Petitioner Frias' housing unit in shifts, with additional staff covering when the regular staff take breaks for meals or are out sick or on vacation. Other staff enter his unit regularly for maintenance, repairs, social services, grievances and programs. During the day, Petitioner Frias is unable to maintain social distance from other inmates and correction staff. His housing area is small and is generally at full capacity. He has little to no control over how close other people in custody or jail staff come to

him. If jail staff or other people in his housing unit fail to wear masks or practice social distancing, or fail to follow other public health recommendations, which is common, he is unable to leave the housing unit.

Respondent Howard A. Zucker ("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 the 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). Respondent Andrew M. Cuomo ("Governor 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. Respondents Zucker and Governor Cuomo are responsible for establishing the COVID-19 vaccine distribution plans, including the timing of when certain categories of individuals within each phase are authorized to receive vaccinations.

Petitioners' Allegations

The basis for this Article 78 Petition is the Respondents' failure to include Petitioners in the COVID-19 eligibility group 1b with similarly situated individuals. Pursuant to CPLR §901, Petitioners Holden and Frias seek to represent a Class of individuals consisting of all persons who are or will be incarcerated in DOC facilities who do not fall in vaccine priority category 1a or 1b and have not been authorized to receive the COVID-19 vaccination. As of January 22, 2021, there were 5,225 individuals in DOC custody and only a small portion of this population has been authorized to be vaccinated due to status other than their incarceration, such as age or special authorization under Phase 1a. The named Petitioners claim that they will fairly and adequately protect the Class because they seek the same relief as all Class members -- to be authorized for inclusion in category 1b and offered access to the vaccination. Petitioners allege that there are questions of law and fact common to the Class that predominate over questions affecting only individual members, and the claims of the parties are typical of the Class claims. Specifically, all members of the Class are, or will be, incarcerated in New York City DOC facilities, facing a common threat due to COVID-19, and unable to access the vaccination. The common legal issue among all Class members is whether the failure to include members of the Class in vaccine priority level 1b was arbitrary and capricious, an abuse of discretion, and contrary to law.

When DOH began its phased distribution of COVID-19 vaccines to individuals in the New York State's Phase 1a category and to some groups within its Phase 1b category, those initially authorized to receive the COVID-19 vaccine included, among other groups: residents and staff at nursing homes and other congregate care facilities; and staff and residents at Office for People with Developmental Disabilities ("OPWDD"), Office of Mental Health ("OMH"), and Office of Addiction Services and Supports ("OASAS") facilities. OPWDD, OMH, and OASAS residential centers are located throughout New York State and house people who have applied and have been found eligible for their services. Beginning January 11, 2021, DOH expanded authorization for vaccine eligibility to additional groups within category 1b, including "Corrections," and any "[i]ndividual 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." The 1b subcategory entitled "Corrections" specifically includes: State Department of Corrections and Community Supervision Personnel, including correction and parole officers; Local Correctional Facilities, including correction officers; State Department of Corrections and Community Supervision Personnel, including correction and parole officers; Local correction facilities, including correction officers; Local Probation Departments, including probation officers; State Juvenile Detention and Rehabilitation Facilities; and, Local Juvenile Detention and Rehabilitation Facilities.

Residents of all government operated, licensed or regulated facilities designated by DOH as congregate facilities are explicitly included in Phases 1a and 1b. Residents of congregate facilities for youth, who are not otherwise clinically eligible for COVID-19 vaccination, are also included. Notwithstanding this, all adult incarcerated individuals in correctional or detention facilities are explicitly excluded.

The CDC recommends that incarcerated individuals to be vaccinated. Importantly, it also recommends that States "vaccinate staff and incarcerated/detained person of correctional or detention facilities at the same time because of their shared increased risk of disease". In recommending priority for vaccine eligibility, the CDC has additionally included both incarcerated individuals and others living in congregate settings in the same high-risk category. Specifically, given the increased rates of COVID-19 transmission in congregate living settings, the CDC has advised that states should consider authorizing vaccinations for individuals in congregate living facilities, including those in correction or detention facilities during the 1b vaccination Phase. In its recommendation, the CDC includes correction and detention facilities in the category of "congregate living facilities" that also includes homeless shelters, group homes, and employer- provided shared housing units.

The CDC and other public health experts recommend prioritizing congregate residential settings because they pose a very high risk of COVID-19 transmission due to the physical realities of shared spaces and the inability of inhabitants to control their environments and ensure adherence to self- protective public health measures. People in these settings share common spaces to eat, bathe, socialize, and sleep. Moreover, congregate settings increase the likelihood of airborne transmission because, as the CDC has stated, high-risk airborne droplet transmission occurs in enclosed spaces, during prolonged exposure to respiratory particles, and in settings with inadequate ventilation or air handling.

Petitioners submit evidence that DOC facilities are congregate settings where incarcerated people face increased risk of infection similar to, or greater than, residents of other congregate facilities. Pursuant to DOH, congregate settings include "an environment in which a group of usually unrelated persons reside, meet, or gather either for a limited or extended period of time in close physical proximity. Examples include homeless shelters, assisted living facilities, group homes, prisons, detention centers, schools and workplaces." DOC facilities are congregate settings, and petitioners are particularly vulnerable to COVID-19. As with other congregate facilities, DOC facilities create an increased risk of community transmission from the fact that staff move back and forth from the facility to the community on a daily basis. People incarcerated in DOC facilities are also at high risk because they have no authority to require others in their housing units to wear masks, nor can they ensure that other people will maintain, at a minimum, six feet of distance. They are also unable to move their bed to gain more distance from others.

Petitioners submit evidence that COVID-19 has spread rapidly within the DOC facilities and since March 2020, has continued to threaten its population. To date, the COVID-19 pandemic has caused at least 2,856 infections and at least 18 deaths among incarcerated people and jail staff within DOC, and the conditions in the New York City jails grow more dangerous every day. As of January 22, 2021, 21% of the entire city jail population was housed in a unit with a COVID-19 related designation: either likely exposed, symptomatic, or confirmed positive. Petitioners argue that Respondents' exclusion of incarcerated individuals from those currently eligible for the vaccine is arbitrary, capricious and contrary to law. Thus, they contend they are entitled to Class certification, a grant of the Petition mandating that incarcerated individuals be made eligible for the vaccine and a preliminary injunction mandating that Respondents immediately modify current vaccine eligibility category 1b to authorize incarcerated individuals for vaccination.

Respondents Allegations

Respondents move to dismiss the Petition for lack of subject matter jurisdiction, standing, and failure to state a cause of action pursuant to CPLR3211(a)(2), (3) and (7) and 7804(f), and also in opposition to Petitioners' motion for a preliminary injunction. Respondents claim that their goal is to make the various vaccines available to all adult New Yorkers, including all correctional inmates like Petitioners. However, vaccinations have become available only gradually, requiring Respondents, who are charged by law with responsibility for the program to distribute the vaccinations, to prioritize eligibility based in their judgment of who needs to be vaccinated the soonest.

Respondents argue that by this lawsuit, Petitioners seek to undermine the phased vaccine rollout. Petitioners' contention that all correctional inmates are excluded and will continue to be excluded from eligibility to receive COVID-19 vaccinations is baseless. Respondents allege that all adult inmates will be eligible to be vaccinated when sufficient quantities of vaccine are available. As of the date of filing, Respondents authorized vaccination of inmates 65 years of age or older or inmates with qualifying medical conditions. Currently, Respondents have authorized vaccination of inmates 60 years of age or older or inmates with qualifying medical conditions and several hundred inmates in DOC custody have already received vaccines.

Moreover, Respondents argue that Petitioners, who do not claim to have any health issues, are not similarly situated to residents of congregate care facilities, which are given priority 1a, not 1b as Petitioners' seek. Respondents further argue that in citing the CDC recommendations, Petitioners fail to recognize that the CDC guidelines are discretionary, not mandates. In any event, argue Respondents, Petitioners fail to show that the Court has jurisdiction over this matter, that Petitioners have standing or, even if jurisdiction and standing exist, that the phased vaccine rollout lacks a rational basis to the legitimate government purpose of distributing the limited supply of vaccines in a phased approach, starting with those most in need.

Vaccine supplies are controlled by the Federal government, requiring that they be distributed in a phased approach, starting with those in most need. In anticipation of the availability of vaccines for COVID19, in October 2020 DOH published "New York State's COVID-19 Vaccination Program," a pamphlet addressing a comprehensive vaccination program, prioritizing eligibility for vaccination. This pamphlet identifies incarcerated individuals as one of a list of groups at risk for acquiring or transmitting COVID-19. As the Federal government distributes more supplies, additional New Yorkers will be made eligible to receive vaccines. Persons in Phases 1a

and 1b are currently eligible for vaccination, which include, but are not limited to, healthcare workers, residents age 60 and older, first responders, teachers, public transit workers, grocery store workers, public safety workers, public-facing hotel workers, correction, parole, and probation officers, public-facing government and public employees, and adults over the age of 16 with certain specified comorbidities and underlying conditions. Incarcerated individuals age 60 and older or those with qualifying comorbidities or underlying conditions are currently eligible. Moreover, Governor Cuomo announced that as of March 23, 2021, New York will allow residents age 50 and older to receive COVID-19 vaccines.

On or about January 5, 2021, Respondents authorized Correctional Health Services (CHS), the inmate medical services provider for DOC inmates, to begin vaccination of high-risk inmates which commenced on January 7, 2021. Since January 7, 2021, several hundred inmates have been vaccinated. On January 11, 2021, Respondents extended vaccine eligibility to DOC staff. Respondents are continuing to develop a plan to make all inmates statewide eligible for COVID-19 vaccines. Guidelines published by the CDC provide that "[t]he prioritization of correctional staff and incarcerated persons differ by jurisdiction." Although "[j]urisdictions are encouraged to vaccinate staff and incarcerated/detained persons of correctional or detention facilities at the same time," the CDC's guidelines recognize that it may not be "feasible to vaccinate all staff and incarcerated or detained persons at the same time," in which case prioritization should be "based on facility-level or individual-level factors (such as, older age or having an underlying medical condition), or both."

Article 78

Article 78 of the Civil Practice Law and Rules provides for judicial review of a governmental agency's discretionary determination through a writ of mandamus challenge. CPLR §7801. Such review is appropriate where the agency's decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR §7803(3); Matter of Poster v. Strough, 299 A.D.2d 127, 142 (2d Dept. 2002). Petitioners bring this action pursuant to CPLR Article 78 and seek mandamus review under CPLR §7803(3) of Respondents' determination to exclude incarcerated individuals from those eligible to receive the COVID-19 vaccine under the 1b category.

On judicial review of an administrative action under CPLR Article 78, courts must uphold the

administrative exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." Matter of Pell v. Board of Ed. Union Free School District, 34 N.Y.2d 222 (1974). In an Article 78 proceeding, it is well-settled that Petitioner bears the "heavy burden of showing" that Respondents' actions are "unreasonable and unsupported by any evidence." Nazareth Home of the Franciscan Sisters v. Novello, 7 N.Y.3d 538, 544 (2006); Stanton v. Town of Islip Department of Planning & Development, 37 A.D.3d 473 (2d Dep't 2007). To this end, "conclusory allegations and speculative assertions will not suffice," Razzano v. Remsenburg-Speonk UFSD, 162 A.D.3d 1043, 1045 (2d Dep't 2018); and where the petition fails "to go any further than stating conclusions of fact," it is properly dismissed by the court, Garofano v. State, 122 A.D.2d 209, 210 (2d Dep't 1986).

A decision is arbitrary and capricious where "it is taken without sound basis in reason or regard to the facts." Matter of Peckham v Calogero, 12 N.Y.3d 424, 431 (2009). "The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact." Matter of Pell, 34 N.Y.2d at 222. It is further incumbent on a government agency to provide a reasoned, factual basis for its exercise of discretion. See Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational Services, 77 N.Y.2d 753, 758 (1991). "[A] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious." Knight v. Amelkin, 68 N.Y.2d 975, 977 (1986) (citing Matter of Field Delivery Services, 66 N.Y.2d 516, 517 (1985)). A decision may also be arbitrary and capricious where two classes are treated differently despite being "so similar as to require the same treatment." Matter of Buffalo Civic Auto Ramps, Inc. v Serio, 21 A.D.3d 722, 800 (1st Dept. 2005) citing Matter of Klein v. Levin, 305 A.D.2d 316, 317–18 (1st Dept. 2003).

"If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency." Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009); Weiss v. County of Nassau, 176 A.D.3d 1085, 1086 (2d Dep't 2019) ("[T]he court may not substitute its judgment for that of the agency responsible for making the determination."). Where "the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." Rodriguez v. County of Nassau, 80 A.D.3d 702, 703 (2nd Dep't 2011). Rationality is the key in

determining whether an action is arbitrary and capricious or an abuse of discretion. Matter of Pell, 34 N.Y.2d at 231. The court's function is completed on finding that a rational basis supports the administrative determination. See Howard v. Wyman, 28 N.Y.2d 434 (1971).

Equal Protection

Petitioners' Equal Protection claim is also governed by a rational basis standard. "The New York Equal Protection Clause (N.Y. Const, art I, § 11)" is "modeled after its federal counterpart." Walton v. N.Y.S. Department of Correctional Services, 13 N.Y.3d 475, 492 (2009). Under the Equal Protection Clause of the 14 Amendment and Article 1§11, the State classification at issue must bear "some fair relationship to a legitimate public purpose." Plyler v. Doe, 457 U.S. 202, 216 (1982); Congregational Rabbinical College of Tartikov Inv. v. Village of Pomona, 945 F.3d 83, 110 N 211 (2d Cir. 2019)(citing People v. Kern, 75 N.Y.2d 638, 649 (1990). And when considering whether a rational basis exists in the context of an equal protection claim, a court will consider the "countervailing costs" to those who are being excluded. Plyler, 457 U.S. at 223-24. As to either the Federal or the State provision, "[u]nless a suspect class or fundamental right is involved..., classifications that create distinctions between similarly situated individuals will be upheld if they are rationally related to a legitimate government interest." Walton, 13 N.Y.3d at 492.

Respondents argue that Petitioners' claims fail because Respondents have a rational basis for the prioritization of inmates who are neither at least 60 years old nor have qualifying medical conditions for vaccination. Petitioners contend this is a violation of Equal Protection principles. "Under this standard, it is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency. . . . Rather, the limited issue for the court's review is whether the agency identified 'the relevant areas of . . . concern,' took a 'hard look' at them, and made a 'reasoned elaboration of the basis for its determination.'" Fisher v. Giuliani, 280 A.D.13, 19-20 (1st Dep't 2001) (citations omitted). The issue is not whether Respondents' determination is correct or whether reasonable minds may disagree with it, but whether it was "arbitrary, capricious or irrational." City of New York v. O'Connor, 9 A.D.3d 328, 329-30 (1st Dep't 2004). With respect to Equal Protection challenges, "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend

the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" Dandridge v. Williams, 397 U.S. 471, 485 (1970)) (citations omitted).

Motion to Dismiss

On a motion to dismiss for lack of subject matter jurisdiction pursuant to CPLR 3211(a)(2), including for lack of justiciability, the Court must determine whether it has the statutory or constitutional power to adjudicate the matter before it. See New York State Inspection, Sec. & Law Enforcement Employees v. Cuomo, 64 N.Y.2d 233, 241 (1976). A motion to dismiss for lack of standing is considered under CPLR 3211(a)(3). See Security Pacific National Bank v. Evans, 31 A.D.3d 278, 278 (1st Dep't 2006). "The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution . . . . The most critical requirement of standing, and the one arguably implicated in this case, is the presence of 'injury in fact—an actual legal stake in the matter being adjudicated.'" Id. at 279.

On a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), a pleading should be liberally construed, the facts alleged by plaintiff should be accepted as true, all inferences should be drawn in the plaintiff's favor, and the court should determine "only whether the facts as alleged fit within any cognizable legal theory." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). "Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." Kliebert v. McCoan, 228 A.D.2d 232, 232 (1st Dep't 1996). In addition, "vague and conclusory allegations" are insufficient to sustain a claim, Gordon v. Dino De Laurentis Corp., 141 A.D.2d 435, 436 (1st Dep't 1988). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 142 (2017).

Under CPLR 3211(a)(7), the Court is generally limited to considering the face of the challenged pleading, and evidence submitted by the pleader in support of or referenced in it. See Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 635-36 (1976). Where, as here, Petitioners have chosen to submit affidavits in support of

their pleading, this evidence may show that they have no claim, even if their Petition is facially sufficient. See Rovello, 40 N.Y.2d at 636. The Court may also consider facts subject to judicial notice. See City of Hope, Inc. v. Fisk Bldg. Associates, 63 A.D.2d 946, 947 (1st Dep't 1978). The Court may also take judicial notice of records in other cases. See In re Julian P., 129 A.D.3d 1222, 1225 (3d Dep't 2015); Bernasconi v. Aeon, LLC, 105 A.D.3d 1167, 1169 (3d Dep't 2013).

Preliminary Injunction

Preliminary injunctive relief is a "drastic remedy" that is not routinely granted. Koultukis v. Phillips, 285 A.D.2d 433, 435 (1st Dep't 2001). To obtain a preliminary injunction, a petitioner must demonstrate: (1) a probability of success on the merits; (2) a danger of irreparable injury in the absence of an injunction; and (3) a balance of the equities in their favor. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862, 552 N.E.2d 166, 167 (1990). A preliminary injunction should be granted only if the petitioner establishes "a clear right to relief under the law and undisputed facts found in the moving papers." Koultukis, 285 A.D.2d at 435.4

Respondents' Opposition to the Petition and Preliminary Injunction

Respondents argue that the Petition seeks to have this Court formulate policies for the distribution of vaccines to all 19,500,000 citizens of the State, a task assigned by the Legislature to the Executive. Respondents further argue that Petitioners' "second guessing" of health policy violates principles of separation of powers and litigation is ill-equipped to address the matter. There is no dispute that all adult New Yorkers will be made eligible to receive vaccines against the COVID-19 virus, including incarcerated persons, when sufficient quantities of vaccination are available. The number of vaccines available is controlled by the Federal government and as more vaccines are made available, more categories will be made eligible to receive them. Prioritization, not of eligibility for the vaccination, but of the timing of eligibility for the vaccination, is precisely the kind of exercise of "judgment, allocation of resources and ordering of priorities, which [is] generally not subject to judicial review." N.Y.S. Inspection, Sec. & Law Enforcement Employees, District Council 82, 64 N.Y.2d 233, 239 (1984). Respondents claim that Petitioners here clearly seek to "reorder priorities, allocate the limited resources available, and in effect direct how the vast [government] enterprise should conduct its affairs." Jones v. Beame, 45 N.Y.2d 402, 407 (1978).

Furthermore, Respondents contend that the individual Petitioners lack standing because they do not allege that they want a vaccine, and class relief is unavailable. "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation... Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria." Society of Plastics Indus. v. County. of Suffolk, 77 N.Y.2d 761, 769 (1991). "Standing to sue . . . requir[es] . . . that the litigant have something truly at stake in a genuine controversy." Saratoga County. Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 812 (2003). That an issue is of "vital public concern" does not vest a party with standing. Society of Plastics, 77 N.Y.2d at 769. A necessary element of standing is that the party seeking relief "must show 'injury in fact,' meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural." N.Y.S. Association of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). Injury in fact requires that Petitioners' harm be "concrete[]," not "'tenuous' and 'ephemeral.'" Id. at 214 (citation omitted).

Respondents contend that Petitioners here fail to establish concrete harm as a result of the phased distribution of vaccines because their affidavits fail to establish that they would accept a COVID-19 vaccine if it were offered to them. Petitioner Holden is silent on the matter and Petitioner Frias merely states that he "would like to have the option to receive the vaccination." This lack of injury, argue Respondents, also disqualifies the named Petitioners from representing the Class on whose behalf they purport to bring this action, leaving the Class unrepresented. To qualify as an injury-in-fact, and thus confer standing, an injury must be "personally suffered" by the petitioner. See Murray v. Empire Ins. Co., 175 A.D.2d 693, 695 (1st Dep't 1991).

Petitioners do not address the issue of the risk caused to them by a delay in receiving vaccines, but limit their argument to the utility of vaccines to inmates only in the broad, general sense. Petitioners also fail to allege that they themselves face materially adverse conditions in DOC facilities. Their arguments rest on the assumption that all inmates face the same risk. However, with only a limited number of doses available and the prospect of many more becoming available in the near future, Respondents claim that the court cannot compel Respondents to make all DOC inmates immediately eligible. This is especially true here where Petitioners have failed to make any attempt to demonstrate that healthy Petitioners need vaccines on the same timetable as the others, or that they face the same risk as older inmates or those with significant medical conditions.

Contrarily, Petitioners do not dispute that the current limited availability of vaccines justifies a system of prioritizing eligibility for the vaccines based on some assessment of the relative risk of contracting COVID or the seriousness of the consequence of contracting COVID. They merely dispute their placement in the prioritization scheme. Petitioners also inaccurately claim that not giving inmates equal priority to staff runs afoul of CDC guidelines. As noted by the Court of Appeals, "guidelines, by definition, are not binding." Town of Islip v. N.Y.S. Public Employment Relations Board, 23 N.Y.3d 482, 493 (2014). The CDC's guidelines on this point are not definitive. Not only do they merely "encourage[]" vaccinating inmates and staff together, but they suggest an alternative, including prioritization "based on facility-level or individual-level factors (such as, older age or having an underlying medical condition), or both," which is what Respondents have done. The CDC guidelines do not contain any specific guidelines for prioritizing persons in non-care congregate living settings and leave the matter entirely up to State and local discretion, providing that "jurisdictions may choose to prioritize vaccination of persons in these settings based on local, state, tribal, or territorial epidemiology."

Petitioners contend that inmates of correctional facilities should be prioritized at the same level as residents in other congregate residential settings. However, Petitioners recognize that persons in congregate care facilities, such as nursing homes and facilities operated by OPWDD, OMH and OASAS, are in priority group 1a, not priority group 1b where Petitioners seek placement, so their contention that these facilities are analogous to prisons and jails in every material way is baseless. Respondents argue that equating all inmates with residents of long-term care facilities is another example of Petitioners' fallacy of assuming that all inmates face the same risk.

With respect to the preliminary injunction, Respondents argue that Petitioners cannot establish a probability of success on the merits because their claims fail for lack of jurisdiction, and also fail on the merits. Petitioners also fail to demonstrate irreparable harm as there is no evidence that Petitioners would accept a vaccine if offered to them, so there is no cognizable injury in not being made eligible for it. Moreover, Petitioners' claim of irreparable harm rests on the incorrect assumption that all inmates face the same risk. Petitioners fail to recognize that not all inmates face the same risk, and those who are most vulnerable are already eligible to receive a vaccine, leaving Petitioners without evidence that addresses the risk to those inmates who do not claim that they themselves face serious health issues. The third element for injunctive relief is that the balance of equities is in Petitioners' favor which Petitioners' fail to show. That making healthy inmates

immediately eligible promotes the health of the public in general is a pure speculation, since Petitioners' papers do not address concerns for the needs of the public at large, the interest that Respondents are charged with protecting.

Analysis

In the instant matter, the Court grants the Petition and the application for a preliminary injunction, and denies Respondents' cross-motion to dismiss the Petition. Petitioners are incarcerated individuals in New York City DOC facilities who are confined in congregate settings. It is undisputed that residents in all other congregate settings in the State of New York, including juvenile detention centers, have been prioritized for vaccine access. At this juncture of the fight against COVID-19, it is well-known and universally accepted that people working and living together are at exponentially heightened risk for contracting COVID-19, a virus that can cause long-term health complications and death. In light of this, New York's Health Commissioner and Governor Cuomo have specifically prioritized for vaccination thousands of New Yorkers who work and live in congregate facilities that are breeding grounds for this deadly virus. Respondents did this not only to protect the lives of those individuals, but also to protect the broader community from the spread of the virus. This prioritization is consistent with the unanimous recommendations of the CDC and public health and medical experts. Despite these scientific recommendations, Respondents have excluded adult individuals who are incarcerated.

In all material respects, incarcerated adults face the same heightened risk of infection, serious illness, and death, as people living in other congregate settings, and even more so than juveniles in detention centers, where individuals have been prioritized for the vaccine. Moreover, CDC has recommended those confined in jails and prisons should be vaccinated at the same time as those working in the very same facilities. However, Respondents have excluded those confined in prisons and jails from the COVID-19 vaccine, while granting access to correctional workers, as well as those working and living in other government-run congregate facilities. This Court finds that this exclusion is by definition arbitrary and capricious and violates Equal Protection.

Petitioners face an extraordinary risk of COVID-19, serious long-term health complications and possible death if Respondents do not immediately provide access to this life-saving vaccine. The imminent risk of

contracting COVID-19 for individuals living within these facilities is high. Specifically, the congregate nature of Petitioners' living conditions, the rising rate of the incarcerated population and the increasing number of COVID-19 positive cases within these facilities creates significant risk. When contracted, Petitioners are likely to suffer irreparable bodily harm. Because Respondents have failed to act, a preliminary injunction is warranted. Without such intervention, Petitioners' health and lives are at risk. Moreover, given this extraordinary situation, the immediate and irreparable harm that Petitioners face while unvaccinated, and that the equities weigh heavily in their favor, this Court hereby issues a preliminary injunction mandating that Respondents offer Petitioners and all incarcerated individuals access to the vaccine.

Significantly, Respondents do not dispute that Petitioners are confined in congregate settings. Nor do they dispute that residents in other congregate settings, including juvenile detention centers, have been prioritized for vaccine access. Further, Respondents do not dispute that a majority of the individuals confined in adult incarcerated settings are not prioritized for vaccine access. Yet, they provide no reasonable justification for the differentiation in treatment between these groups. Instead, they argue that general supply constraints give Respondents the right to prioritize eligibility. However, Respondents fail to explain why, despite the vaccine supply limitations, they chose to prioritize all residents of all other congregate facilities, including teenagers in juvenile detention facilities, and excluded incarcerated individuals. It is well known at this time that juveniles are less likely to suffer the life-altering and life-threatening consequences of COVID-19, yet inexplicably, they have been prioritized over the adult incarcerated individuals in receiving the vaccine. Respondents have made the vaccine available to all other residents of congregate settings based solely on the fact that they are living in congregate settings. Respondents provide no justification for the differentiation in treatment between these groups in all other congregate facilities. Instead, they argue that Petitioners are not part of a high-risk group and that they will be given access at some unknown future time. This, despite Respondents having already prioritized residents of every other type of congregate setting, as well as correctional officers, based on the inherent risks of their congregate environments. And it is in spite of CHS's recommendation that all incarcerated people be made eligible for vaccination in order to ensure the increased safety of everyone who is living and working in DOC facilities. Respondents explanation of their inconsistent treatment of incarcerated adults, as compared to all other residents of congregate settings, is arbitrary and capricious.

New York State's phase 1a and phase 1b prioritization categories collectively encompass

every government run or contracted congregate living facility for adults, except adult incarcerated settings. The exclusion is stark. Phase 1a of New York State's Plan includes "residents at OPWDD, OMH and OASAS facilities." It is important to note that this category simultaneously priorities both "staff and residents" of these facilities. Without question, these congregate facilities are analogous to prisons and jails in every material way. Residents are generally not permitted to leave freely, and are confined to settings where they must share bathrooms, eating spaces, and sleeping spaces. Phase 1b of New York State's Plan also includes "individuals living in a homeless shelter where sleeping, bathing or eating accommodations must be shared with individuals…who are not part of the same household."

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

Similarly in this case, Respondents have irrationally distinguished between incarcerated people and people living in every other type of adult congregate facility, at great risk to incarcerated people's lives during this pandemic, in violation of State and Federal Equal Protection guarantees, and their decision must be vacated and modified to allow incarcerated individuals as a group to access vaccine eligibility in phase 1b. People working and living together are at exponentially heightened risk for contracting COVID-19, a virus that can cause long-term health complications and death. In light of this, New York's Health Commissioner and Governor Cuomo have specifically prioritized vaccinations for thousands of New Yorkers who work and live in congregate facilities that are the breeding grounds for this deadly virus. This prioritization is consistent with the unanimous recommendations of the CDC and public health and medical experts. Despite these scientific

recommendations, Respondents have excluded individuals who are incarcerated. There is no acceptable excuse for this deliberate exclusion as COVID-19 does not discriminate between congregate settings.

Here, Petitioners seek a determination as to whether the Vaccination Program established by Respondents has been implemented non-arbitrarily, rationally, and equitably as between similarly situated people. A limitation on the supply of vaccines does not justify the differential treatment of incarcerated people, as compared to other similarly situated residents of other congregate facilities such as homeless shelters and juvenile detention facilities. Supply limitations do not explain prioritizing vaccination for all residents of those other congregate settings, who face a heightened risk of contracting COVID-19 because of the nature of those settings, while disregarding that same heightened risk faced by incarcerated people. Generally, the numbers of persons eligible for vaccination consistently has exceeded the reported supply of vaccines in New York State. Respondents nonetheless have continued to expand eligibility categories beyond available supply for groups other than incarcerated adults. Both of these facts bely Respondents' claim that limited resources justify the arbitrary distinction drawn. Respondents have already made the determination that congregate settings constitute high-risk environments for COVID-19 transmission and infection, which counsels prioritizing all staff and residents of those settings; they have acted on this determination in every other congregate living setting, including homeless shelters and juvenile detention facilities. Respondents followed CDC guidance in prioritizing residents of all other congregate facilities, but irrationally excluded residents of adult correctional facilities.

Petitioners ask this Court to determine that this policy decision must necessarily apply to all incarcerated people as a class because there is no legitimate or rational basis for their exclusion from prioritization. That is the narrow, justiciable issue for the Court to review in this case. With respect to standing, Petitioners desire COVID-19 vaccination, and are presently unable to access the vaccine because of Respondents' eligibility determination. Therefore, they are injured, and have standing to bring this case. Here, Petitioners have personally suffered because they want access to the vaccine, and Respondents have denied them access to it, by excluding them from eligibility. As such, Petitioners have been injured, and they are proper class representatives. See Murray v. Empire Insurance Co., 175 A.D.2d 693, 695 (1st Dep't 1991). Nevertheless, the litigation of Class issues is premature at this stage, as CPLR §902 provides Petitioners 60 days from the filing of a responsive pleading to move for class certification. Moreover, the relief Petitioners seek does not require the certification of a Class at this stage. Therefore, Respondents' arguments related to the sufficiency of the class

cannot form the basis for the dismissal of the Petition.

Announcement from Governor Cuomo

Governor Cuomo announced today, March 29, 2021, that effective tomorrow, March 30, 2021, all New York residents 30 years of age or older will be eligible for COVID-19 vaccination, and effective April 6, all New York residents 16 years of age or older will be eligible for vaccination. These qualifications apply to incarcerated individuals in the State of New York. Arguably, the Petition on behalf of Holden may be moot as he is now eligible for vaccination. However, as of today, Petitioner Frias and other incarcerated individuals under the age of 30 years of age are still not eligible for the vaccine, notwithstanding that they are being held in congregate settings. This decision by the Respondents to exclude these incarcerated persons from eligibility for the vaccine was unquestionably arbitrary and capricious, especially in light of the fact that Respondents approved vaccinations for all other congregate living facilities, including juvenile detention facilities. This was an unfair and unjust decision by Respondents, was not based in law or fact and was an abuse of discretion.

Accordingly, it is hereby ORDERED that the branch of the Petition seeking an Order vacating and annulling Respondents' determination which excluded incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to immediately authorize incarcerated individuals as a group for vaccination, upon finding their exclusion arbitrary and capricious and an abuse of discretion pursuant to CPLR §7803(3) is GRANTED; and, it is further ORDERED that the branch of the Petition seeking an Order vacating and annulling Respondents' determination excluding incarcerated individuals as a group from those currently eligible in COVID-19 vaccine priority category 1b, and directing Respondents to modify current eligibility of category 1b and immediately authorize incarcerated individuals as a group for vaccination, upon finding the exclusion in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution and Article 1 §11 of the New York State Constitution, pursuant to CPLR §7803(3), is GRANTED; and, it is further ORDERED that Petitioners' Order to Show Cause for a preliminary injunction, pursuant to CPLR §6301, mandating that Respondents immediately modify current COVID-19 vaccine eligibility category 1b to authorized incarcerated individuals for vaccination is GRANTED; and, it is further ORDERED that Respondents' cross-motion to dismiss the Petition is DENIED, for the reasons stated herein.

This constitutes the decision and Order of this Court.

Dated: 3/29/21

A. Y. Tuitt

Hon. Alison Y. Tuitt