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. 452029/2020

Hon. Arthur F. Engoron

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITIONERS' APPLICATION FOR CLASS CERTIFICATION AND A PRELIMINARY INJUNCTION

THE LEGAL AID SOCIETY
199 Water Street
New York, NY 10038
Tel: (212) 577-3300
Fax: (212) 809-1574

JENNER & BLOCK LLP
919 Third Ave.
New York, NY 10022
Tel: (212) 891-1600

Attorneys for Petitioners

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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 reply memorandum of law in further 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 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 fulfill their obligation to provide safe shelter for Petitioners and the classes of homeless New Yorkers they represent during the COVID-19 pandemic.

PRELIMINARY STATEMENT

As winter arrives and COVID-19 cases continue to surge in New York City, concrete measures to protect the City's population continue to be necessary until vaccines are widely distributed and the pandemic has abated. Yet, thousands of single adults—to whom Respondents owe an obligation to provide safe shelter—remain in congregate shelter settings, shared hotel rooms, or on the street to avoid the risk of exposure to SARS-CoV-2 in congregate settings. In their opposition papers, Respondents essentially concede that single occupancy rooms are a safer alternative to congregate shelter.[1] Respondents dispute only whether they are obligated to provide that safer alternative and to whom.

This case was filed on October 22, 2020, seven months after the onset of the pandemic. Yet, in their papers, Respondents announce for the first time that they have just instituted a standard

[1] *See* Resp'ts' Br. 15 (highlighting CDC recommendation for shelter providers to provide "modified sleeping arrangements to allow social distancing") (citing CDC, "Interim Guidance for Homeless Service Providers to Plan and Respond to Coronavirus Disease (updated Nov. 3 2020)").

and a process, the "DHS COVID-19 Risk Factor Guidelines" (hereinafter "Interim Guidelines"), to assess which clients are at greater risk of serious illness or death if they were to contract the virus. Contrary to Respondents' characterization of their pandemic response as "swift,"[2] no such process existed until this point. Even with this new process, it is still unclear whether every client who is at a greater risk of serious illness or death if they were to contract the virus will be granted the accommodation that Respondents acknowledge is appropriate and necessary to fulfill their obligation to provide safe shelter under the New York State Constitution. The Interim Guidelines also deviate from Centers for Disease Control and Prevention (CDC) guidance.

Many Petitioners and class members will no doubt be safer as a result of Respondents' new Interim Guidelines that assess clients' individual risks of developing severe complications from COVID-19, but this process is still insufficient. Even after its implementation, thousands of single adult New Yorkers experiencing homelessness will remain at risk of harm in congregate settings or double-occupancy hotel rooms, including those individuals who are at heightened risk of severe illness or death from COVID-19 as determined by the CDC.

Petitioners continue to seek safe shelter in the form of single-occupancy hotel room placements for all class members. Yet, given the urgency of addressing these at-risk populations in the coming days, Petitioners also seek targeted and narrowed relief in this motion, including:

(1) An Order ensuring that all individuals in the Heightened Risk Class and Disability Class who have conditions recognized by the CDC as creating a heightened risk of severe illness or death from COVID-19 are provided with a single-occupancy hotel room;

(2) An Order requiring Respondents to establish a procedure and standard for those in

[2] Indeed, until this lawsuit was filed, Petitioners Morleen Fisher and Tamara Williams were living in a congregate shelter that Respondents failed to de-densify. Respondents subsequently granted single-room placements to four of the five individual Petitioners after Petitioners filed this lawsuit.

the Right to Shelter Class to seek a single-occupancy hotel room based on demonstrated need, such as those individuals who are "essential workers" serving vulnerable populations as a condition of their employment.

As set forth in Petitioners' opening papers and herein, Petitioners have a likelihood of prevailing on their claims brought pursuant to Article 78, their constitutional right to safe shelter, and the Americans with Disabilities Act ("ADA") and accompanying disability rights laws. Respondents' deviation from the CDC's guidance is arbitrary and capricious, and contrary to law. Moreover, throughout their affidavits, Respondents ignore the well-recognized threat of aerosol transmission entirely—a significant factor for indoor congregate facilities like shelters. Respondents also attempt to compare the COVID-19 positivity rate in homeless shelters with the positivity rate of the general population in New York City, but without acknowledging that individuals in the general population can structure their lives and sleeping arrangements as they see fit, whereas homeless individuals are forced to share extremely close quarters with strangers whose activities and exposure to others outside the shelter are completely unknown. It is for this reason that the Court must ensure that the City offers a single room to all clients who are at increased risk of serious illness or death if they contract SARS-CoV-2. Anything less would be a breach of Respondents' duty to provide safe shelter and, arbitrary and capricious.

Finally, Respondents' Interim Guidelines are inadequate, not only as a substantive matter but also procedurally as they rely on Respondents' cumbersome "CAS" assessment process for reasonable accommodation determinations. Based on Petitioners' experience with Respondents' CAS process, it is unduly burdensome for many individuals, and it will lead to extensive delays in the provision of safe shelter for the Heightened Risk Class and the Disability Class. The Interim Guidelines also offer no relief for individuals who have no medical conditions or disabilities of

their own, even if they may have a comparably compelling need for a single room, such as employment that puts them in contact with high-risk populations.

Accordingly, Petitioners seek urgent intervention from this Court in issuing Petitioners' requested injunction requiring that all class members are afforded single rooms, the safest and most appropriate shelter during the course of the COVID-19 pandemic, or in the alternative (a) (i) requiring Respondents to implement its new standard so that all individuals who fall within a high risk category under the Interim Guidelines are afforded the single-room placement that Respondents acknowledge they need, and (ii) extending the Interim Guidelines to all individuals who fall within the CDC risk factors; and (b) requiring Respondents to establish a procedure and standard for members of the Right to Shelter Class to seek single rooms based on demonstrated need, such as working as an "essential worker" serving vulnerable populations.

I. PETITIONERS' CLAIMS ARE JUSTICIABLE

Respondents argue that this case is not justiciable, seeking to preclude review of Petitioners' claims entirely, *see* Resp'ts' Br. 8–12, despite decades of precedent in which this Court has reviewed constitutional and statutory claims like those presented here. The New York Court of Appeals has stated that claims brought on behalf of homeless individuals "do not present a nonjusticiable controversy merely because the activity contemplated on the State's party may be complex and rife with the exercise of discretion." *Klostermann v. Cuomo*, 463 N.E.2d 588, 590, 594 (N.Y. 1984) (reversing lower court's finding of nonjusticiability, and rejecting the defendants' argument that the "controversy is nonjusticiable because any adjudication in support of plaintiffs will necessarily require the expenditure of funds and a concomitant allocation of resources"). And the Court has emphasized that the "enforcement of a clear constitutional or statutory mandate is the proper work of the courts." *Hurell-Harring v. State,* 930 N.E.2d 217, 227 (N.Y. 2010) (citations omitted) (reversing lower courts' dismissal).

Petitioners in this case allege that Respondents have failed to provide safe shelter, pursuant to their constitutional obligation, by arbitrarily denying homeless single adults shelter placements that will keep them safe amidst a deadly pandemic. *See* Verified Pet. ¶¶ 12, 15, 111–16, 137–141; *Barnes v. Koch*, 518 N.Y.S.2d 539, 542 (N.Y. Sup. Ct. 1987) (ordering the City to "fulfill its obligation to shelter the homeless by placement in a shelter that does not risk their health"). Petitioners also allege that Respondents have arbitrarily denied this safe shelter to those at higher risk of severe illness or death if they were to contract SARS-CoV-2, Verified Pet. ¶¶ 144–49, and that, until now, Respondents have failed to develop and implement a process that could assess the level or type of accommodation required to keep petitioners safe, in violation of due process. *Id.* ¶¶ 119–20, 152–65. Such claims are, and have been, the "proper work of the courts." *Hurell-Harring,* 930 N.E.2d at 227; *see also Center for Indep. of Disabled v. Metro. Transp. Auth.*, 184 A.D.3d 197, 209 (Sup. Ct. App. Div. 2020) (holding that claims brought under the NYCHRL were justiciable; a "court can direct the State to prepare plans and programs to provide suitable treatment"); *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 212 (E.D.N.Y. 2000), *aff'd sub nom Henrietta D. v. Bloomberg*, 331 F.3d 262 (2d Cir. 2003) (adjudicating plaintiffs' claims brought against the City under the ADA and state constitution in order to "ensure meaningful access" to necessary benefits and services).

Respondents primarily argue that this Court cannot assess the claims presented by Petitioners due to the implementation of Respondents' Interim Guidelines, which were announced after the filing of this lawsuit. *See* Resp'ts' Br. 11; Wolpert Suppl. Affirm. ¶¶ 9–12, Ex. A. While Petitioners set forth below why these newly announced Interim Guidelines are insufficient on their merits, Respondents certainly cannot rely on them to shield themselves from review in this case.

In *McCain v. Koch*, the Court of Appeals held that the plaintiffs' claims brought on behalf of homeless individuals were justiciable, reversing the appellate division and rejecting the City respondents' argument that their adoption of departmental regulations governing shelter standards precluded judicial review. 511 N.E.2d 62, 66 (N.Y. 1987). The Court held that the claims of those plaintiffs were justiciable because, at minimum, there "remain[ed] questions of compliance [with] and enforcement" of those standards. *Id.* at 67. In this case, where there are no departmental regulations – only a set of recently announced guidelines – this Court may not only assess the sufficiency of the Interim Guidelines, but also compliance and enforcement. *Id.* at 66 (noting that in "the absence of any departmental regulation," "it was necessary for the court to establish its own minimum standards").

In seeking to preclude judicial review in this case, Respondents rely primarily on two cases: *Mixon v. Grinker*, 669 N.E.2d 819 (N.Y. 1996) and *New York State Inspection, Security and Law Enforcement Employees v. Cuomo*, 475 N.E.2d 90 (N.Y. 1984). Neither is apposite. In *Mixon*, the Court of Appeals reviewed a bench trial in which the plaintiffs, homeless individuals suffering from HIV-related illness, challenged the "adequacy" of the City's "Comprehensive Care Plan (CCP)," a "special medical needs housing program" formulated to meet the needs of the plaintiffs' population. 669 N.E.2d at 819–21. Following findings at trial that the CCP was a "comprehensive program" of housing, nutrition, medicine, and services, the Court held that the plaintiffs did not have "the right to plenary judicial review of the merits" of that carefully tailored program. *Id.* at 820–21. By contrast, in this case, Respondents have only recently formulated the Interim Guidelines for determining which clients meet the threshold for the possibility of the provision of a single room. The Interim Guidelines are not a comprehensive program of benefits and services, *see* Wolpert Suppl. Affirm. Ex. A, and because they were announced since the filing of this case,

questions of compliance and enforcement remain unaddressed.[3]

Further, the 24 years since *Mixon* was decided show the case's limited reach; only a single court has even cited to *Mixon*, and that court distinguished *Mixon* in granting relief for a petitioner seeking emergency housing placement. *Hanna v. Turner*, 1999 WL 35135515 (N.Y. Sup. Ct. July 12, 1999) (relying on *McCain* and holding that it could require the agency to "comply with its own governing standards"). Thus, no court has ever relied upon *Mixon* to foreclose judicial review in the manner Respondents seek.

The Court of Appeals' decision in *NYS ISLEE v. Cuomo*, also relied upon by Respondents, demonstrates why Petitioners' claims are justiciable. In *Cuomo*, the petitioners, employees at a correctional facility, commenced an Article 78 proceeding seeking to prevent the Governor from closing that facility, under the theory that they might be "exposed to an increased hazard" if the employees were transferred to other prison facilities. 475 N.E.2d at 93–94. The Court of Appeals affirmed dismissal, holding that it was within the sole and express power of the state executive branch to "establish[] and clos[e] any correctional facility," *id.* at 93,[4] but noting that "it is well within the power of the judiciary to declare the vested rights of a specifically protected class of individuals . . . ." *Id.* (citing *Klostermann*, 463 N.E.2d at 588). Here, Petitioners base their claims on their vested rights under the New York State Constitution, the U.S. Constitution, and various federal and local laws. Thus, *Cuomo* does not support the argument that Petitioners' claims are nonjusticiable; it in fact stands for the opposite: that the Court can enforce Petitioners' vested right

[3] Respondents' reliance on *Corwin v. City of New York*, 2020 WL 5745617, at *3 (N.Y. Sup. Ct. Sep. 25, 2020) is misplaced for similar reasons. In that case, the petitioner-schoolteachers challenged the City Department of Education (DOE)'s comprehensive COVID-19 risk accommodations policy that was put in place months prior to the lawsuit, where that policy adopted CDC guidance wholesale and provided for individualized considerations of the risks to *all* teachers. *Id.* at *4–6. It thus has no bearing on this case, in which Respondents did not have *any* such policy prior to this lawsuit and have only just announced Interim Guidelines that contravene much of the CDC guidance and exclude many homeless individuals from consideration entirely.

[4] The Court also affirmed the dismissal of these claims because the "purported hazard" claimed by the petitioners was "wholly speculative and abstract." 475 N.E.2d at 94.

to safe shelter under the New York State Constitution.

Respondents' calls for the Court to defer to "public health officials" is a red herring. Respondents acknowledge that the CDC is the respected authority on COVID-19 responses, but they adhere to the CDC guidance only when it suits their purpose and ignore it when it does not.[5] Respondents concede that certain populations are at higher risk and that, to fulfill their obligation to provide safe shelter, a single-room placement is appropriate for certain populations. At a minimum, Respondents should be required to implement their own standard. Resp't's Br. 10-12. Instead, Respondents ask for their actions to be immune from judicial review, even where their actions, as described below, are inconsistent with the guidance of public health officials and raise serious constitutional and statutory questions. This request is untenable under the law and should be rejected.

II. PETITIONERS ARE LIKELY TO SUCCEED ON THEIR CLAIMS SEEKING SINGLE-OCCUPANCY ROOMS FOR THE HEIGHTENED RISK AND DISABILITY CLASSES

Petitioners seek safe shelter in the form of single-occupancy rooms for the Heightened Risk Class, defined as all homeless individuals "who are at heightened risk of severe illness or death from the virus that causes COVID-19 by virtue of either (or both) their age or medical conditions as identified by the CDC." Verified Pet. ¶ 128(a). In light of the available single-occupancy hotel rooms, it is arbitrary and capricious, and contrary to law, to provide such rooms to some high risk individuals and not to others. Moreover, Petitioners seek to ensure that all those in the Disability Class who are at heightened risk of severe illness or death from COVID-

[5] Respondents cite the CDC guidance as a comprehensive or definitive list that should determine the risk factors for the granting of single rooms, *see* Resp't's Br. 24–25 ("Indeed, the CDC's list of medical conditions that place adults at increased risk if the[y] contract the virus is limited. As such, not all members of the proposed Disability Class are at heightened risk if they contract COVID-19 or would be entitled to a single occupancy room, even if the City did not provide a safe shelter environment . . . ."), while, at the same time, cherry picking which conditions from the CDC's list of high risk conditions will be sufficient to meet the threshold to be eligible for a single hotel room placement.

19, due to their disability, are granted a single-room accommodation.

A. The Failure To Provide Single-Occupancy Rooms to the Heightened Risk Class Is Arbitrary and Capricious, and Contrary to Law

In response to Petitioners' request in this motion for single-occupancy rooms for the Heightened Risk Class, Respondents have now formulated the Interim Guidelines that are "based on the risk factors identified by the [CDC] to enhance its established reasonable accommodation process when considering COVID-19 related requests." Wolpert Suppl. Affirm. ¶ 9. While Respondents appear to be claiming, nine months into the pandemic, that they have now fully incorporated the CDC guidelines into their determinations of who receives single-occupancy rooms, this assertion is unfortunately belied by the plain words of their own Interim Guidelines.

Comparing the Interim Guidelines with the CDC guidance, Respondents have left large swaths of high-risk individuals out of single room eligibility, despite Respondents' purported reliance on the CDC guidelines. *Compare* Wolpert Suppl. Affirm. Ex. A at 2–3 *with* Centers for Disease Control and Prevention, People with Certain Medical Conditions (Dec. 1, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html. For example, Respondents parse certain severe conditions where the CDC does not: Respondents exclude those with "mild stage" COPD, deny single rooms to those with "well controlled" diabetes, and specify certain types of cancer as producing higher risk; the CDC does not make any of these distinctions in deeming individuals with COPD, diabetes, or cancer to be high risk. More broadly, Respondents exclude entirely individuals with a history of smoking and individuals who are obese (over 30 BMI), despite the CDC's recognition of those conditions as definitively placing afflicted individuals at a higher risk of severe illness or death.

Finally, for most of the conditions that the CDC deems to be potential comorbidities, Respondents exclude them from single rooms, including severe asthma, hypertension, and liver

disease. And Respondents' new Interim Guidelines do not allow for any consideration of whether someone is entitled to a single room if they have multiple potential comorbidities, even though the CDC guidance provides that the "more underlying medical conditions someone has, the greater their risk is for severe illness from COVID-19."[6]

Respondents offer no explanation for these departures from CDC guidance, despite purportedly basing their new guidelines on the CDC risk factors. Wolpert Suppl. Affirm. ¶ 9. Accordingly, the basis for Petitioners' motion remains true; in carrying out their obligation to provide safe shelter and to ensure social distancing through single rooms, Respondents are acting arbitrarily and inconsistently when determining who gets single rooms and who does not. *See* Pet'rs' Br. 15–16; *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" (citation omitted)). Respondents should be obligated to offer single rooms to all those whom the CDC deems high risk, rather than picking and choosing who gets safe shelter in the next several months, which many experts are projecting as potentially the worst of the pandemic.

Throughout the pandemic, courts have relied on the CDC risk factors to provide the necessary guidance, such as when ordering the release of prisoners due to medical conditions, conditions which notably Respondents' newly announced Interim Guidelines exclude from single-room consideration. *See, e.g.*, *United States v. Campagna*, No. 16 Cr. 78-01, 2020 WL 1489829, at *31 (S.D.N.Y. Mar. 27, 2020) (ordering an inmate's release due to his immunocompromised condition, recognized by CDC guidance as putting the inmate at heightened risk); *United States v. Canini*, No. 04 Cr. 283, 2020 WL 4742910, at *1 (S.D.N.Y. June 8, 2020) ("severe asthmatic

[6] Centers for Disease Control and Prevention, People with Certain Medical Conditions (Dec. 1, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

condition"); *United States v. Franco*, No. 12 Cr. 932, 2020 WL 4344834, at *1 (S.D.N.Y. June 24, 2020) (diabetes, hypertension, and obesity). Indeed, in *Corwin*, upon which Respondents rely, the court found it significant that the DOE adopted in full the CDC high risk categories in offering accommodations, including obesity and smoking, and noted that it was reasonable for the DOE to rely on those guidelines because the CDC is the "nation's health protection agency and has been supporting both the federal and state governments on the front line of public health," and "applies rigorous scientific standards to ensure the accuracy and reliability of [its] research results." 2020 WL 5745617, at *8 (alteration in original) (internal citations and quotation marks omitted).

Instead of presenting a rational basis for the divergence from the CDC guidelines, Respondents repeatedly cite the cost of single room placements as the basis for their failure to fulfill their constitutional obligation. *See*, *e.g.*, Resp'ts' Br. 1, 5–6, 28, 31–32. The New York Court of Appeals has categorically rejected the defense that "there simply is not enough money to provide the services that plaintiffs assert are due them," holding that where "existing conditions violate an individual's constitutional rights," respondents' violation "cannot be justified by lack of staff or facilities." *Klostermann*, 463 N.E.2d at 594; *accord Henrietta D*, 119 F. Supp. 2d at 218–19 (finding defendants' administration of public benefits program violated Article XVII of the New York Constitution and holding that where conditions violate an individual's constitutional rights, "defendants cannot argue that the failure to alter those conditions is justified by lack of staff or facilities"); *Doe v. Dinkins*, 600 N.Y.S.2d 939, 943 (N.Y. App. Div. 1993) ("Compliance is mandatory despite a purported claim of insufficient funds. . . . Any inconvenience caused by compliance is outweighed by the harm which would be suffered otherwise."). Respondents thus cannot shirk their constitutional obligations on the basis of cost.[7]

[7] Even if the program cost were relevant, Respondents exaggerate the cost by repeatedly citing the full cost of the program on an annual basis without accounting for the expected FEMA reimbursement. *See, e.g.*, Resp'ts' Br. 1, 32

B. The Failure To Provide Single Rooms to the Disability Class Is a Violation of the ADA and Related Laws

The ADA prohibits Respondents from discriminating against individuals seeking and receiving shelter on the basis of their disability status. 42 U.S.C. § 12132. It also requires that Respondents undertake an individualized inquiry when a client requests a reasonable accommodation to access shelter. *See, e.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (the ADA requires an "individualized inquiry" into what accommodations are reasonable). Respondents argue against a strawman when they assert that the CDC's list of medical conditions is narrower than the disabilities covered under the ADA. Resp'ts' Br. 24–25. Petitioners have defined the Disability Class more narrowly than the ADA. The Disability Class does not include every individual with any qualifying disability under the ADA but is limited to individuals whose disability puts them at heightened risk of serious illness or death if they contract COVID-19.

Respondents further erroneously claim that Petitioners' arguments under the ADA, Section 504 of the Rehabilitation Act, the New York State Human Rights Law, and the New York City Human Rights Law are effectively moot because of the settlement reached in *Butler v. City of New York et al*, No. 15 Civ. 3782 (S.D.N.Y. 2015). *Butler* was resolved years before the beginning of the current pandemic, and that settlement only pertained to the claims raised in that lawsuit and does not foreclose claims arising from the pandemic.[8] While *Butler* did establish a robust

(citing cost of $1.56 billion on an annual basis). FEMA has committed to reimbursing seventy-five percent of the cost. Verified Pet. ¶ 73. Not only is the pandemic expected to be of limited duration (not lasting years), but FEMA has recently confirmed that it will fund emergency hotel programs for the duration of the COVID-19 pandemic. Diane Yentel (@dianeyentel) Twitter (Dec. 18, 2020 8:33 PM ET), https://twitter.com/dianeyentel/status/1340107875927158784 (posting letter from Governor of California stating that FEMA "has just announced they will no longer require states to submit requests every 30 days to reauthorize reimbursement for non-congregate shelter – and instead FEMA has authorized reimbursement for this life-saving mission through the duration of the COVID-19 emergency"). Respondents also do not provide a breakdown of the cost data with respect to the provision of single-occupancy rooms to either the Heightened Risk Class or the Disability Class.

[8] Stipulation of Settlement at ¶ 89, *Butler v. City of New York*, No. 15 Civ. 03783 (S.D.N.Y. 2015) (so ordered November 9, 2017) (releasing defendants from "any and all claims that *have been* or *could have been asserted* in this Action") (emphasis added).

reasonable accommodation process for individuals with disabilities, the range and nature of disabilities requiring a reasonable accommodation has broadened significantly from when *Buter* was settled, as clients with disabilities who could otherwise access shelter safely in a congregate site are no longer able to do so due to the risks from COVID-19.

By failing to offer all Disability Class members single rooms, Respondents are discriminating against them by failing to provide them meaningful access to safe shelter. While Respondents have now provided some members of the Disability Class (including four of the five named Petitioners) with a single room, they have refused to provide single rooms to many other Disability Class members who are at heightened risk of severe illness or death from COVID-19, effectively discriminating against them.

Further, the reasonable accommodation (RA) process developed in *Butler* is inadequate to address the needs of the Disability Class. First, the *Butler* RA process can take weeks or months to reach a determination, if one is reached at all. *See* Reply Aff. Lindsey Davis ¶¶ 6–7, 9–13. During the pandemic, spending even a single day in a congregate shelter or double-occupancy room puts class members at increased risk of contracting SARS-CoV-2 and thereby suffering the irreparable harm of possible serious illness or death, because they will be forced to sleep, eat, and bathe unmasked within close proximity to other individuals who may have contracted the virus.

Second, based on Respondents' new Interim Guidelines, even if a member of the Disability Class applies for a reasonable accommodation for a single room, Respondents may deny the request if the class member does not fall into their "highest priority" category. Wolpert Suppl. Affirm. ¶¶ 9–12, Ex. A. While Respondents' RA Process affords certain members of the Disability Class (who meet the CDC standard for being at risk of serious illness or death if they contract COVID-19) double-occupancy rooms, that placement does not adequately accommodate their

disability because these individuals are still at risk of exposure to SARS-CoV-2 while sharing a room with a stranger whose exposure to the virus is unknown. As a result, Respondents cannot rely on the reasonable accommodation process derived from the *Butler* settlement to escape their duty to accommodate members of the Disability Class with single rooms.

And the cases Respondents cite are all distinguishable. For instance, in *Edwards v. Horn*, the plaintiff alleged only that someone "mock[ed]" him for his disability, not that he was excluded from a service of a public entity, like members of the Disability Class here. No. 10 Civ. 6194, 2012 WL 760172, at *21 (S.D.N.Y. Mar. 8, 2012). *Wiltz v. New York Univ.* is also inapposite; it concerns a claim that a state court discriminated against the plaintiff in an eviction proceeding, which is far afield from the well-pleaded allegations in this case. No. 18 Civ. 00123, 2019 WL 721658, at *5 (S.D.N.Y. Feb. 1, 2019), *report and recommendation adopted*, 2019 WL 720700 (S.D.N.Y. Feb. 19, 2019). Finally, in *Elbert v. N.Y. State Dep't of Corr. Servs.*, the court dismissed an ADA claim where the plaintiff prisoner alleged only that he received inadequate medical care, not that he was discriminated against, as the Disability Class has been in this case. 751 F. Supp. 2d 590, 595–96 (S.D.N.Y. 2010).

III. PETITIONERS ARE LIKELY TO SUCCEED ON THEIR CLAIMS SEEKING SINGLE-OCCUPANCY ROOMS FOR THE RIGHT TO SHELTER CLASS

A. Petitioners' Requested Relief Is Far Simpler, Safer, and More Efficient Than Respondents' Current Program

Respondents have constructed a cumbersome apparatus for making fine distinctions between different kinds of risk categories in order to sort each homeless single adult into one of three categories: clients with risks necessitating a single room, clients with risks necessitating a double-occupancy room, and clients who can be placed in congregate facilities. There is nothing in the CDC guidelines that sanctions this differentiation. The amount of time that passes during

this extensive review will lead to further spread of the virus within the community at a time when public health officials are struggling to contain an outbreak that has touched every neighborhood in the City and threatens to overwhelm our health care system.

B. Respondents' Papers and Standards Ignore Aerosol Transmission, Which Is a Well-Established Risk in Indoor Congregate Settings

Respondents do not dispute the risks of aerosol transmission, now acknowledged by global consensus to be the primary driver of infection and death from COVID-19. *See* Pet'rs' Br. 4–5 (describing the dangers of aerosol transmission); *Frequently Asked Questions*, Centers for Disease Control and Prevention (Dec. 17, 2020), https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread (confirming that inhaling "respiratory droplets or small particles, such as those in aerosols . . . is thought to be the *main way* the virus spreads" (emphasis added)). In fact, the word "aerosol" does not appear anywhere in Respondents' papers, nor do Respondents acknowledge that airborne spread of SARS-COV-2 poses a risk to individuals who are more than six feet apart. *See generally* Resp'ts' Br. Respondents have benefited from low levels of transmission in the community to date. However, with infection rates climbing throughout the City, it is inevitable that requiring people to sleep, eat, and live in close quarters with inadequate ventilation will lead to increased virus transmission within those spaces and consequently, throughout the City. Indeed, Respondents' incident reports acknowledge cases of roommates in double-occupancy hotel rooms who required transfers following a positive test for their roommate. *See* Reply Aff. Giselle Routhier ¶ 8. For some, Respondents' failure to offer safe shelter is tantamount to not offering shelter at all, particularly to those individuals who will choose to remain unsheltered or on the streets rather than seek refuge in an environment they can reasonably see as potentially more hazardous than sleeping outside.

C. Individuals without Conditions on the CDC List, Like Ms. Smith, Are Still at Risk of Severe Illness or Death from COVID-19, and Have Compelling Needs for Avoiding Infection

Respondents' refusal to acknowledge any obligation to keep essential workers safe from the virus also defies logic and their duties under the law. There is no dispute that Petitioner Smith, the sole movant for whom respondents have not conceded relief, is employed as a caregiver for high risk individuals who rely on her for assistance in performing their activities of daily living. *See* Aff. Rodaisha Smith ¶ 4. Her clients are at tremendous risk if they contract the virus from her, not to mention the threat to Ms. Smith's livelihood were she to become sick and be unable to work. Like every other working person in the shelter system, Ms. Smith is required to expose herself to the risk of possible infection each time she takes off her mask to sleep in a poorly ventilated room with another person whose whereabouts during the day are totally outside her knowledge or control—unlike New Yorkers in the general population who can structure their lives as they see fit to reduce their risk of exposure. Because she herself has no disabilities, the negotiated relief in *Butler*, cited by Respondents as dispositive here, offers Ms. Smith no avenue to pursue a remedy. It is arbitrary and capricious for Respondents to categorically deny Ms. Smith access to a single room that would protect her health, the health of her clients, and the health of all New Yorkers.

IV. PETITIONERS ARE LIKELY TO SUCCEED ON THEIR DUE PROCESS CLAIMS

Respondents argue that Petitioners are not likely to succeed on their procedural due process claims because "Petitioners claim that all New Yorkers experiencing homelessness . . . have a property interest *in their preferred shelter placement*," and shelter residents "do not have a due process right to be housed in any particular neighborhood or type of housing." Resp'ts' Br. 20–21 (emphasis added) (internal quotations and citations omitted). Respondents misstate Petitioners' claim. Petitioners claim that "Petitioners and the Right to Shelter Class have a property interest in

shelter free of potentially significant health threats," not in their preferred shelter placement. Pet'rs' Br. 25 (emphasis added). In the context of this once-in-a-lifetime pandemic, single-occupancy rooms are the best means to provide safe shelter free of potentially significant health risks to New Yorkers experiencing homelessness. *See* Pet'rs' Br. 4–5, 8.

Accordingly, contrary to Respondents' position that New Yorkers experiencing homelessness "do not have a right to advance notice and a hearing prior to a shelter placement or transfer," Resp'ts' Br. 22, Petitioners and the Heightened Risk Class indeed have a right to an individualized determination prior to placement that ensures that they are receiving safe shelter free of significant health risks. *See Goldberg v. Kelly,* 397 U.S. 254, 267 (1970) (The "'fundamental requisite of due process of law is the opportunity to be heard' . . . 'at a meaningful time and in a meaningful manner.'" (internal citations omitted)); *Dusenbery v. United States,* 534 U.S. 161, 167 (2002) ("[I]ndividuals whose property interests are at stake are entitled to notice and 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.").

Respondents cite several entirely inapposite cases to argue that Petitioners do not have a due process right to choose their own shelter placement, which again is a misstatement of Petitioners' claims. These cases include *Nappi v. N.Y.C. Dep't Homeless Servs.*, No. 100453/2020, 2020 N.Y. Misc. LEXIS 9932 (N.Y. Sup. Ct. Nov. 10, 2020), in which the petitioner sought to maintain her shelter residence at Pam's Place or within an area close to her physicians' offices. Similarly, in *Jenkins v. N.Y.C. Dep't of Homeless Servs.*, 643 F. Supp. 2d 507, 509 (S.D.N.Y. 2009), the petitioner, who was diagnosed with schizophrenia, did *not* want to be placed in a particular shelter—the Mental Health/Chemical Abuse facility at the Fort Washington Shelter—and thus sought another shelter placement. By contrast, Petitioners here do not seek shelter in a

particular neighborhood or facility, nor do they seek to avoid a particular neighborhood or facility. Rather, they seek what they are entitled to and have a property interest in under the New York Constitution—safe shelter free of potentially significant health risks—without consideration to the particular facility, neighborhood, or amenities of the shelter.[9] Safe shelter means shelter that provides them with the ability to socially distance and prevent transmission of the potentially deadly disease during the pandemic.

In addition, Respondents tout their RA policy, which relies on Respondents' just-announced Interim Guidelines, as affording the Heightened Risk Class with the opportunity to request single-occupancy rooms. *See* Resp'ts' Br. 18–20. Respondents' RA policy entirely ignores and thus fails to offer any process to individuals experiencing homelessness who do not fall within one of the arbitrarily narrow set of risk factors contained in Respondents' Interim Guidelines. The RA policy excludes those with CDC risk factors not contained in the Interim Guidelines and individuals without any conditions, like Petitioner Smith, whose job requires her to assist clients who would face severe health complications if they contracted SARS-Cov-2.

V. PETITIONERS ARE LIKELY TO SUFFER IRREPARABLE HARM ABSENT RELIEF

Petitioners have demonstrated irreparable harm from the injuries described in their Petition. Each Petitioner and the classes are at heightened risk of exposure to SARS-CoV-2, and that risk by its very nature constitutes irreparable harm. *See* Pet'rs' Br. 16–18. Petitioners "risk severe health consequences, including death, if they contract coronavirus disease. . . . And because the

[9] Respondents also cite *Nuraina v. N.Y. Off. Temp. Disability Assistance*, No. 401317/11, 2011 WL 5118163 (N.Y. Sup. Ct. Oct. 7, 2011), to argue that "DHS clients do not have a right to choose placements within the system," Resp'ts' Br. 22, yet the petitioners in *Nuraina* successfully obtained an order from an administrative law judge directing DHS to place the petitioners "in a shelter that meets their medical needs," and the respondents did not oppose the finding that they were required to meet the petitioners' medical needs.

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)).

Respondents cite only two opinions to have found a lack of irreparable harm, Resp'ts' Br. 28–29, and they are plainly inapposite. In *Monterosa v. Decker*, a habeas case seeking release from immigration detention, the court explicitly conditioned its holding that there was no irreparable harm on the fact that the petitioner "does not claim to have any condition that increases [their] risk of serious illness or death from COVID-19." No. 20 Civ. 02653, 2020 WL 1847771, at *6 (S.D.N.Y. Apr. 11, 2020).[10] The Heightened Risk Class has set forth facts that demonstrate they are at increased risk of serious illness and death. Furthermore, homeless shelter residents travel throughout the City to work as in-home aides, transportation workers, convenience store clerks, and other essential jobs and may be exposed to the virus outside the shelter system. *See* Pet'rs' Br. 9–12. Accordingly, neither of Respondents' cases bear on the present circumstances or on Respondents' constitutional obligation to provide safe shelter.

VI. THE BALANCE OF THE EQUITIES FAVORS GRANTING RELIEF

Petitioners must also demonstrate a balance of the equities, *i.e.* that a "weigh[ing] [of] the interests of the general public as well as the interests of the parties to the litigation" tips in favor of Petitioners. *See Corwin v. City of New York*, 2020 WL 5517368, at *7 (N.Y. Sup. Ct. Sept. 14, 2020) (holding that risk of COVID-19 is enough for a balance of the equities to favor petitioners). Respondents acknowledge that the de-densification of the shelters benefits the public. *See* Resp'ts' Br. 14 n.4. This benefit alone tilts the balance toward Petitioners. *See Basank v. Decker*, 449 F.

[10] In *Van Diver v. Nagy*, No. 20-11340, 2020 WL 4696598, at *1 (E.D. Mich. Aug. 13, 2020), the court denied a habeas petition by an individual serving a life sentence without the possibility of parole for first-degree murder, where the petitioner had "not pointed to any specific inadequacies in the preventative measures undertaken by" the prison. *Id.* at *5. Petitioners here plainly do not seek to overturn Article III sentencing determinations for any crimes, let alone murder, and have pointed to numerous inadequacies in Respondents' preventative measures. *See* Pet'rs' Br. 6–9.

Supp. 3d 205, 216 (S.D.N.Y. 2020) ("[P]ublic health and safety are served best by rapidly decreasing the number of individuals . . . in confined, unsafe conditions." (citation omitted)). Respondents argue that financial costs outweigh reducing the risk of serious illness or death without citing to a single case holding that such a balancing is warranted.[11]

Even accepting Respondents' arguments regarding costs as true, the balance of the equities still favors granting relief for Petitioners, and reducing the risk of harm to them and the likelihood of community spread throughout New York City.

VII. PETITIONERS' PROPOSED CLASSES SHOULD BE CERTIFIED.

Respondents raise no argument to dispute that the Classes should be certified. Accordingly, each of the Right to Shelter Class, the Heightened Risk Class, and the Disability Class should be certified.

CONCLUSION

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

[11] Respondents' cited cases are from dramatically different contexts and have no bearing on this case. *See Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 418 N.Y.S.2d 216, 216 (N.Y. App. Div. 1979) (reversing a preliminary injunction where the plaintiff construction company, not the defendant, caused initial harm through substandard construction); *Wragg v. Ortiz*, 462 F. Supp. 3d 476, 510 (D.N.J. 2020) (holding that the equities tipped in favor of the state because of "the risks associated with a large scale release of inmates . . . [and] the safety and security of the communities to where they are released").

Dated: December 21, 2020
New York, NY

Respectfully Submitted,

/s/ Joshua Goldfein

Judith Goldiner
Joshua Goldfein
Beth Hofmeister
Kathryn Kliff
THE LEGAL AID SOCIETY
199 Water Street
New York, NY 10038
Tel: (212) 577-3300
Fax: (212) 809-1574
Email: JGoldfein@legal-aid.org

Dawn L. Smalls
Jacob D. Alderdice
Ali I. Alsarraf
Cayman C. Mitchell
JENNER & BLOCK LLP
919 Third Ave., 38th Floor
New York, NY 10022
Telephone: 212-891-1600
Email: dsmalls@jenner.com

Attorneys for Petitioners