

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
C.F., on her own behalf and on behalf of her minor children; M.F., on her own behalf and on behalf of her minor children; B.D. on her own behalf and on behalf of her minor children; M.N., on her own behalf and on behalf of her minor child, and A.L, on her own behalf and on behalf of her minor child,

Petitioners,

-against-

THE NEW YORK CITY DEPARTMENT OF  
HEALTH AND MENTAL HYGIENE and  
DR. OXIRIS BARBOT, M.D. in her Official Capacity  
as Commissioner of the New York City  
Department of Health and Mental Hygiene,

Respondents.

AS AND FOR A PROCEEDING BROUGHT  
PURSUANT TO ARTICLE 78 OF THE CPLR

Index No. \_\_\_\_\_

**AFFIRMATION OF  
ROBERT J. KRAKOW  
IN SUPPORT OF  
ARTICLE 78 PETITION  
AND ORDER TO SHOW CAUSE**

-----X

Robert J. Krakow, an attorney duly admitted to practice before the Courts of the State of New York and not a party to the above-captioned special proceeding, hereby affirms the following to be true, under penalty of perjury, pursuant to CPLR § 2106:

1. I am an attorney for the above captioned Petitioners and make this Affirmation to my own personal knowledge and following discussions with the Petitioners and after a review of the public record and our file.

2. I make this Affirmation in support of a Temporary Restraining Order and Preliminary Injunction directing Respondents to stop enforcement of emergency Orders, described more fully below, and in support of a Verified Article 78 Petition, annexed hereto, seeking an Order vacating the

emergency Orders, preventing the enforcement of the emergency Orders, and rendering them null and void.

3. Set forth at the end of this Affirmation is a list and description of 23 exhibits filed in support of the relief requested in the Verified Article 78 Petition and in support of injunctive relief.

4. The Petitioners are unvaccinated with the MMR vaccination, either as parents who are themselves unvaccinated and not otherwise immune to measles or as children not vaccinated with the MMR vaccination who have duly approved religious exemptions to vaccination pursuant to Public Health Law § 2164(9).

5. The Petitioners are directly affected by emergency Orders issued on April 9, 2019, which, among other commands, direct that the Petitioners and their minor children “shall” be vaccinated with the MMR vaccine within two days of the issuance of the April 9, 2019 Orders. The emergency Orders are annexed to this Affirmation as Exhibits 1, 2 and 3.

6. The emergency Orders warn that “failure to comply with this Order is a violation of §3.05 of the New York City Health Code, and a misdemeanor for which you may be subject to civil and/or criminal fines, forfeitures and penalties, including imprisonment.” Order, Exhibit 1 at 3.<sup>1</sup> For reasons specified below, the terms of these emergency Orders exceed the respondents’ authority because, among other reasons, the grounds upon which these Orders are predicated are insufficient to justify these drastic emergency measures and because respondents have failed to employ the least restrictive measures to end the measles outbreak.

---

<sup>1</sup> Exhibit 1, the first Order, which specified persons in zip code 11221 as subject to the Order was found at url: <https://www1.nyc.gov/assets/doh/downloads/pdf/press/2019/emergency-orders-measles> (last accessed 4/9/19 at 6:11 p.m.). However, the pdf now posted at the same URL, which is annexed to the Krakow Affirmation as Exhibit 3, is a different Order with zip code 11211 substituted for 11221. A third version of the Order, annexed as Exhibit 2, contained zip code 11237 in the “It is Further Ordered” sections on page 2 of the document. See Exhibit 2 annexed to the Krakow Affirmation. The Order as modified, presumably in its corrected final form, is annexed to the Krakow Affirmation as Exhibit 3.

7. The emergency Order, Exhibit 1, is predicated on the respondents' claim that there is "...an active outbreak of measles among people residing in zip codes 11205, 11206, 11221 and 11249. Since September 2018, more than 250 cases of measles have been documented among people living in Williamsburg..." Order, Exhibit 1 at 1. While asserting that the "number continues to grow as new cases are still occurring," respondents failed in the emergency Orders to state the number of active cases. Respondents have also failed to disclose the number of cases that have been caused by MMR vaccination, i.e. vaccine-strain measles cases that occur because of viral transmission from those recently vaccinated.

8. The irreparable harm caused to Petitioners by the emergency Orders is incalculable. Parents, whose religious beliefs are being disregarded, risk becoming criminals if they simply do nothing. Parents, who know their children's health status better than anyone else, are being threatened with the forced vaccination of their children against their wills. Children and their parents are being ostracized by neighbors. Because of the emergency Orders, the petitioners are being treated like pariahs, even though there is no evidence that any of them carry measles or have even been exposed to measles. This has all occurred without the respondents' rational use of the isolation and quarantine provisions of Public Health Law § 2100 at their disposal.

9. Rather than using available legal mechanisms such as isolation or quarantine under Public Health Law § 2100, respondents have imposed not only severe criminal and civil penalties for not vaccinating but have stated that persons not vaccinated "shall be vaccinated against measles," thus introducing the specter of unjustifiable forced vaccination to Williamsburg and the City of New York.

10. Public Health Law section 2100 reads as follows:

Communicable diseases; local boards of health and health officers; powers and duties Communicable diseases; local boards of health and health officers; powers and duties.

1. Every local board of health and every health officer shall guard against the introduction of such communicable diseases as are designated in the sanitary code, by the exercise of proper and vigilant medical inspection and control of all persons and things infected with or exposed to such diseases.
2. Every local board of health and every health officer may:
  - (a) provide for care and isolation of cases of communicable disease in a hospital or elsewhere when necessary for protection of the public health and,
  - (b) subject to the provisions of the sanitary code, prohibit and prevent all intercourse and communication with or use of infected premises, places and things, and require, and if necessary, provide the means for the thorough purification and cleansing of the same before general intercourse with the same or use thereof shall be allowed.

11. Public Health Law 2100 allows respondent Commissioner of Health to isolate persons who have a communicable disease, including measles. She has not used that authority effectively. The same law allows her to prohibit and prevent all intercourse with infected premises, places, and things and require their purification. She has not used that authority either.

12. Apart from the overreach of the emergency Orders' dictates, the respondents' approach to the outbreak has been and continues to be irrational. The outbreak started in September 2018. Most individuals who contracted measles have recovered and are no longer infectious. Only a small number of active measles cases now exist. To the extent that these cases pose any threat, the respondents can manage them through isolation and quarantine, which are far less restrictive interventions than forced vaccination to those who oppose vaccination.

13. More than six months after the first cases of measles reported in Williamsburg, and despite the Commissioner of Health's failure to quarantine those infected at any time during this

period, the respondents now seek to bully unvaccinated people, and particularly children, and to grandstand against religious exemptions.

14. The equities here strongly favor striking the respondents' illegal and unprecedented emergency Orders. The emergency Orders punish unvaccinated families because of their entirely legal status, recognized by our state. Rather than timely quarantining those who had or have measles, the respondents have permitted their mobility. They now seek to pressure families that have religious exemptions into choosing between criminalization and disavowing their religious beliefs. The respondents have scared the public by claiming 250 cases of measles, without advising how many cases are active.

15. Each petitioner has filed an affidavit, Exhibits 13, 14, 15, 16, and 17, explaining the petitioner's status and the basis for not vaccinating.

16. Each petitioner will be irreparably harmed if the emergency Orders are enforced, as they contain a provision directing that the petitioners and their children "shall" be vaccinated.

17. Each petitioner will each be irreparably harmed if the emergency Orders are enforced, because they contain civil and criminal penalties, including the risks of criminal prosecution and imprisonment if the petitioners simply maintain their unvaccinated status.

18. Each petitioner will be irreparably harmed if the emergency Orders are enforced, because the petitioner's religious beliefs will be violated.

19. The emergency Orders are directly premised upon New York City Health Code Sections 3.01 and 3.05 and the definition of "nuisance" in New York City Administrative Code §17-142. The factual circumstances do not remotely meet the standard necessary for respondents to invoke the extraordinary measures of forced vaccination and criminal sanctions for the status quo, particularly when the least restrictive and likely most effective methods to protect the public from infectious disease – isolation and quarantine -- have not been used.

20. The emergency Orders declare that any unvaccinated person not in compliance with the Orders will be designated a nuisance under New York City Administrative Code §17-142. This novel interpretation of New York law governing nuisance has never been and cannot be used in the strained fashion of the emergency Orders.

21. Injunctive relief is sought to avoid irreparable harm to petitioners and their children, as the emergency Orders are disproportionate to the provable factual circumstances and fail to use the least restrictive means that would likely control measles yet balance the rights to individual autonomy, informed consent, and free exercise of religion. The respondents have taken these dramatic steps without a blueprint for implementation, itself suggesting that a true public health emergency does not exist. See Exhibit 3 to Krakow Affirmation.<sup>2</sup>

22. In addition to being unnecessary and disproportionate, respondents' command that people "shall" vaccinate with the MMR vaccine is inappropriate because the MMR vaccine indisputably carries the risk of severe injury and death to some individuals. In addition, the MMR combination vaccine is the only available measles vaccine, thus the Orders command vaccination for mumps and rubella, carrying unnecessary risk of harm. Forced vaccination contravenes the principle of informed consent, which has been a cornerstone of public health ethics in post WWII democracies and is enshrined in the laws of the State of New York, the Nuremberg Code, the Helsinki Declaration, and the UN Declaration on Human Rights and Bioethics, governing biomedical treatment. See Exhibit 5, para 6, annexed to the Krakow Affirmation. Under the

---

<sup>2</sup> Mayor De Blasio's spokesperson, Marcy Miranda, was quoted in the *New York Post* on April 9, 2019, the day the emergency Orders were issued, as follows: "Because we have not done this before it's not like we have a path set out. We'd have to confer with our legal team." See Exhibit 3 annexed to Krakow Affirmation, *Williamsburg residents could face 'forcible vaccinations' amid measles outbreak*, *New York Post*, April 9, 2019 at 7.59 p.m., online edition, URL: <https://nypost.com/2019/04/09/williamsburg-residents-could-face-forcible-vaccinations-amid-measles-outbreak/> (accessed 4/10/19)



factual circumstances of the emergency Orders, respondents have overreached their authority and have promulgated Orders that promise to fail to check the spread of measles. The emergency Orders, moreover, inject into the community an intervention, compelled MMR vaccination, that can itself cause harm.

23. In addition, the respondents' emergency Orders unnecessarily override the petitioners' and their children's religious practices and the children's lawful exemptions from vaccination to attend school, which they obtained in full compliance with Public Health Law §2164(9).

24. For the reasons set forth above and upon the facts and circumstances alleged herein, respondents' emergency Orders are arbitrary, capricious, contrary to law, exceed their lawful authority and should be vacated.

19. As Dr. Richard Moskowitz explains in his Affidavit (Exhibit 11), people who are not vaccinated with measles pose no threat to people who are vaccinated. Dr. Moskowitz explains that because people who are recently vaccination "shed" the virus, which can infect other people, they are likely a greater threat to public health than people who are unvaccinated.

20. Dr. Moskowitz explains that "small localized outbreaks of ordinary childhood diseases, including the current outbreaks in Brooklyn" are insufficient to override the rights of individuals, including the right to informed consent regarding medical interventions, which is enshrined in the public laws of New York, the Nuremberg Code, and the Helsinki Declaration.

21. Dr. Tina Kimmel, an experienced former public health official and research scientist in California, explains in her affidavit, Exhibit 8, that unvaccinated people who have not been exposed to measles cannot possibly spread the virus to the general population, especially persons who have been vaccinated. She also explains that the "Commissioner's arbitrary order that all residents be vaccinated contravenes the principle of Informed Consent." The "arbitrary order also contravenes the

international norms of cooperation between the government and the governed.” Dr. Kimmel points out that “[b]y arbitrarily criminalizing families being sensitive to their own medical needs, the Commissioner runs the risk of MMR being given to people for whom the vaccine is known to be dangerous to their life and health.” Dr. Kimmel states:

According to the vaccine manufacturer’s own package insert, this includes any individual with a hypersensitivity or anaphylactoid reaction to eggs, gelatin, neomycin or any other component of the vaccine; anyone with a fever above a low-grade fever, or with an individual or family history of cerebral injury, convulsions, or any other condition of stress due to fever; anyone who is nursing pregnant, or will become pregnant within three months of receiving the vaccine; anyone with blood dyscrasia, leukemia, lymphoma of any type, or other malignant neoplasm; anyone who is immunosuppressed or receiving any of several kinds of immunosuppressive therapy, or with a family history of congenital or hereditary immunodeficiency; anyone with dys- or hypogammaglobulinemia, or with current or a history of thrombocytopenia; anyone with untreated tuberculosis or who will be having a tuberculin test in the near future; or anyone who has had a blood or plasma transfusion or administration of human immune globulin within the last three months. [https://www.merck.com/product/usa/pi\\_circulars/m/mmr\\_ii/mmr\\_ii\\_pi.pdf](https://www.merck.com/product/usa/pi_circulars/m/mmr_ii/mmr_ii_pi.pdf).

Dr. Kimmel also states that the Commissioner lacks the authority to override an individual’s religious beliefs.

22. Dr. Kimmel states:

Rather than issuing pointless and overbroad impositions, NYC Department of Health (DOH) should be working to end the measles outbreak by following standard public health practices. Strangely, these practices do not appear to have been implemented. They include: enforced isolation of cases until they are no longer infectious (in the case of measles, four days after the rash appears); contact tracing; with vaccination only of nonimmune contacts ("ring vaccination"). The Commissioner could suggest or even order a quarantine of these contacts for the maximum incubation period, although measles is not considered a dangerous enough disease to be quarantinable by the US Federal Centers for Disease Control and Prevention. All of these measures are simple and effective ways that would actually stop the spread of measles in NYC.



21. Dr. Jane Orient explains in her Affidavit, Exhibit 9, that the current measles outbreak in Brooklyn is not “a clear and present danger to the public health. Violations of medical ethics and human rights are neither necessary nor sufficient to prevent or contain measles outbreaks. It is contrary to public policy, medical ethics and respect for human rights to force vaccination on persons who do not give their voluntary informed consent.”

22. Dr. Orient and Dr. Fitzpatrick explain that vaccines themselves cause injuries, as recognized by Congress in creating the Vaccine Injury Compensation Program, which has paid more than \$4 billion dollars to vaccine-damaged persons. The Verified Petition presents facts documenting the existence of vaccine injury and the risks and contraindications of the MMR vaccine, as set forth in the manufacturer’s own package insert. (Exhibit 7).

23. Dr. Shira Miller states in her Affidavit, Exhibit 10, that “It has not been proven that the MMR vaccine is less of a nuisance (New York Code§ 17-142 " ... dangerous to human life or detrimental to health ... ") than measles infection.” Dr. Miller explains as follows:

It has not been scientifically demonstrated that the MMR vaccine poses less risk of death or permanent disability than measles because it has not been proven that the risk of death or permanent disability from the MMR vaccine is less than 1 in 10,000.

Dr. Miller explains that for the reasons outline in her affidavit:

[I]t has not been proven that the MMR vaccine is safer than measles, and there is insufficient evidence to demonstrate that mandatory measles mass vaccination in the United States results in a net public health benefit. Furthermore, vaccinating others with the MMR vaccine is not necessary in order to protect immunocompromised persons. As such, governmental mandatory measles vaccination orders are both unscientific and unethical and have no justification as a method for managing measles outbreaks.

24. The petitioners have set forth at length in their Verified Petition the reasons why respondents’ emergency Orders are arbitrary, capricious, contrary to law and unconstitutional.

25. Petitioners have presented 23 exhibits, referenced in this Affirmation and in the Verified Petition. The exhibits are described below.

25. Attached as Exhibit 1 is a true and correct copy of the *Order of the Commissioner* dated April 9, 2019, as originally issued by the Commissioner of Health Oxiris Barbot, M.D. and the New York City Department of Health and Mental Hygiene (the “Department of Health”).

26. Attached as Exhibit 2 is a true and correct copy of the *Order of the Commissioner* dated April 9, 2019, as issued after Exhibit 1 by the Commissioner of Health Oxiris Barbot and the New York City Department of Health and Mental Hygiene (the “Department of Health”).

27. Attached as Exhibit 3 is a true and correct copy of the *Order of the Commissioner* dated April 9, 2019, as issued after Exhibits 1 and 1A by the Commissioner of Health Oxiris Barbot and the New York City Department of Health and Mental Hygiene (the “Department of Health”).

28. Attached as Exhibit 4 is a true and correct printed copy of the online version of a New York Post article published April 9, 2019, titled, *Williamsburg residents could face ‘forcible vaccinations’ amid measles outbreak*, URL: <https://nypost.com/2019/04/09/williamsburg-residents-could-face-forcible-vaccinations-amid-measles-outbreak/>.

29. Attached as Exhibit 5 is a true and correct printed copy of the online version of a Newsweek article published April 10, 2019, titled, *NYC Officials Listed Wrong Zip Code for Measles Vaccination Order Then Changed It Without Telling Anyone* URL: <https://www.newsweek.com/nyc-measles-vaccine-vaccination-order-zip-1391831>.

30. Attached as Exhibit 6 is a true and correct copy of the Declaration of Hendrieka Fitzpatrick, M.D., duly executed on April 13, 2019, before a Notary Public.

31. Attached as Exhibit 7 is a true and correct copy of the MMR II (Measles, Mumps and Rubella Virus Vaccine Live) published online by Merck, the manufacturer of the vaccine. The

document originated at URL:

[https://www.merck.com/product/usa/pi\\_circulars/m/mmr\\_ii/mmr\\_ii\\_pi.pdf](https://www.merck.com/product/usa/pi_circulars/m/mmr_ii/mmr_ii_pi.pdf).

32. Attached as Exhibit 8 is a true and correct copy of the Declaration of Tina Kimmel, Ph.D., M.P.H., duly executed on April 10, 2019, before a Notary Public.

33. Attached as Exhibit 9 is a true and correct copy of the Declaration of Jane Orient, M.D., duly executed on April 10, 2019, before a Notary Public.

34. Attached as Exhibit 10 is a true and correct copy of the Affidavit of Shira Miller, M.D., duly executed on April 11, 2019, before a Notary Public.

35. Attached as Exhibit 11 is a true and correct copy of the Declaration of Richard Moskowitz, M.D., duly executed on April 12, 2019, before a Notary Public.

36. Attached as Exhibit 12 is a true and correct copy of the Affidavit of Vera Sharav, head of the Alliance for Human Research Protection (AHRP), duly executed on April 13, 2019, before a Notary Public.

37. Attached as Exhibit 13 is a true and correct copy of the Affidavit of petitioner C.F., duly executed before a Notary Public on April 12, 2019.

38. Attached as Exhibit 14 is a true and correct copy of the Affidavit of petitioner M.F., duly executed before a Notary Public on April 12, 2019.

39. Attached as Exhibit 15 is a true and correct copy of the Affidavit of petitioner A.L., duly executed before a Notary Public on April 13, 2019.

40. Attached as Exhibit 16 is a true and correct copy of the Affidavit of petitioner M.N., duly executed before a Notary Public on April 12, 2019.

41. Attached as Exhibit 17 is a true and correct copy of the Affidavit of petitioner B.D., duly executed before a Notary Public on April 12, 2019.

42. Attached as Exhibit 18 is a true and correct printed copy of the online version of a Daily Beast article published April 9, 2019, titled *Civil Liberties Union Blasts NYC 'Forced Vaccination'* URL: <https://www.thedailybeast.com/measles-crisis-new-york-civil-liberties-union-blasts-forced-vaccination-in-nyc>.

43. Attached as Exhibit 19 is a true and correct copy of the following paper published in the medical literature: Barkin, R.M. (1975). Measles mortality: a retrospective look at the vaccine era. *American Journal of Epidemiology*, 102(4), 341-349.

44. Attached as Exhibit 20 is a true and correct copy of a compilation of demographic data regarding the population and square mileage of the zip codes specified in the emergency Orders promulgated by the Department of Health.

45. Attached as Exhibit 21 is a true and correct copy of a "Grant Final Report" by Lazarus, et al. *Electronic Support for Public Health-Vaccine Adverse Event Reporting System (ESP:VAERS)* submitted to The Agency for Healthcare Research and Quality (AHRQ), U.S. Department of Health and Human Services, URL: <https://healthit.ahrq.gov/sites/default/files/docs/publication/r18hs017045-lazarus-final-report-2011.pdf>.

46. Attached as Exhibit 22 is a true and correct copy of the NYC Department of Health website reporting information about measles, URL: <https://www1.nyc.gov/site/doh/health/health-topics/measles.page> (Accessed 4/14/19).

47. Attached as Exhibit 22 is a true and correct copy of "Reported Cases and Deaths from Vaccine Preventable Diseases, United States" published by the Centers for Disease Control, *Epidemiology and Prevention of Vaccine Preventable Diseases*, 13<sup>th</sup> Edition, March 2018.

48. This Affirmation, the Article 78 Verified Petition, and the exhibits and other documents pertaining to petitioners' application are being provided to counsel for respondents in

advance of the presentation to the Court of an Order to Show Cause seeking injunctive relief.

Respondents were notified that this action would be brought on Friday, April 12, 2019, at approximately noon. The undersigned attorney was in telephone and email communication thereafter with Sherril Kurland, an attorney for the Corporation Counsel who represented that she was the attorney assigned by the Corporation Counsel to represent respondents.

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

WHEREFORE, petitioners respectfully request that this Court enter an Order:

(a) Temporarily restraining respondents and any of their agents, officers, and employees from implementing or enforcing the emergency Orders of the Commissioner issued and dated on or around April 9, 2019; and

(b) Permanently enjoining and restraining respondents and any of their agents, officers, and employees from implementing or enforcing the emergency Orders of the Commissioner issued and dated on or around April 9, 2019; and

(c) Declaring the emergency Orders of the Commissioner arbitrary, capricious, and contrary to law, the imposition of which is beyond respondents' authority, and

(d) Vacating the emergency Orders dated on and around April 9, 2019, and

(e) Granting such other and further relief which it deems just and proper.

Dated: April 15, 2019



ROBERT J. KRAKOW