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

MORLEEN FISHER, TAMARA WILLIAMS, BJ ATHILL, RODAISHA SMITH, GARY CORBIN, COALITION FOR THE HOMELESS, on behalf of themselves and all others similarly situated, *Petitioners,* *vs.* THE CITY OF NEW YORK; THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES; STEVEN BANKS, as Commissioner of the New York City Department of Social Services; THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES; JOSLYN CARTER, as Administrator of the New York City Department of Homeless Services, *Respondents.*	Index No.

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' APPLICATION FOR CLASS CERTIFICATION, A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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Petitioners Morleen Fisher, Tamara Williams, Rodaisha Smith, BJ Athill, Gary Corbin, and Coalition for the Homeless, on behalf of themselves and all others similarly situated, by their attorneys The Legal Aid Society and Jenner & Block LLP, submit this memorandum of law in support of (1) their application under Article 9 of the C.P.L.R. for class certification, and (2) their application under C.P.L.R. § 6301 *et seq.* for a temporary restraining order and a preliminary injunction enjoining Respondents City of New York (the "City"), the New York City Department of Social Services ("DSS"), Steven Banks as Commissioner of DSS, the New York City Department of Homeless Services ("DHS"), and Joslyn Carter, as Administrator of DHS (collectively "Respondents") to provide urgent and necessary relief for Petitioners and the classes of homeless New Yorkers they represent to remedy Respondents' violations of Article 78 of the CPLR, Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the New York State Human Rights Law, the New York City Human Rights Law, the Fourteenth Amendment of the U.S. Constitution, and Article I, Section 6 of the New York State Constitution.

PRELIMINARY STATEMENT

Petitioners bring this proceeding to seek relief to remedy the disproportionate risk of serious illness or death they currently face by being housed in congregate shelter with many unrelated adults, during this once-in-a-century global pandemic. Respondents have a constitutional obligation to provide safe shelter free of significant health risks to those that need it. Petitioners are homeless individuals living in congregate shelters, double-occupancy hotel rooms, or on the streets of New York that have been denied or have not been offered vacant single-occupancy hotel rooms so that they may practice effective social distancing and guard against the spread of COVID-19 (the "Right to Shelter Class"). In this motion, Petitioners seek urgent judicial

intervention to provide them with this readily available remedy to enable them to safely socially distance for the duration of the COVID-19 pandemic.

Public health experts, advocates for the homeless, the federal government, and Respondents themselves have recognized the inability for homeless individuals living in congregate shelters to practice necessary social distancing during the pandemic. In light of this fact, the Federal Emergency Management Agency ("FEMA") announced that it would reimburse local governments for the costs of moving individuals out of congregate shelters and into vacant hotel rooms that would allow them to socially distance. Respondents, after some initial delay, began moving some homeless individuals from congregate shelters into hotel rooms pursuant to their legal obligation to provide safe shelter. However, Respondents' hotel program has been dangerously insufficient, leaving thousands of individuals in congregate shelters and placing many in double-occupancy hotel rooms where they are unable to safely socially distance. To date, the age-adjusted COVID-19 mortality rate for single adults in shelters is 80 percent greater than it is for the New York City general population. By refusing single-occupancy placements, Respondents have denied safe shelter to Petitioners and thousands of similarly situated individuals, including many who are at heightened risk of serious illness or death due to their age and/or medical conditions.

For the reasons explained in this memorandum, Petitioners have a likelihood of success on their claims pursuant to Article 78 that Respondents have acted contrary to law and in an arbitrary and capricious manner by denying Petitioners safe shelter during the COVID-19 pandemic, have violated federal, state, and local disability rights laws by discriminating against Petitioners with disabilities, and have made determinations as to Petitioners' shelter rights without due process of law. This Court should certify this case as a class action, grant the individual Petitioners a TRO

enjoining Respondents to provide each individual Petitioner with a single-occupancy hotel room, and grant a preliminary injunction providing the same relief to the entire Right to Shelter Class, or in the alternative the Heightened Risk Class, who are at greater risk of serious illness or death if exposed to the virus. In the alternative, Petitioners seek a preliminary injunction (i) enjoining Respondents to provide single occupancy rooms to the Disability class, and (ii) requiring that Respondents establish procedures pursuant to which Petitioners' and the classes' due process rights to safe shelter are protected, including individualized determinations as to their need for room placements, prior notice of Respondents' denial of Petitioners' right to safe shelter free of significant health risks, and an opportunity to be heard.

BACKGROUND

The COVID-19 pandemic has uprooted life as we know it; as of this date, SARS-CoV-2, the novel coronavirus causing the COVID-19 disease, has infected more than 36 million people worldwide, resulting in the deaths of more than one million people. Verified Pet. ¶ 55. The United States has led the world in recorded deaths, and New York State in turn has led the United States, with more than 33,000 deaths as of this date since the spread of the virus was first recognized in March 2020. *Id.* ¶ 57. With nearly half a million confirmed cases in New York, many thousands more have sustained serious and potentially life-long negative repercussions. *Id.*

I. Public Directives From Local And State Government Encourage New Yorkers To Avoid Congregating In Enclosed Spaces And Require Social Distancing From Unrelated Adults.

Since March 2020, when the COVID-19 pandemic began upending public life, the need for all people to practice "social distancing" has been clear: for the benefit of the entire community, each of us must, whenever possible, remain at least six feet apart from any unrelated individuals; avoid sharing enclosed, indoor settings with unrelated individuals; and enable infected individuals and those who have been exposed to the virus to isolate themselves to prevent further community

spread. Verified Pet. ¶¶ 4, 95. As early as March 9, 2020, Mayor Bill de Blasio and Governor Andrew Cuomo began recommending that New Yorkers practice social distancing. *Id.* ¶ 92. On March 20, 2020, Governor Cuomo issued an executive order requiring all non-essential businesses to close, banning all non-essential gatherings of individuals of any size for any reason, and urging individuals to stay in their homes as much as possible, in order to limit exposure to the virus. *Id.* ¶ 96. Public officials, including Respondents, directed New Yorkers to remain socially distant; for example, on April 18, 2020, Mayor de Blasio urged New Yorkers not only to remain socially distant, but also to report on others who failed to socially distance, requesting that people send in photographs to "help make sure that people are kept apart and that's going to stop the disease from spreading and that's going to save lives." *Id.* ¶ 105.

II. Health Experts, Advocates For The Homeless, The Federal Government, And Respondents Recognize The "Unique" Dangers Of Congregate Shelter.

As COVID-19 spread throughout New York City, people experiencing homelessness, including Petitioners and other similarly situated individuals, were unable to socially distance. At the beginning of the pandemic, in March 2020, there were over 14,000 in congregate dorms, at least 3,500 in commercial hotel placements, and more than 1,400 in safe havens and stabilization beds, which are provided in both congregate and non-congregate settings. Verified Pet. ¶ 3. While living in congregate shelters, residents share sleeping dorms, bathrooms, eating areas, and recreational spaces with other unrelated individuals, often dozens of others. *Id.* SARS-CoV-2 is not only spread through contact or close, interpersonal interactions, but also through airborne or aerosol transmission, with virus droplets potentially lingering in the air for hours, and infecting people who are more than six feet away. *Id.* ¶ 65. Many congregate shelters are housed in older buildings, with poor HVAC or ventilation systems, particularly in their sleeping areas and bathrooms. *Id.* ¶ 78.

Health experts, advocates for the homeless, the federal government, and Respondents themselves all recognized the dangers of congregate shelter as the COVID-19 pandemic spread. On March 15, 2020, the New York City Department of Health and Mental Hygiene ("DOHMH") issued guidance noting that "[u]nless initial responses are effective, outbreaks in congregate settings will take place," and that "[h]omeless shelters will have unique challenges in regard to" preventing those outbreaks. *Id.* ¶ 93. The DOHMH guidance recommended that anyone with COVID-19-like illness be "isolated in a private bedroom with private bathroom." *Id.* At the time, advocates, including Petitioner Coalition for the Homeless, demanded that the City offer single-occupancy room placements to all homeless New Yorkers. Respondents denied these requests, claiming hotel rooms are too costly. *Id.* ¶¶ 103–104.

III. COVID-19 Holds Heightened Risks For The Heightened Risk Class.

Since March, we have learned more about the transmission of the virus and the people who are most in danger of its effects. Older people, such as those over the age of 65, and people with a wide variety of chronic medical conditions are significantly more susceptible to serious illness or death from COVID-19. *Id.* ¶ 63. These conditions include, among others, cancer, heart failure, obesity, sickle cell disease, diabetes, asthma, hypertension, and immune deficiencies. *Id.* ¶¶ 60–61. In New York, over 90 percent of all COVID-19 fatalities have had at least one such other condition, or comorbidity. *Id.* ¶ 62. COVID-19 has also been disproportionately fatal for Black and Hispanic/Latinx New Yorkers, with fatality rates over twice those of white New Yorkers. *Id.* ¶¶ 58, 82, 86.

Individuals experiencing homelessness are more likely to suffer from chronic health conditions and disabilities and exhibit a higher incidence of mental illness and substance use and abuse. *Id.* ¶ 80. And Black and Hispanic/Latinx New Yorkers disproportionately experience homelessness: 86 percent of homeless single adults in New York City identify as Black or

Hispanic, significantly greater than the 53 percent of the New York City population who identify as such. *Id.* ¶ 82.

IV. Respondents Took Insufficient Action To Ensure Homeless New Yorkers Were Able To Safely Socially Distance As COVID-19 Spread Through New York City.

With New York City tourism falling precipitously during the pandemic, hotels experienced a dramatic decline in occupancy rates, with many on the verge of going out of business altogether. On March 30, 2020, FEMA announced that it would reimburse at least 75 percent of costs incurred by state and local governments in moving populations in congregate housing, such as homeless shelters, into hotel rooms. Verified Pet. ¶ 73. In light of the widespread vacancies, hotel rooms became a widely available option for individuals in congregate shelter to be able to remain socially distant. *Id.* ¶¶ 90–91.

From the end of March through mid-April 2020, Respondents resisted moving homeless New Yorkers into hotel rooms at all—despite the availability of FEMA' cost reimbursement and the life-or-death risk facing individuals in congregate shelters. *Id.* ¶ 100. In mid-April, when New York City became the worldwide epicenter of the pandemic, Respondents contracted with hotels in the City to begin providing hotel placements to homeless individuals (the "Emergency Hotel Program"). *Id.* But these initial efforts were vastly insufficient. At that time, Respondents moved only 2,500 of the over 13,000 individuals who then were in congregate shelter. *Id.* According to Mayor de Blasio, Respondents were prioritizing "anybody in shelters where it's been difficult to achieve social distancing." *Id.* ¶ 101. But as DOHMH, FEMA, and CDC guidance recognized, this definition constitutes nearly all congregate shelters in the City, which continued to house thousands of individuals. *Id.*

Advocates, including Petitioner Coalition for the Homeless, continued to demand that the City offer single-occupancy room placements to all homeless New Yorkers. *Id.* ¶ 103.

Respondents continued to deny these requests, with their rationale shifting from cost objections—which they continued to assert—to arguing that shelter residents could not obtain necessary social services at the hotels. *Id.* ¶ 104. But this rationale was also unsupported. For one, many shelter residents were not in need of intensive services. *Id.* ¶ 109. Moreover, clinics and service providers across the city have experience in and were ready to operate at hotels and provide the necessary services. *Id.* Respondents also disrupted unsheltered people sleeping in the streets in New York City, despite CDC guidance that they should be permitted to shelter outside in place. *Id.* ¶ 104.

By the end of April, 94 of the approximately 100 congregate shelters in New York City had reported at least one confirmed COVID-19 case. *Id.* ¶ 106. At that point, Respondents relented and agreed to provide additional placements in hotel rooms to individuals in congregate shelters, though only doing so gradually, and again only for some. *Id.* ¶¶ 107–11. By late June 2020, Respondents had moved approximately 8,700 single adults into de-densification hotels, and left approximately 5,500 single adults in congregate shelter settings. *Id.* ¶ 111. The numbers remain roughly the same as of this filing. *Id.* Of the individuals in hotel rooms, approximately half have been placed in double-occupancy rooms, while most of the remaining individuals have been placed in single-occupancy rooms. *Id.* Because those in double-occupancy rooms are sharing their living space with another unrelated individual, they are still unable to safely socially distance. *Id.* ¶ 112.

Respondents have not only failed to provide single-occupancy rooms for all single adults experiencing homelessness in the Right to Shelter Class, but they have even failed to do so for many individuals who are at heightened risk of serious illness or death (the Heightened Risk Class). They have also failed to accommodate individuals with disabilities, including those who have disabilities or medical conditions that place them at heightened risk of serious illness or death (the

Disability Class). For example, Petitioner Morleen Fisher was told by shelter staff that Respondent DHS "does not put crazy people in hotels." Fisher Aff. ¶ 9.

V. Providing Single-Occupancy Hotel Placements Is A Critical Public Health Measure And Necessary To Fulfill The City's Obligation To Provide Shelter Free Of Significant Health Risks.

Respondents all have a legal obligation pursuant to Article XVII of the New York State Constitution to provide shelter to homeless individuals, which includes shelter that is safe from significant health risks. In the context of this once-in-a-century pandemic, this obligation requires Respondents to provide single-occupancy rooms to allow homeless New Yorkers to safely socially distance. The recognized need to provide homeless individuals in congregate shelter with their own space is not just for their own benefit, but to minimize the spread of SARS-CoV-2 throughout the entire City. Individuals sharing sleeping, eating, and bathing space amidst the pandemic also present risks to the employees of the shelters and the many social service providers that interact with the shelters. Moreover, many individuals in shelter work throughout the City, as in-home aides, transportation workers, convenience store clerks, and other essential (and, as more businesses have reopened, non-essential) jobs. If Petitioners and the classes they represent contract SARS-CoV-2, the risks of another wave hitting the City increase.

VI. To The Extent Petitioners Are Denied Relief As The Right To Shelter Class, Petitioners Are Entitled To Individualized Determinations Of Need For Placement In A Single-Occupancy Room.

Respondents' limited hotel placements have been made in an arbitrary manner without regard to Petitioners' individualized risk of illness or death if they were to contract SARS-CoV-2. Respondent DHS has stated that, in deciding whether to offer a single-occupancy room to individuals in congregate shelters or double-occupancy rooms, it would make individualized determinations based on all the circumstances, including whether the individual is at a heightened risk of serious illness or death if they were to contract SARS-CoV-2. Verified Pet. ¶¶ 15, 115–

117. But DHS has not made these determinations, *id.* ¶ 122, and has provided no formal procedure through which individuals at risk may receive notice of their eligibility for single-occupancy rooms, or any procedure for making these determinations.

VII. The Harm To Petitioners And Other Individuals In The Classes Is Irreparable.

To date, the toll of COVID-19 has been severe on individuals experiencing homelessness. The age-adjusted COVID-19 mortality rate for single adults in shelters is 409 deaths per 100,000 people—a rate 80 percent higher than that of the general population of New York City. *Id.* ¶ 84. As noted above, the City's homeless population is disproportionately Black and Hispanic/Latinx, and the difference in mortality rate is even starker when ethnicity is factored in. The age-adjusted COVID-19 mortality rate for homeless single adults is 233 percent higher than white New Yorkers overall. *Id.* ¶ 86. Petitioners are all individuals who are at present risk of harm due to their living situations, and seek immediate relief on behalf of themselves, the Right to Shelter Class, the Heightened Risk Class, and the Disability Class.

A. Petitioner Morleen Fisher

Petitioner Morleen Fisher currently resides in a congregate shelter in downtown Manhattan, where she shares a sleeping area with ten other unrelated people, an eating area with five other people, and a bathroom with nineteen other people. Fisher Aff. ¶¶ 1, 4–5. Ms. Fisher is 55 years old and has been diagnosed with diabetes and takes medication to manage her symptoms. Ms. Fisher has also been diagnosed with post-traumatic stress disorder ("PTSD") and bipolar disorder, and due to a history of smoking, suffers from shortness of breath. *Id.* ¶ 3. She works part-time as an in-home aide to an elderly couple in the Upper East Side, and that couple in turn has serious health conditions. *Id.* ¶ 6. Ms. Fisher asked about being placed in a single-occupancy hotel room to reduce her risk of contracting SARS-CoV-2 but was told that Respondent

DHS does not place people with mental health conditions into hotel rooms. *Id.* ¶ 9. Nonetheless, she has requested a room, but her request has not been granted.

B. Petitioner Tamara Williams

Petitioner Tamara Williams is currently placed in a congregate shelter in Manhattan, where she shares a sleeping area with eleven unrelated individuals and a bathroom with over twenty unrelated individuals, and an eating area with up to fifteen unrelated individuals. Williams Aff. ¶¶ 4–5. Ms. Williams has a history of heart failure and has been diagnosed with chronic obstructive pulmonary disease ("COPD") as well as Type II diabetes, all conditions which she manages with medication and are categorized as high-risk factors for severe illness from COVID-19 by the CDC if she were to contract SARS-CoV-2. *Id.* ¶ 3. She has also been diagnosed with schizoaffective disorder and PTSD. *Id.* She is employed part-time as a counselor for a non-profit behavioral health center. *Id.* ¶ 6. She currently works remotely. *Id.*

C. Petitioner B.J. Athill

Petitioner BJ Athill has been placed in a double-occupancy hotel room that he shares with another individual who he does not know. Athill Aff. ¶ 4. Mr. Athill has been diagnosed with chronic bronchial asthma, which per CDC guidance puts him at increased risk for severe illness or death if he were to contract SARS-CoV-2. *Id.* ¶ 3. He works at a large grocery store in downtown Manhattan, and is training to become a driver for the City's Access-A-Ride program, providing accessible transportation to disabled people. *Id.* ¶ 6. Although he wears a mask at all times while at work, he is unable to do so while he eats and sleeps in his hotel room with his roommate. *Id.* ¶ 7. Mr. Athill has requested a single-occupancy hotel room.

D. Petitioner Rodaisha Smith

Petitioner Rodaisha Smith is currently placed in a double-occupancy hotel room in midtown Manhattan that she shares with a person who she did not previously know. Smith Aff.

¶¶ 1, 3. Ms. Smith works the night shift as a residential support professional for a nonprofit organization, currently assisting two clients in Manhattan who would face severe health complications if they contracted SARS-Cov-2. *Id.* ¶ 4. She takes the subway to and from work. *Id.* ¶ 7.

E. Petitioner Gary Corbin

Petitioner Gary Corbin, a 63-year-old man, currently lives unsheltered. Corbin Aff. ¶ 1. As a result of his cancer treatment, he walks with a right leg prosthesis and has heart disease, liver damage, and bi-polar disorder controlled with medication. *Id.* ¶¶ 3–4. At the beginning of the COVID-19 pandemic, when Mr. Corbin lived in a congregate shelter, he was told that only "people ready to be employed" could be placed in hotel rooms. *Id.* ¶ 7. After proving his employability, he was able to obtain a placement in a hotel room. *Id.* DHS placed Mr. Corbin in a double-occupancy room and he had a roommate who he learned was failing to take precautions to avoid exposure to COVID-19. *Id.* ¶ 8. In light of his own physical and mental conditions, Mr. Corbin requested a single-occupancy room, but was denied. *Id.* He thus left the hotel room and slept on the streets, before briefly returning to a drop-in center. *Id.* ¶¶ 9–10. However, after observing unsafe behavior at the drop-in center, including the failure by staff to use personal protective equipment (PPE), and again being denied a single-occupancy hotel room, he returned to living on the streets. *Id.*

F. Petitioner Coalition for the Homeless

Pursuant to its mission, Petitioner Coalition for the Homeless advocates for individuals experiencing homelessness and has been in contact with members of the Right to Shelter Class who are not parties to this case. As just two examples: A.S., a 45-year-old man, lives in a congregate shelter, and has bi-polar disorder and a panic disorder, the latter of which is presently being triggered by a fear of contracting SARS-CoV-2 while in the shelter. Davis Aff. ¶ 9. A.S.

has requested placement in a single-occupancy room on multiple occasions, and Respondent DHS has denied those requests. *Id.* M.D. is a 65-year-old woman with schizophrenia, chronic lung disease (COPD), stroke, aortic atherosclerosis, colitis, and kidney stones, and is currently living in a congregate shelter. *Id.* She has requested a single-occupancy room placement in a hotel, with support from her physician, but DHS has not granted her request. *Id.*

LEGAL STANDARD

A preliminary injunction may be granted "in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual." C.P.L.R. § 6301. A temporary restraining order likewise may be granted pending a hearing for a preliminary injunction where "it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." *Id.*

In order to establish their entitlement to a preliminary injunction, Petitioners must show (1) that they have a likelihood of ultimate success on the merits, (2) there is the prospect of irreparable injury to Petitioners if the injunction is withheld, and (3) a balancing of the equities tips in favor of Petitioners. *1234 Broadway LLC v. W. Side SRO Law Project*, 86 A.D.3d 18, 23, (1st Dep't 2011). Petitioners meet this standard, and the facts of this case should compel the Court to issue a temporary restraining order and a preliminary injunction.

ARGUMENT

Petitioners seek a preliminary injunction requiring Respondents to offer single-occupancy hotel rooms to the Right to Shelter Class and a temporary restraining order requiring Respondents to offer the individual Petitioners single-occupancy hotel rooms (the "Right to Shelter Class TRO and PI"). The Right to Shelter Class TRO and PI are necessary to remedy Respondents' actions that are arbitrary and capricious and contrary to law in violation of Article 78.

If the Court finds Petitioners have not satisfied their burden for the Right to Shelter Class TRO and PI, Petitioners seek as an alternative a preliminary injunction and a TRO requiring Respondents to offer single-occupancy hotel rooms to the Heightened Risk Class and Petitioners who are members of the Heightened Risk Class (the "Heightened Risk Class TRO and PI").

If the Court finds Petitioners have not satisfied their burden for the Heightened Risk Class TRO and PI, Petitioners seek the following injunctive relief in the alternative: (1) a preliminary injunction and a TRO requiring Respondents to offer single-occupancy hotel rooms to the Disability Class and individual Petitioners who are members of the Disability Class ("The Disability Class TRO and PI"), respectively, on the basis of Respondents' violations of federal, state, and local disability discrimination laws, and (2) a preliminary injunction requiring Respondents to make individualized determinations regarding Petitioners' right to shelter in single-occupancy hotel rooms, and to give Petitioners prior notice of Respondents' denial of Petitioners' right to shelter in single-occupancy hotel rooms and an opportunity to be heard. In addition, Petitioners seek certification of this action as a class action.

I. PRIMARY INJUNCTIVE RELIEF REQUESTED

A. A Preliminary Injunction Should Be Issued Requiring Respondents To Offer Single-Occupancy Hotel Rooms To The Right to Shelter Class, Or In The Alternative The Heightened Risk Class.

This Court should issue a preliminary injunction enjoining Respondents to provide single-occupancy hotel room placements to Petitioners and the Right to Shelter Class, or in the alternative the Heightened Risk Class, during the COVID-19 pandemic. Petitioners have established a likelihood of success on each of their Article 78 claims for Respondents' denial of single-occupancy room placements. Petitioners face potential irreparable injury of serious illness or death, and the equities strongly weigh in favor of the Court's issuance of Petitioners' requested preliminary injunction.

1. Petitioners And The Classes Have A Likelihood Of Success On Their Article 78 Claims.

CPLR 7803 provides that a court may review agency actions and determinations and order appropriate relief where a "body or officer failed to perform a duty enjoined upon it by law," and where agency determinations were "affected by an error of law or . . . arbitrary and capricious." N.Y.C.P.L.R. 7803. In this case, Respondents' failure to carry out their obligation to provide safe shelter to Petitioners and the Right to Shelter, or in the alternative the Heightened Risk Class, is contrary to law. Moreover, and as an independent claim supporting Petitioners' requested relief, Respondents have acted in an arbitrary and capricious manner through their administration of the Emergency Hotel Program by repeatedly emphasizing the need for New Yorkers to socially distance, yet denying available single-occupancy hotel rooms to the Right to Shelter Class, or in the alternative the Heightened Risk Class, without a rational basis, and in a discriminatory manner.

(1) *Respondents' Failure to Provide Single-Occupancy Room Placements Is Contrary To Law*

Respondents are affirmatively obligated to provide safe shelter to Petitioners and the Right to Shelter Class pursuant to Article XVII, Section 1 of the New York State Constitution.[1] New York courts have interpreted the right to shelter to include emergency housing which "satisfies minimum standards of sanitation, safety and decency," *McCain v. Koch*, 511 N.E.2d 62, 63 (N.Y. 1987), and the "right to be sheltered free of potentially significant health threats." *Barnes v. Koch*, 518 N.Y.S.2d 539, 543 (N.Y. Sup. Ct. 1987). FEMA and the CDC have also recognized that congregate shelters are not "free of potentially significant health threats" of COVID-19. *Barnes*, 518 N.Y.S.2d at 543, and do not meet the criteria for safe shelter. In a separate proceeding pending

[1] *Callahan v. Carey*, a class action brought on behalf of homeless men in New York City, established the legal right to shelter under the New York State Constitution. *See* No. 42582/79, slip op. (N. Y. Sup. Ct. Aug. 26, 1981). This right was later extended to homeless women in *Eldredge v. Koch*, 469 N.Y.S.2d 744, 745 (1st Dep't 1983), and to homeless families in *McCain v. Koch*, 511 N.E.2d 62 (N.Y. 1987).

in state court, Respondents acknowledge that their current provision of hotels to homeless individuals during the COVID-19 pandemic is carried out pursuant to their obligation to provide "legally required shelter from the elements." *See* Affirmation of Joshua Goldfein, Ex. 4 ¶ 44 (Affirmation of Antonia Pereira, *Downtown New Yorkers Inc. et al. v. The City of New York et al.*, Index No. 158550/2020 (N.Y. Sup. Ct.)).

Despite this legal obligation, Respondents have denied the needed single-occupancy hotel room placements without cause even though 75 percent of the cost is paid for and the rooms are widely available. By denying single-occupancy hotel rooms to Petitioners and thousands of similarly situated individuals, and thus denying them safe shelter during the COVID-19 pandemic, Respondents are violating that obligation and have failed in their duties to Petitioners to provide shelter free of significant health risks during the course of the COVID-19 pandemic. Accordingly, Respondents' actions are contrary to law, and Petitioners have established a likelihood of success on their claim under Article 78.

(2) *Respondents' Failure to Provide Single-Occupancy Room Placements Is Arbitrary And Capricious*

Moreover, Respondents' actions to enforce social distancing rules while precluding Petitioners from the means to safely socially distance, without a rational basis, is plainly arbitrary and capricious. *See, e.g.*, *Niang v. New York City Dep't of Educ.*, 137 A.D.3d 542, 542 (1st Dep't 2016) (holding decision arbitrary and capricious where it was made "contrary to [the agency's] own" policy). Respondents have repeatedly acknowledged since the beginning of the COVID-19 pandemic that, in order to remain safe from exposure to SARS-CoV-2, New Yorkers must practice social distancing. The Mayor has gone so far as to urge New Yorkers to report on others who are not socially distancing. Yet Respondents continue to deny single-occupancy room placements that would allow Petitioners to follow these directives and keep themselves and their communities safe,

Respondents have put Petitioners at risk of contracting SARS-CoV-2 and, due to Petitioners' pre-existing health conditions, at serious risk of illness or death.

Further, in administering the program for hotel room placements, Respondents have offered single-occupancy hotel room placements to a few thousand people and denied them to thousands of others, with no discernible basis. To Petitioners' knowledge, such determinations were made on an ad-hoc basis and without regard to Petitioners' medical conditions, which put them at higher risk of severe illness or death if they contracted SARS-CoV-2. In fact, the only explanation given was discriminatory – that they only placed people in single-occupancy hotel rooms that were employed or did not suffer from mental illness. Where there is such "inconsistent application" of a policy, causing Petitioner's harm, courts are empowered to step in and remedy that harm. *Corwin v. City of New York*, No. 157166/2020, 2020 WL 5517368, at *5 (N.Y. Sup. Ct. Sep. 14, 2020) (granting TRO for petitioners who alleged "inconsistent application" of school district's COVID-19 safety policies); *Jonathon Woodner Co. v. Eimicke*, 160 A.D.2d 907, 908 (2d Dep't 1990) (holding that, "without offering a rational reason for the lack of consistency," "[s]uch an inconsistent application of the law is arbitrary and capricious").

2. Injunctive Relief Is Appropriate Because Petitioners and the Classes Will Suffer Irreparable Harm In the Absence of an Injunction, and the Equities Are In Favor Of Petitioners.

"Irreparable injury has been defined as 'that which cannot be repaired, restored, or adequately compensated in money, or where the compensation cannot be safely measured.'" *Bisca v. Bisca*, 437 N.Y.S.2d 258, 261 (Sup. Ct., Nassau County 1981) (citation omitted).

Petitioners have shown irreparable injury here. It is without doubt that serious risk of bodily injury or death constitutes irreparable injury. *See, e.g.*, *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 43 (2d Cir. 1997) (holding there was irreparable harm where a treatment facility for alcohol and drug abuse would have closed, leading to potential "death, illness,

or disability"); *Int'l Union of Operating Engineers, Local No. 463 v. City of Niagara Falls*, 743 N.Y.S.2d 236, 240–41 (Sup. Ct., Niagara County 2002), *aff'd sub nom. Bathurst v. City of Niagara Falls*, 298 A.D.2d 1010 (4th Dep't 2002) (holding that loss of healthcare coverage would be irreparable). And COVID-19 creates such a serious health risk because of its potentially severe medical complications and high fatality rate. Indeed, Petitioners "risk severe health consequences, including death, if they contract coronavirus disease. . . . And because the risk of harm to plaintiffs is a grave threat to their health and possibly their lives, they have . . . no adequate remedy at law. *Mays v. Dart*, 453 F. Supp. 3d 1074, 1098 (N.D. Ill. 2020) (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)).

The combination of the highly contagious virus and the crowded conditions in congregate shelters or double-occupancy rooms creates a significantly higher risk of exposure to SARS-CoV-2, and no amount of monetary damages will cure the lingering symptoms from COVID-19, much less death. Indeed, numerous courts across the country have held that the risk of contracting SARS-CoV-2 in areas of confinement (such as prisons or immigration detention facilities) constitutes irreparable harm. *See, e.g.*, *Basank v. Decker*, 449 F. Supp. 3d 205, 216 (S.D.N.Y. 2020) ("The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO."); *Wilson v. Williams*, 455 F. Supp. 3d 467, 479 (N.D. Ohio 2020), *vacated on other grounds*, 961 F.3d 829 (6th Cir. 2020) ("It is true that some subclass members may not die if they contract the virus. However, it is more than mere speculation that the virus will continue to spread and pose a danger to inmates if BOP does not increase its efforts to stop the spread. Petitioners have therefore shown a risk for irreparable harm.").

Just last month, this Court observed that illness or death from COVID-19 constituted irreparable harm, finding "the prospective injury . . . if [workers] are forced to return to in-person [work] is potentially irreparable: a significant illness, hospitalization, or even death could result from any one infection." *Corwin*, 2020 WL 5517368, at *8. Members of the Heightened Risk Class in particular are at grave risk of harm if they contract SARS-CoV-2. Over 90 percent of all COVID-19 fatalities in New York have had at least one condition identified by the CDC that members of the Heightened Risk Class also have, including, among others, cancer, heart failure, obesity, sickle cell disease, diabetes, asthma, hypertension, and immune deficiencies. Verified Pet. ¶¶ 59–62. Due to these conditions, as well as the increased age of many members of the Heightened Risk Class, denying these individuals safe shelter that allows them to socially distance places them in mortal danger.

The balance of the equities decisively favors Petitioners too. By allowing Petitioners to safely socially distance, Respondents fulfill their obligation to shelter the most vulnerable New Yorkers and help stem the spread of COVID-19 as a potential second wave looms. *Basank*, 449 F. Supp. 3d at 216 ("public health and safety are served best by rapidly decreasing the number of individuals detained in confined, unsafe conditions."); *cf. Int'l Union of Operating Engineers*, 743 N.Y.S.2d 236, 241 ("A loss of or reduction in health care coverage outweighs any possible monetary loss to the City.")

Requiring Respondents to provide single-occupancy room placements to all Petitioners and the Right to Shelter Class, or in the alternative the Heightened Risk Class, is the appropriate remedy. It is the only way to allow Petitioners to safely socially distance during the pandemic.

B. The Individual Petitioners Should Be Granted A TRO Enjoining Respondents To Provide Them With A Single-Occupancy Hotel Room Pending A Hearing.

As COVID-19 cases tick up across New York City, the individual Petitioners are at immediate risk of contracting SARS-CoV-2, and due to their medical conditions and/or age, are at increased risk of severe illness or death. One Petitioner has a reasonable concern that, in light of his extensive medical history, getting sick with COVID-19 would be a "death sentence." Corbin Aff. ¶ 12. For the same reasons that Petitioners meet the preliminary injunction standard, and because vacant hotel rooms remain widely available, Petitioners request a TRO pending the hearing on this motion enjoining Respondents to offer them a single-occupancy hotel room.

II. ALTERNATIVE INJUNCTIVE RELIEF REQUESTED

In the event the Court finds Petitioners have not satisfied their burden for the primary injunctive relief requested in Section I, *supra*, Petitioners seek the following alternative injunctive relief: (1) a preliminary injunction and a TRO requiring Respondents to offer single-occupancy hotel to rooms to the Disability Class and individual Petitioners who are members of the Disability Class, respectively, on the basis of Respondents' violations of federal, state, and local disability discrimination laws, and (2) a preliminary injunction requiring Respondents to make individualized determinations regarding Petitioners' right to safe shelter, and to give Petitioners prior notice of Respondents' denial of Petitioners' right to safe shelter free of significant health risks and an opportunity to be heard.

A. A Preliminary Injunction Should Be Issued Requiring Respondents To Offer Single-Occupancy Hotel Rooms To The Disability Class.

This Court should issue a preliminary injunction enjoining Respondents from denying single-occupancy hotel room placements to the Disability Class during the COVID-19 pandemic. Petitioners have established a likelihood of success on their disability discrimination claims for

Respondents' denial of single-occupancy room placements to the Disability Class. The Disability Class, which is at increased risk of severe illness and death from contracting SARS-CoV-2, faces potential irreparable injury of serious illness or death, and the equities strongly weigh in favor of the Court's issuance of Petitioners' requested preliminary injunction.

1. Petitioners Are Likely To Succeed In Proving Their Disability Discrimination Claims.

Respondents' failure to provide single-occupancy hotel rooms to members of the Disability Class constitutes a violation of the ADA, the Rehabilitation Act, the New York State Human Rights Law, and the New York City Human Rights Law.

Title II of the ADA provides that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794.

Although "there are subtle differences between [the ADA and the Rehabilitation Act], the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities." *Henrietta D. v. Bloomberg,* 331 F.3d 261, 272 (2d Cir. 2003) (internal quotation marks omitted). In addition, disability discrimination claims brought under the NYSHRL "are governed by the same legal standards as federal ADA claims," and the NYCHRL "is as or more protective than State and Federal discrimination laws." *I.M. by L.M. v. City of New York*, 178 A.D.3d 126, 135 (1st Dep't 2019) (internal quotations omitted). Thus, "if a plaintiff can satisfy his or her burden under the

ADA, a plaintiff will also satisfy his or her burden under the [Rehabilitation Act] and the State and City HRL." *Id.*

Given the ADA's purpose to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), the statute "is to be broadly construed." *Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 639–40 (S.D.N.Y. 2013) (citations omitted). The Rehabilitation Act is also to be broadly construed. *Id.* (citing *Heilweil v. Mount Sinai Hosp.,* 32 F.3d 718, 722 (2d Cir. 1994)).

To establish a violation under the ADA and the Rehabilitation Act, petitioners must demonstrate that: (1) they are "qualified individual[s]" with a disability; (2) respondents are subject to the ADA and the Rehabilitation Act; and (3) petitioners were "denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or [was] otherwise discriminated against by defendants, by reason of plaintiffs' disabilities." *Sinisgallo v. Town of Islip Hous. Auth.*, 865 F. Supp. 2d 307, 337 (E.D.N.Y. 2012) (internal quotations omitted). Petitioners meet all of these requirements.

First, Petitioners and the Disability Class are all qualified individuals with disabilities. A person is considered a "qualified individual" with a disability under the ADA and the Rehabilitation Act if the person (1) has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) has "a record of such an impairment"; or (3) is a person "regarded as having such an impairment." 42 U.S.C. § 12102(1); 29 U.S.C. §§ 705(9)(B) & (20)(B).

Here, members of the Disability Class are qualified individuals with disabilities because they "have a disability within the meaning of the ADA, the Rehabilitation Act, the New York State

Human Rights Law, or the New York City Human Rights Law."[2] Verified Pet. ¶ 128. For example, Petitioner Morleen Fisher is a member of the Disability Class, and thus a qualified individual, because she has diabetes, takes medication for her diabetes, and is diagnosed with bipolar disorder. *See, e.g.*, *Hensel v. City of Utica*, No. 615CV0374LEKTWD, 2017 WL 2589355, at *4 (N.D.N.Y. June 14, 2017) (finding "a plaintiff can show she is disabled merely by alleging that she suffers from diabetes and takes medication for it"); *Ruhlmann v. Ulster Cty. Dep't of Soc. Servs.*, 234 F. Supp. 2d 140, 178 (N.D.N.Y. 2002) (finding plaintiff with bipolar disorder "disabled" within the meaning of the NYSHRL).[3] As another example, Petitioner Tamara Williams has chronic lung disease (COPD), Type II diabetes, PTSD, schizoaffective disorder, and a history of heart failure. *See, e.g., Felix v. City of New York*, No. 16-CV-5845 (AJN), 2020 WL 6048153, at *4 (S.D.N.Y. Oct. 13, 2020) ("The ADA's implementing regulations explicitly acknowledge schizophrenia as a disability covered by the ADA.").

Second, there can be no dispute that Respondents City of New York, DSS, and DHS are subject to both the ADA and the Rehabilitation Act.[4] With respect to the ADA, the City, DSS, and DHS are "public entities" within the meaning of the ADA; the City is a local government and DHS is an "agency . . . of a . . . local government." *See* 42 U.S.C. § 12131(1)(A); *Oslzly v. Rosenblatt*, No. 14-CV-3638 SLT LB, 2014 WL 4161347, at *6 (E.D.N.Y. Aug. 19, 2014) (finding

[2] As an advocate on behalf of qualified individuals, Petitioner Coalition for the Homeless has standing to sue as an organization. *See Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 640 (S.D.N.Y. 2013).

[3] *Reilly v. Revlon, Inc.,* 620 F. Supp. 2d 524, 541 (S.D.N.Y. 2009) (NYSHRL and NYCHRL "have a broader definition of 'disability' than does the ADA; neither statute requires any showing that the disability substantially limits a major life activity.").

[4] In prior cases, Respondent City of New York and DHS have not disputed that they are subject to the ADA and the Rehabilitation Act. *E.g.*, *Siino v. City of New York*, No. 14 CV 7217 (MKB)(LB), 2020 WL 3807451, at *13 (E.D.N.Y. Feb. 27, 2020), *report and recommendation adopted*, No. 14CV7217MKBLB, 2020 WL 1861865 (E.D.N.Y. Apr. 14, 2020); *Brooklyn Ctr. for Indep. of Disabled*, 980 F. Supp. 2d at 640.

DHS is a public entity under Title II of the ADA). Respondents' Emergency Hotel Program is federally funded and constitutes "programs or activities" subject to the Rehabilitation Act. 29 U.S.C. § 794(b)(1).

Third, Respondents violated the ADA, the Rehabilitation Act, the NYSHRL, and the NYCHRL by failing to afford the Disability Class meaningful access to safe shelter under Respondents' Emergency Hotel Program in the form of single-occupancy hotel rooms. Pursuant to these laws, Respondents must "do more than provide a program on equal terms to those with and without disabilities; they require 'affirmative accommodations to ensure that facially neutral rules do not in practice discriminate against individuals with disabilities.'" *Brooklyn Ctr. for Indep. of Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 597 (S.D.N.Y. 2013) (quoting *Henrietta D. v. Bloomberg,* 331 F.3d at 275). Whereas Respondents have provided some individuals—including those without disabilities—with safe shelter by granting them single-occupancy room placements, Respondents have denied the Disability Class that same benefit by either placing members of the Disability Class in double-occupancy hotel rooms or congregate shelters.

By virtue of their disabilities—in this case, serious health conditions, like diabetes, that significantly increase their likelihood of serious illness or death from COVID-19—Petitioners are denied safe shelter when they are denied single-occupancy room placements that allow them to socially distance. Thus, as a "practical matter," Petitioners are not "able to access benefits to which they are legally entitled." *Henrietta D.,* 331 F.3d at 271. Further, respondents have failed to make reasonable accommodations for the Disability Class to provide meaningful access to the benefit of safe shelter free of potentially significant health risks. *See Wright v. Giuliani*, No. 99 CIV. 10091 (WHP), 2000 WL 777940, at *6 (S.D.N.Y. June 14, 2000), *aff'd*, 230 F.3d 543 (2d Cir. 2000) ("holding that plaintiffs who are "deprived of meaningful access to the particular emergency

housing benefits granted to able-bodied New York City residents because of their physical disabilities . . . have stated a cause of action under the ADA and the Rehabilitation Act.").

In addition, Respondents discriminated against the Disability Class by denying hotel accommodations to individuals with mental impairments. When Petitioner Fisher, who has bipolar disorder, PTSD, and Type II diabetes and is living in congregate shelter, requested a hotel room, shelter staff told her that "DHS does not put crazy people in hotels." Fisher Aff. ¶ 9.

Furthermore, "[a] defendant must incur reasonable costs and take modest, affirmative steps to accommodate the handicapped as long as the accommodations sought do not pose an undue hardship or a substantial burden." *Tsombanidis,* 352 F.3d at 578. Given that FEMA has offered to pay *at least* 75 percent of shelter costs and hotels have ample capacity, the provision of single-occupancy rooms is a "modest, affirmative step[]" that "does not pose an undue hardship or a substantial burden" on Respondents. *Id*.

2. Injunctive Relief Is Appropriate Because the Disability Class Will Suffer Irreparable Harm In the Absence of an Injunction, and the Equities Are In Favor Of The Disability Class.

For the same reasons described in Section I.A.2, *supra*, Petitioners and the Disability Class have shown irreparable harm, and the balance of the equities decisively favors Petitioners the Disability Class. Weighing in further favor of Petitioners and the Disability Class is that the Disability Class is at an increased risk of severe illness or death from contracting COVID-19 due to their high risk medical conditions identified by the CDC.

B. The Individual Petitioners Who Are Members Of The Disability Class Should Be Granted A TRO Enjoining Respondents To Provide Them With A Single-Occupancy Hotel Room Pending A Hearing.

For the same reasons described in Section I.B., *supra*, Petitioners request a TRO pending the hearing on this motion enjoining Respondents to offer each of the individual Petitioners who are members of the Disability Class a single-occupancy hotel room. These Petitioners in particular

merit this TRO because they are at an increased risk of severe illness or death from contracting SARS-CoV-2 due to their high risk medical conditions identified by the CDC.

C. A Preliminary Injunction Should Be Issued Requiring Respondents To Make Individualized Determinations Regarding Petitioners' Right To Safe Shelter.

This Court should issue a preliminary injunction requiring Respondents to make individualized determinations regarding Petitioners' right to safe shelter, and to give Petitioners prior notice of Petitioners' right to safe shelter free of significant health risks and an opportunity to be heard. Petitioners have established a likelihood of success on their due process claims for Respondents' failure to provide Petitioners notice and an opportunity to be heard. Petitioners face potential irreparable injury of serious illness or death, and the equities strongly weigh in favor of the Court's issuance of Petitioners' requested preliminary injunction.

1. Petitioners And The Classes Have A Likelihood Of Success On Their Due Process Claims.

Government action violates the procedural requirements of the Fourteenth Amendment's Due Process Clause where (1) there is a liberty or property interest protected by due process, and (2) the procedures afforded by the government upon terminating that interest are constitutionally inadequate. *See Kapps v. Wing*, 404 F.3d 105, 112 (2d Cir. 2005). Likewise, Section 6 of Article I of the New York State Constitution prohibits terminating a liberty or property interest without due process of law. Here, Petitioners and the Right to Shelter Class have a property interest in shelter free of potentially significant health threats, and Respondents' failure to provide notice and an opportunity to be heard prior to denying Petitioners and the Right to Shelter Class of that property interest is constitutionally inadequate.

(1) *Petitioners Have a Constitutionally Protected Property Interest*

It is well established that "property" protected by the Due Process Clause includes the right to receive certain governmental benefits. *See Atkins v. Parker*, 472 U.S. 115, 128 (1985) (food

stamp benefits); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (Social Security disability benefits); *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970) (welfare benefits). In order to prove their right to a due process-protected entitlement, Petitioners must only demonstrate that the City's eligibility determination gave rise to a continuing expectation of benefits, thereby creating a property interest. This property interest must either be supported by (1) an independent source of law, like a statute, or (2) in the absence of statutory language, agency practices that "reinforce the continuing nature" of the benefit. *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 740 (5th Cir. 2008).

Here, Petitioners and the Right to Shelter Class have a property interest in safe shelter free of potentially significant health threats. Article XVII, Section 1 of the New York Constitution provides a right to safe shelter.[5] New York courts have interpreted this right to include the "right to be sheltered free of potentially significant health threats." *Barnes*, 518 N.Y.S.2d at 543. Respondents recently have acknowledged this right in another proceeding (stating that their current provision of hotel rooms to homeless individuals during the COVID-19 pandemic is carried out pursuant to their obligation to provide "legally required shelter from the elements.") *See* Goldfein Affirm., Ex. 4 ¶ 44 (Pereira Affirm., *Downtown New Yorkers*, Index No. 158550/2020).

(2) *Respondents' Procedures Are Constitutionally Inadequate*

The United States Supreme Court has held that the "'fundamental requisite of due process of law is the opportunity to be heard' . . . 'at a meaningful time and in a meaningful manner.'" *Goldberg*, 397 U.S. at 267 (internal citations omitted); *see also Dusenbery v. United States,* 534 U.S. 161, 167 (2002) ("[I]ndividuals whose property interests are at stake are entitled to notice and

[5] *Cf. Caractor v. Davis-Moten*, No. CV 06-5299 (SJF), 2008 WL 11417789, at *5 (E.D.N.Y. Sept. 15, 2008), *report and recommendation adopted*, No. CV-06-5299(SJF)(MLO), 2008 WL 11417788 (E.D.N.Y. Sept. 29, 2008) (finding property interest in family shelter was protected by the Fourteenth Amendment).

an opportunity to be heard."); *LaChance v. Erickson* 522 U.S. 262, 266 (1998) ("The core of due process is the right to notice and a meaningful opportunity to be heard.").

Here, Respondents failed to provide Petitioners and the Right to Shelter Class an opportunity to be heard before denying them shelter free of potentially significant health risks. Instead, Respondents have made unilateral and arbitrary decisions regarding the denial of the placement of Petitioners and members of the Right to Shelter Class into a shelter setting without significant health risks. Furthermore, these denials are being made without providing Petitioners and the Right to Shelter Class with an opportunity to be heard prior to Respondents' determinations.

Moreover, many of Petitioners and the Right to Shelter Class did not receive any notice of Respondents' decision denying their placement in single-occupancy hotel rooms. Instead, the information Petitioners and the Right to Shelter Class have received has been ad-hoc and has not included any legitimate reason for the deprivation of their property interest. *See, e.g.*, Fisher Aff. ¶ 9; Corbin Aff. ¶ 7.

2. Injunctive Relief Is Appropriate Because Petitioners And The Classes Will Suffer Irreparable Harm In The Absence Of An Injunction, And The Equities Are In Favor Of Petitioners.

For the same reasons described in Section I.A.2, *supra*, Petitioners have shown irreparable harm, and the balance of the equities decisively favors Petitioners.

III. PETITIONERS' PROPOSED CLASSES SHOULD BE CERTIFIED.

Certification of a class is appropriate in New York State where "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the

interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy." C.P.L.R. § 901(a); *see also City of New York v. Maul*, 59 A.D.3d 187, 189 (1st Dep't 2009), *aff'd*, 929 N.E.2d 366 (N.Y. 2010). All three proposed Classes meet these requirements.

A. The Total Number of Class Members Is So Numerous That Joinder of All Members Would Be Impracticable.

The Right to Shelter Class is comprised of more than 17,191 single adult homeless New Yorkers, and the Heightened Risk Class and the Disability Class, which are subsets of the Right to Shelter Class, include thousands of individuals, making the total number of individuals far too numerous to all be added as individual petitioners to this action.

B. Respondents' Violation of the Classes' Rights Presents Common Legal and Factual Questions That Predominate Over Individual Issues.

The Right to Shelter Class has sought and been denied safe shelter free of potentially significant health risks in the form of single-occupancy hotel rooms under Respondents' Emergency Hotel Program. These events form the basis of the common legal and factual questions being raised in this action. Specifically, this action contemplates the following common legal and factual questions that predominate over individual issues:

a. whether Respondents refused to provide single-occupancy rooms that would allow single homeless individuals, who are living or will live in congregate shelters and double-occupancy hotel rooms, to safely socially distance during the COVID-19 pandemic, and whether such refusal is arbitrary and capricious and contrary to law;

b. whether Respondents failed to provide adequate processes through which single homeless individuals would receive individualized determinations as to whether they would have access to a single-occupancy hotel room, and whether such failure was arbitrary and capricious and violates procedural due process rights; and

c. whether Respondents refused to provide single-occupancy hotel rooms to single homeless adults with disabilities, and whether such refusal is discriminatory under federal, state, and local disability discrimination laws.

C. The Claims of the Representatives Are Typical of the Class.

The claims of Petitioners are typical of the entire Right to Shelter Class. They are single adult homeless New Yorkers who Respondents have denied safe shelter free of potentially significant health risks in the form of single-occupancy hotel rooms. And some of Petitioners are of a certain age and have certain medical conditions identified by the CDC that place them at heightened risk of severe illness or death if they contract SARS-CoV-2, which is typical of the Heightened Risk Class. Other Petitioners have medical conditions identified by the CDC that qualify as disabilities under federal, state, and local disability discrimination laws, which is typical of the Disability Class. Thus, Petitioners will be adequate and appropriate class representatives.

D. The Class Will Be Fairly and Adequately Protected.

Counsel for Petitioners have significant class action experience to provide adequate and appropriate representation to the class in this litigation. Counsel Legal Aid Society has represented homeless individuals certified as a class in several cases. *See, e.g.*, *Callahan v. Carey*, 909 N.E.2d 1229 (N.Y. 2009); *McCain v. Koch*, 511 N.E.2d 62 (N.Y. 1987); *Boston v. City of New York*, 402295/08 (Sup. Ct. N.Y.); *Butler et al. v. City of New York et al.*, 1:15-CV-03783 (S.D.N.Y.); *see also Zheng v. The City of New York*, 400806/11 (Sup. Ct. N.Y. 2011). Counsel Dawn Smalls served as co-lead counsel for one of the largest FLSA class actions on record. *See Beltran, et al. v. Interexchange, Inc., et al.*, 1:14-CV-03074 (D. Colo.). In addition, the Right to Shelter Class is comprised of vulnerable individuals living in temporary shelter without the resources to file individual lawsuits, which would in any case create a risk of inconsistent or varying adjudications and incompatible standards of conduct for Respondents.

E. Class Certification Is Superior To Any Other Method Of Adjudication.

Class certification is clearly superior to all other available methods of proceeding with this action. Adjudicating the rights of thousands of similarly situated New Yorkers in one action is the

most efficient and equitable method of proceeding for all parties. A class action will also provide the entire Right to Shelter Class with a meaningful opportunity to be heard, an opportunity Respondents failed to afford in their decision to deny each member of the Right to Shelter Class safe shelter free of significant health risks.

Accordingly, because the proposed Classes meet all the requirements of a class under Article 9 of the CPLR, and for the foregoing reasons, each Class should be certified as a class.

CONCLUSION

For the foregoing reasons, the Court should (1) certify this case as a class action, and (2) issue a temporary restraining order and a preliminary injunction enjoining Respondents from denying single-occupancy hotel room placements to Petitioners and the Right to Shelter Class, or in the alternative the Heightened Risk Class, during the COVID-19 pandemic; or, in the alternative, issue a temporary restraining order and a preliminary injunction enjoining Respondents from denying single-occupancy hotel room placements to Petitioners and the Disability Class; and issue a preliminary injunction requiring Respondents to make individualized determinations and to provide notice and an opportunity to be heard regarding Petitioners' right to safe shelter.

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Respectfully Submitted,

/s/ Joshua Goldfein

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