
New York Supreme Court
Appellate Division – Second Department

◆ ● ◆

In the Matter of

**Appellate
Case No.:
2019-04455**

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-Appellants,

– 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-Respondents,

as and for a proceeding brought pursuant to Article 78 of the CPLR.

RECORD ON APPEAL

Corporation Counsel of the
City of New York
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Respondents*
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STATEMENT PURSUANT TO CPLR 5531

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court
Appellate Division – Second Department

In the Matter of

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-Appellants,

– 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-Respondents,

as and for a proceeding brought pursuant to Article 78 of the CPLR.

1. The index number of the case in the court below is 508356/19.
2. The full names of the original parties are as above. There have been no changes.
3. The action was commenced in Supreme Court, Kings County.
4. The action was commenced on or about April 15, 2019, by the filing of an Article 78 Verified Petition. The Affirmation in Opposition in lieu of an Answer was served thereafter.
5. The nature and object of the action is as follows: Article 78 Proceeding / Administrative Review and Declaratory Judgment.
6. The appeal is from a Decision and Order of the Honorable Lawrence Knipel, entered on April 18, 2019.
7. This appeal is being perfected on a full reproduced record.

NOTICE OF APPEAL, DATED APRIL 24, 2019 [2 - 3]

FILED: KINGS COUNTY CLERK 04/24/2019 01:52 PM

NYSCEF DOC. NO. 38

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/24/2019

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,

Index No. 508356-2019

NOTICE OF APPEAL

Petitioners-Appellants,

-against-

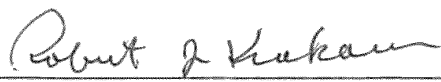
THE NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE and
DR. OXIRIS BARBOT, M.D. in her Official Capacity
as Commissioner of the New York City
Department of Health and Mental Hygiene,

Respondents-Appellees.

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

-----X
PLEASE TAKE NOTICE that Petitioners herein, 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, hereby appeal to the Appellate
Division of the Supreme Court, Second Judicial Department, from the Decision and Order of
Lawrence Knipel, J.S.C., dated and filed April 18, 2019, and entered in the office of the Clerk of
the County of Kings on April 23, 2019. This appeal is taken from each and every part of said Order
by which Petitioners were aggrieved.

Dated: New York, New York
April 24, 2019


ROBERT J. KRAKOW
LAW OFFICE OF ROBERT J. KRAKOW, P.C.
Attorney for Petitioners
233 Broadway, Suite 2320
New York, New York 10279
(212) 227-0600

FILED: KINGS COUNTY CLERK 04/24/2019 01:52 PM

NYSCEF DOC. NO. 38

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/24/2019

Of Counsel:

ROBERT F. KENNEDY, Jr., Esq.

PATRICIA FINN, Esq.

MICHAEL SUSSMAN, Esq.

To:

ZACHARY W. CARTER

Corporation Counsel of

the City of New York

Attorney for Respondents

100 Church Street, 5th Floor

New York, New York 10007

Attention: Sherrill Kurland, Esq.
Sheryl Neufeld, Esq.

**DECISION AND ORDER OF THE HONORABLE LAWRENCE KNIPEL,
DATED AND FILED APRIL 18, 2019, APPEALED FROM, WITH NOTICE OF ENTRY,
DATED APRIL 23, 2019 [4 - 12]**

FILED: KINGS COUNTY CLERK 04/18/2019 04:18 PM

NYSCEF DOC. NO. 36

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/23/2019

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of April, 2019

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----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 -

Index No. 508356/19

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, AND DR. OXISRIS BARBOT, M.D., IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondents.

-----X

The following papers numbered 1 to 5 read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) (Memorandum) _____
Reply Affidavits (Affirmations) (Affirmation in Opposition _____
Memorandum of Law) _____
Affidavit (Affirmation) (Reply Memorandum of Law) _____
Other Papers _____

Papers Numbered

1 - 8

9 - 10

11 - 12

13

In an Order dated April 9, 2019, respondent Dr. Oxiris Barbot, Commissioner of the New York City Department of Health and Mental Hygiene, declared a public health emergency pursuant to section 3.01 of the New York City Health Code, and ordered any person who lives or works in designated zip codes who has not received the MMR vaccine, to be vaccinated unless such person can demonstrate immunity. The order stated that failure to comply with the Order was a violation of section 3.05 of the Health Code, and subjected the violator to civil and/or criminal fines and penalties.

In a hybrid proceeding brought pursuant to CPLR Articles 78 and 30, petitioners, parents of unvaccinated children, seek to vacate the Order as arbitrary and capricious and contrary to law. The Petition alleges that respondents' actions "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." Respondents, on the other hand, contend that the Order is entirely reasonable and rational, and that petitioners cannot show it is arbitrary or capricious, or that it was made in excess of the Commissioner's authority, or that it violated petitioners' due process, equal protection or any other State or Federal Constitutional right.

At the hearing held on April 18, 2019, Respondents' attorney handed up a new Resolution of the Board of Health dated April 17, 2019, which made clear that, unlike the prior order which stated that a violation of Section 3.05 of the New York City Health Code could subject the violator to criminal fines and penalties, a violator would be "subject to the fines authorized by applicable"

law and regulation. The parties agreed to deem this proceeding a challenge to the Respondent's order as indicated in the April 17, 2018 resolution. Thus, to the extent Petitioners' challenge to the Order is based on the possible imposition of criminal penalties, that branch of the challenge is dismissed as academic.

The pivotal question posed for this court's determination is whether Respondent Commissioner has a rational, non-pretextual basis for declaring a public health emergency and issuing the attendant orders challenged herein. The evidence in this regard is largely uncontroverted. The unvarnished truth is that these diagnoses represent the most significant spike in incidences of measles in the United States in many years and that the Williamsburg section of Brooklyn is at its epicenter. It has already begun to spread to remote locations¹. While Petitioners choose to characterize the situation as a mere "measles outbreak", exhibits annexed to their own moving papers amply demonstrate the gravity of the situation. Petitioner's Exhibits 4, 18 and 22 document that through April 8, 2019 there have been 285 diagnoses during the current outbreak in the affected area, as compared to 85 diagnoses nationwide during all calendar year 2016.² Adjusting for time and geography, this appears to constitute a dramatic spike, demanding immediate attention. Although petitioners proffer an affidavit from Dr. Orient wherein she opines that "the current measles outbreak is not a clear and present danger", she fails to provide any basis for this opinion. As such, this unsupported, bald faced opinion cannot be credited by this court.

Accordingly, this court can only conclude that there presently exists an emergent measles epidemic in the area codes in or bordering the Williamsburg neighborhood of Brooklyn, sufficient to warrant the declaration of a public health emergency.³

Having found the declaration to be well founded, it is incumbent upon the court to examine the remedy provided in the orders, namely directing MMR vaccination and imposition of various penalties, for a failure to do so.

CPLR 7803 provides for limited review only where the body or officer exceeded their authority or acted irrationally in an arbitrary, capricious or abusive manner (*see Pell vs. Bd of Education* 34 NY2d 222 (1974); CPLR 7803). Petitioners contend that the remedy imposed in the orders fails to use the least restrictive legally available means to control the outbreak. Yet, when asked at oral argument what actions would be better and less restrictive, Petitioners' attorney could not offer a demonstrably better, safer, or more efficient alternative, and thus Petitioners have not satisfied their burden of showing that the Order is arbitrary or capricious or otherwise unlawful on this basis.

Petitioners' remaining contentions fall into three general categories: scientific, religious and moral.

Scientific Objections

Petitioners' medical experts opine, variously, that the MMR vaccine is ineffective, is of greater risk than non-vaccination and that the MMR vaccine itself propagates the very disease it was designed to prevent. These contentions are completely unsupported by studies, medical literature

or other acceptable evidence. Indeed, Dr. Fitzpatrick concedes that “it is virtually impossible to find ‘mainstream literature’ on the risk of the MMR”. This lack of foundation reduces the opinions of these doctors to little more than speculation.

Religious Objections

The religious objection exemption contained in Public Health Law §2164(a) applies only to the certificate of immunization required to admit a child to school, not to remedies attendant upon declaration of a public health emergency. Even if it did apply, the affidavits provided herein are insufficient to raise this issue. The affidavits merely state, in essence, that in the individual opinion of each of the affiants, taking the vaccine is violative of their religion. These opinions are entirely unsupported by an affidavit of a religious official (priest, rabbi, etc.) or other doctrinal documentation tending to support their opinion. As such, the affidavits are insufficient to raise a religious exemption under PHL 2164(9). *See Caiezel v. Great Neck Public Schools* 814 F Supp 2d 209 (2011), *affd* 500 Fed Appx 16 (2012), cert. denied, 569 US 947 (2013).

Moral Objections

Petitioners have raised various moral objections seemingly centered around a claim that the order(s) would compel forced vaccination. An examination of the orders indicates, and respondents concede that they do not require forcible vaccination. Accordingly, this court need not address the issue of forcible vaccination.


Petitioner raise the issue of informed consent and “medical ethics, tort law and internationally accepted human rights principles such as the Nuremberg Code” (See affidavit of Dr. Orient). These issues are inappropriately raised in this context. A fireman need not obtain the informed consent of the owner before extinguishing a house fire. Vaccination is known to extinguish the fire of contagion.

It is worthwhile to note that in enacting changes to Public Health Law §2164 in 1968 our legislature issued the following findings and declaration:

“Among the truly great medical advances of this generation have been the development of proved methods of reducing the incidence of smallpox and measles, the once great cripplers. Public health statistics show clearly that immunization is effective and safe.”

To the extent Petitioners are seeking injunctive relief, they have failed to demonstrate entitlement thereto.

For the foregoing reasons, the relief requested in the instant Order to Show Cause is denied, and the hybrid proceeding/action is dismissed.

ENTERED FOR THE COURT,

J. S. C.
HON. LAWRENCE KNIPEL
Administrative Judge

1. Most recently 39 cases have been diagnosed in Michigan which have been traced to an individual traveling from Williamsburg.

2. Department of Health records indicate 267 cases in Williamsburg alone.
3. Epidemic is commonly defined as an outbreak of disease that spreads quickly and affects many individuals at the same time (Merriam-Webster Dictionary). This court notes, but takes exception to the recent decision of the Supreme Court in Rockland County wherein the court looks to the percentage of overall population affected to determine whether there is an epidemic. The appropriate measure is rather the sudden percentage rise in infection experienced by the subject population. If one were to wait till a significant percentage of overall population were infected, disaster would inevitably ensue. *See WD vs. County of Rockland*, Index No. 31785/2019 (April 5, 2019).

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;
et al.,

Petitioners,

-against-

THE NEW YORK CITY DEPARTMENT OF HEALTH
AND MENTAL HYGIENE, et al.,

**NOTICE OF ENTRY
OF DECISION
AND ORDER AND
JUDGMENT**

Index No.: 508356/2019
Hon. Lawrence Knipel

Respondents,

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

-----X

PLEASE TAKE NOTICE, that the annexed is a true and complete copy of the
Decision and Order that was signed by the Honorable Lawrence Knipel on April 18, 2019 and
filed and recorded in the Office of the Clerk of the Court on April 18, 2019.

Dated: New York, New York
April 23, 2019

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Respondent
100 Church Street, Room 5-167
New York, New York 10007
(212) 356-2605

By:



SHERRILL KURLAND
Assistant Corporation Counsel

FILED: KINGS COUNTY CLERK 04/23/2019 11:44 AM

NYSCEF DOC. NO. 37

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/23/2019

TO: **BY NYSCEF DELIVERY and USPS MAIL**
ROBERT JOEL KRAKOW
Attorney for Petitioners
233 Broadway, Suite 2320
New York, NY 10279
rkrakow@krakowlawfirm.com

ORDER TO SHOW CAUSE, BY PETITIONERS, FOR PRELIMINARY INJUNCTION,
SIGNED APRIL 16, 2019, WITH PROPOSED ORDER ATTACHED THERETO [13 - 18]

FILED: KINGS COUNTY CLERK 04/16/2019 09:26 AM

INDEX NO. 508356/2019

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

RECEIVED NYSCEF: 04/16/2019

PRESENT:

HONORABLE

Johnny Lee
Boynes
Justice.

AT IAS PART 72 of the Supreme Court
of the State of New York, Kings County Borough
of Brooklyn, City of New York, on the 16 day of April
2019

-----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; *E.T.* on her own behalf and on behalf
of her minor children; M.N., on her own behalf and
on behalf of her minor child,

Index No. 508356/19

ORDER TO SHOW CAUSE

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

-----X
PLEASE TAKE NOTICE that upon reading and filing the annexed Verified Petition,
dated April 15, 2019, the Affidavits of Richard Moskowitz, M.D., Hendrieka Fitzpatrick, M.D.,
Tina Kimmel, Ph.D., M.P.H, Shira Miller, M.D., Jane Orient M.D. and Vera Sherav, and
petitioners C.F., M.F., B.D., E.T. and M.N., the Memorandum of Law in Support of the Verified
Petition, dated April 15, 2019, the Memorandum of Law in Support of a Preliminary Injunction,
dated April 15, 2019, the Affirmation of Robert J. Krakow, dated April 15, 2019, and the
exhibits annexed thereto, and all prior papers and proceedings herein, it is hereby

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(3)(d))
which, at the time of its printout from the court system's electronic website, had not yet been reviewed and
approved by the County Clerk. Because court rules (22 NYCRR §202.5(d)) authorize the County Clerk to reject
filings for various reasons, readers should be aware that documents bearing this legend may not have been
accepted for filing by the County Clerk.

let
~~ORDERED~~ that defendants-respondents The New York City Department of Health and Mental Hygiene and Dr. Oxiris Barbot, in her Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene (collectively "respondents"), or their attorneys, show cause before this Court, at IAS Part 57, at the Supreme Court, Kings County, Room 774, 360 Adams Street, Brooklyn, New York 11201 on April 18, 2019, at 9³⁰ o'clock in the Sanoon, or as soon thereafter as counsel can be heard, why an order should not be entered: (1) permanently enjoining and restraining defendants-respondents and any of their agents, officers and employees from implementing or enforcing the Order of the Commissioner issued on April 9, 2019, and declaring the Order invalid on the basis that it is unlawfully *ultra vires*; and (2) granting such other and further relief as this Court deems just, proper and equitable.

a hearing by
 Pending ~~further order~~ of this court and sufficient cause having been demonstrated and no prior application having been made by petitioners with regard to the lawfulness of the Order of the Commissioner issued on April 9, 2019, to this or any other Court, defendant is hereby temporarily enjoined from enforcing said Order and people in the zip codes specified in said Order shall not be subject to civil and criminal penalties under Sections 301 and 305 of the New York Health Code or subject to New York City Administrative Code § 17-142 for not being vaccinated for the measles.

let
 It is hereby ~~ORDERED~~ that respondents shall serve and file any opposing affidavits and memoranda no later than 5:00 pm on the 16th day of April, 2019, and plaintiffs-petitioners shall serve and file any reply affidavits and memoranda, if any, on the 17th day of April, 2019; and it is further

FILED: KINGS COUNTY CLERK 04/16/2019 09:26 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 31

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

RECEIVED NYSCEF: 04/16/2019

let
~~ORDERED~~ that a copy of this Order to Show Cause, together with the Verified Petition
→ and papers upon which it is based, ~~shall~~ be served on or before the *16th* day of April, 2019, by
personal service upon defendants-respondents, which shall be deemed good and sufficient
service.

SO ORDERED.

ENTER:

[Signature]
J.S.
HON. JOINTY LEE BAYNES

This is a copy of a pleading filed electronically pursuant to ³New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5(d)) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

P R E S E N T:

HONORABLE _____
Justice.

-----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; E.T., on her own behalf and on behalf
of her minor children, M.N., on her own behalf and
on behalf of her minor child,

Index No. _____

ORDER TO SHOW CAUSE

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

-----X

PLEASE TAKE NOTICE that upon reading and filing the annexed Verified Petition,
dated April 15, 2019, the Affidavits of Richard Moskowitz, M.D., Hendrieka Fitzpatrick,, M.D.,
Tina Kimmel, Ph.D., M.P.H, Shira Miller, M.D., Jane Orient M.D. and Vera Sherav, and
petitioners C.F., M.F., B.D., E.T. and M.N., the Memorandum of Law in Support of the Verified
Petition, dated April 15, 2019, the Memorandum of Law in Support of a Preliminary Injunction,
dated April 15, 2019, the Affirmation of Robert J. Krakow, dated April 15, 2019, and the
exhibits annexed thereto, and all prior papers and proceedings herein, it is hereby

ORDERED that defendants-respondents The New York City Department of Health and Mental Hygiene and Dr. Oxiris Barbot, in her Official Capacity as Commissioner of the New York City Department of Health and Mental Hygiene (collectively “respondents”), or their attorneys, show cause before this Court, at IAS Part ___, at the Supreme Court, Kings County, Room ___, 360 Adams Street, Brooklyn, New York 11201 on April ___, 2019, at ___ o’clock in the _____ noon, or as soon thereafter as counsel can be heard, why an order should not be entered: (1) permanently enjoining and restraining defendants-respondents and any of their agents, officers and employees from implementing or enforcing the Order of the Commissioner issued on April 9, 2019, and declaring the Order invalid on the basis that it is unlawfully *ultra vires*; and (2) granting such other and further relief as this Court deems just, proper and equitable.

Pending further order of this court and sufficient cause having been demonstrated and no prior application having been made by petitioners with regard to the lawfulness of the Order of the Commissioner issued on April 9, 2019, to this or any other Court, defendant is hereby temporarily enjoined from enforcing said Order and people in the zip codes specified in said Order shall not be subject to civil and criminal penalties under Sections 301 and 305 of the New York Health Code or subject to New York City Administrative Code § 17-142 for not being vaccinated for the measles.

It is hereby ORDERED that respondents shall serve and file any opposing affidavits and memoranda no later than 5:00 pm on the ___ day of April, 2019, and plaintiffs-petitioners shall serve and file any reply affidavits and memoranda, if any, on the ___ day of _____, 2019; and it is further

ORDERED that a copy of this Order to Show Cause, together with the Verified Petition and papers upon which it is based, shall be served on or before the ____ day of April, 2019, by personal service upon defendants-respondents, which shall be deemed good and sufficient service.

SO ORDERED.

E N T E R:

J.S.C.

ARTICLE 78 VERIFIED PETITION, DATED APRIL 15, 2019 [19 - 50]

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 1

RECEIVED NYSCEF: 04/15/2019

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,

Index No. _____

ARTICLE 78
VERIFIED PETITION

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

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Petitioners, by and through their undersigned counsel, respectfully allege as follows:

PRELIMINARY STATEMENT

1. Petitioners bring this proceeding pursuant to CPLR Articles 78 and 3001 to challenge as arbitrary, capricious and *ultra vires*/contrary to law Orders of the Commissioner of Health and Mental Hygiene, Oxiris Barbot, M.D., (the “emergency Orders”) issued on or about April 9, 2019.

2. The emergency Orders command that all persons over six months of age who work, reside or attend school within specified zip codes “*shall be vaccinated against measles*” if they are not vaccinated or not immune to the measles. The emergency Orders deem any

unvaccinated person a “nuisance,” as defined in New York City Administrative Code §17-142.

The emergency Orders are annexed to the Krakow Affirmation as Exhibits 1, 2 and 3.

3. Petitioners seek a temporary restraining order, preliminary injunction, and a declaratory judgment vacating the Orders as beyond the powers of the Commissioner or *ultra vires* because the emergency Orders have an insufficient factual predicate. There is insufficient evidence of a measles epidemic or dangerous outbreak to justify the respondents’ extraordinary measures, including forced vaccination. The Orders are, therefore, arbitrary, capricious, contrary to law and in violation of petitioners’ rights under the United States Constitution and New York State law.

BACKGROUND AND SUMMARY OF PETITION

4. 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 3.¹ For reasons specified below, the terms of these emergency Orders exceed the authority of the respondents 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.

¹ 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.

5. 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 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.

6. 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.

7. This Petition seeks relief for respondents' actions that are disproportionate to the provable factual circumstances and that 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.²

² 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)

8. 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 Order commands vaccination for mumps and rubella, which are unnecessary and carry risk of harm. Forcing 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 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.

9. 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 have obtained in full compliance with Public Health Law §2164(9).

10. 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.

PARTIES

11. Petitioners are individuals and their children who reside in one of the zip codes identified in the three Orders made available on Commissioner's website.

12. The petitioners – 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; A.L., on her own behalf and on behalf of her minor child; and M.N., on her own behalf and on behalf of her minor child – are residents of the zip codes specified in the emergency Orders who are subject to or whose children are subject to forced vaccination and civil and criminal penalties, including imprisonment, by the authority of the orders issued by respondents. Petitioners seek injunctive relief against respondents for their arbitrary and capricious actions, described below.

13. C.F. resides in zip code 11211, which is a zip code covered in the Orders. She and her minor children, who have religious exemptions to vaccination for school attendance, are subject to the forced or mandated vaccination provision in the Orders. While the first Order initially posted on the Department of Health's web site did not include the zip code 11211, a subsequent version did. Thus, depending on the version of the respondents' Orders that apply, something only known to respondents, the first Order applies to C.F.

14. M.F. resides in zip code 11249, which is a zip code covered by the Orders. She and her minor children, who have religious exemptions to vaccination, are subject to the forced or mandated vaccination provision in the emergency Orders. While the first emergency Order initially posted on the Department of Health's web site did not include the zip code 11249, a subsequent version did include 11249. Thus, depending on which version of the Orders apply, something only known to respondents, M.F. is required to comply.

15. B.D. resides in zip code 11205, which is a zip code covered by the Orders. She and her minor child, who has a religious exemption to vaccination, are subject to the forced or mandated vaccination provision in the emergency Orders.

16. A.L. resides in zip code 11206, which is a zip code covered by the Orders. She and her minor child, who has a religious exemption to vaccination, are subject to the forced or mandated vaccination provision in the emergency Orders.

17. M.N. resides in zip code 11205, which is a zip code covered by the emergency Orders. She and her minor child, who has a religious exemption to vaccination, are subject to the forced or mandated vaccination provision in the emergency Orders.

18. The petitioners are all adversely affected by the emergency Orders issued April 9, 2019 because they command that petitioners “shall” vaccinate themselves or their children in contravention of their religious beliefs or be subject to criminal and civil penalties, including imprisonment.

19. The petitioners are all adversely affected by the emergency Orders, which require vaccination irrespective of whether the petitioners give informed consent or receive the information required under the National Childhood Vaccine Injury Act. 42 U.S.C. § 300aa-26.³

³ The relevant provision of the National Childhood Vaccine Injury Act provides, as follows:

d) Health care provider duties

On and after a date determined by the Secretary which is--

(1) after the Secretary develops the information materials required by subsection (a), and

(2) not later than 6 months after the date such materials are published in the Federal Register,

each health care provider who administers a vaccine set forth in the Vaccine Injury Table *shall provide* to the legal representatives of any child or to any other individual to whom such provider intends to administer such vaccine a copy of the information materials developed pursuant to subsection (a), supplemented with visual presentations or oral explanations, in appropriate cases. Such materials shall be provided prior to the administration of such vaccine.

42 U.S.C.A. § 300aa-26 (West). (Emphasis added).

The respondents have thus failed to account for these requirements in the recklessly short 48-hour period during which the emergency Orders command that people “shall” be vaccinated, thereby ignoring statutory safeguards against the risk of harm from vaccination and overriding fundamental principles of informed consent.

20. Respondent, the New York City Department of Health and Mental Hygiene (“Department of Health” or “DOH”), includes an administrative agency in the executive branch of the New York City government. The Department of Health also comprises the Board of Health (the “Board”), which has eleven individual members appointed by and serving at the pleasure of the Mayor pursuant to sections 551 and 553-54 of the N.Y.C. Charter. Respondent Dr. Oxiris Barbot, M.D. is Commissioner of the Department of Health and serves as Chair of the Board of Health.

JURISDICTION AND VENUE

21. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803.2. and 3. This jurisdiction is because respondents issued the emergency Orders and have proceeded and are proceeding without or in excess of jurisdiction, and the emergency Orders are in violation of lawful procedure, affected by an error of law, and are arbitrary, capricious and an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001, on the ground that the Orders are arbitrary, capricious and contrary to law.

22. This Court has personal jurisdiction over petitioners pursuant to CPLR § 301.

23. This Court has personal jurisdiction over respondents pursuant to CPLR § 302(a)(1).

24. Venue lies in Kings County pursuant to CPLR § 506(b) and § 7804(b) because it is the county within the judicial district “where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place.”

**AS AND FOR A FIRST CAUSE OF ACTION
(RELIEF UNDER ARTICLE 78 OF THE CPLR – ORDERS ARE ULTRA
VIRES AND OUTSIDE SCOPE OF AUTHORITY)**

25. On or about April 9, 2019, acting through Commissioner Oxiris Barbot, respondents declared a state of emergency and issued emergency Orders that mandate “any person who lives, works or resides within the 11205, 11206, 11221 and/or 11237 zip codes and who has not received the MMR vaccine within forty eight (48) hours” of the order “*shall be vaccinated against measles,*” unless the person can demonstrate immunity to the measles.

26. The first published Order also further mandated “that the parent or guardian of any child older than six months of age who lives, works or resides within the 11205, 11206, 11221 and/or 11237 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this order being signed by me *shall* cause such child to be vaccinated against measles unless such parent or guardian can demonstrate that the child has immunity to the disease or document that he or she should be medically exempt from this requirement.” Exhibit 1, Order.

27. When initially issued, the first emergency Order specified in its first paragraph that “there is an active outbreak of measles among people” who reside in zip codes 11205, 11206, 11221, and 11249. Zip code 11221 is not located in Williamsburg, but rather is part of Bushwick. The first Order directed that every person who “lives works or resides” in zip codes 11205, 11206, 11221 and 11249 must be vaccinated with the MMR within 48 hours of the

Order's signing unless the person can "demonstrate immunity to the disease" or "document to the satisfaction of the Department" that he or she should be "medically exempt." The first Order also directed parents of children in zip codes 11205, 11206, 11221 and 11249 to have their children vaccinated with the MMR vaccine. The first Order issued on April 9, 2019 is annexed to the Krakow Affirmation as Exhibit 1.

28. Without explanation from respondents, sometime after the first Order was issued on April 9, 2019, respondents issued a second emergency Order. The second Order is annexed as Exhibit 2. The second Order specifies zip codes 11205, 11206, 11211, and 11249. This Order includes zip codes 11211 and 11249, in the "whereas" clauses of the emergency Order, which the first Order did not include. This second Order omits zip code 11221, which was included in the first Order. This second Order, however, names a non-Williamsburg zip code, 11237, which is located in Bushwick, in the crucial "It is Further Ordered" paragraph on page 2, which directs that people "shall" vaccinated. This second Order is annexed to the Krakow Affirmation as Exhibit 2. Finally, a third emergency Order was issued that removed both zip codes 11211 and 11237 and included zip codes 11211 and 11249. The respondents thereby inconsistently specified the zip codes to which their emergency mandate applies. The respondents have failed to clarify the glaring inconsistencies among their three Orders. These glaring inconsistencies have caused confusion, anxiety and fear among residents of at least two zip codes who cannot determine whether an Order applies to them and if they face "civil and/or criminal fines, forfeitures and penalties, including imprisonment" for non-compliance. Exhibits 1, 2 and 3. A *Newsweek* article that describes the exceedingly confusing zip code discrepancies in the respondents' three Orders is annexed to the Krakow Affirmation as Exhibit 5.⁴

⁴ The *Newsweek* article that describes with references to Tweets from New York residents is titled, "NYC Officials Listed Wrong Zip Code For Measles Vaccination Order Then Changed It

29. Thus, respondents have not taken the required care or exercised the most minimal due diligence to get the zip codes right in these unusual emergency Orders. It should be expected that the Health Department would exercise appropriate care in issuing these extraordinary emergency public health directives, rare in New York City's history, commanding New Yorkers to be vaccinated under penalty of imprisonment. To compound respondents' malfeasance in executing their duty to protect public health, the respondents, having initially failed to identify the correct zip codes, issued second and third emergency Orders, without telling New York City residents about their mistakes and the changes in the zip codes specified in the Orders. Whether due to typographical, geographical, or other ineptness, the zip code errors affect the lives of all New Yorkers. Such malfeasance by respondents, especially coupled with the lack of planning for enforcement of the Orders, reveals that the emergency Orders are arbitrary, capricious and contrary to law *ab initio*.⁵

30. The emergency Orders report, "[s]ince September 2018, more than 250 cases of measles have been documented amount people living in Williamsburg," but the Orders conspicuously failed to specify the number of active cases of measles when respondents issued the emergency Orders. In a notice posted on the New York City Health Department web site after the emergency Orders were issued, the Health Department states, "[a]s of April 8, 2019,

Without Telling Anyone," *Newsweek*, 4/10/19 at 9.45 AM, URL: <https://www.newsweek.com/nyc-measles-vaccine-vaccination-irder-zip-1391831> (Accessed 4/13/19, 1:29 AM).

⁵ The New York Civil Liberties Union has been reported to have "blasted" the Health Department Orders as "illegal" because, "[m]easures such as quarantine or penalties for non-vaccination may be permissible, but forced vaccination is not." See Exhibit 18, annexed to the Krakow Affirmation. The NYCLU is published by the *Daily Beast* on April 9, 2019, at 5:15 p.m. The *Daily Beast* article is published at URL: <https://www.thedailybeast.com/measles-crisis-new-york-civil-liberties-union-blasts-forced-vaccination-in-nyc> (last accessed 4/13/19, 2:43 PM).

there have been 285 confirmed cases of measles in Brooklyn and Queens since October.” The Health Department website, as of April 14, 2019, specifies cases by location, but that information was not available from respondents on April 9, 2019. It is important to note that according to CDC data, there have been hundreds of measles cases in the United States in recent years, including 667 cases in 2014. While petitioners are not suggesting that measles is of no concern, the question is whether 285 measles cases over the last 7 months, and a much smaller number of cases in recent weeks, justifies the extraordinary directives in the emergency Orders. Petitioners strongly believe that the existing circumstances do not justify the unusual directives contained in the emergency Orders. ⁶ See Exhibit 22 annexed to Krakow affirmation, also at <https://www1.nyc.gov/site/doh/health/health-topics/measles.page> (accessed 4/14/19 @ 1 p.m.).

31. When Commissioner Barbot issued the Orders, likely there were far fewer active cases of measles than 250. The number of active cases is insufficient to constitute an epidemic and does not justify the emergency Orders.

32. At the time Commissioner Barbot issued the emergency Orders, the respondents had failed to use the authority they have under Public Health Law Section 2100 to isolate and quarantine those infected with measles and those living in close proximity to them.

33. New York City Health Code §3.01(d) provides, “Where urgent public health action is necessary to protect the public health against an imminent or existing threat, the Commissioner may declare a public health emergency.”

⁶ The Notice that is posted on the Health Department web site contains information that was not posted at the time the emergency Orders were issued on April 9, 2019. Some of the information posted on respondents’ web site is inconsistent with the emergency Orders. For example, the web site statement says, “[i]nfants ages 6-11 months should also receive MMR vaccine before traveling internationally” whereas the emergency Orders command that all children older than six months must be vaccinated within 48 hours of the issuance of the emergency Orders or their parents will face civil and criminal penalties, including imprisonment. Exhibits 1, 2, 3 annexed to Krakow Affirmation.

34. Neither Code §3.01(d) nor other relevant provisions of the New York City Health Code mention vaccination or specify the circumstances under which the Commissioner may compel vaccination or require civil and criminal penalties for failure to do so.

35. Moreover, New York State law provides means for dealing with contagious disease outbreaks, including measles, specifically authorizing both the exclusion of non-vaccinated students from a school in which a case of measles has been reported and/or the quarantining of a person or place infected by the disease.

36. Neither the Commissioner of Health nor the Governor of New York State has declared any public health emergency regarding measles. In fact, it has been reported in the New York Post on April 9, 2018, that the Governor has questioned the Constitutional basis for the respondents' emergency Orders.⁷

37. Each petitioner has been irreparably harmed by Commissioner Barbot's emergency Orders, which subject them to criminal prosecution, severe fines and imprisonment for non-compliance.

38. Respondents' emergency orders impermissibly extinguish the force of religious exemptions for each of the petitioners' children, which they obtained in full compliance with Section 2164(9) of the Public Health Law, and which the State of New York continues to recognize, irrespective of whether the child could attend school since September 2018, when the measles outbreak began.

39. The emergency Orders are arbitrary and capricious because they fail to state how many active cases of measles existed at the time of the issuance of the Orders, instead specifying

⁷ "Cuomo questions legality of enforced vaccinations in Brooklyn," *New York Post*, April 9, 2019, 12:08pm, URL: <https://nypost.com/2019/04/09/cuomo-questions-legality-of-enforced-vaccinations-in-brooklyn/> (last accessed 4/13/19).

only that, “[s]ince September 2018, more than 250 cases of measles have been documented among people living in Williamsburg,” a period of more than six months. The Orders, therefore, fail to justify the emergency basis for circumstances that have existed since at least September 2018.

40. The emergency Orders are arbitrary and capricious because they contemplate mandating or forcing people to receive vaccines without any plan for implementation. The respondents have stated publicly that “there’s no blueprint for how City officials could forcibly vaccinate people.” A spokesperson for the respondents stated, “[b]ecause 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.” A *New York Post* article quoting the respondent Mayor Bill De Blasio’s spokesperson making these statements is annexed to the Krakow Affirmation as Exhibit 3.⁸ The respondents have thus issued Orders without an enforcement plan, despite the claimed emergency. The only purpose for the Orders, therefore, appears to be to instill fear among the people in the affected zip code areas, many of whom belong to an insular, self-segregated community that already faces stigmatization.

41. The emergency Orders are arbitrary and capricious in prescribing mandatory vaccination because administration of the MMR vaccine carries the risk of harm to both children and adults. Parents of children receiving the MMR, and adults, together with their individual healthcare practitioners, are in the best position to assess risk.

42. The emergency Orders are arbitrary and capricious in prescribing mandatory vaccination, thus violating the fundamental principle of informed consent to any medical intervention that carries a documented risk of harm, as does the MMR vaccine.

⁸ *New York Post*, April 9, 2019, “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/> (accessed April 10, 2019).

43. The emergency Orders are arbitrary and capricious by imposing mandatory vaccination by executive fiat, without the authority of law or sufficient basis in fact.

44. The emergency Orders are arbitrary and capricious because the incidence of measles cited in the Orders is insufficient to justify the declaration of a public health emergency pursuant to section 3.01 of the New York City Health Code.

45. The emergency Orders are arbitrary and capricious in finding that any person who lacks the measles vaccine or immunity to measles is a “nuisance,” as defined in the New York City Administrative Code §17-142. Respondents have provided no legal authority or precedent for finding an unvaccinated person in any context to be a nuisance.

46. The emergency Orders are arbitrary and capricious by providing only 48 hours before imposing severe penalties, including making non-vaccination a criminal offense, without authority in statute, rule or law.

47. The emergency Orders exceed reasonable authority by imposing civil and criminal sanctions for people’s failure to comply with the Orders’ prescribed 48-hour window.

The emergency Orders provide as follows:

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.

Exhibits 1 at 3; Exhibit 2 at 3.

WHEREFORE, for the several reasons set forth *supra*, this Honorable Court should declare that respondents’ declaration of emergency and emergency Orders issued on or about April 9, 2019, commanding, mandating and forcing people to receive the MMR vaccine within 48 hours of the Orders’ issuance are arbitrary, capricious and contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A SECOND CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
ORDERS ARBITRARY AND CAPRICIOUS BECAUSE THEY IGNORE
RISK OF HARM DUE TO COMPULSORY VACCINATION)**

48. Petitioners incorporate paragraphs 1-47 as if set forth fully and repeated herein.

49. None of the petitioners' children have measles.

50. Nevertheless, some of petitioners' children have been barred from attending school.

51. By the terms of the emergency Orders, petitioners' children will be forced to receive an MMR vaccination, the only vaccination available for measles, and will thereby be exposed to live virus mumps and rubella vaccinations, which carry risk of harm.

52. Respondents have an insufficient basis to compel or force a measles vaccination, let alone mumps and rubella vaccinations.

53. As there are zero reported cases of mumps or rubella in the covered zip codes, there exists no justification whatsoever for exposing petitioners' children via the MMR vaccine to mumps and rubella, which carry risk of harm.

WHEREFORE, because the mumps and rubella components of the MMR vaccine carry a risk of harm and there exists no justification to expose children to the mumps and rubella vaccinations *supra*, the Honorable Court should declare respondents' declaration of emergency and the emergency Orders issued on or around April 9, 2019 to be arbitrary, capricious and contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A THIRD CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
ORDERS ILLEGALLY DECLARE PERSONS A NUISANCE DUE TO
UNVACCINATED STATUS)**

54. Petitioners incorporate paragraphs 1-53 as if set forth fully and repeated herein.

55. The emergency Orders provide:

I also find that the presence of any person in Williamsburg lacking the MMR vaccine, unless that vaccine is otherwise medically contra-indicated or such person has demonstrated immunity against measles, creates an unnecessary and avoidable risk of continuing the outbreak and is therefore a nuisance, as defined in New York City Administrative Code §17-142.

56. There is no authority in Administrative Code §17-142 to declare presence of a person in a specified geographical location to be a “nuisance” within the definition of the law.

57. There is no factual basis, other than the baseless assertions of the emergency Orders, to declare a person a “nuisance” under the law.

WHEREFORE, because there is no basis in fact or law for the emergency Orders’ declaration that a person is nuisance, the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A FOURTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
ILLEGAL DE FACTO OVERRIDING OF STATE LAW GOVERNING
RELIGIOUS EXEMPTIONS)**

58. Petitioners re-allege the foregoing paragraphs 1-57 as if more fully stated herein.

59. There is no public health emergency in New York City of the extreme magnitude required under the New York City Health Code to invoke an emergency and to issue and enforce the emergency Orders requiring forced vaccination of children and adults.

60. The emergency Orders improperly invalidate the petitioners’ children’s religious exemptions obtained in full compliance with Public Health Law §2164(9).

WHEREFORE, because the emergency Orders improperly and without justification override New York State Law governing religious exemptions, thereby operating as an

unjustifiable and unnecessary override of Public Health Law § 2164(9), the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A FIFTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
ARBITRARINESS DUE TO ORDER’S RISK OF HARM)**

61. Petitioners re-allege the foregoing paragraphs 1-60 as if more fully stated herein.

62. The emergency Orders’ claims regarding the safety and effectiveness of the MMR vaccine and the risk of harm to vaccinated people are exaggerated, inaccurate and misleading.

63. It is the law and policy of the United States that vaccines carry known risks of harm.

64. The legislative history of the National Childhood Vaccine Injury Act shows that as of 1983 it “was known that about one half of one percent of apparently normal infants experience a serious adverse reaction to vaccine. *See* S. Hrg. 98-1060, at 21 (1984).” *Oliver v. Sec’y of Health & Human Servs.*, 900 F.3d 1357, 1364 (Fed. Cir. 2018). In 1983, one half of one percent of children translated to approximately 20,000 children whom Congress acknowledged would be seriously harmed by routine vaccination.

65. The fact that the MMR can cause injury to children and adults is well-recognized. In the Vaccine Injury Compensation Program formed under the 1986 National Childhood Vaccine Injury Act (NCVIA or the “Vaccine Act”), there is a Table promulgated by rule by the Secretary of Health and Human Services. 42 U.S.C.A. § 300aa-14; 42 C.F.R. § 100.3.

66. The Vaccine Injury Table includes the following serious adverse outcomes or injuries resulting from the MMR vaccine, causation for which is presumed under the Vaccine Act: anaphylaxis, encephalopathy, encephalitis, shoulder injury related to vaccine administration,

vasovagal syncope, chronic arthritis, thrombocytopenic purpura, and vaccine-strain measles viral disease in an immunodeficient recipient. 42 C.F.R. § 100.3(a) III and IV.

67. According to statistics of the Federal Health Resources & Services Administration (“HRSA”), the sub-agency within the Department of Health and Human Services that administers the Vaccine Injury Compensation Program (“VICP”), more than \$4.1 Billion dollars have been paid to 6,465 vaccine-injured persons since 1988. Source HRSA, URL: <https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/monthly-stats-april-2019.pdf>.

68. This significant number of compensated vaccine injury cases exists even though the Department of Health and Human Services has failed to comply with its statutory mandate to publicize the VICP. The Vaccine Act directs: “The Secretary shall undertake reasonable efforts to inform the public of the availability of the Program.” 42 U.S.C.A. § 300aa-10. Furthermore, a 2014 Government Accountability Office (“GAO”) report to Congress found the following:

In its 2006 VICP strategic plan, HRSA noted that one of the critical issues facing the program from 2005 to 2010 was that many parents, the general public, attorneys, and health care professionals were not aware VICP existed.

Vaccine Injury Compensation: Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives: <https://www.gao.gov/assets/670/667136.pdf> at 31.

69. The GAO report found, “Without awareness of the program, individuals who might otherwise receive compensation for a vaccine-related injury or death could be denied compensation because of a failure to file their claim within the statutory deadlines.” *Id.* The GAO report also found that because HRSA’s mission of promoting vaccines conflicts with its statutory mission to promote the VICP, efforts at promotion have been limited. *Id.* As a result,

there are likely far fewer vaccine injury claims submitted to the VICP than otherwise would be the case because the public is unaware of it.

70. In addition, a study of the Vaccine Adverse Event Reporting System (“VAERS”), the voluntary vaccine injury reporting system established under the Vaccine Act, reported to HHS that “ fewer than 1% of vaccine adverse events are reported.” See Exhibit 21 annexed to Krakow Affirmation at 6.

71. Thus, the true incidence of vaccine injuries in the United States is unknown. It is well-documented, however, that vaccine injuries are grossly underreported. The fact that vaccine injuries occur, including MMR vaccine-caused injuries, is undisputed and uncontroversial.

72. The United States Court of Federal Claims has found that the understanding of vaccine injury is a “field [of medicine] bereft of complete and direct proof of how vaccines affect the human body.” *Althen v. Sec’y of Health & Human Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

73. Pursuant to the Vaccine Act, the Supreme Court of the United States has held that because vaccines are “unavoidably unsafe,” vaccine manufacturers are immune from liability for design defects. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

74. For this reason, lawsuits for vaccine injury against vaccine manufacturers are all but nonexistent in the United States, despite the fact that tens of thousands of vaccine injuries occur every year.

75. Against this backdrop evidencing vaccine injury, and notwithstanding the risk of serious harm from vaccination, and without any reference to such risk, the emergency Orders have declared that the MMR vaccine is “safe and effective,” a patently and dangerously misleading statement.

76. The manufacturer's package insert for the MMR vaccine lists multiple risks of adverse effects. See Exhibits 6 and 7 to the Krakow Affirmation.

77. The manufacturer's package insert for the MMR vaccine contains information suggesting that giving the MMR vaccine before 12 months of age is neither effective nor safe. See Exhibits 6 and 7 to the Krakow Affirmation.

78. The manufacturer's package insert for the MMR vaccine states, "Safety and effectiveness of mumps and rubella vaccine in infants less than 12 months of age have not been established." See Exhibits 6 and 7 to the Krakow Affirmation.

79. The MMR package insert warns against MMR vaccination of adolescent and young adult females who may be or are about to become pregnant. ("Women of childbearing age should be advised not to become pregnant for 3 months after vaccination...."). Exhibit 7 at 3, which is referenced in Exhibit 6, an exhibit to the Krakow affirmation.

80. The manufacturer's package insert for the MMR vaccine states that the vaccine presents the risk of adverse reactions affecting the nervous system, including seizures and brain injury. See Exhibit 6 and Exhibit 7 at 7, annexed as exhibits to the Krakow affirmation. Contrary to representations by respondents and public health authorities, the data show that in the 1970's, at a time when measles vaccination was nearly as widespread as it is today and when outbreaks were more common and widespread than the Williamsburg outbreak, measles deaths were "estimated to be approximately 1.0 deaths per 10,000 measles cases." See Exhibit 19 in the Krakow Affirmation, a medical journal article titled, *Measles Mortality: A Retrospective Look At the Vaccine Era*, American Journal of Epidemiology, The Johns Hopkins University, 1975.

81. According to the CDC, there have been two deaths from measles in 2012 and none thereafter throughout the United States. By comparison, there have been 13 deaths from pertussis and 141 deaths from tetanus during the same period. Notably, there were 667 measles

cases in 2014. *See* Exhibit 23 annexed to Krakow Affirmation, also at URL:

<https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/E/reported-cases.pdf>

82. By contrast, the Centers for Disease Control reports the following mortality rate from smallpox on its website: "Smallpox was a devastating disease. On average, 3 out of every 10 people who got it died. Those who survived were usually left with scars, which were sometimes severe." URL: <https://www.cdc.gov/smallpox/history/history.html>.

83. The World Health Organization ("WHO") has classified adverse drug events that occur at a frequency of 1:1000 to 1:10,000 as "rare." It considers an adverse drug event that happens at a frequency of less than 1:10,000 as "very rare." It classifies an adverse event that happens at a frequency greater than 1:1000 but less than 1:100 as "uncommon (infrequent)." URL: https://www.who.int/medicines/areas/quality_safety/safety_efficacy/trainingcourses/definitions.pdf.

84. The rate for measles mortality at 1 in 10,000 infections, which likely prevails today given contemporary standards of nutrition and sanitation by WHO classifications for drugs adverse events, would be a "rare" to "very rare," or at the very worst "uncommon (infrequent)."

85. Thus, the rate of measles mortality, which is rare or very rare under WHO definitions, or at the worst uncommon or infrequent, cannot be easily compared with the death rate of 1 in 3 people infected with smallpox during outbreaks, as the CDC reports.

86. Upon information and belief, respondents have reported no deaths associated with the Williamsburg measles outbreak.

87. The risk of harm associated with measles infection for a healthy preschool child in the United States is less than the risk of harm associated with the MMR vaccine. See Exhibit 6 to the Krakow Affirmation, Affidavit of Dr. Hendrieka Fitzpatrick, M.D.

88. Unvaccinated people pose no increased risk of measles to people who have been

vaccinated. Exhibit 5 at para. 2.

89. By forcing children to receive the MMR vaccination, the emergency Orders enhance the risk of harm from injury by the MMR vaccination.

90. By forcing adults to receive the MMR vaccination, the emergency Orders enhance the risk of harm from injury by the MMR vaccination.

91. By forcing children and adults to receive the MMR vaccination, the emergency Orders fail to reduce the risk of measles to people who have been vaccinated.

92. Vaccinating people with the MMR vaccine and allowing them to associate immediately with other people in public actually enhances the risk of harm to the public because the measles can spread through viral shedding of those recently vaccinated. See Exhibit 5, para. 4, annexed to the affirmation of Robert Krakow.

93. The emergency Orders' mandate of measles vaccination restricted to four shifting and ill-defined zip codes is medically nonsensical, will fail to prevent measles outbreaks, and thus represents an irrational public health intervention. See Exhibit 5 at para. 7.

WHEREFORE, because the emergency Orders grossly understate the risk of harm to children, adults and the general public from the MMR vaccine, while at the same time overstating the benefits, the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A FIFTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
DUE PROCESS)**

94. Petitioners re-allege the foregoing paragraphs 1-93 as if more fully stated herein.

95. The emergency Orders violate the First and Fourteenth Amendments to the United States Constitution and violate the New York State Constitution by imposing civil and criminal penalties for the petitioners' free exercise of their religious practices and beliefs.

96. The emergency Orders violate the First and Fourteenth Amendments to the United States Constitution and violate the New York State Constitution by imposing civil and criminal penalties, including imprisonment, in violation of the petitioners' rights to due process under law.

WHEREFORE, because the emergency Orders violate the First and Fourteenth Amendments to the United States Constitution (due process) and the applicable provisions of the New York State Constitution, the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A SIXTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
EQUAL PROTECTION)**

97. Petitioners re-allege the foregoing paragraphs 1-96 as if more fully stated herein.

98. Despite the language of the third emergency Order, there are six zip codes covered in the three emergency Orders issued by respondents: 11205, 11206, 11221, 11249, 11211, and 11237. A chart showing the population and square mileage of the affected zip codes taken from web sites that compile such data is annexed to the Krakow Affirmation as Exhibit 20.

99. The data show that 438,929 people live in the affected zip codes.

100. At the time of their issuance, the respondents' emergency Orders provide no data to the affected residents and workers on the number of active measles cases in the population of

these zip codes.

101. The respondents, therefore, provided no rational basis let alone a compelling state interest to restrict the free exercise of religion and fundamental interests in bodily autonomy of the 438,929 affected residents (plus an untold number of people who work in the zip codes but do not reside there), as compared with any of the other 8.6 million New York City residents.

102. The aforementioned data beg the question: do the number of cases justify the extraordinary measures contained in the emergency Orders?

103. Even if there are active cases located in the identified zip codes, the Department of Health cannot show that it has narrowly tailored its emergency Orders to address a compelling state interest.

104. Under New York State Public Health Law §2100 the Department of Health has the statutory authority to isolate or quarantine, or both, people who pose a threat of infectious disease to others.

105. Whether or not measles is a serious infection disease is open to question, as measles is not even on the federal list of quarantinable diseases published by the Centers for Disease Control. *See Legal Authorities for Isolation and Quarantine*, URL: <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

106. Accordingly, the respondents' emergency Orders bear no rational or compelling relationship to the known facts about the people affected in the geographical areas.

107. Under these circumstances, by issuing the emergency Orders, the respondents have violated the rights of the petitioners and people in the affected areas and have denied equal protection of the governing law of petitioners and others in violation of the Due Process Clause as applied to New York State under the Fourteenth Amendment's Equal Protection Clause.

WHEREFORE, because the emergency Orders violate the Fifth and Fourteenth Amendments to the United States Constitution (equal protection) and the applicable provisions of the New York State Constitution, the Orders are arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

**AS AND FOR A SEVENTH CAUSE OF ACTION
(DECLARATORY RELIEF UNDER ARTICLE 30 OF THE CPLR –
COLLATERAL CONSEQUENCES OUTSIDE IDENTIFIED ZIP CODES)**

108. Petitioners re-allege the foregoing paragraphs 1-106 as if more fully stated herein.

109. Upon information and belief, the source of which is a Williamsburg resident and her child who together reside in one of the affected zip codes, the child has been excluded from a school located in a New York City county outside of Kings County.

110. As a direct result of the respondents' alarmist emergency Orders, the child has been excluded from school for the sole reason that the child lives in an affected Williamsburg zip code.

111. The school that is located outside of Kings County has used the presumed authority of the emergency Orders to illegally override the child's lawful religious exemption from vaccination under New York State Public Health Law §2164(9).

112. The child is healthy, does not have the measles and poses no threat to vaccinated or unvaccinated persons.

113. Upon information and belief, the source of which is a parent in one of the affected zip codes, a school administrator in New York County has advised that many schools in New York City that are located outside the zip codes identified in the emergency Orders are excluding children who live in zip codes identified in the emergency Orders.

114. The children are being excluded from their schools because they live in an affected zip code, notwithstanding their longstanding duly approved religious exemptions to vaccination that were obtained in full compliance with Public Health Law §2164(9).

115. These actions of school administrators to exclude students located outside the zip codes specified in the emergency Orders is occurring despite the fact that such actions are outside the scope of the Orders.

WHEREFORE, because the emergency Orders have collateral effects beyond the already broad and *ultra vires* scope of respondents' authority, this Court should find that the emergency Orders are without foundation in law and fact, are creating confusion, and unnecessary actions well beyond the zip codes where active measles infections exist, if any. The emergency Orders are creating an environment that goes against the public interest of the City of New York. This Court should, therefore, find the emergency Orders to be arbitrary, capricious, contrary to law and, accordingly, null and void and without the force of law.

NO PRIOR APPLICATION

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

RELIEF REQUESTED

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

- (a) Enjoining and permanently 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) Declaring the emergency Orders arbitrary, capricious and contrary to law, the imposition of which is beyond respondents' authority, and
- (c) Vacating the mandatory vaccination emergency Orders dated on and around April 9, 2019, and

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

Dated: New York, New York
April 15, 2019

Respectfully submitted,

LAW OFFICE OF ROBERT J. KRAKOW, P.C.

By: 

ROBERT J. KRAKOW

LAW OFFICE OF ROBERT J. KRAKOW, P.C.

Attorney for Petitioners

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FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

NYSCEF DOC. NO. 1

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/15/2019

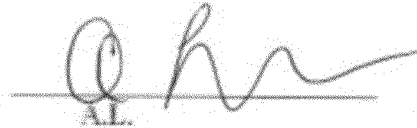
VERIFICATION

STATE OF NEW YORK

COUNTY OF KINGS

Pursuant to CPLR §3020, A.L., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to A.L. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to be true.


A.L.

Sworn to before me this 13th
Day of April 2019


Notary Public


SUNNY PHONG
Notary Public, State of New York
Reg. No. 01PH6387923
Qualified in Kings County
Commission Expires 02/25/2023

VERIFICATION

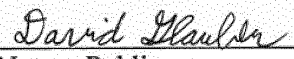
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COUNTY OF KINGS)

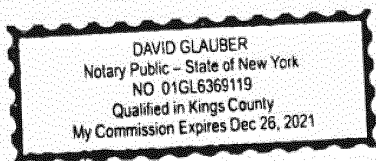
Pursuant to CPLR §3020, B.D., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to B.D. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to e true.


B.D.

Sworn to before me this 12
day of April 2019


Notary Public

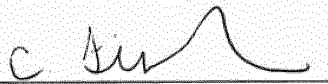


VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF KINGS)

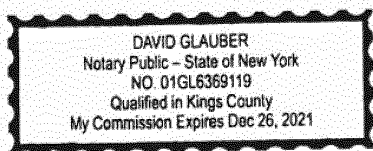
Pursuant to CPLR §3020, C.F., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to C.F. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to e true.


C.F.

Sworn to before me this 11
Day of April 2019


Notary Public




VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF KINGS)

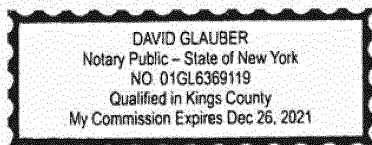
Pursuant to CPLR §3020, M.F., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to M.F. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to e true.


M.F.

Sworn to before me this 11
Day of April 2019


Notary Public



FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

NYSCEF DOC. NO. 1

INDEX NO. 508356/2019

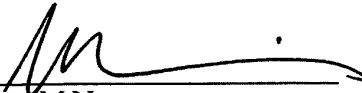
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VERIFICATION

STATE OF NEW YORK)
)
 COUNTY OF KINGS)

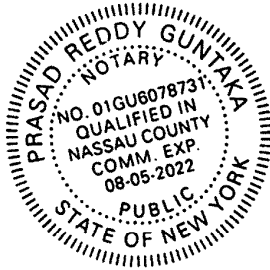
Pursuant to CPLR §3020, M.N., being duly sworn, deposes and says:

I have read the foregoing petition and know the contents thereof as to M.N. and my minor children, that the same is true to my own knowledge, except as to matters therein alleged on information and belief, and that as to those matters I believe them to be true.


 M.N.

Sworn to before me this 12th
 Day of April 2019


 Notary Public



**AFFIRMATION OF ROBERT J. KRAKOW, FOR PETITIONERS, IN SUPPORT OF
ARTICLE 78 PETITION AND ORDER TO SHOW CAUSE, DATED APRIL 15, 2019 [51 - 63]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 2

RECEIVED NYSCEF: 04/15/2019

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

-----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

Index No. _____

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

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 3.¹ 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.

¹ 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.²

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

² 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.

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.

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, 13th 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

**EXHIBIT 1 TO KRAKOW AFFIRMATION -
ORDER OF THE COMMISSIONER, OXIRIS BARBOT, M.D., NYC DEPARTMENT
OF HEALTH AND MENTAL HYGIENE, DATED APRIL 9, 2019 [64 - 66]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 3

RECEIVED NYSCEF: 04/15/2019



NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
Oxiris Barbot, M.D.
Commissioner

ORDER OF THE COMMISSIONER

TO: All persons who reside, work or attend school in the neighborhood of Williamsburg, Brooklyn, New York and to the parents and/or guardians of any child who resides, works or attends school in the neighborhood of Williamsburg, Brooklyn, New York

WHEREAS, there is an active outbreak of measles among people residing in the neighborhood of Williamsburg in Brooklyn, New York who live within zip codes 11205, 11206, 11221 and 11249. Since September 2018, more than 250 cases of measles have been documented among people living in Williamsburg and that number continues to grow as new cases are still occurring; and

WHEREAS, measles is a highly contagious viral disease that can result in serious health complications, such as pneumonia and swelling of the brain. About a third of reported measles cases have at least one complication and in some cases, measles can cause death. Measles can be serious in all age groups. However, infants, young children, pregnant persons, people whose immune systems are weak and adults are more likely to suffer from measles complications; and

WHEREAS, measles is easily transmitted from a sickened person to others who lack immunity to the disease. The virus can live for up to two hours in air or on surfaces where an infected person coughed or sneezed and people who lack immunity are highly likely to become sick if they are in contact with an infectious person or near where an infectious person recently has been; and

WHEREAS, although measles is highly contagious, the Measles-Mumps-Rubella (MMR) vaccine is an effective and safe vaccine that will prevent its transmission. While measles remains one of the leading causes of death among young children in parts of the world where the vaccination is not available, the disease until this outbreak was largely eliminated in the United States; and

WHEREAS, the measles outbreak persists in Williamsburg despite other efforts taken by the Department of Health and Mental Hygiene to stop it, including orders excluding unvaccinated children from attending preschools and daycare programs, because a high rate of people living within Williamsburg have not been vaccinated against measles; and

WHEREAS, pursuant to section 556 of the Charter of the City of New York, the Department is responsible for controlling communicable diseases within the City of New York and for supervising the abatement of nuisances that affect or are likely to affect the public health; and

WHEREAS, pursuant to section 3.01 of the New York City Health Code, I am authorized to declare a public health emergency and issue orders and take actions that I deem

necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat; and

WHEREAS, I find the ongoing measles outbreak in Williamsburg to be an existing threat to public health in the City of New York; and

WHEREAS, I also find that the presence of any person in Williamsburg lacking the MMR vaccine, unless that vaccine is otherwise medically contra-indicated or such person has demonstrated immunity against measles, creates an unnecessary and avoidable risk of continuing the outbreak and is therefore a nuisance, as defined in New York City Administrative Code §17-142; and

WHEREAS, pursuant to New York City Health Code §3.07, no person “shall do or assist in any act which is or may be detrimental to the public health or to the life or health of any individual... or ...shall fail to do any reasonable act or take any necessary precaution to protect human life and health.”

IT IS HEREBY ORDERED that any person who lives, works or resides within the 11205, 11206, 11221 and/or 11249 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this Order being signed by me shall be vaccinated against measles unless such person can demonstrate immunity to the disease or document to the satisfaction of the Department that he or she should be medically exempt from this requirement.

IT IS FURTHER ORDERED that the parent or guardian of any child older than six months of age who lives, works or resides within the 11205, 11206, 11221 and/or 11249 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this order being signed by me shall cause such child to be vaccinated against measles unless such parent or guardian can demonstrate that the child has immunity to the disease or document that he or she should be medically exempt from this requirement.

THIS ORDER shall remain in effect until the next meeting of the New York City Board of Health scheduled for April 17, 2019 at which time it may be continued or rescinded by the Board.



Dated: April 9, 2019

Oxiris Barbot, M.D.
Commissioner of Health

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

NYSCEF DOC. NO. 3

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/15/2019

WARNING

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.

Anyone wishing to object to the order, please write or fax Thomas G. Merrill, General Counsel, New York City Department of Health and Mental Hygiene, 42-09 28th Street (WS 14-38) Long Island City NY 11101-4132; tmerrill@health.nyc.gov telephone: 347-396-6116; fax: 347-396-6087, providing a statement of the reasons for your objection to the order. If you have any questions about how to comply with this Order, please telephone Jane R. Zucker, M.D., M.Sc., Assistant Commissioner, Bureau of Immunization at 347-396-2471.

**EXHIBIT 2 TO KRAKOW AFFIRMATION -
ORDER OF THE COMMISSIONER, OXIRIS BARBOT, M.D., NYC DEPARTMENT
OF HEALTH AND MENTAL HYGIENE, DATED APRIL 9, 2019 [67 - 69]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

NYSCEF DOC. NO. 4

INDEX NO. 508356/2019

RECEIVED NYSCEF 04/15/2019



NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
Oxiris Barbot, M.D.
Commissioner

ORDER OF THE COMMISSIONER

TO: All persons who reside, work or attend school in the neighborhood of Williamsburg, Brooklyn, New York and to the parents and/or guardians of any child who resides, works or attends school in the neighborhood of Williamsburg, Brooklyn, New York

WHEREAS, there is an active outbreak of measles among people residing in the neighborhood of Williamsburg in Brooklyn, New York who live within zip codes 11205, 11206, 11221 and 11249. Since September 2018, more than 250 cases of measles have been documented among people living in Williamsburg and that number continues to grow as new cases are still occurring; and

WHEREAS, measles is a highly contagious viral disease that can result in serious health complications, such as pneumonia and swelling of the brain. About a third of reported measles cases have at least one complication and in some cases, measles can cause death. Measles can be serious in all age groups. However, infants, young children, pregnant persons, people whose immune systems are weak and adults are more likely to suffer from measles complications; and

WHEREAS, measles is easily transmitted from a sickened person to others who lack immunity to the disease. The virus can live for up to two hours in air or on surfaces where an infected person coughed or sneezed and people who lack immunity are highly likely to become sick if they are in contact with an infectious person or near where an infectious person recently has been; and

WHEREAS, although measles is highly contagious, the Measles-Mumps-Rubella (MMR) vaccine is an effective and safe vaccine that will prevent its transmission. While measles remains one of the leading causes of death among young children in parts of the world where the vaccination is not available, the disease until this outbreak was largely eliminated in the United States; and

WHEREAS, the measles outbreak persists in Williamsburg despite other efforts taken by the Department of Health and Mental Hygiene to stop it, including orders excluding unvaccinated children from attending preschools and daycare programs, because a high rate of people living within Williamsburg have not been vaccinated against measles; and

WHEREAS, pursuant to section 556 of the Charter of the City of New York, the Department is responsible for controlling communicable diseases within the City of New York and for supervising the abatement of nuisances that affect or are likely to affect the public health; and

WHEREAS, pursuant to section 3.01 of the New York City Health Code, I am authorized to declare a public health emergency and issue orders and take actions that I deem

Exhibit 2 - C.F. et al. v. NYC Comm. of Health – p. 01

necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat; and

WHEREAS, I find the ongoing measles outbreak in Williamsburg to be an existing threat to public health in the City of New York; and

WHEREAS, I also find that the presence of any person in Williamsburg lacking the MMR vaccine, unless that vaccine is otherwise medically contra-indicated or such person has demonstrated immunity against measles, creates an unnecessary and avoidable risk of continuing the outbreak and is therefore a nuisance, as defined in New York City Administrative Code §17-142; and

WHEREAS, pursuant to New York City Health Code §3.07, no person "shall do or assist in any act which is or may be detrimental to the public health or to the life or health of any individual... or ...shall fail to do any reasonable act or take any necessary precaution to protect human life and health."

IT IS HEREBY ORDERED that any person who lives, works or resides within the 11205, 11206, 11221 and/or 11237 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this Order being signed by me shall be vaccinated against measles unless such person can demonstrate immunity to the disease or document to the satisfaction of the Department that he or she should be medically exempt from this requirement.

IT IS FURTHER ORDERED that the parent or guardian of any child older than six months of age who lives, works or resides within the 11205, 11206, 11221 and/or 11237 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this order being signed by me shall cause such child to be vaccinated against measles unless such parent or guardian can demonstrate that the child has immunity to the disease or document that he or she should be medically exempt from this requirement.

THIS ORDER shall remain in effect until the next meeting of the New York City Board of Health scheduled for April 17, 2019 at which time it may be continued or rescinded by the Board.



Dated: April 9, 2019

Oxiris Barbot, M.D.
Commissioner of Health

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WARNING

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Anyone wishing to object to the order, please write or fax Thomas G. Merrill, General Counsel, New York City Department of Health and Mental Hygiene, 42-09 28th Street (WS 14-38) Long Island City NY 11101-4132; tmerrill@health.nyc.gov telephone: 347-396-6116; fax: 347-396-6087, providing a statement of the reasons for your objection to the order. If you have any questions about how to comply with this Order, please telephone Jane R. Zucker, M.D., M.Sc., Assistant Commissioner, Bureau of Immunization at 347-396-2471.

**EXHIBIT 3 TO KRAKOW AFFIRMATION -
ORDER OF THE COMMISSIONER, OXIRIS BARBOT, M.D., NYC DEPARTMENT
OF HEALTH AND MENTAL HYGIENE, DATED APRIL 9, 2019 [70 - 72]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

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NYSCEF DOC. NO. 5

RECEIVED NYSCEF: 04/15/2019



NEW YORK CITY DEPARTMENT OF
HEALTH AND MENTAL HYGIENE
Oxiris Barbot, M.D.
Commissioner

ORDER OF THE COMMISSIONER

TO: All persons who reside, work or attend school in the neighborhood of Williamsburg, Brooklyn, New York and to the parents and/or guardians of any child who resides, works or attends school in the neighborhood of Williamsburg, Brooklyn, New York

WHEREAS, there is an active outbreak of measles among people residing in the neighborhood of Williamsburg in Brooklyn, New York who live within zip codes 11205, 11206, 11211 and 11249. Since September 2018, more than 250 cases of measles have been documented among people living in Williamsburg and that number continues to grow as new cases are still occurring; and

WHEREAS, measles is a highly contagious viral disease that can result in serious health complications, such as pneumonia and swelling of the brain. About a third of reported measles cases have at least one complication and in some cases, measles can cause death. Measles can be serious in all age groups. However, infants, young children, pregnant persons, people whose immune systems are weak and adults are more likely to suffer from measles complications; and

WHEREAS, measles is easily transmitted from a sickened person to others who lack immunity to the disease. The virus can live for up to two hours in air or on surfaces where an infected person coughed or sneezed and people who lack immunity are highly likely to become sick if they are in contact with an infectious person or near where an infectious person recently has been; and

WHEREAS, although measles is highly contagious, the Measles-Mumps-Rubella (MMR) vaccine is an effective and safe vaccine that will prevent its transmission. While measles remains one of the leading causes of death among young children in parts of the world where the vaccination is not available, the disease until this outbreak was largely eliminated in the United States; and

WHEREAS, the measles outbreak persists in Williamsburg despite other efforts taken by the Department of Health and Mental Hygiene to stop it, including orders excluding unvaccinated children from attending preschools and daycare programs, because a high rate of people living within Williamsburg have not been vaccinated against measles; and

WHEREAS, pursuant to section 556 of the Charter of the City of New York, the Department is responsible for controlling communicable diseases within the City of New York and for supervising the abatement of nuisances that affect or are likely to affect the public health; and

WHEREAS, pursuant to section 3.01 of the New York City Health Code, I am authorized to declare a public health emergency and issue orders and take actions that I deem

necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat; and

WHEREAS, I find the ongoing measles outbreak in Williamsburg to be an existing threat to public health in the City of New York; and

WHEREAS, I also find that the presence of any person in Williamsburg lacking the MMR vaccine, unless that vaccine is otherwise medically contra-indicated or such person has demonstrated immunity against measles, creates an unnecessary and avoidable risk of continuing the outbreak and is therefore a nuisance, as defined in New York City Administrative Code §17-142; and

WHEREAS, pursuant to New York City Health Code §3.07, no person “shall do or assist in any act which is or may be detrimental to the public health or to the life or health of any individual... or ...shall fail to do any reasonable act or take any necessary precaution to protect human life and health.”

IT IS HEREBY ORDERED that any person who lives, works or resides within the 11205, 11206, 11211 and/or 11249 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this Order being signed by me shall be vaccinated against measles unless such person can demonstrate immunity to the disease or document to the satisfaction of the Department that he or she should be medically exempt from this requirement.

IT IS FURTHER ORDERED that the parent or guardian of any child older than six months of age who lives, works or resides within the 11205, 11206, 11211 and/or 11249 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this order being signed by me shall cause such child to be vaccinated against measles unless such parent or guardian can demonstrate that the child has immunity to the disease or document that he or she should be medically exempt from this requirement.

THIS ORDER shall remain in effect until the next meeting of the New York City Board of Health scheduled for April 17, 2019 at which time it may be continued or rescinded by the Board.



Dated: April 9, 2019

Oxiris Barbot, M.D.
Commissioner of Health

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

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**EXHIBIT 4 TO KRAKOW AFFIRMATION -
NEWS ARTICLE, NEW YORK POST, DATED APRIL 9, 2019 [73 - 74]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

NYSCEF DOC. NO. 6

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/15/2019

Williamsburg residents could face 'forcible vaccinations' amid measles outbreak

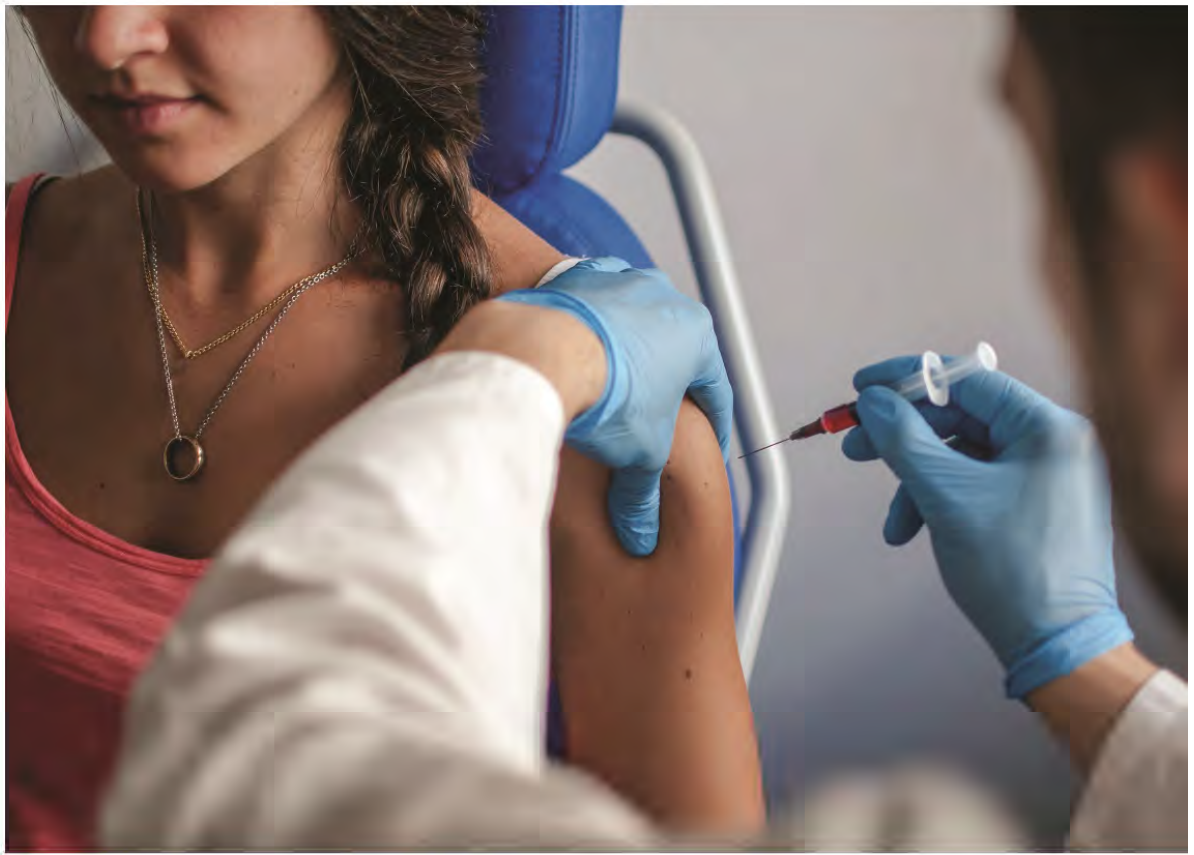
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METRO

Williamsburg residents could face 'forcible vaccinations' amid measles outbreak

By Julia Marsh

April 9, 2019 | 7:59p



Shutterstock

Health officials may forcibly inject residents of Williamsburg, Brooklyn, who flout a mandatory vaccination order, a City Hall spokesman confirmed Tuesday.

"We will consider [forcible vaccinations] on a case-by-case basis," said mayoral spokeswoman Marcy Miranda, adding that the drastic measure is "not our first choice."

City officials announced a public health emergency over the outbreak following the diagnoses of 285 cases of measles since Oct

<https://nypost.com/2019/04/09/williamsburg-residents-could-face-forcible-vaccinations-amid-measles-outbreak/>

Exhibit 4 - C.F. et al. v. NYC Comm. of Health – p. 01

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

NYSCEF DOC. NO. 6

INDEX NO. 508356/2019

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4/13/19, 2:10 PM

Williamsburg residents could face 'forcible vaccinations' amid measles outbreak

Health Commissioner Oxiris Barbot signed an order Tuesday that requires around 212,000 people who live and work in Williamsburg and aren't already immune to measles to be vaccinated within 48 hours. Violators will face a \$1,000 fine.

Miranda said there's no blueprint for how city officials could forcibly vaccinate people.

"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," Miranda said.

"We're hoping it doesn't quite get that extreme. We're hoping people will comply," Miranda said.

But, she added, "This is a big deal. We're talking about people's lives here. We hope people will comply."

FILED UNDER MEASLES, VACCINES, WILLIAMSBURG

Recommended by |

EXHIBIT 5 TO KRAKOW AFFIRMATION -
NEWS ARTICLE, NEWSWEEK, DATED APRIL 10, 2019 [75 - 98]

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 7

RECEIVED NYSCEF: 04/15/2019

NYC Officials Listed Wrong ZIP Code for Measles Vaccination Order Then Changed it Without Telling Anyone

4/13/19, 1:29 AM

[SIGN IN](#) [SUBSCRIBE](#)

U.S.

NYC OFFICIALS LISTED WRONG ZIP CODE FOR MEASLES VACCINATION ORDER THEN CHANGED IT WITHOUT TELLING ANYONE

BY NINA GODLEWSKI ON 4/10/19 AT 9:45 AM EDT

SHARE



U.S.

In an announcement on Tuesday, the New York City Health Commissioner's Officer ordered that residents of certain Brooklyn neighborhoods where the measles outbreak is particularly rampant had to get vaccinated. The order came with one big problem, however: One of the ZIP codes given was incorrect.

The order, which stated that those who did not get vaccinated within 48 hours of the order and could not prove immunity could be charged a \$1,000 fine, was originally released with four ZIP codes designating the areas where people who live, work or reside were required to be vaccinated or immune. Those ZIP codes originally included the ZIP 11221, an area of Bushwick and Bedford-Stuyvesant.

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

NYSCEF DOC. NO. 7

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/15/2019

NYC Officials Listed Wrong ZIP Code for Measles Vaccination Order Then Changed it Without Telling Anyone

4/13/19, 1:29 AM

New York City issued an order that stated people living or working in certain Brooklyn neighborhoods had to get vaccinate.

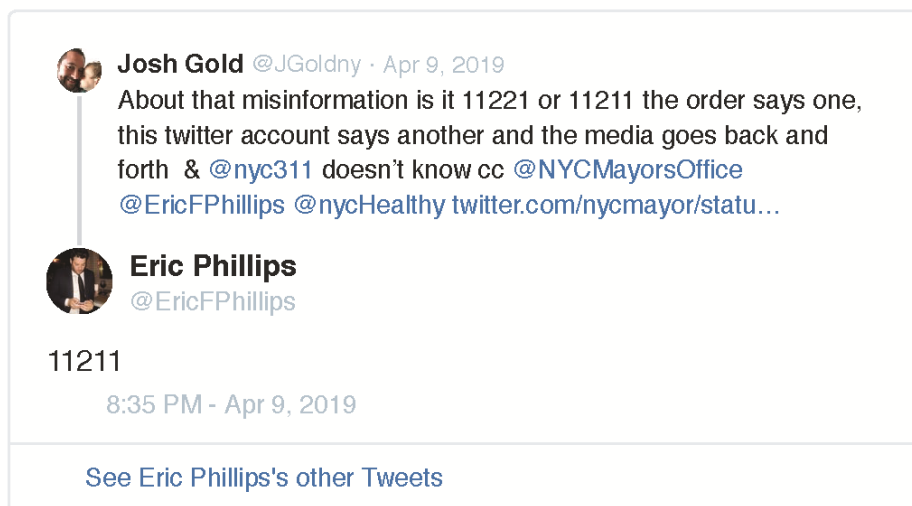
MEDIA FOR MEDICAL/UIG VIA GETTY IMAGES

But that order from Commissioner Oxiris Barbot's office changed Tuesday night. The change to the order removed the 11221 ZIP code and replaced it with another, very similar ZIP, 11211. The new ZIP code covers a large area of Williamsburg.

The change was not noted in any formal release from either the commissioner's office or from Mayor Bill de Blasio's office Tuesday evening when it was made. Tweets from the two in which the 11221 ZIP was listed were removed from social media and new ones were posted Tuesday evening.

Some people noticed the change though and tweeted about it, asking the officials for clarification on the ZIP code. Eric Phillips, press secretary for the mayor, tweeted back at

one of the confused tweeters and said the correct ZIP code was in fact 11211.



Other people noticed another error in the order, where on Page 1 it listed the 11249 ZIP code and on Page 2, listed 11237. One person posted screenshots of the discrepancy on Twitter asking for clarification about which areas were actually part of the order.

The Department of Health responded and said that the correct ZIP codes were officially 11205, 11206, 11221 and 11249. That response cleared up the 11249-versus-11237 confusion but did not address the 11221-versus-11211 issue.

A later tweet from the department said that the ZIP codes where the vaccines were mandatory were "11205, 11206, 11211 and 11249." As of Wednesday morning, those were the same ZIP codes that the order listed, and they were consistent through the order.

The health commissioner's office and the mayor's office did not immediately respond to *Newsweek's* request for information about the changes or confirm that they had been made as of Wednesday morning at 9:15 a.m. EDT.

Residents who are looking to get the vaccine are advised to contact the city's helpline 311.

RELATED STORIES

Where Can You Get the Measles Vaccine?

NYC Health Officials Mandate Vaccines in Brooklyn

78 New Measles Cases Reported, Four New States Involved



So far in 2019, there have been 465 cases of measles reported to the Centers for Disease Control and Prevention from 19 states across the country. That figure represents the second greatest number of cases reported to the CDC in the United States since the virus was officially eliminated in 2000, according to the CDC.

In New York City, there have been 285 cases of measles since September 30, 2018, more than 250 of those have been from people living in the Williamsburg neighborhood, said the order from the commissioner.

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Measles is characterized by a cough, fever, runny nose, red eyes and a rash, but the complications can be serious and sometimes cause death. Some complications include diarrhea and ear infections and more severe complications include pneumonia and brain swelling, known as encephalitis.

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**Barbara Mattia**

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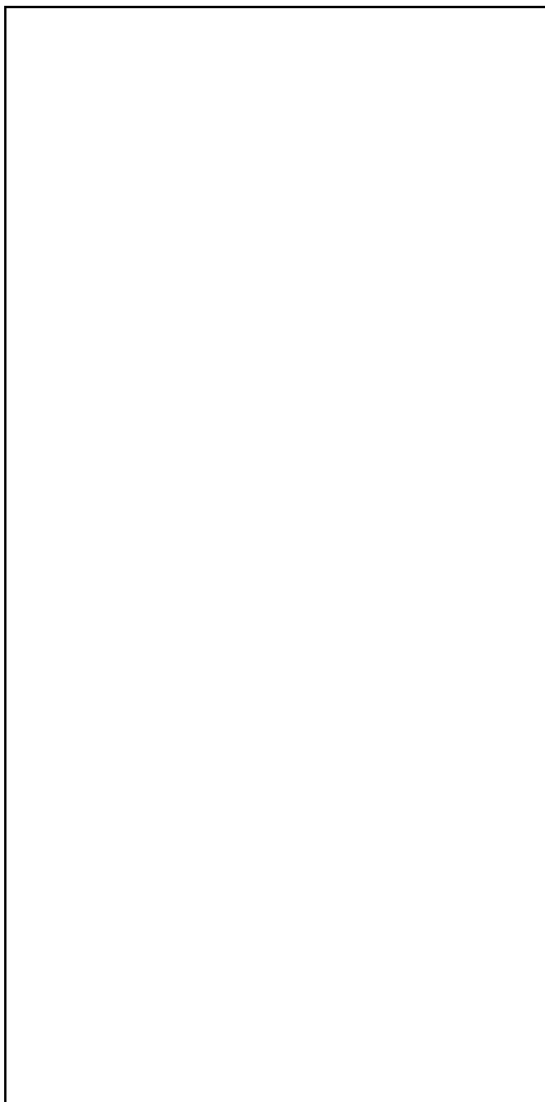
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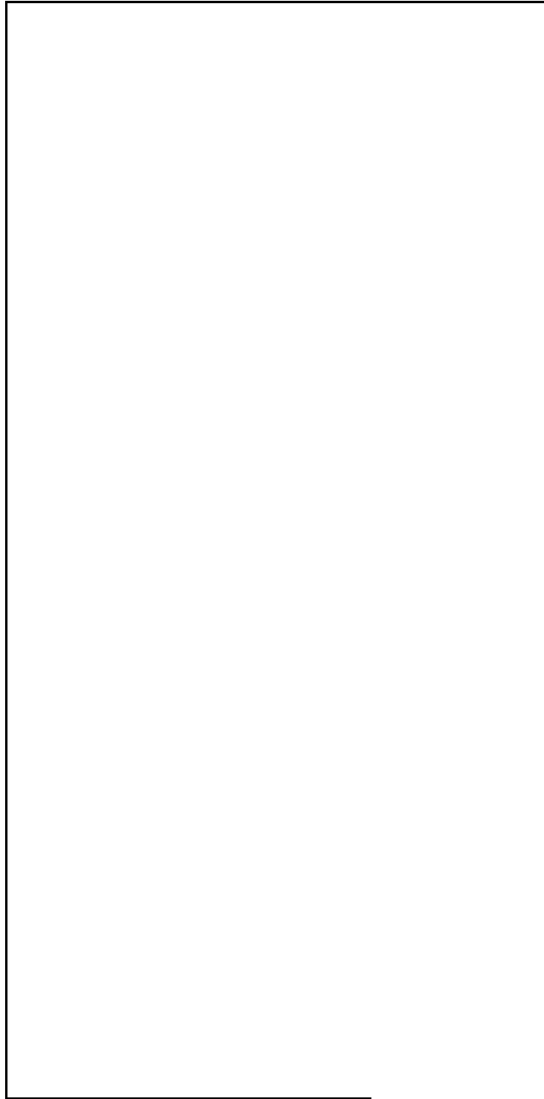
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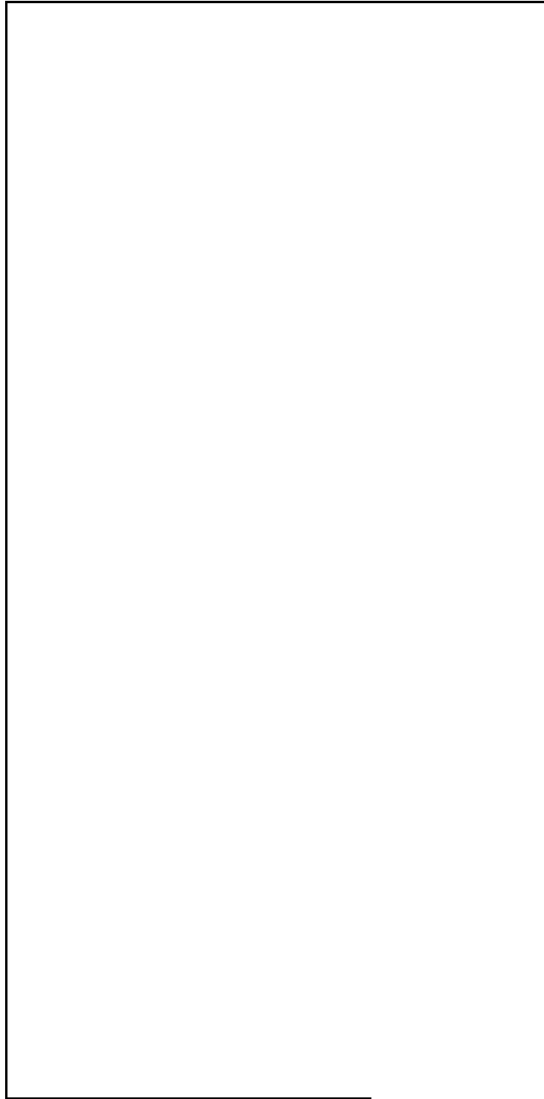
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Stacey Abrams: Democrats Don't Have Too Many Candidates**EDITOR'S PICK**

CULTURE**New Section of the Forbidden City Opening to Public**

The Qianlong Garden includes elaborate rock gardens, four courtyards and more than two dozen pavilions and structures, representing one of the most extravagant dynasties in imperial China.

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CULTURE**Regina Hall Dishes on 'Little' Movie and Bad Bosses**

"If I had a boss like this, I would've just quit."

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HEALTH**Spike in Children Swallowing Toys, Magnets**

"The dramatic increase in foreign body injuries over the 21-year study period, coupled with the sheer number and profundity of injuries, is cause for concern," the author of the study said.

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WORLD**Russia's 'Satan 2' Undergoing 'Final Tests'**

Russian President Vladimir Putin gave updates on "modern powerful precision weapons that are determining and will determine in the future the image of Russia's armed forces."

Newsweek

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**EXHIBIT 6A TO KRAKOW AFFIRMATION -
DECLARATION OF HENDRIEKA FITZPATRICK, M.D., DATED APRIL 15, 2019 [99 - 102]**

FILED: KINGS COUNTY CLERK 04/16/2019 08:24 PM

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NYSCEF DOC. NO. 32

RECEIVED NYSCEF: 04/16/2019

DECLARATION OF DR. HENDRIEKA FITZPATRICK

Hendrieka Fitzpatrick, M.D., an adult of legal age, hereby states and deposes under pains and penalties of perjury:

1. I am a medical doctor licensed in and by the State of New Jersey. I graduated from Cornell University with a B.A. in Medical Ethics. I am a graduate of George Washington University Medical School, in Washington D.C. and have been licensed for 33 years. My practice has focused on the care of women and children.

2. Of the thousands of decisions of how best to care for their kids, the choice to defer or delay vaccines requires of the parents a real strength of conviction and resilience that is beyond the ordinary and constant challenges of parenthood. In the 1860s, Joseph Lister proposed a then radical theory that handwashing prevented morbidity and mortality for patients dying after medical procedures. Lister was ostracized by the medical society and died impoverished for refusing to abandon his radical theory that clean hands prevented the spread of disease. The medical profession often resists new and unwelcome news that its actions may be causing more harm than good.

3. It is common practice for pediatricians everywhere in New Jersey to refuse to provide pediatric care for unvaccinated children. It is common practice to delay the discharge of an infant from the NICU unless the parent allows vaccination. Yet the official recommendation is to delay vaccination in infants born before 36 weeks' gestation because of increased risk of adverse effects in premature infants.

4. The risk of harm associated with measles infection for a healthy preschool child is less than the risk of harm associated with the MMR vaccine. In 99% of measles cases, the outcome is a benign 8-day illness. Additionally, 50% of children tested for immunity to measles prior to vaccines have acquired immunity without ever having been ill. Measles was identified as a disease for eradication in the USA by vaccine even though measles is a benign illness with no adverse sequelae in the USA. Rates of infection had significantly decreased before the vaccine was developed in 1963.

5. The "medical literature" is biased toward vaccines for children. Eradication of measles from the US population became a goal 100 years ago and the vaccine was introduced in 1963. When the CDC speaks of eradication of a disease it implies that the disease poses significant morbidity and mortality to the population. The risk of serious illness from measles, mumps or rubella is extremely low in the USA. The risk of any persistent complications from the measles in children is estimated between 1:10,000 and 1:500,000. Less than 2% of children with measles develop "moderate complications". These complications include ear infections, diarrhea and pneumonia and are easily treated. These "moderate complications" are the same for EVERY viral illness of childhood.

6. In fact, measles is a serious illness in some areas of the world. Measles is a serious disease ONLY in children with chronic hunger and malnutrition, and morbidity from the measles only occurs in children with Vitamin A deficiency. The World Health Organization has

reported that optimizing Vitamin A blood levels in children is as effective as the measles vaccine. In fact, the World Health Organization (WHO) recommends that Vitamin A doses be given during measles outbreaks because Vitamin A significantly decreases complications from measles and prevents transmission to vulnerable populations.

7. Until 2010, there was a single vaccine against measles which was taken off the market because of low profitability. Seizure disorder was listed as a known risk for this vaccine. Currently, children can only be immunized against measles in a combination vaccine MMR which is a combination of 3 live viruses. The risk of reported serious complications from the MMR vaccine is 1:1000. Of course, it is virtually impossible to find "mainstream" literature on the risk of the MMR. Proving that an adverse reaction is vaccine-related is nearly impossible because of the lack of medical literature reporting studies of the subject. Drug companies routinely minimize the risk of vaccines; immunization is a medical intervention, and no medical intervention is without risk.

8. The most important period of time for immunological and neurological development occurs during the first 2 or 3 years of life. Vaccines contain excipients (added ingredients) that are assumed inconsequential by all pharmaceutical companies. If considered individually, many of the excipients can potentially cause harm. MMR vaccine manufacturing practice poses particular concern because in order to create a live virus vaccine, each virus has to be kept alive. The rubella virus used for manufacture is kept alive by human fetal cells, and mumps and measles by animal fetal cells. Injecting humans with human DNA fragments is a known trigger for autoimmune disease. In fact, 1 in 4 women who receive an MMR vaccine postpartum because of "insufficient" rubella immunity develop significant debilitating joint disease, which is occasionally permanent.

9. It is imperative to obtain informed consent for any medical intervention. Primary care physicians administer vaccines with inadequate informed consent or with none. In my experience, physicians themselves are not informed of the risks and benefits of vaccines. I have cared for many families who had no idea that there is a potential for harm from vaccines and were not informed of potential adverse effects. Parents have a right to choose to fully vaccinate their children or to delay or defer or refuse vaccines. New York law provides for medically-based and religiously-based exemptions to vaccination reflecting this principle.

10. The MMR II vaccine is the vaccine available on the market for measles, mumps and rubella. Its package insert is annexed to this affidavit. The package insert specifies that the MMR vaccine ingredients include DNA and RNA from humans and chickens. DNA and RNA are included in the vaccine ingredients listed in the package insert. It is exposure to nuclear contents -- DNA and RNA -- that provides the mechanism that triggers autoimmune disease.

11. In addition, the MMR vaccine contains phenol red (a dye), and Tween 80 (polysorbate 80), which are both categorized as toxins. Other ingredients include recombinant human albumin, fetal bovine serum and neomycin, all of which are problematic when injected into humans.

12. The insert specifically states that the vaccine is "indicated for simultaneous vaccination against measles, mumps, and rubella in individuals 12 months or older." (page 2). Although the manufacturers' package insert states that "local health authorities may recommend

measles vaccination of infants between 6 to 12 months of age in outbreak situations,” it acknowledges that “the immune system of 6-month-olds is not always capable of mounting a response to measles vaccine.” (page 2) In other words, the effectiveness in this group is questionable at best.

13. The vaccine insert also states that giving mumps and rubella vaccine to children less than 12 months is neither effective nor safe. The insert states, “Safety and effectiveness of mumps and rubella vaccine in infants less than 12 months of age have not been established.” (page 2).

14. Babies who are nursing (regardless of age) with mothers who are immune are likely to be immune. Thus, vaccination in these circumstances is not necessary and may even cause harm.

15. Vaccinating babies less than 12 months old may interfere with successfully immunizing the child at a later point, and thus these children may never become immune. For this reason, vaccinating children under 12 months of age, as required by New York City’s Order, may cause harm and defeat the very purpose it purports to serve.

16. The MMR package insert warns against MMR vaccination of adolescent and young adult females who may be or about to become pregnant. (“Women of childbearing age should be advised not to become pregnant for 3 months after vaccination...”) (page 3).

17. MMR vaccination poses risks to young adults. Teens and young adults receiving the vaccine have a significant likelihood of developing autoimmune illness (estimated as 1:4). Doctors should inform parents and teens themselves that if the recipient develops arthritis within 6 months of the vaccine, the vaccine is a likely cause.

18. The MMR vaccine presents the risk of adverse reactions affecting the nervous system, including seizures and brain injury (page 7). The MMR vaccine is contraindicated in children with febrile seizures, and the measles component of the vaccine increases the risk of seizures post vaccination. Fever is an expected side effect after the vaccine, and in susceptible kids, the fever causes seizures. The MMR vaccine is warned against in anyone with previous “cerebral injury.” (page 4)

19. Every medical intervention should be preceded by informed consent; however, informed consent in the case of obligatory vaccinations cannot be voluntary and valid. “Consent” is paradoxical in a situation where not consenting will lead to legal, and possibly criminal, consequences. I also question whether there is adequate informed consent in the case of “emergency” vaccines when the benefits are touted and the risks minimized.

20. US vaccine policy essentially assumes that vaccines are medically risk-free. But the fact that vaccines do injure some children is the foundation for US vaccine policy in the National Vaccine Injury Compensation Program under the 1986 National Childhood Vaccine Injury Act. It is our national policy that vaccines can and do injure some children. How many children are injured by vaccines and the mechanism of injury are not fully understood.

21. Unvaccinated people pose no increased risk of measles to people who have been vaccinated.

Hendricka Fitzpatrick M.D. 4-15-19
Hendricka Fitzpatrick, M.D.

*On the ____ day of ____ in the year ____ before me, the undersigned, personally appeared
____, personally known to me or proved to me on the basis of satisfactory evidence to
be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to
me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their
signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s)
acted, executed the instrument.
(Signature and office of individual taking acknowledgment)*

Sworn to before me this
____ day of April 2019

Notary Public

**EXHIBIT 7 TO KRAKOW AFFIRMATION -
COPY OF MMR II (MEASLES, MUMPS AND RUBELLA VIRUS VACCINE LIVE) [103 - 113]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 9

RECEIVED NYSCEF: 04/15/2019

**M-M-R® II
(MEASLES, MUMPS, and
RUBELLA VIRUS VACCINE LIVE)**

DESCRIPTION

M-M-R® II (Measles, Mumps, and Rubella Virus Vaccine Live) is a live virus vaccine for vaccination against measles (rubeola), mumps, and rubella (German measles).

M-M-R II is a sterile lyophilized preparation of (1) ATTENUVAX® (Measles Virus Vaccine Live), a more attenuated line of measles virus, derived from Enders' attenuated Edmonston strain and propagated in chick embryo cell culture; (2) MUMPSVAX® (Mumps Virus Vaccine Live), the Jeryl Lynn™ (B level) strain of mumps virus propagated in chick embryo cell culture; and (3) MERUVAX® II (Rubella Virus Vaccine Live), the Wistar RA 27/3 strain of live attenuated rubella virus propagated in WI-38 human diploid lung fibroblasts.{1,2}

The growth medium for measles and mumps is Medium 199 (a buffered salt solution containing vitamins and amino acids and supplemented with fetal bovine serum) containing SPGA (sucrose, phosphate, glutamate, and recombinant human albumin) as stabilizer and neomycin.

The growth medium for rubella is Minimum Essential Medium (MEM) [a buffered salt solution containing vitamins and amino acids and supplemented with fetal bovine serum] containing recombinant human albumin and neomycin. Sorbitol and hydrolyzed gelatin stabilizer are added to the individual virus harvests.

The cells, virus pools, and fetal bovine serum are all screened for the absence of adventitious agents.

The reconstituted vaccine is for subcutaneous administration. Each 0.5 mL dose contains not less than 1,000 TCID₅₀ (tissue culture infectious doses) of measles virus; 12,500 TCID₅₀ of mumps virus; and 1,000 TCID₅₀ of rubella virus. Each dose of the vaccine is calculated to contain sorbitol (14.5 mg), sodium phosphate, sucrose (1.9 mg), sodium chloride, hydrolyzed gelatin (14.5 mg), recombinant human albumin (≤0.3 mg), fetal bovine serum (<1 ppm), other buffer and media ingredients and approximately 25 mcg of neomycin. The product contains no preservative.

Before reconstitution, the lyophilized vaccine is a light yellow compact crystalline plug. M-M-R II, when reconstituted as directed, is clear yellow.

CLINICAL PHARMACOLOGY

Measles, mumps, and rubella are three common childhood diseases, caused by measles virus, mumps virus (paramyxoviruses), and rubella virus (togavirus), respectively, that may be associated with serious complications and/or death. For example, pneumonia and encephalitis are caused by measles. Mumps is associated with aseptic meningitis, deafness and orchitis; and rubella during pregnancy may cause congenital rubella syndrome in the infants of infected mothers.

The impact of measles, mumps, and rubella vaccination on the natural history of each disease in the United States can be quantified by comparing the maximum number of measles, mumps, and rubella cases reported in a given year prior to vaccine use to the number of cases of each disease reported in 1995. For measles, 894,134 cases reported in 1941 compared to 288 cases reported in 1995 resulted in a 99.97% decrease in reported cases; for mumps, 152,209 cases reported in 1968 compared to 840 cases reported in 1995 resulted in a 99.45% decrease in reported cases; and for rubella, 57,686 cases reported in 1969 compared to 200 cases reported in 1995 resulted in a 99.65% decrease.{3}

Clinical studies of 284 triple seronegative children, 11 months to 7 years of age, demonstrated that M-M-R II is highly immunogenic and generally well tolerated. In these studies, a single injection of the vaccine induced measles hemagglutination-inhibition (HI) antibodies in 95%, mumps neutralizing antibodies in 96%, and rubella HI antibodies in 99% of susceptible persons. However, a small percentage (1-5%) of vaccinees may fail to seroconvert after the primary dose (see also INDICATIONS AND USAGE, *Recommended Vaccination Schedule*).

A study{4} of 6-month-old and 15-month-old infants born to vaccine-immunized mothers demonstrated that, following vaccination with ATTENUVAX, 74% of the 6-month-old infants developed detectable neutralizing antibody (NT) titers while 100% of the 15-month-old infants developed NT. This rate of seroconversion is higher than that previously reported for 6-month-old infants born to naturally immune mothers tested by HI assay. When the 6-month-old infants of immunized mothers were revaccinated at 15

months, they developed antibody titers equivalent to the 15-month-old vaccinees. The lower seroconversion rate in 6-month-olds has two possible explanations: 1) Due to the limit of the detection level of the assays (NT and enzyme immunoassay [EIA]), the presence of trace amounts of undetectable maternal antibody might interfere with the seroconversion of infants; or 2) The immune system of 6-month-olds is not always capable of mounting a response to measles vaccine as measured by the two antibody assays.

There is some evidence to suggest that infants who are born to mothers who had wild-type measles and who are vaccinated at less than one year of age may not develop sustained antibody levels when later revaccinated. The advantage of early protection must be weighed against the chance for failure to respond adequately on reimmunization.{5,6}

Efficacy of measles, mumps, and rubella vaccines was established in a series of double-blind controlled field trials which demonstrated a high degree of protective efficacy afforded by the individual vaccine components.{7-12} These studies also established that seroconversion in response to vaccination against measles, mumps, and rubella paralleled protection from these diseases.{13-15}

Following vaccination, antibodies associated with protection can be measured by neutralization assays, HI, or ELISA (enzyme linked immunosorbent assay) tests. Neutralizing and ELISA antibodies to measles, mumps, and rubella viruses are still detectable in most individuals 11 to 13 years after primary vaccination.{16-18} See INDICATIONS AND USAGE, *Non-Pregnant Adolescent and Adult Females*, for Rubella Susceptibility Testing.

The RA 27/3 rubella strain in M-M-R II elicits higher immediate post-vaccination HI, complement-fixing and neutralizing antibody levels than other strains of rubella vaccine{19-25} and has been shown to induce a broader profile of circulating antibodies including anti-theta and anti-iota precipitating antibodies.{26,27} The RA 27/3 rubella strain immunologically simulates natural infection more closely than other rubella vaccine viruses.{27-29} The increased levels and broader profile of antibodies produced by RA 27/3 strain rubella virus vaccine appear to correlate with greater resistance to subclinical reinfection with the wild virus,{27,29-31} and provide greater confidence for lasting immunity.

INDICATIONS AND USAGE

Recommended Vaccination Schedule

M-M-R II is indicated for simultaneous vaccination against measles, mumps, and rubella in individuals 12 months of age or older.

Individuals first vaccinated at 12 months of age or older should be revaccinated prior to elementary school entry. Revaccination is intended to seroconvert those who do not respond to the first dose. The Advisory Committee on Immunization Practices (ACIP) recommends administration of the first dose of M-M-R II at 12 to 15 months of age and administration of the second dose of M-M-R II at 4 to 6 years of age.{32} In addition, some public health jurisdictions mandate the age for revaccination. Consult the complete text of applicable guidelines regarding routine revaccination including that of high-risk adult populations.

Measles Outbreak Schedule

Infants Between 6 to 12 Months of Age

Local health authorities may recommend measles vaccination of infants between 6 to 12 months of age in outbreak situations. This population may fail to respond to the components of the vaccine. Safety and effectiveness of mumps and rubella vaccine in infants less than 12 months of age have not been established. The younger the infant, the lower the likelihood of seroconversion (see CLINICAL PHARMACOLOGY). Such infants should receive a second dose of M-M-R II between 12 to 15 months of age followed by revaccination at elementary school entry.{32}

Unnecessary doses of a vaccine are best avoided by ensuring that written documentation of vaccination is preserved and a copy given to each vaccinee's parent or guardian.

Other Vaccination Considerations

Non-Pregnant Adolescent and Adult Females

Immunization of susceptible non-pregnant adolescent and adult females of childbearing age with live attenuated rubella virus vaccine is indicated if certain precautions are observed (see below and PRECAUTIONS). Vaccinating susceptible postpubertal females confers individual protection against subsequently acquiring rubella infection during pregnancy, which in turn prevents infection of the fetus and consequent congenital rubella injury.{33}

Women of childbearing age should be advised not to become pregnant for 3 months after vaccination and should be informed of the reasons for this precaution.

The ACIP has stated "If it is practical and if reliable laboratory services are available, women of childbearing age who are potential candidates for vaccination can have serologic tests to determine susceptibility to rubella. However, with the exception of premarital and prenatal screening, routinely performing serologic tests for all women of childbearing age to determine susceptibility (so that vaccine is given only to proven susceptible women) can be effective but is expensive. Also, 2 visits to the health-care provider would be necessary — one for screening and one for vaccination. Accordingly, rubella vaccination of a woman who is not known to be pregnant and has no history of vaccination is justifiable without serologic testing — and may be preferable, particularly when costs of serology are high and follow-up of identified susceptible women for vaccination is not assured."{33}

Postpubertal females should be informed of the frequent occurrence of generally self-limited arthralgia and/or arthritis beginning 2 to 4 weeks after vaccination (see ADVERSE REACTIONS).

Postpartum Women

It has been found convenient in many instances to vaccinate rubella-susceptible women in the immediate postpartum period (see PRECAUTIONS, *Nursing Mothers*).

Other Populations

Previously unvaccinated children older than 12 months who are in contact with susceptible pregnant women should receive live attenuated rubella vaccine (such as that contained in monovalent rubella vaccine or in M-M-R II) to reduce the risk of exposure of the pregnant woman.

Individuals planning travel outside the United States, if not immune, can acquire measles, mumps, or rubella and import these diseases into the United States. Therefore, prior to international travel, individuals known to be susceptible to one or more of these diseases can either receive the indicated monovalent vaccine (measles, mumps, or rubella), or a combination vaccine as appropriate. However, M-M-R II is preferred for persons likely to be susceptible to mumps and rubella; and if monovalent measles vaccine is not readily available, travelers should receive M-M-R II regardless of their immune status to mumps or rubella.{34-36}

Vaccination is recommended for susceptible individuals in high-risk groups such as college students, health-care workers, and military personnel.{33,34,37}

According to ACIP recommendations, most persons born in 1956 or earlier are likely to have been infected with measles naturally and generally need not be considered susceptible. All children, adolescents, and adults born after 1956 are considered susceptible and should be vaccinated, if there are no contraindications. This includes persons who may be immune to measles but who lack adequate documentation of immunity such as: (1) physician-diagnosed measles, (2) laboratory evidence of measles immunity, or (3) adequate immunization with live measles vaccine on or after the first birthday.{34}

The ACIP recommends that "Persons vaccinated with inactivated vaccine followed within 3 months by live vaccine should be revaccinated with two doses of live vaccine. Revaccination is particularly important when the risk of exposure to wild-type measles virus is increased, as may occur during international travel."{34}

Post-Exposure Vaccination

Vaccination of individuals exposed to wild-type measles may provide some protection if the vaccine can be administered within 72 hours of exposure. If, however, vaccine is given a few days before exposure, substantial protection may be afforded.{34,38,39} There is no conclusive evidence that vaccination of individuals recently exposed to wild-type mumps or wild-type rubella will provide protection.{33,37}

Use With Other Vaccines

See DOSAGE AND ADMINISTRATION, *Use With Other Vaccines*.

CONTRAINDICATIONS

Hypersensitivity to any component of the vaccine, including gelatin.{40}

Do not give M-M-R II to pregnant females; the possible effects of the vaccine on fetal development are unknown at this time. If vaccination of postpubertal females is undertaken, pregnancy should be avoided for three months following vaccination (see INDICATIONS AND USAGE, *Non-Pregnant Adolescent and Adult Females* and PRECAUTIONS, *Pregnancy*).

Anaphylactic or anaphylactoid reactions to neomycin (each dose of reconstituted vaccine contains approximately 25 mcg of neomycin).

Febrile respiratory illness or other active febrile infection. However, the ACIP has recommended that all vaccines can be administered to persons with minor illnesses such as diarrhea, mild upper respiratory infection with or without low-grade fever, or other low-grade febrile illness.{41}

Patients receiving immunosuppressive therapy. This contraindication does not apply to patients who are receiving corticosteroids as replacement therapy, e.g., for Addison's disease.

Individuals with blood dyscrasias, leukemia, lymphomas of any type, or other malignant neoplasms affecting the bone marrow or lymphatic systems.

Primary and acquired immunodeficiency states, including patients who are immunosuppressed in association with AIDS or other clinical manifestations of infection with human immunodeficiency viruses;{41-43} cellular immune deficiencies; and hypogammaglobulinemic and dysgammaglobulinemic states. Measles inclusion body encephalitis{44} (MIBE), pneumonitis{45} and death as a direct consequence of disseminated measles vaccine virus infection have been reported in immunocompromised individuals inadvertently vaccinated with measles-containing vaccine.

Individuals with a family history of congenital or hereditary immunodeficiency, until the immune competence of the potential vaccine recipient is demonstrated.

WARNINGS

Due caution should be employed in administration of M-M-R II to persons with a history of cerebral injury, individual or family histories of convulsions, or any other condition in which stress due to fever should be avoided. The physician should be alert to the temperature elevation which may occur following vaccination (see ADVERSE REACTIONS).

Hypersensitivity to Eggs

Live measles vaccine and live mumps vaccine are produced in chick embryo cell culture. Persons with a history of anaphylactic, anaphylactoid, or other immediate reactions (e.g., hives, swelling of the mouth and throat, difficulty breathing, hypotension, or shock) subsequent to egg ingestion may be at an enhanced risk of immediate-type hypersensitivity reactions after receiving vaccines containing traces of chick embryo antigen. The potential risk to benefit ratio should be carefully evaluated before considering vaccination in such cases. Such individuals may be vaccinated with extreme caution, having adequate treatment on hand should a reaction occur (see PRECAUTIONS).{46}

However, the AAP has stated, "Most children with a history of anaphylactic reactions to eggs have no untoward reactions to measles or MMR vaccine. Persons are not at increased risk if they have egg allergies that are not anaphylactic, and they should be vaccinated in the usual manner. In addition, skin testing of egg-allergic children with vaccine has not been predictive of which children will have an immediate hypersensitivity reaction...Persons with allergies to chickens or chicken feathers are not at increased risk of reaction to the vaccine."{47}

Hypersensitivity to Neomycin

The AAP states, "Persons who have experienced anaphylactic reactions to topically or systemically administered neomycin should not receive measles vaccine. Most often, however, neomycin allergy manifests as a contact dermatitis, which is a delayed-type (cell-mediated) immune response rather than anaphylaxis. In such persons, an adverse reaction to neomycin in the vaccine would be an erythematous, pruritic nodule or papule, 48 to 96 hours after vaccination. A history of contact dermatitis to neomycin is not a contraindication to receiving measles vaccine."{47}

Thrombocytopenia

Individuals with current thrombocytopenia may develop more severe thrombocytopenia following vaccination. In addition, individuals who experienced thrombocytopenia with the first dose of M-M-R II (or its component vaccines) may develop thrombocytopenia with repeat doses. Serologic status may be evaluated to determine whether or not additional doses of vaccine are needed. The potential risk to benefit ratio should be carefully evaluated before considering vaccination in such cases (see ADVERSE REACTIONS).

PRECAUTIONS

General

Adequate treatment provisions, including epinephrine injection (1:1000), should be available for immediate use should an anaphylactic or anaphylactoid reaction occur.

Special care should be taken to ensure that the injection does not enter a blood vessel.

Children and young adults who are known to be infected with human immunodeficiency viruses and are not immunosuppressed may be vaccinated. However, vaccinees who are infected with HIV should be monitored closely for vaccine-preventable diseases because immunization may be less effective than for uninfected persons (see CONTRAINDICATIONS).{42,43}

Vaccination should be deferred for 3 months or longer following blood or plasma transfusions, or administration of immune globulin (human).{47}

Excretion of small amounts of the live attenuated rubella virus from the nose or throat has occurred in the majority of susceptible individuals 7 to 28 days after vaccination. There is no confirmed evidence to indicate that such virus is transmitted to susceptible persons who are in contact with the vaccinated individuals. Consequently, transmission through close personal contact, while accepted as a theoretical possibility, is not regarded as a significant risk.{33} However, transmission of the rubella vaccine virus to infants via breast milk has been documented (see *Nursing Mothers*).

There are no reports of transmission of live attenuated measles or mumps viruses from vaccinees to susceptible contacts.

It has been reported that live attenuated measles, mumps and rubella virus vaccines given individually may result in a temporary depression of tuberculin skin sensitivity. Therefore, if a tuberculin test is to be done, it should be administered either before or simultaneously with M-M-R II.

Children under treatment for tuberculosis have not experienced exacerbation of the disease when immunized with live measles virus vaccine;{48} no studies have been reported to date of the effect of measles virus vaccines on untreated tuberculous children. However, individuals with active untreated tuberculosis should not be vaccinated.

As for any vaccine, vaccination with M-M-R II may not result in protection in 100% of vaccinees.

The health-care provider should determine the current health status and previous vaccination history of the vaccinee.

The health-care provider should question the patient, parent, or guardian about reactions to a previous dose of M-M-R II or other measles-, mumps-, or rubella-containing vaccines.

Information for Patients

The health-care provider should provide the vaccine information required to be given with each vaccination to the patient, parent, or guardian.

The health-care provider should inform the patient, parent, or guardian of the benefits and risks associated with vaccination. For risks associated with vaccination see WARNINGS, PRECAUTIONS, and ADVERSE REACTIONS.

Patients, parents, or guardians should be instructed to report any serious adverse reactions to their health-care provider who in turn should report such events to the U.S. Department of Health and Human Services through the Vaccine Adverse Event Reporting System (VAERS), 1-800-822-7967.{49}

Pregnancy should be avoided for 3 months following vaccination, and patients should be informed of the reasons for this precaution (see INDICATIONS AND USAGE, *Non-Pregnant Adolescent and Adult Females*, CONTRAINDICATIONS, and PRECAUTIONS, *Pregnancy*).

Laboratory Tests

See INDICATIONS AND USAGE, *Non-Pregnant Adolescent and Adult Females*, for Rubella Susceptibility Testing, and CLINICAL PHARMACOLOGY.

Drug Interactions

See DOSAGE AND ADMINISTRATION, *Use With Other Vaccines*.

Immunosuppressive Therapy

The immune status of patients about to undergo immunosuppressive therapy should be evaluated so that the physician can consider whether vaccination prior to the initiation of treatment is indicated (see CONTRAINDICATIONS and PRECAUTIONS).

The ACIP has stated that "patients with leukemia in remission who have not received chemotherapy for at least 3 months may receive live virus vaccines. Short-term (<2 weeks), low- to moderate-dose systemic corticosteroid therapy, topical steroid therapy (e.g. nasal, skin), long-term alternate-day treatment with low to moderate doses of short-acting systemic steroid, and intra-articular, bursal, or tendon injection of corticosteroids are not immunosuppressive in their usual doses and do not contraindicate the administration of [measles, mumps, or rubella vaccine]."{33,34,37}

Immune Globulin

Administration of immune globulins concurrently with M-M-R II may interfere with the expected immune response.{33,34,47}

See also PRECAUTIONS, *General*.

Carcinogenesis, Mutagenesis, Impairment of Fertility

M-M-R II has not been evaluated for carcinogenic or mutagenic potential, or potential to impair fertility.

Pregnancy

Pregnancy Category C

Animal reproduction studies have not been conducted with M-M-R II. It is also not known whether M-M-R II can cause fetal harm when administered to a pregnant woman or can affect reproduction capacity. Therefore, the vaccine should not be administered to pregnant females; furthermore, pregnancy should be avoided for 3 months following vaccination (see INDICATIONS AND USAGE, *Non-Pregnant Adolescent and Adult Females* and CONTRAINDICATIONS).

In counseling women who are inadvertently vaccinated when pregnant or who become pregnant within 3 months of vaccination, the physician should be aware of the following: (1) In a 10-year survey involving over 700 pregnant women who received rubella vaccine within 3 months before or after conception (of whom 189 received the Wistar RA 27/3 strain), none of the newborns had abnormalities compatible with congenital rubella syndrome;^{50} (2) Mumps infection during the first trimester of pregnancy may increase the rate of spontaneous abortion. Although mumps vaccine virus has been shown to infect the placenta and fetus, there is no evidence that it causes congenital malformations in humans;^{37} and (3) Reports have indicated that contracting wild-type measles during pregnancy enhances fetal risk. Increased rates of spontaneous abortion, stillbirth, congenital defects and prematurity have been observed subsequent to infection with wild-type measles during pregnancy.^{51,52} There are no adequate studies of the attenuated (vaccine) strain of measles virus in pregnancy. However, it would be prudent to assume that the vaccine strain of virus is also capable of inducing adverse fetal effects.

Nursing Mothers

It is not known whether measles or mumps vaccine virus is secreted in human milk. Recent studies have shown that lactating postpartum women immunized with live attenuated rubella vaccine may secrete the virus in breast milk and transmit it to breast-fed infants.^{53} In the infants with serological evidence of rubella infection, none exhibited severe disease; however, one exhibited mild clinical illness typical of acquired rubella.^{54,55} Caution should be exercised when M-M-R II is administered to a nursing woman.

Pediatric Use

Safety and effectiveness of measles vaccine in infants below the age of 6 months have not been established (see also CLINICAL PHARMACOLOGY). Safety and effectiveness of mumps and rubella vaccine in infants less than 12 months of age have not been established.

Geriatric Use

Clinical studies of M-M-R II did not include sufficient numbers of seronegative subjects aged 65 and over to determine whether they respond differently from younger subjects. Other reported clinical experience has not identified differences in responses between the elderly and younger subjects.

ADVERSE REACTIONS

The following adverse reactions are listed in decreasing order of severity, without regard to causality, within each body system category and have been reported during clinical trials, with use of the marketed vaccine, or with use of monovalent or bivalent vaccine containing measles, mumps, or rubella:

Body as a Whole

Panniculitis; atypical measles; fever; syncope; headache; dizziness; malaise; irritability.

Cardiovascular System

Vasculitis.

Digestive System

Pancreatitis; diarrhea; vomiting; parotitis; nausea.

Endocrine System

Diabetes mellitus.

Hemic and Lymphatic System

Thrombocytopenia (see WARNINGS, *Thrombocytopenia*); purpura; regional lymphadenopathy; leukocytosis.

Immune System

Anaphylaxis and anaphylactoid reactions have been reported as well as related phenomena such as angioneurotic edema (including peripheral or facial edema) and bronchial spasm in individuals with or without an allergic history.

Musculoskeletal System

Arthritis; arthralgia; myalgia.

Arthralgia and/or arthritis (usually transient and rarely chronic), and polyneuritis are features of infection with wild-type rubella and vary in frequency and severity with age and sex, being greatest in adult females and least in prepubertal children. This type of involvement as well as myalgia and paresthesia, have also been reported following administration of MERUVAX II.

Chronic arthritis has been associated with wild-type rubella infection and has been related to persistent virus and/or viral antigen isolated from body tissues. Only rarely have vaccine recipients developed chronic joint symptoms.

Following vaccination in children, reactions in joints are uncommon and generally of brief duration. In women, incidence rates for arthritis and arthralgia are generally higher than those seen in children (children: 0-3%; women: 12-26%),{17,56,57} and the reactions tend to be more marked and of longer duration. Symptoms may persist for a matter of months or on rare occasions for years. In adolescent girls, the reactions appear to be intermediate in incidence between those seen in children and in adult women. Even in women older than 35 years, these reactions are generally well tolerated and rarely interfere with normal activities.

Nervous System

Encephalitis; encephalopathy; measles inclusion body encephalitis (MIBE) (see CONTRAINDICATIONS); subacute sclerosing panencephalitis (SSPE); Guillain-Barré Syndrome (GBS); acute disseminated encephalomyelitis (ADEM); transverse myelitis; febrile convulsions; afebrile convulsions or seizures; ataxia; polyneuritis; polyneuropathy; ocular palsies; paresthesia.

Encephalitis and encephalopathy have been reported approximately once for every 3 million doses of M-M-R II or measles-, mumps-, and rubella-containing vaccine administered since licensure of these vaccines.

The risk of serious neurological disorders following live measles virus vaccine administration remains less than the risk of encephalitis and encephalopathy following infection with wild-type measles (1 per 1000 reported cases).{58,59}

In severely immunocompromised individuals who have been inadvertently vaccinated with measles-containing vaccine; measles inclusion body encephalitis, pneumonitis, and fatal outcome as a direct consequence of disseminated measles vaccine virus infection have been reported (see CONTRAINDICATIONS). In this population, disseminated mumps and rubella vaccine virus infection have also been reported.

There have been reports of subacute sclerosing panencephalitis (SSPE) in children who did not have a history of infection with wild-type measles but did receive measles vaccine. Some of these cases may have resulted from unrecognized measles in the first year of life or possibly from the measles vaccination. Based on estimated nationwide measles vaccine distribution, the association of SSPE cases to measles vaccination is about one case per million vaccine doses distributed. This is far less than the association with infection with wild-type measles, 6-22 cases of SSPE per million cases of measles. The results of a retrospective case-controlled study conducted by the Centers for Disease Control and Prevention suggest that the overall effect of measles vaccine has been to protect against SSPE by preventing measles with its inherent higher risk of SSPE.{60}

Cases of aseptic meningitis have been reported to VAERS following measles, mumps, and rubella vaccination. Although a causal relationship between the Urabe strain of mumps vaccine and aseptic meningitis has been shown, there is no evidence to link Jeryl Lynn™ mumps vaccine to aseptic meningitis.

Respiratory System

Pneumonia; pneumonitis (see CONTRAINDICATIONS); sore throat; cough; rhinitis.

Skin

Stevens-Johnson syndrome; erythema multiforme; urticaria; rash; measles-like rash; pruritis.

Local reactions including burning/stinging at injection site; wheal and flare; redness (erythema); swelling; induration; tenderness; vesiculation at injection site; Henoch-Schönlein purpura; acute hemorrhagic edema of infancy.

Special Senses — Ear

Nerve deafness; otitis media.

Special Senses — Eye

Retinitis; optic neuritis; papillitis; retrobulbar neuritis; conjunctivitis.

Urogenital System

Epididymitis; orchitis.

Other

Death from various, and in some cases unknown, causes has been reported rarely following vaccination with measles, mumps, and rubella vaccines; however, a causal relationship has not been established in healthy individuals (see CONTRAINDICATIONS). No deaths or permanent sequelae were reported in a published post-marketing surveillance study in Finland involving 1.5 million children and adults who were vaccinated with M-M-R II during 1982 to 1993.{61}

Under the National Childhood Vaccine Injury Act of 1986, health-care providers and manufacturers are required to record and report certain suspected adverse events occurring within specific time periods after vaccination. However, the U.S. Department of Health and Human Services (DHHS) has established a Vaccine Adverse Event Reporting System (VAERS) which will accept all reports of suspected events.{49} A VAERS report form as well as information regarding reporting requirements can be obtained by calling VAERS 1-800-822-7967.

DOSAGE AND ADMINISTRATION*FOR SUBCUTANEOUS ADMINISTRATION*

Do not inject intravascularly.

The dose for any age is 0.5 mL administered subcutaneously, preferably into the outer aspect of the upper arm.

The recommended age for primary vaccination is 12 to 15 months.

Revaccination with M-M-R II is recommended prior to elementary school entry. See also INDICATIONS AND USAGE, *Recommended Vaccination Schedule*.

Children first vaccinated when younger than 12 months of age should receive another dose between 12 to 15 months of age followed by revaccination prior to elementary school entry.{32} See also INDICATIONS AND USAGE, *Measles Outbreak Schedule*.

Immune Globulin (IG) is not to be given concurrently with M-M-R II (see PRECAUTIONS, *General* and PRECAUTIONS, *Drug Interactions*).

CAUTION: A sterile syringe free of preservatives, antiseptics, and detergents should be used for each injection and/or reconstitution of the vaccine because these substances may inactivate the live virus vaccine. A 25 gauge, 5/8" needle is recommended.

To reconstitute, use only the diluent supplied, since it is free of preservatives or other antiviral substances which might inactivate the vaccine.

Single Dose Vial— First withdraw the entire volume of diluent into the syringe to be used for reconstitution. Inject all the diluent in the syringe into the vial of lyophilized vaccine, and agitate to mix thoroughly. If the lyophilized vaccine cannot be dissolved, discard. Withdraw the entire contents into a syringe and inject the total volume of restored vaccine subcutaneously.

It is important to use a separate sterile syringe and needle for each individual patient to prevent transmission of hepatitis B and other infectious agents from one person to another.

Parenteral drug products should be inspected visually for particulate matter and discoloration prior to administration whenever solution and container permit. M-M-R II, when reconstituted, is clear yellow.

Use With Other Vaccines

M-M-R II should be given one month before or after administration of other live viral vaccines.

M-M-R II has been administered concurrently with VARIVAX® [Varicella Virus Vaccine Live (Oka/Merck)], and PedvaxHIB® [Haemophilus b Conjugate Vaccine (Meningococcal Protein Conjugate)] using separate injection sites and syringes. No impairment of immune response to individually tested vaccine antigens was demonstrated. The type, frequency, and severity of adverse experiences observed with M-M-R II were similar to those seen when each vaccine was given alone.

Routine administration of DTP (diphtheria, tetanus, pertussis) and/or OPV (oral poliovirus vaccine) concurrently with measles, mumps and rubella vaccines is not recommended because there are limited data relating to the simultaneous administration of these antigens.

However, other schedules have been used. The ACIP has stated "Although data are limited concerning the simultaneous administration of the entire recommended vaccine series (i.e., DTaP [or DTwP], IPV [or OPV], Hib with or without Hepatitis B vaccine, and varicella vaccine), data from numerous studies have indicated no interference between routinely recommended childhood vaccines (either live, attenuated, or killed). These findings support the simultaneous use of all vaccines as recommended."{62}

HOW SUPPLIED

No. 4681 — M-M-R II is supplied as follows: (1) a box of 10 single-dose vials of lyophilized vaccine (package A), **NDC 0006-4681-00**; and (2) a box of 10 vials of diluent (package B). To conserve refrigerator space, the diluent may be stored separately at room temperature.

Storage

To maintain potency, M-M-R II must be stored between -58°F and +46°F (-50°C to +8°C). Use of dry ice may subject M-M-R II to temperatures colder than -58°F (-50°C).

Protect the vaccine from light at all times, since such exposure may inactivate the viruses.

Before reconstitution, store the lyophilized vaccine at 36°F to 46°F (2°C to 8°C). The diluent may be stored in the refrigerator with the lyophilized vaccine or separately at room temperature. **Do not freeze the diluent.**

It is recommended that the vaccine be used as soon as possible after reconstitution. Store reconstituted vaccine in the vaccine vial in a dark place at 36°F to 46°F (2°C to 8°C) and discard if not used within 8 hours.


For information regarding stability under conditions other than those recommended, call 1-800-MERCK-90.

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Revised: XX/XXXX

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EXHIBIT 8 TO KRAKOW AFFIRMATION -

AFFIDAVIT OF TINA KIMMEL, PH.D., MSW, MPH, SWORN TO APRIL 10, 2019 [114 - 116]

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/15/2019

NYSCEF DOC. NO. 10

AFFIDAVIT OF TINA KIMMEL

[illegible]

Tina Kimmel, having been duly sworn, states under pains and penalties of perjury:

1. I make this Affidavit based on my education and professional experience. I hold a PhD, a Master of Social Welfare, and a Master of Public Health degrees from UC Berkeley. As part of my career as a Research Scientist for the California Department of Public Health, I worked in the Immunization Branch 1990-1996. While there, I was the coordinator of California's Personal Belief Exemption program. I have maintained familiarity with the literature concerning appropriate public health response to outbreaks of measles in local populations, and have reviewed the statutory and regulatory authority provided by the State of New York in responding to situations like this.

2. Brooklyn, NY has experienced a small outbreak of measles, mostly confined to an insular population of religious Jews who reside in Brooklyn.

3. On April 9, 2018, the NYC Health Commissioner Dr. Oxiris Barbot issued an order requiring everyone in four Brooklyn zip codes to receive the MMR vaccine if they have not already done so (with only signed medical exceptions or demonstrated immunity). Residents must comply within the next 48 hours, on penalty of civil and criminal sanctions, including imprisonment.

4. Unvaccinated people who have not been exposed to measles or any other virus cannot possibly spread the virus to the general population, particularly to individuals who have already been vaccinated against that virus. Thus, there is no positive public health result that can come out of this order.

5. The Commissioner's arbitrary order that all residents be vaccinated contravenes the principle of Informed Consent. The doctrine of informed consent was introduced in the United States after the horrific 1932-1972 Tuskegee experiment. That incident is considered a national scandal, and President Clinton apologized to the surviving victims and families in 1997. Informed consent is now the sine qua non of all clinical as well as experimental treatment. Coerced consent, such as under this NYC order, is specifically NOT allowed to be considered informed consent.

6. The Commissioner's arbitrary order also contravenes international norms of cooperation between the government and the governed. In 2017, the World Health Organization (WHO) published a relevant major 331-page report, "Advancing the Right to Health: The Vital Role of Law". It promotes immunization ("with limited exceptions for medical or religious reasons") as the first line of defense against infectious disease. However, according to WHO, it is vital to "build ethical principles into infectious disease legislation. Public health laws should embody a decisionmaking process that balances personal rights with the public's health in an ethical and transparent way. The public should have an opportunity to participate in the formulation of public health policies, and governments should give reasons for policies and decisions that restrict individual freedoms. Governments must strive to ensure that there is a reasonable fit between the coercive measures imposed on individuals, and the public health benefit that they seek to achieve." <https://www.idlo.int/publications/advancing-right-health-vital-role-law>, p. 153-154

7. By 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. 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.

8. The Commissioner lacks authority to override state law and compel families -- many of whom he knows to hold genuine and sincere religious beliefs which are contrary to immunization -- to somehow magically CHANGE their religious beliefs, or, to ACT AGAINST their religious beliefs to satisfy his arbitrary, disrespectful, and overbroad edict. Either way, this order infringes upon

the separation of church and state without any rational basis, let alone a compelling public health interest.

9. The Commissioner seems motivated primarily by a desire to browbeat residents into complying with orders that have likely been given to him to "raise immunization rates" or else. Note, for instance, that he has ordered residents to be vaccinated with the controversial but profitable Measles-Mumps-Rubella vaccine, when it is only measles that is of concern currently.

10. 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, which do not abridge the civil rights of families who have had no exposure to the virus.

Tina Kimmel

Tina Kimmel, PhD, MSW, MPH

Signed and sworn to before me this ____ day of April 2019.

NOTARY PUBLIC

MY COMMISSION EXPIRES:

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

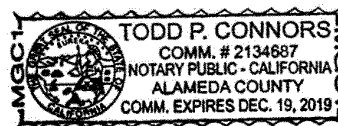
STATE OF CALIFORNIA COUNTY OF Alameda

Subscribed and sworn to (or affirmed) before me on this 10th day of April

2019 by Tina Kimmel

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

(Signature of Notary)



**EXHIBIT 9 TO KRAKOW AFFIRMATION -
DECLARATION OF JANE M. ORIENT, M.D., SWORN TO APRIL 11, 2019 [117 - 120]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 11

RECEIVED NYSCEF: 04/15/2019

April 11, 2019

Declaration of Jane M. Orient, M.D.

I, Jane Orient, M.D., an adult of legal age, submit this declaration under penalty of perjury.
I make the following statements to the best of my personal knowledge and belief.

1. I received a Bachelor of Science in Mathematics and a Bachelor of Arts in Chemistry from the University of Arizona in Tucson, Arizona, and an M.D. degree from Columbia University College of Physicians and Surgeons in 1974. I completed an internal medicine residency at Parkland Memorial Hospital in Dallas, the Dallas VA, and the University of Arizona Affiliated Hospitals and am board-certified by the American Board of Internal Medicine. I was a staff physician at the Tucson Veterans Administration Hospital 1978-1980 and have been in solo private practice of internal medicine since then. I was a faculty member at the University of Arizona College of Medicine while working at the Veterans Administration Hospital. I have a longstanding interest in infection control and vaccinations. I was chairman of the Laboratory Services, Infection Control, and Blood Utilization Committee at Carondelet St. Joseph's Hospital in Tucson from 1988 to 1991. I was chairman of the Public Health Committee of the Pima County Medical Society in Tucson from 1988 to the time when this committee was terminated in 2018 and am now chairman of the Public Health Committee of the Pima County Medical Foundation. I was a member of the Ad Hoc Public Health Committee of the Arizona Medical Association from 1995 to 2018. I am the president of Doctors for Disaster Preparedness and have periodically written about infectious disease threats and vaccinations in the *Doctors for Disaster Preparedness Newsletter* and *Civil Defense Perspectives*.
2. I have been executive director of the Association of American Physicians and Surgeons since 1989. AAPS is a 501(c)(6) organization representing physicians in all specialties nationwide since 1943. Our mission is to defend and promote the ethical practice of private medicine and the patient-physician relationship. The AAPS official policy is to oppose mandatory vaccination. In 2001, our general assembly passed a resolution stating, "Be it therefore resolved: That AAPS calls for a moratorium on vaccine mandates and for physicians to insist upon truly informed consent for the use of vaccines."
3. The current measles outbreak 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.
4. Vaccines themselves cause some injuries, as recognized by the U.S. Supreme Court and by Congress in enacting the Vaccine Injury Compensation Program, which has awarded more than \$4 billion dollars in compensation to vaccine-damaged individuals.

5. The risks and benefits of a vaccine are variables that depend on the frequency and severity of the disease, the safety profile of the vaccine, and the individual characteristics of the patient.
6. Safety studies of vaccines are inevitably limited, and after-market surveillance of adverse reactions to vaccines is inadequate. The official mechanism is the Vaccine Adverse Event Reporting System (VAERS), which has been variously estimated as receiving reports on as few as 10 percent or even 1 percent of actual reactions. These reports are supposed to be investigated, but follow-up is by no means complete.
7. I have been unable to find any studies of adequate statistical power to rule out a rate of serious complications or death from the MMR vaccine that is greater than the risk of serious complications or death from measles in the U.S. Additionally, to calculate the number of persons affected, one would need to multiply the rate of vaccine adverse effects by the number of people receiving the vaccine, and the rate of measles complications and death by the number of people who get measles.
8. Life is fraught with risk, and regulators frequently intervene for risks of 1 in 10,000 or even lower for voluntary (occupational) exposures to toxic chemicals, or much lower, say 1 in 100,000, for involuntary (public) exposure to such hazards. It is contradictory to usual public policy to coerce individuals to assume a risk of vaccines that cannot be proven to be lower than for other hazards that call for regulatory protection.
9. Despite the risk of serious adverse effects or even death from the vaccine, of a magnitude that is not precisely known, many physicians recommend, and most patients accept vaccines because of the potential benefit of protection from the disease. However, medical ethics, tort law, and internationally accepted human rights principles such as the Nuremberg Code require informed consent. A physician can rightly be accused of battery if he performs any procedure to which the patient has not consented.
10. Measles outbreaks occur even in nations that have virtually universal immunization, for example, Saudi Arabia and China.
11. No person can transmit measles simply by virtue of being unvaccinated. Measles can be transmitted only by a person who is infected with it. Measles is contagious while a person is manifesting symptoms and signs or is in the incubation period after an exposure. Persons who have received two doses of measles vaccine have contracted measles and infected others.¹ In recent outbreaks, between 9 percent and 37 percent of cases had received at least one dose of measles vaccine.²

12. Persons vaccinated with MMR are less likely to manifest measles if exposed than are unvaccinated persons. However, it has not been proved that such persons are incapable of spreading the virus even if they personally do not show signs of illness.
13. Standard public health procedure in controlling an epidemic of a contagious disease is to identify infected persons and their contacts. In the United States now, all measles in the has originated with a person who has recently been in a country that was having a measles outbreak. Thus, the potential sources of contagion are persons who have recently been in such a country, for example, Israel, and their contacts. The standard public health procedure would be to quarantine such persons for the duration of the incubation period, about 21 days. This is just as effective for vaccine-preventable diseases as for far more dangerous diseases like Ebola for which there is no vaccine. Simply vaccinating people, especially after exposure, will not reliably stop transmission.
14. In the past, measles was a disease that almost all children experienced. Mortality was about 1 in 10,000 cases (1 in 1,000 *reported* cases);³ thus, almost all or about 9,999 out of 10,000 American children survived measles with robust lifetime immunity, which enabled women to protect their infants with antibodies providing passive immunity during the most vulnerable part of their lives.
15. Mortality for measles in the U.S. was plummeting long before the measles vaccine was introduced.⁴ Mortality is still high in some parts of the world, owing to malnutrition, especially vitamin A deficiency, and other factors leading to overall poor health status.
16. The mortality rate of measles is now higher than it was in the pre-vaccination era because the age distribution of cases is different.⁵ Infants are no longer protected by maternal antibodies, and adults, in whom measles is generally more severe, are more likely to be infected because they have waning vaccine-induced immunity rather than the more robust immunity from infection and recovery in childhood. It is possible that herd immunity, one rationale for vaccine mandates, is now actually less than in the pre-vaccination era.



Jane M. Orient, M.D.

State of Arizona)
County of Pima } ss.

On the 11th day of April in the year 2019 before me, the undersigned, personally appeared Jane M. Orient, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their

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NYSCEF DOC. NO. 11

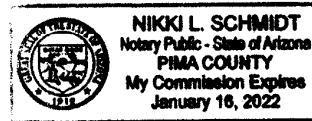
INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/15/2019

signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

(Signature and office of individual taking acknowledgment)

Nikki L. Schmidt
Nikki L. Schmidt



References

¹ Rosen JB, Rota JS, Hickman CJ, et al. Outbreak of measles among persons with prior evidence of immunity, New York City, 2011. *Clinical Infectious Diseases* 2014;58:1205–1210. Available at: <https://doi.org/10.1093/cid/ciu105>.

² Poland GA, Jacobson RM. The re-emergence of measles in developed countries: time to develop the next-generation measles vaccines? *Vaccine* 2011;30(2):103–104.doi: 10.1016/j.vaccine.2011.11.085.

³ Centers for Disease Control. Measles prevention: recommendations of the Immunization Practices Advisory Committee (ACIP). *MMWR* 1989;38(S-9):1-18.

⁴ Langmuir AD, Henderson DA, Serfling RE, Sherman IL. The importance of measles as a health problem. *Am J Public Health Nations Health* 1962;52(Suppl 2):1–4.

⁵ Fefferman NH, Naumova EN. *Lancet Infectious Diseases* 2015;15(8):922-926. Available at: [https://doi.org/10.1016/S1473-3099\(15\)00053-5](https://doi.org/10.1016/S1473-3099(15)00053-5).

**EXHIBIT 10 TO KRAKOW AFFIRMATION -
AFFIDAVIT OF SHIRA MILLER, M.D., SWORN TO APRIL 11, 2019 [121 - 123]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

NYSCEF DOC. NO. 12

INDEX NO. 508356/2019

RECEIVED NYSCEF: 04/15/2019

Page 1 of 3

AFFIDAVIT OF SHIRA MILLER, M.D.

RE: NYC Mandatory Measles, Mumps, Rubella (MMR) Vaccination Order by Dr. Oxiris Barbot on April 9, 2019

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.

To make scientifically-justifiable and ethical public health decisions regarding vaccination, the risks of a vaccine must be compared to the risks of the disease one is trying to prevent. Thus, when considering the MMR vaccine to prevent measles, the risks of the MMR vaccine need to be compared to the risks of measles.

- 1) In the early 1960s, prior to the introduction of the measles vaccine, approximately 4,000,000 U.S. children had measles each year. The chance of dying from measles at that time, when nearly every child got measles by age 15, was 1 in 10,000 (0.01%);ⁱ this is similar to the current chance of being struck by lightning once in one's lifetime. In recent history, due to this relatively low public health threat, measles outbreaks were not considered public health emergencies and measles was not (and still is not) deemed a quarantinable communicable disease according to Federal regulations.ⁱⁱ

As Dr. Alexander Langmuir, director of the epidemiology branch of the Communicable Disease Center for over 20 years, explained in his 1962 article The Importance of Measles as a Public Health Problem, "...in the United States measles is a disease whose importance is not to be measured by total days disability or number of deaths."ⁱⁱⁱ

By comparison, over 23,000 infant deaths (due to all causes) currently occur every year in the U.S. and thus the chance of a child dying in his or her first year of life is 1 in 170 (0.6%)^{iv}—this is 60 times the risk of a child dying from measles in 1962, a time when 4,000,000 children had measles every year.

- 2) 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.^v


In addition, every year an estimated 5,700 U.S. children (approximately 1 in 640) suffer febrile seizures from the first dose of the MMR vaccine—which is five times more than the number of febrile seizures expected from measles. This amounts to 57,000 febrile seizures over the past 10 years due to the MMR vaccine alone. As 5% of children with a history of febrile seizures progress to epilepsy, a debilitating and life-threatening chronic condition, the estimated number of children whose epilepsy is due to the MMR vaccine

in the past 10 years is 2,850.^{vi}

Furthermore, the Vaccine Adverse Event Reporting System (VAERS), designed to be a warning system for identifying vaccine side effects, receives only about 90 annual reports of MMR-vaccine seizures following the first dose—which is only 1.6% of the 5,700 MMR-vaccine seizures that are estimated to occur. Thus, other serious vaccine adverse events from MMR, including permanent neurological harm and death, may similarly be underreported.^{vii}

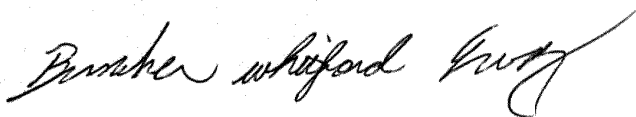
- 3) In rare situations, such as vitamin A deficiency or a compromised immune system, where measles can be severe and even deadly (if left untreated), high-dose vitamin A and immune globulin (passive immunization) are indicated for the treatment or prevention of measles upon exposure, respectively.^{viii} In addition, there is evidence that the antiviral medicine ribavirin is beneficial in the treatment of severe measles, and this requires further research.^{ix,x,xi}

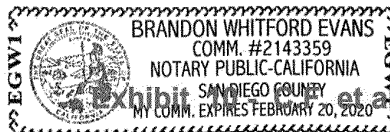
In summary, it has not been proven that the MMR vaccine is safer than measles, and there is insufficient evidence to demonstrate that mandatory measles mass vaccination in the United States results in a net public health benefit. Furthermore, vaccinating others with the MMR vaccine is not necessary in 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.


Shira Miller, M.D.
Founder and President
Physicians for Informed Consent

April 11, 2019

On the 11th day of April in the year 2019 before me, the undersigned, personally appeared Shira Miller, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.





- ⁱ Physicians for Informed Consent. Measles – Disease Information Statement (DIS). Sept 2018. (<https://www.physiciansforinformedconsent.org/measles/dis>)
- ⁱⁱ Federal Register / Vol. 82, No. 12 / Thursday, January 19, 2017 / Rules and Regulations (<https://www.federalregister.gov/documents/2017/01/19/2017-00615/control-of-communicable-diseases>)
- ⁱⁱⁱ Langmuir AD, Henderson DA, Serfling RE, Sherman IL. The importance of measles as a health problem. Am J Public Health Nations Health. 1962 Feb;52(2) Suppl:1-4. (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1522578/>)
- ^{iv} Kochanek KD, Murphy SL, Xu JQ, Arias E. Mortality in the United States, 2016. NCHS Data Brief, no 293. Hyattsville, MD: National Center for Health Statistics. 2017. (<https://www.cdc.gov/nchs/products/databriefs/db293.htm>)
- ^v Physicians for Informed Consent. Measles – Vaccine Risk Statement (VRS). Dec 2017. (<https://www.physiciansforinformedconsent.org/measles/vrs>)
- ^{vi} Miller S. BMJ 359 (2017):j5104, Re: The unofficial vaccine educators: are CDC funded non-profits sufficiently independent? (<https://www.bmj.com/content/359/bmj.j5104/rr-13>)
- ^{vii} Ibid
- ^{viii} Physicians for Informed Consent. Vaccines: What About Immunocompromised Schoolchildren? July 2018. (<https://www.physiciansforinformedconsent.org/immunocompromised-schoolchildren>)
- ^{ix} Roy Moulik N, Kumar A, Jain A, and Jain P. Measles outbreak in a pediatric oncology unit and the role of ribavirin in prevention of complications and containment of the outbreak. Pediatr Blood Cancer. 2013; 60: E122-E124. (<https://www.ncbi.nlm.nih.gov/pubmed/23629813>)
- ^x Pal G. Effects of ribavirin on measles. J. Indian Med Assoc. 2011. (<https://www.ncbi.nlm.nih.gov/pubmed/22480102>)
- ^{xi} Uylangco CV, Beroy GJ, Santiago LT, Mercoleza VD, Mendoza SL. A double-blind, placebo-controlled evaluation of ribavirin in the treatment of acute measles. Clin Ther. 1981;3(5):389-96. (<https://www.ncbi.nlm.nih.gov/pubmed/7008941>)

Physicians for Informed Consent is a nationally recognized 501(c)(3) nonprofit organization representing hundreds of doctors, as well as scientists and attorneys, whose mission is to safeguard informed consent in vaccination. In addition, our Coalition for Informed Consent consists of more than 150 U.S. and international organizations.

**EXHIBIT 11 TO KRAKOW AFFIRMATION -
DECLARATION OF RICHARD MOSKOWITZ, M.D., SWORN TO APRIL 12, 2014 [124 - 127]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 13

RECEIVED NYSCEF: 04/15/2019

DECLARATION OF DR. RICHARD MOSKOWITZ

COMMONWEALTH OF MASSACHUSETTS)
) ss:s.
COUNTY OF SUFFOLK)

I, Richard Moskowitz, M.D., having been duly sworn, hereby submits this Declaration under pains and penalties of perjury:

1) I am a graduate [Phi Beta Kappa] of Harvard University [1995] and received my medical degree from New York University in 1963. I completed my internship at St. Anthony's Hospital in Denver in 1967. I have been a licensed medical doctor since 1967. I am licensed to practice medicine in the Commonwealth of Massachusetts. My primary areas of specialty are general and family medicine. I have studied and been deeply interested in the subject of vaccinations for many years and recently published a book entitled, *Vaccines: A Reappraisal*. I make the following statements to my personal knowledge and to a reasonable degree of medical certainty.

2) The only conceivable medical basis for New York City's forced vaccination Order of April 9, 2019, would be if all the people who are not immune to measles posed a threat to those vaccinated by infecting them with the measles virus. But if that threat were real, it would mean that the measles vaccine wasn't successful, that it doesn't in fact protect the vaccinated.

3) Some have suggested that the appropriate public health goal is "herd immunity," which is postulated to prevent outbreaks when a vaccinated rate of 85-95% is reached. But this has never in fact happened. The present outbreaks are wholly typical of those that have occurred ever since the measles vaccine was introduced, and of those that will undoubtedly continue to occur even if 100% were vaccinated, as has been shown in China, where the government mandates the MMR with no non-medical exemptions. Even

with more than 99% of the population vaccinated, over 700 outbreaks were recorded in 2014 alone, with roughly 26,000 cases.¹ Even here, the vast majority of measles and mumps cases have occurred in vaccinated individuals, often 95% or higher.²

4) Moreover, there is good evidence that these diseases are being spread primarily by shedding of the live viruses from those recently vaccinated,³ which again, shows not only that the vaccine is ineffective to that extent, but that it is propagating the very diseases it was designed to prevent, and that the unvaccinated kids and their parents are unjustly taking the blame for it. In short, no forced vaccination is appropriate.

5) Measles is a highly contagious illness, the symptoms of which represent the concerted effort of the entire immune system to expel the virus from the blood, and that almost always results in complete recovery without complications or sequelae. Deaths and major complications do occur in hypersensitive and immunocompromised individuals, but they are exceedingly rare. Moreover, the vast majority of children who do recover from measles have been shown to be much less prone to develop chronic, autoimmune diseases and cancer later in life than those who are merely vaccinated against it.⁴ I need hardly add that these are the predominant medical afflictions of our time.

6) The question of whether it is appropriate to administer the MMR to prevent these diseases is, therefore, much more complicated and questionable than is generally thought, and deserves much more scientific study than it has so far

received, study that needs to be conducted independently of the drug industry that stands to profit from the practice. But that question is clearly trumped by the rights of people to refuse unwanted medical treatment, and of parents to make appropriate medical decisions for their children, which are enshrined in the laws of the State of New York, the Nuremberg Code of Human Rights and the Helsinki Declaration governing biomedical research with human subjects, both of which our country helped to formulate, still professes to adhere to, insists that all patients and experimental subjects be allowed to give informed consent to all medical and surgical procedures, and explicitly forbids administering them by force.⁵ One could perhaps imagine a dire and imminent public health emergency that would justify temporarily waiving these rights, but small, localized outbreaks of ordinary childhood diseases, including the current measles outbreaks in Brooklyn obviously falls far short of that standard.

7) Even if vaccination were an appropriate response to the current outbreaks, arbitrarily restricting it to the four ZIP codes makes no medical sense at all. Even if a more sensible geographic distribution could be devised, it would still fail to prevent similar outbreaks, for all the reasons previously outlined, and would not be rational.

¹ Ma, et al., "Monitoring Progress toward Elimination of Measles in China," Bulletin of the World Health Organization 92:390, 2015.

² Cf. Matson, et al., "Investigation of a Measles Outbreak in a Fully-Vaccinated School Population," Pediatric Infectious Diseases 12:292, 1993; and "Mumps Outbreak at Harvard", NBC News, April 2016.

³ Cf., for example, Payne, et al., "Sib Transmission of Vaccine-Derived Rotavirus," Pediatrics 125:938, 2010; and Murti, "One Case of Vaccine Associated Measles 5 Weeks Post-Vaccination," British Columbia, Canada, Eurosurveillance 18:12, 2013.

⁴ Cf., for example, Kubota, et al., "Association of Measles and Mumps with Cardiovascular Disease," *Atherosclerosis* 241:682, 2015.

⁵ World Medical Association, *Ethical Principles /01· Medical Research Involving Human Subjects*, Helsinki, 1964, amended 2008, par. 24, p. 3.


Richard Moskowitz, M.D.

On the 12 day of April in the year 2019, before me, the undersigned, personally appeared Richard Moskowitz, M.D, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.


Notary Public

exp. Aug 5, 2022



ISRAEL DIAZ
Notary Public
Commonwealth of Massachusetts
My Commission Expires August 5, 2022

**EXHIBIT 12 TO KRAKOW AFFIRMATION -
AFFIDAVIT OF VERA SHARAV, SWORN TO APRIL 13, 2019 [128 - 130]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 14

RECEIVED NYSCEF: 04/15/2019

AFFIDAVIT OF VERA SHARAV

1. I am a public advocate for human rights, focusing specifically on medical ethics and medical research involving human subjects – some of who are patients. In 2001, I founded and head the Alliance for Human Research Protection (AHRP), a not-for-profit national network of professional and lay individuals dedicated to advancing responsible and ethical medical practices. The AHRP disseminates information about medical research ethics and drug and vaccine safety issues, drawing attention to conflicts of interest in the practice of medicine and medical research enterprise. These (mostly unacknowledged) financial conflicts undermine the human rights, dignity, and welfare of vulnerable populations, and they skew the scientific literature by concealing drug and vaccine hazards. As a result, public health policies have been formulated without regard for serious, irreversible harm caused to some individuals.

2. I have given testimony before academic and government sponsored public policy advisory forums, including the Institute of Medicine, the Food and Drug Administration, the federal Office of Human Research Protection, the National Bioethics Advisory Committee, Global Harmonization Task Force, the National Public Health Association, the US Military Ethics Forum. I have served on the Children's Workgroup of the National Human Research Advisory Committee.

3. The topics of my articles and presentations include: unethical experimentation on psychiatric patients and children; the ethics of conducting industry-sponsored clinical drug trials on prisoners and children in foster care; human pesticide experiments; unethical, hazardous medical device trials; conflicts of interest, the ethics of screening for mental illness, which has resulted in overmedicated children.

4. I am the author of peer-reviewed published articles such as Screening for Mental Illness: The Merger of Eugenics and the Drug Industry, *Ethical Human Psychology and Psychiatry* (2005); Conflicts of Interest in Biomedical Research Harm Children With and Without Disabilities," *J Disability Policy Studies* (2004); "The Impact of FDAMA on the recruitment of children for research," *Ethical Human Sciences and Services*; "Children in Clinical Research: A Conflict of Moral Values," *American Journal of Bioethics* (2003)

5. The cornerstone of medical ethics is the physician's ancient oath, "First, do no harm:" "I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone." This personal and professional commitment to adhere to the precautionary principle of medicine, which puts the patient's interest first, is the basis for our trust in medical doctors.

6. History has demonstrated that any move to transform medical ethics from its humanitarian Hippocratic tradition to population-based, utilitarian ethics – an ethics that justifies subordinating the interest of the individual for the so-called "greater good of society" – is the first step down the

slippery slope.

7. As a child survivor of the Holocaust, I am especially attuned toward recognizing the signs of government overreach; especially when state dictates violate the moral human right of the individual to make an autonomous decision whether or not to give informed consent to any medical intervention. Dictatorships always invoke “the greater good of society” when they trample individual human rights.

8. The darkest page in the history of medicine occurred when medicine’s moral commitment to serve the best interest of the individual patient was usurped by public health dictates. Mass murder was framed as an issue of public health; and the healing profession was subverted into a murderous state apparatus. State dictated public health policies were formulated by officials and physicians who rationalized that these policies were for the “good of German society” and to improve “the health of the German nation.”

9. Eugenics Sterilization Laws in the United States were enacted to lend legitimacy to discriminatory public health policies; those policies persisted long after the fall of the Nazi regime.¹ Latina women in Puerto Rico, New York City, and California were specifically targeted by the government for sterilization throughout the 20th century. It is estimated that one-third of Puerto Rican women were coercively sterilized.² Similar discriminatory policies led to the sterilization of approximately 25% -50% of Native American women between 1970 and 1976.³

10. The practice of medicine in the U.S. is increasingly dominated by government dictated public health policies formulated under the influence of corporate interests, disregarding foundational moral imperatives of a democratic society. Those moral imperatives ensure that the rights of the individual are protected. Those who are at greatest risk victimization are children who cannot refuse medical interventions – some of which are state-mandated for children only.

11. Public health policies, such as the federal recommended children’s vaccination schedule, have been formulated in collaboration with pharmaceutical corporations -- those with clear financial conflicts of interest. These corporate giants (and their agents) have skewed the scientific literature by concealing drug and vaccine hazards. As a result, public health policies have been formulated without regard for the serious irreversible harm that some individuals will suffer – in the case of vaccine injuries, children are at greatest risk.

12. The politicized and police-dominated enforcement of state-mandated childhood vaccinations has reached an alarming level of hysteria – as demonstrated by Mayor de Blasio’s Declaration of a Measles Emergency April 9, 2019. The Mayor’s order targets an insular religious community who exercised their lawful right to a religious vaccination exemption. His declaration and threat to use force against members of the orthodox Jewish community in Brooklyn is especially egregious – raising troubling parallels to past government abuses of its public health authority. The directive is unjustified by any rational criteria inasmuch as New York City has a population of more than 8 and

a half million residents; while the number of measles cases during the past 6 months was 285 cases. Most of those infected have long ago recovered, and as a result of having had measles, they have gained life-long immunity; something which the vaccine does not provide.

13. While the government has the power to isolate and quarantine those who are ill with an infectious disease, the criminalization of those who do not vaccinate and the threat of force to vaccinate people against their will – even as the vaccine carries with it serious risks, including the possible risk of death – is to embark on a slippery slope. That path is paved on the demise of one human right after another, until it reaches its destination; a fascist totalitarian dictatorship where individual rights do not exist.

What standard, if any, did Mayor de Blasio use to issue such an unprecedented, warlike declaration against a vulnerable, marginalized minority; a minority that has been the target of violent acts of Antisemitism?

I certify under awareness of the penalties of perjury that the foregoing statements are true.


Vera Sharav

On the 17 day of April, 2019, before me, the undersigned, personally appeared Vera Sharav, personally known to me to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same, and that by her signature on the instrument, the individual executed the instrument.


BENJAMIN SHARAV

Notary Public, State of New York

No. 02SH6192942

Qualified in NEW YORK COUNTY

Commission Expires 9/08/2020

¹ Unwanted Sterilization And Eugenics Programs In The United States, PBS (Public Broadcasting System), 2016

² History of Forced Sterilization and Current U.S. Abuses, Kathryn Krase, OurBodiesOurSelves, 2014; Sterilization of Puerto Rican Women: A Selected, Partially Annotated Bibliography (Louis de Malave, 1999), University of Wisconsin

³ Forced Sterilization of Native Americans: Late Twentieth Century Physician Cooperation with National Eugenic Policies Gregory W. Rutecki, *Bioethics Clinical & Medical Ethics*, 2010

**EXHIBIT 13 TO KRAKOW AFFIRMATION -
AFFIDAVIT OF C.F., SWORN TO APRIL 11, 2019 [131 - 132]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 15

RECEIVED NYSCEF: 04/15/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
C.F. on her own behalf and of behalf of her minor
children, et al.,

Index No.

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
The New York City Department of Health and Mental
Hygiene.,

Respondents.

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

-----X

AFFIDAVIT OF C.F.

C.F., being duly sworn, deposes and says:

1. I refuse to accept an MMR vaccination for myself or my children on the grounds that it is against my deeply held personal religious beliefs. The United States Constitution guarantees my right to freedom of religion.

2. My religion instructs me to preserve my health through the commandment to guard your health. My children and I were created healthy, born healthy and have always been healthy. As such, my religion will not permit me to inject foreign substances such as the antigens, toxins and aborted fetal tissue incorporated into vaccines into a perfectly healthy body. The risks associated with the MMR vaccine, as published by the vaccine manufacturer in their package insert and by other reputable, peer reviewed studies makes it impossible for me to allow vaccination and be in compliance of my religion.

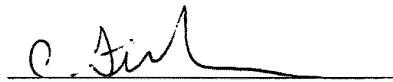
3. The current situation has been manufactured into a health crisis where none exists. The measles is a routine childhood disease which rarely results in complications or fatality. It can be treated with natural supportive recuperative techniques such as Vitamin A, proper rest and adequate hydration. As per my religious belief, the body is fully capable of handling this disease and heal itself to a full recovery.

4. I made my choice five years ago to follow my religious belief and not vaccinate my family. I take full responsibility for this decision. We are healthy and do not constitute a public threat or nuisance in any way. Our religious choice must be respected as U.S. citizens. We are entitled to our civil liberties and the option to partake of the medical treatments that are consonant with our religion and to heal ourselves in the way we see fit.

5. The forced vaccination in zip code 11211 as well as others places an undue burden on the residents of my community. Other zip codes are just as likely to transmit the disease. In fact, it would make more sense for the NYC Department of Health to take a stand to quarantine affected individuals than to force vaccinate the perfectly healthy.

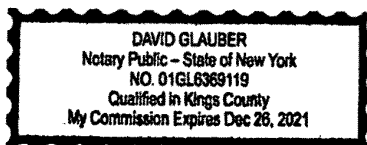
6. It is not even clear to me whether the Zip Code where I live is covered by the Order, as 11211 was not even listed in the Order first released by the City of New York. This is very confusing to me.

7. The ban is a violation of my civil liberties as well as all those passing through the affected zip codes.


C.F.

Sworn to before me this
11 day of April 2019


Notary Public



**EXHIBIT 14 TO KRAKOW AFFIRMATION -
AFFIDAVIT OF M.F., SWORN TO APRIL 11, 2019 [133 - 135]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 16

RECEIVED NYSCEF: 04/15/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
C.F. on her own behalf and of behalf of her minor
Children; et al.,

Index No.

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
The New York City Department of Health and Mental
Hygiene.,

Respondents.

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

-----X

AFFIDAVIT OF M.F.

M.F., being duly sworn, deposes and says:

1. I am a resident of Zip Code 11249, which I am advised covered by the April 9, 2019, Order of the Commissioner of Health for New York City. I and my two children have exercised our right to decline vaccination on religious grounds. We have followed the procedure set forth under New York State law for my children to exercise our religious exemption, which has been honored. We are in full compliance with the law enacted by New York State.
2. I refuse to accept an MMR vaccination for myself or my children on the grounds that it is against my strongly held personal religious beliefs. This Order of the Commissioner of Health dated April 9, 2019, violates my rights and my family's rights under New York law. The Order also violates my freedom of religious practice guaranteed by the United States Constitution.

3. My religion precludes me from injecting foreign bodies into a perfectly healthy body. I base this on the verse "Thou shalt be holy" (Kedoshim Tehiyu). G-d created a perfectly healthy body that is not designed to assimilate foreign objects such as found in vaccine ingredients. Furthermore, the commandment to guard your life (V'Nishmartem es Nafshoseichem) means that I am not allowed to inject a perfectly healthy body with a substance when I am not sure of the outcome. The risks associated with the MMR vaccine as outlined in sources such as the manufacturers vaccine insert, make this intervention unjustifiable from a religious standpoint. Furthermore, the lack of liability for the potential damage from the MMR vaccine leaving the only clear recourse in the Vaccine Injury Compensation Program, makes the manufacturer an untrustworthy agent for supplying this medical intervention.

4. There is no reason that the community in the 11249 or other affected zip codes should be singled out in this way for forced vaccination. There is a lack of due process and equal protection. Many of those already vaccinated may not have titers demonstrating immunity for the measles and are nevertheless not included in this forced vaccination program. Furthermore, children are not the only carriers of disease are unfairly burdened with being vaccinated for a disease that adults can transmit as well.


5. The forced vaccination campaign of only Jews in yeshivas in the affected zip codes is discriminatory. There are many children in public schools have religious exemptions in place and were never excluded from school. It is unfair treatment of a religious minority under the law.

6. There is a lack of a public health necessity for this draconian action. Measles is not the equivalent of smallpox or Ebola. Ironically, the vaccination campaign will cause viral shedding which may very well spread measles infection fuel the outbreak.

7. Measles, like many other common ailments, rarely leads to complications. With modern day sanitary and medical practices, measles is a routine childhood disease treatable with vitamin A and supportive health practices such as keeping the affected person well hydrated and rested.

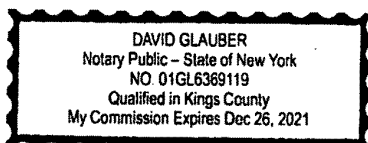
8. This order is targeting innocent, healthy people. Like Rockland, NYC failed to take simple, reasonable steps to control the disease spread. The NYC Department of Health was negligent in not isolating or quarantining those with measles. Unvaccinated people do not transmit disease; infected people transmit it. This order does nothing to address this issue. This forced vaccination policy is unenforceable as people travel in and out of these zip codes on a daily basis, many by way of public transportation. Under this order, those traveling by subway will have to present proof of immunization and titers.

9. Having 48 hours to comply is completely unreasonable as it does not give residents enough time to be tested from titers or track down medical records. Furthermore, it does not afford residents enough of an opportunity to make alternate arrangements for themselves or their families so that they will not be in breach of this ban or their religious beliefs.


M.F.

Sworn to before me this
11 day of April 2019


Notary Public



**EXHIBIT 15 TO KRAKOW AFFIRMATION -
AFFIDAVIT OF A.L., SWORN TO APRIL 13, 2019 [136 - 140]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 17

RECEIVED NYSCEF: 04/15/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
C.F. on her own behalf and of behalf of her minor
children; et al.,

Index No.

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
The New York City Department of Health and Mental
Hygiene.,

Respondents.

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

-----X

AFFIDAVIT OF A.L.

A.L., being duly sworn, deposes and says:

1. My name is A.L., and I reside in the 11206 zip code with my child, who attends pre-school.
2. Because of my sincere and forthright religious beliefs, which conflict with immunizations, my child is unvaccinated. These immunizations violate the belief systems of our faith. By declaring that we hold such convictions, and presenting them in writing, my child is able to attend school, since we are in compliance with the immunization exemption provisions of NYS Public Health Law 2164 Sub. 9, which pertains to both public and private schools, as well as parochial schools and daycare centers, nursery schools, and kindergarten through secondary schools.

3. It is a violation of the Establishment Clause of the First Amendment to the Constitution for any institution representing government, to inquire into the details of one's religious beliefs for the purpose of determining their truthfulness. That being said, because of the current order in affect for my zip code in Brooklyn, and what is happening to members of the Jewish community, I feel the need to speak out, even though I am not a part of that community. I understand that my veracity may be judged to ensure that my beliefs are genuine, so I would like to provide some background on the role that faith plays in our lives as a family. Please understand that I have felt obligated, given the current climate, to remove identifying factors that may be used to harm us, and to protect the privacy of my minor child.

4. We are an interfaith family, and our spirituality and religious beliefs stem from both Jewish law and the church. My child has already had several important religious milestones in life. We welcomed my child into the Jewish faith using a naming ceremony in honor of our Jewish roots, and chose a name, which literally means, "healed by god." As a baby, my child was also baptized into the church surrounded by family and the godparents we chose, at one of the largest cathedrals in the world, here in New York City. We chose this particular congregation for its inclusivity of interfaith families like ours, as well as for its progressive beliefs and community action geared towards those less fortunate.

5. Part of embracing my role as a mother has been becoming increasingly concerned with our health as a family. We make an effort to eat mostly whole, organic food, and seek medical care only in the rare event that we are sick. My child was exclusively breastfed and still nurses today ("You should exceedingly guard your health" - Deuteronomy 4:15).

6. There are over 200 commandments in both the Torah and the Talmud that relate to sanitary directives, and state overwhelmingly that God will protect the health and wellbeing of

his people if we make efforts to care for our bodies and treat them as sanctified vessels for our souls. To guard our health, and not defile ourselves physically, is seen as a gesture of fidelity to Him (A few examples - “And you shall serve the Lord your God and he shall bless your bread and your water and remove sickness from your midst” - Exodus 23:25; “If you will diligently harken to the voice of the Lord, your God, and will do that which is right in His sight, and will give ear to His commandments, and keep all His statutes, I will inflict none of these diseases upon you which I inflicted upon the Egyptians; for I am the Lord, your healer” - Exodus 15:26; “You shall not defile yourselves with them that you should become unclean through them” – Leviticus 11:43). I believe that administering vaccines to my healthy child, who has never had so much as an ear infection, and never needed to visit the doctor for anything other than a standard well visit - because we take such interest in maintaining our health - would be a violation of this belief and instruction.

7. It is my hope that in accordance with the way we conduct ourselves as a family, and the way I teach my child, that we will be accepted and respected in an environment even if everyone’s beliefs are not the same as ours. Just as Jewish law and the Bible teach us to be merciful towards all living creatures, I teach my child to be kind and compassionate towards others, and to give them the respect we seek for family. I feel that it is best for us, and for my child, to be around all different types of people, and that regardless of their belief systems or the way they look, I know my child will find ways to honor and nurture their culture, religion, and personhood, even if they differ from ours (“You shall not oppress a stranger, since you yourselves know the feelings of a stranger for you also were strangers in the land of Egypt” - Exodus 23:9)

8. What is happening right now in Brooklyn neighborhoods is an absolute witch hunt. Members of the Jewish community are being publicly castigated and talked about in the most anti-semitic ways I could possibly imagine. Just yesterday I witnessed a mother and her two children encouraged to leave a playground because she and her two healthy children were “bringing measles around.” There are posts after posts being made in local online mom groups about how we can prevent members of that community from entering public spaces and parks with their children.

9. We are a city of almost 9 million people. There is no possible way that a certain group or zip code could encompass all of the germs and exposure in this great city of constantly moving people – including immigrants and tourists on vacation. Yet Mayor DeBlasio held a press conference in which he declared this a solution to a “health emergency” – a few dozen active cases of measles among millions, with zero deaths due to this childhood illness.

10. Removing religious rights from honest, responsible citizens like myself – I take my child to the doctor, maintain our health, and would never bring us out in public if we were sick – is not a solution to this issue. The mayor even admitted that he is likely not up to date on his boosters during a press conference – so why is my healthy child being villainized? According to a CDC report from 2012, only about 64% of American adults are up to date, and it is well-documented that immunity wanes if boosters are not administered. So why is it that my child is considered such a threat, when it is likely that a little less than half of the adults in this city – regardless of where they live – have equal chance of contracting and passing on this or any other vaccine-preventable illness?

11. It is our responsibility as parents, to guard and protect our children’s bodies and health for future generations to come. Every decision I make, and have made, has been weighed

carefully with respect to my child's wellbeing, as well as for those around us. Though the relationship I have with God is a personal one, it is one I am following in an effort to best raise my child. We take the health of our family extremely seriously, and see it as inextricably intertwined with and complemented by our faith and spirituality. Forcing vaccinations, or imposing fines or imprisonment, as this order decreed, is not only ineffective as a public health measure, it is unconstitutional, and I refuse to go against my sincerely held religious beliefs to comply, no matter how much I am bullied or coerced.

12. Thank you for your time and serious consideration of this matter.

A.L.

Sworn to before me this
13th day of April 2019


Notary Public

SUNNY PHONG
Notary Public, State of New York
Reg. No. 01PH6387923
Qualified in Kings County
Commission Expires 02/25/2023

**EXHIBIT 16 TO KRAKOW AFFIRMATION -
AFFIDAVIT OF M.N., SWORN TO APRIL 12, 2019 [141 - 143]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 18

RECEIVED NYSCEF: 04/15/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
C.T. on her own behalf and of behalf of her minor
children; et al.,

Index No.

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
The New York City Department of Health and Mental
Hygiene.,

Respondents.

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

-----X

AFFIDAVIT OF M.N.

M.N., being duly sworn, deposes and says:

1. I am a single mother who resides in the 11205 Zip code with my 2-year-old son.
2. I am a spiritual teacher by profession. Having trained for many years with monks in India, I am a senior advanced teacher in my lineage, and this is my 14th year of teaching in New York and worldwide.
3. My religion is not a set of rules, laid down long ago in a dusty set of books, but a living, breathing experience of my daily life. It is not one aspect of who I am, it is everything about who I am, and how I raise my family.
4. There is a higher Source, God, Universal energy that courses through every living thing on this and every planet. This energy has many names, but it is One Thing. My belief is to interfere with this Source, is to interfere with the Divine Itself.

5. Another way to put it: to go against the will of God. As is listed on our own currency: "In God we Trust."

6. A religious exemption from vaccination is imperative for our family in order to live according to our beliefs and conscience. Our body is a sacred temple and is provided everything it needs for this life at birth. We worship, nourish, protect and provide for this temple as an expression of Divine Love, in daily practice and ritual.

7. When it came time to make choices for my child, the choice was clear. My son is an extremely aware, curious, open and pure boy, and I make the choice every day to maintain that purity for him, to preserve his whole, healthy body, as the Divine brought him to this earth.

8. Yesterday, I watched a press conference and panel, led by our Mayor Bill de Blasio where he declared a "health emergency" in my zip code.

9. There are currently a couple dozen active measles cases in a city of 8+ million people, with zero deaths due to this disease. These numbers could hardly be considered to be an emergency. Yet the Mayor is quick to take away our constitutional right for religious freedom by using threats and coercion in the name of public safety.

10. When asked by a reporter if the panel of experts and Mayor were vaccinated, they all laughed together and the Mayor replied, "Long ago..." It's documented that the measles vaccine does not guarantee a lifelong immunity, and so the Mayor himself is likely due for a booster shot. Yet instead, he chooses to place the "herd immunity" responsibility on my innocent, perfectly healthy, two-year-old son.

11. This is the greatest city in the world, and one of the most inclusive and liberal. For all our fighting about a woman's right to choose about her body, it is astonishing to me that our right to choose what goes in our body does not naturally extend to our families.

12. It is hypocritical that we would work so hard to create legislation that honors a woman's right to choose but turn our back on the constitution. which clearly outlines our religious rights.

13. I am a single mother who currently bears sole financial burden for my child. As you might imagine, the role of a spiritual teacher is less a choice than it is a calling. It is by no means a lucrative profession, certainly not a stable career to raise a family in an expensive city, such as New York.

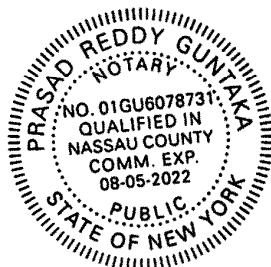
14. By imposing a \$1000 fine on unvaccinated children, the Mayor thinks he can bully people out of their religious beliefs. In essence, the Mayor is asking that I sell my soul for \$1000. No, thank you, Sir. It remains quite intact.

15. I ask that you overturn this unconstitutional order and protect the rights of the very small percentage of children, a marginalized group, who hold religious exemptions in this city.


M.N.

Sworn to before me this
12th day of April 2019


Notary Public



**EXHIBIT 17 TO KRAKOW AFFIRMATION -
AFFIDAVIT OF B.D., SWORN TO APRIL 12, 2019 [144 - 145]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM
NYSCEF DOC. NO. 19

INDEX NO. 508356/2019
RECEIVED NYSCEF: 04/15/2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
C.F. on her own behalf and of behalf of her minor
Children; et al.,

Index No.

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
The New York City Department of Health and Mental
Hygiene.,

Respondents.

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

-----X

AFFIDAVIT OF B.D.

B.D., being duly sworn, deposes and says:

1. I refuse to accept an MMR vaccination for myself or my child on the grounds that it is against my strongly held personal religious beliefs. This ban is in violation of my guaranteed freedom of religious practice as set out clearly in the U.S. Constitution.

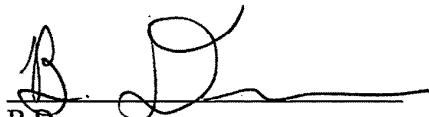
2. My religion precludes me from injecting foreign bodies into a perfectly healthy body. It says in Leviticus (Vayikra) 11:45, "I am G-d, your G-d. And you are to sanctify yourself and you should become holy for I am holy. You should not make your soul impure." By injecting vaccines into our body that come from impure animal sources as well as other substances which are foreign to our body such as aborted fetal cells, we are contradicting our Torah belief.

3. My religion firmly holds that G-d created the world and continues to run every detail of the world. In Exodus (Shemos) 15:26, the Torah tells us, "All disease which were inflicted in Egypt I will not inflict on you for I am G-d who Heals you." It also states in Exodus 21:19, "And He shall heal." By putting any trust in vaccines and to believe that it will save us is opposite of our belief in G-d. We must have complete faith that only He can heal and only He can make one ill.

4. Forced vaccination of those with no titers for measles in the affected zip codes is totally discriminatory. This ban is largely concerned with minors even though adults may carry the disease. It only deals with those who are unvaccinated even though titers may not be present in those who were already vaccinated.

5. Banning only unvaccinated children from yeshivas when no such ban exists in the public schools is religious discrimination and in violation of my equal protection under the law.

6. This ban is targeting the wrong people. Healthy, unvaccinated people do not automatically transmit disease. The NYC Department of Health should take steps to quarantine actual cases of measles and those exposed rather than make a blanket order for mass vaccination in totally healthy individuals.


B.D.

Sworn to before me this
12 day of April 2019


Notary Public

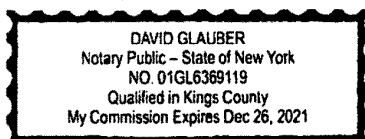


EXHIBIT 18 TO KRAKOW AFFIRMATION -
NEWS ARTICLE, DAILY BEAST, DATED APRIL 9, 2019 [146 - 151]

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

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Measles Crisis: New York Civil Liberties Union Blasts 'Forced Vaccination' in NYC

4/13/19, 2:43 PM

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Liberties Union Blasts NYC 'Forced Vaccination'

could be brewing over an emergency order to stem the spread of measles in a Jewish community.

11:04 04.09.19 5:15 PM ET



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The New York Civil Liberties Union said Tuesday that a city emergency order designed to stem a measles outbreak is illegal because it includes "forced vaccination."

Mayor Bill de Blasio declared a state of emergency earlier in the day as the number of measles cases, mainly among children in Orthodox Jewish neighborhoods, neared 300.

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He signed an order stating that anyone in certain zip codes who has not received the MMR vaccine "shall be vaccinated against measles" unless they can prove they've already had the disease or should be medically exempt.

"It was time to take a more muscular approach," the mayor said in explaining the hard-line policy for an outbreak that began in October.

EMERGENCY**Measles Rages in Brooklyn as Some Yeshivas Defy Vaccine Rule**

Jacelyn Jeffrey-Wilonsky



But civil libertarians said de Blasio may be putting too much muscle into it.

"Public health law authorizes the city to take action to address public health emergencies through containment and isolation of affected people," the group said in a statement.

"The City's order provides that people will be vaccinated without their consent, an extreme measure which is not provided for in the law and raises civil liberties concerns about forced medical treatment.

"In addressing this public health crisis, the government is required to pursue the least restrictive means possible to balance individual autonomy with the public health risk. In this case, measures such as a quarantine or penalties for non-vaccination may be permissible, but forced vaccination is not."

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It was not immediately clear if anyone from Williamsburg, the Brooklyn neighborhood targeted by the order, had contacted the organization or if its lawyers were planning on taking legal action against the city.

“Measures such as a quarantine or penalties for non-vaccination may be permissible, but forced vaccination is not.”

— New York Civil Liberties Union

In Rockland County, north of the city, officials imposed an emergency order last month banning any unvaccinated child from public places, but a judge has already put that on hold.

Health officials have been particularly worried about the spread of measles in Jewish communities because Passover is approaching, bringing with it large gatherings where one infected person can spread the virus to anyone who is unvaccinated.

In addition, some yeshivas have been caught flouting an earlier order banning unvaccinated students. And the city health commissioner said some parents have been throwing measles parties so their kids catch the illness, and thus become immune, eliminating the need for the vaccine.

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Anti-Vaxxers Lose Cash Pipeline in New Crackdown

Study after study has shown the measles vaccine is safe and effective, but some families have used religious or philosophical exemptions to avoid it—thanks, in part, to a growing anti-vaxxer movement fueled by fake and discredited science.

The New York City outbreak is one of several nationwide. There are also clusters in Oakland County, Michigan, and the Pacific Northwest. Authorities say travel to and from Israel and

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Ukraine, along with low vaccination rates in some areas, set the stage for the crisis.

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These days, it seems there's always a new subscription service working its way into our social feeds. From toothbrushes, razors and tampons to athletic wear and even Ikea furniture, there's no issue some new startup can't fix with a well-timed monthly delivery.

But let's be honest, a lot of it isn't worth your time or money. So how to tell those apart from the ones that will actually make your life better? We give the thumbs up to the following subs that solve a legitimate monthly pain point (plus a couple worth signing onto just for fun).

Home-Monitoring

Hive Smart Home Service, \$9.99 per month

While many brands offer individual ways to achieve the famed “connected home,” Hive Smart Home delivers everything in one package. Hive is a comprehensive ecosystem that works with a subscription-based app, enabling you to manage your home—including your thermostats, lightbulbs and window and door motion sensors—whether you’re there or not. Whether you use it to cut heating costs while away, turn on the lights before you arrive home from work in winter, employ the AC judiciously in summer, or naturally dim the lights as bedtime approaches, there’s a number of intuitive ways Hive will make life easier.

Nest Aware, \$5 to \$30 per month, depending on length of preferred video viewability

By now you’re likely familiar with Nest, the smart-home startup that first made waves with their attractive Learning Thermostat in 2011. Since then, the innovative hardware brand has introduced a handful of other equally disruptive products to enhance domestic life, including connected cameras for indoor and outdoor use—perfect for pet owners, parents, and putting into service as virtual house sitting while you’re away. Nest Aware is the company’s subscription service that allows for continuous recording of all camera feeds, 24/7 for up to 30 days. With functionality like time lapses and intelligent alerts, you can review video history, share full resolution clips and know exactly what happened while you weren’t looking.

Printing + Tech Support

HP Instant Ink, \$2.99 for 50 pages per month

Say you need to print financial documents for a rental application, an updated resume, and your daughter’s history paper—all in the next 15 minutes before running out the door. Here, and in just about any other moment, the last thing you want to deal with is running out of printer ink. Thanks to the new HP Tango printer and HP’s Instant Ink subscription plan, you’ll never have to. A first of its kind, the sleek, design-driven Tango is the first ever printer to work with a cloud-based, two-way network connection, making it easy to print, scan and copy from any device, anywhere—even your phone, and even while abroad traveling.

Working with the HP Smart App for Android and iOS, you can initiate print jobs remotely, and receive notifications when your documents are ready. And with the HP Instant Ink plan you’ll never get stuck with a half printed document again. Usage is monitored automatically, so new ink cartridges arrive whenever needed, without you having to even think about it.

Monthly prices align with the number of pages you expect to print—clean and easy with no confusion or hidden costs. Better yet, subscribers can print unlimited 5” by 7” photos from their mobile device without counting towards their monthly page totals.

Best Buy Total Tech Support, \$199.99 per year

Let’s be honest, even the most savvy among us still struggles with new tech or an aging device from time to time. Whether it’s programming your parents’ new TV or trying to recover data from a dying machine, the new Best Buy Total Tech Support service can help. The yearly subscription service offers 24/7 support on all your devices—phones, TVs, Computers, Tablets, etc—regardless of when or where the original purchase was made. Plus,

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with the subscription, you get 20% off repairs and a discounted in-home service rate. You can even have a Geek Squad member help set up your new [HP Tango printer](#), not that you'd need it.

Art + Music

Meural, \$5.95 per month

Forget Grandma's digital picture frames of the mid 2000s. Meural has reinvented the category with a smart art frame that brings tens of thousands of masterpieces from the world's most renowned museums and galleries to your home. Using a proprietary blend of hardware, firmware and software, Meural deflects light without distorting hues while rendering images in a textured and lifelike way. Additionally, ambient light sensors automatically adjust its display to a room's brightness and even puts your artwork to sleep when the room gets dark. At just \$5.95 a month, the membership is certainly the least expensive way to put a Picasso in your living room. And yes, you can still upload photos from your recent trip abroad too, if you really want.

Spotify, \$9.99 per month

Spotify is certainly nothing new, but simply put, it's one of the absolute best ways to spend \$9.99 a month. Not only does the streaming service offer a rich library of music, a number of lesser known services are the real reason the app landed on this list. In addition to music, Spotify also offers access to a seemingly endless number of niche and well-known podcasts and audiobooks narrated by voices of note (hidden under "word" in the browse genres section). Plus we love the AI-backed "assisted playlisting," which uses machine learning to help you create new playlists on the go. You can even integrate Spotify with the Google Clock app to wake up to your favorite song. Plus, the app allows songs to be downloaded to your mobile device for offline listening—great for flying—and now offers a "Data Saver Mode" that can reduce data usage by up to 75 percent.

Getting Around

Lyft Personal Plan, from \$1.99 to \$9.99 per month, depending on the route

The ubiquitous ride-sharing service recently introduced their new Personal Plan subscription, which charges a modest upfront fee for the monthly service, then locks in a fixed rate price for heavily frequented routes, like to and from work, the gym, or a significant other's place. While a couple dollar savings here or there is nice, the real beauty lies in eliminating the fear of unexpected traffic or a surprise surge price, allowing you to sit back and truly enjoy the ride.



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**EXHIBIT 19 TO KRAKOW AFFIRMATION -
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**MEASLES MORTALITY: A RETROSPECTIVE LOOK AT THE
VACCINE ERA¹**

ROGER M. BARKIN²

Barkin, R. M. (Bureau of Epidemiology, CDC, Atlanta, GA 30333). Measles mortality: A retrospective look at the vaccine era. *Am J Epidemiol* 102:341-349, 1975.

Measles mortality provides an indicator in defining the population at greatest risk of experiencing serious complications from measles as well as serving as a parameter in assessing the impact of immunization programs. Efforts to vaccinate susceptible children have helped to reduce measles morbidity and mortality in the United States. Mortality rates were highest in children 6-11 months of age. Higher mortality rates were noted in places with less than 10,000 people and in counties having a large percentage of the population with incomes below poverty level. Vaccine should be accessible to all populations, but intensive efforts need to be directed toward groups at high risk of dying from measles who are suffering from a myriad of other health, social, and economic problems.

Measles; mortality; vaccination

More than a decade has passed since live-virus measles vaccine was licensed for use in the United States. Vaccine licensure in 1963 followed the isolation of wild measles virus by Enders and Peebles in 1954 (1) and its subsequent cultivation and attenuation on chick embryo cells by Milovanovic and co-workers (2, 3). The vaccine has continued to be effective and safe.

Local, state, and national health programs have distributed nearly 70 million doses of live-virus vaccine, nearly 25 per cent of which were federally funded. Eradication programs first received federal sup-

port in 1965, and they helped produce the striking reduction in the number of cases of measles noted in the United States. However, in 1969, federal priorities shifted to an intensive rubella vaccination program and a resurgence of measles took place. This upward trend in reported morbidity and mortality from measles was finally reversed in late 1971 when federal funds were reinstated, and nearly 8 million doses of vaccine were distributed annually (4). The widespread use of measles vaccines accounts for the dramatic decline in measles-associated morbidity and mortality in the United States during the last decade (figure 1).

As we move into the second decade of vaccine availability, evaluation of the continuing impact of measles vaccination is required. Reports describing the status of measles control in the United States have dealt primarily with the epidemiology of measles and emphasized morbidity, immunity levels (by immunization and/or natural disease), and vaccine usage as indicators of past successes and potential progress (4-8). In contrast, this paper will

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The author gratefully acknowledges the assistance of J. Lyle Conrad, M.D., and Robert Pollard, Bureau of Epidemiology; and John Witte, M.D., Donald Eddins, and JoDean Sanders, Bureau of State Services, Center for Disease Control.

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focus on deaths caused by measles and thereby provide another measure of the impact of measles vaccines in the United States.

METHODS

Line listings of recorded measles deaths in the United States compiled by the National Center for Health Statistics (NCHS) provided age, sex, race, state and county of residence, and month of death data on all persons with death attributed to measles. The six-year period 1958–1963 was selected to provide data on measles mortality prior to vaccine licensure, while 1965–1967 and 1968–1970 were analyzed separately and together to evaluate the impact of vaccine on mortality; 1970 is the latest year for which detailed mortality data are currently available.

Income-specific mortality rates were calculated by stratifying the county of residence of individuals who died of measles in 1962–1969 according to the percentage of individuals with incomes below poverty level (1960 Office of Economic Opportunity standards³) and determining the number of deaths and population of these counties. The unavailability of data necessitated different year groupings for income-specific mortality rates. The death-to-case ratio was computed by dividing age-specific mortality by age-specific morbidity data.

Morbidity data were derived from two sources. The Center for Disease Control compiles weekly morbidity information on reported measles cases in the United States through the cooperation of state and local health departments (4). A second major source of morbidity data is the estimated number of measles cases compiled annu-

ally by the National Center for Health Statistics from a health interview survey conducted in cooperation with the Bureau of the Census (9). The age distribution of measles patients was available from data collected by the Center for Disease Control (4, 5).

Rates for the periods 1958–1963 and 1960–1963 were based on the 1960 Census. Estimates of 1966, 1969, and 1967 population were derived from interpolations of 1960 and 1970 Census information and used as the base for 1965–1967, 1968–1970, and 1965–1970, respectively. However, 1960 Census data were used in the calculation of income-specific mortality rates for the entire period analyzed.

RESULTS

Average annual measles mortality rates have slowly declined since the early 1900's from an average of 10 deaths from measles per 100,000 population early in the century to 0.23 per 100,000 during the six-year period 1958–1963, when 2523 deaths from measles were recorded. Following vaccine licensure, the average annual mortality rate dropped to 0.065 deaths per 100,000 population in 1965–1970. A relatively smaller decline in rates was noted in the three-year period 1965–1967, while the most substantial decrease in mortality rates was observed in 1968–1970. The total number of deaths more than quartered in 1965–1970, with 618 deaths recorded, only 154 of which occurred in 1968–1970. Reported measles cases remained relatively constant before the introduction of vaccine in 1963, and it was not until 1965 that the first marked decrease in incidence was noted (figure 1).

Seasonal trends. Deaths attributed to measles occurred primarily in the late winter and the spring, corresponding to the seasonal pattern of measles cases in the United States. The largest number of cases reported and deaths recorded before and after vaccine licensure was in April.

Geographic distribution. Measles mor-

³ Defined by Social Security Administration guidelines using nutritionally adequate food as the basis for determination of poverty income cutoffs. In 1960, 22.2 per cent of the population was at poverty level income or below. For a family of four, this level was \$3017 ("Revision in Poverty Statistics, 1959 to 1968," Current Population Reports, Series P-23, No. 28, August 12, 1969. Bureau of the Census, US Department of Commerce).

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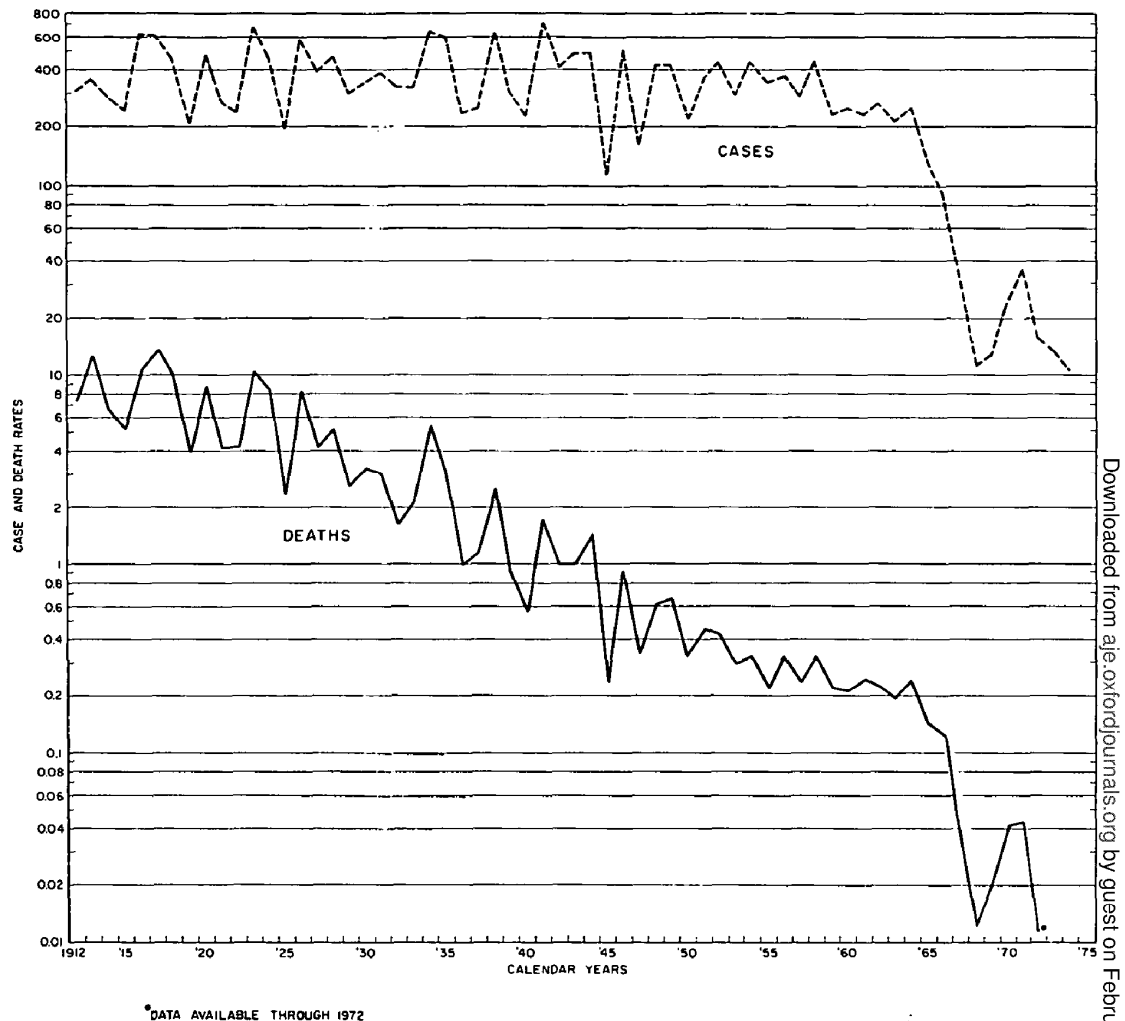


FIGURE 1. Reported measles cases and deaths per 100,000 population, United States, 1912-1974.

tality rates by state were consistently higher in the southern part of the United States. Although statewide mortality rates were lower after vaccine licensure, the geographic clustering of states in the higher quartiles was similar to that noted prior to vaccine licensure (figure 2). In 1968-1970, Arizona, Mississippi, Montana, and New Mexico had the highest mortality rates. The same geographic distribution of states in the south with high mortality rates was noted for race-specific mortality rates.

Population size of place of residence. The population size of the place of residence was found to have a large effect on

measles mortality rates. Mortality rates in places with 10,000 or more people were lower than rates in places with less than 10,000 residents. Following vaccine licensure, the relative percentage decreases in population-specific mortality rates were greatest in places with populations under 10,000. The differential mortality rates in larger and smaller communities declined with increasing vaccine usage (table 1).

Income level. Income-specific mortality rates increased as the percentage of residents with incomes below poverty level increased. Counties with over 60 per cent of the population with incomes below poverty

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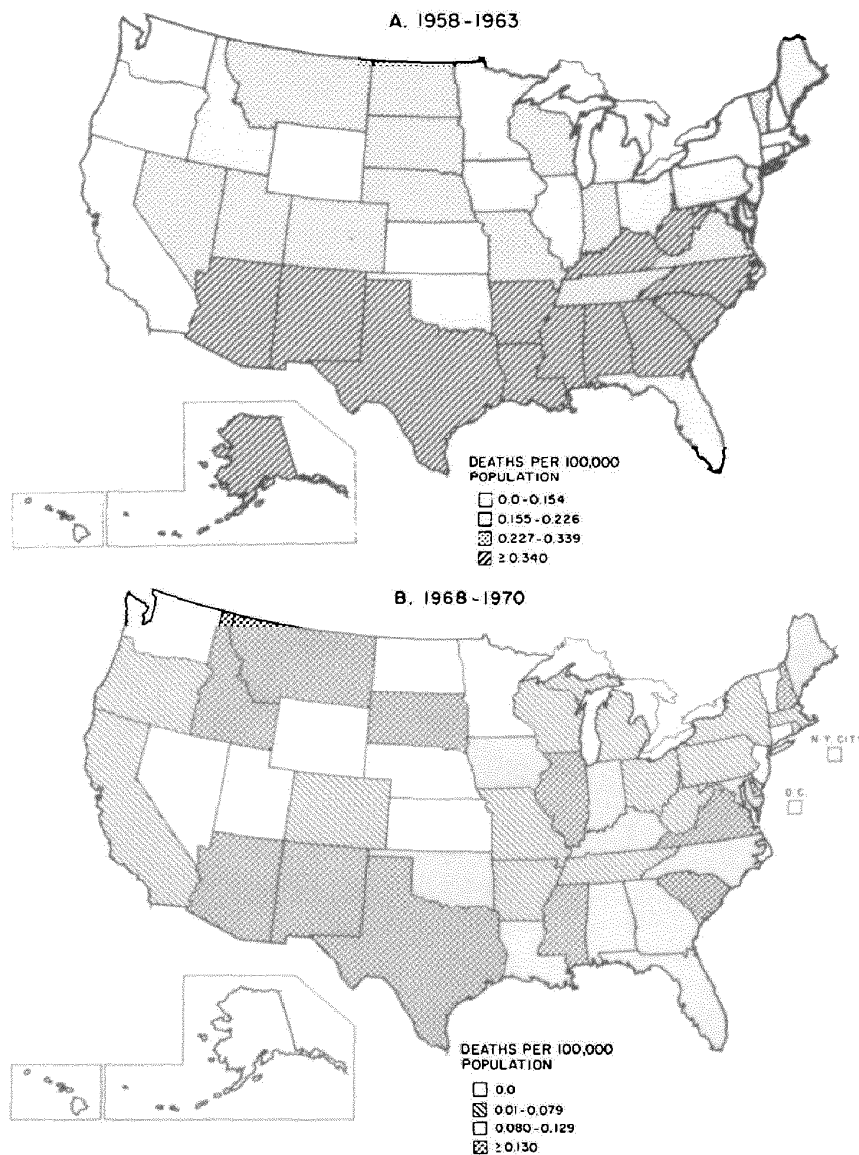


FIGURE 2. Average annual measles mortality rates, United States, 1958-1970.

level had the largest percentage diminution in mortality rates, dropping from 0.92 average annual deaths per 100,000 population in 1962-1963 to 0.09 deaths per 100,000 in 1967-1969 (table 2).

Age and sex. Age-specific mortality rates decreased with increasing age, the rate being lowest for those 15 years of age or over (table 3 and figure 3A). Mortality rates for infants increased substantially at six months of age and were greatest for

those six to 11 months of age. Of children who died when one to four years of age, the age-specific mortality rate was highest for one-year-olds and decreased with age (table 3). The percentile distribution in each age group of population of the place of residence was similar.

Following the licensure of measles vaccines, age-specific mortality rates decreased in all age groups. The largest decline was noted in 1968-1970. Those

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TABLE 1

Average annual measles mortality rate per 100,000 population and (average annual deaths), by year and population size of place of residence, United States, 1960-1970

| Population size of place of residence | 1960-1963 | 1965-1967 | 1968-1970 |
|---------------------------------------|-------------|-------------|------------|
| ≥ 1.0 million | .13 (23.5) | .07 (12.7) | .03 (6.0) |
| 100,000-999,999 | .16 (55.0) | .09 (31.3) | .02 (8.0) |
| 10,000-99,999 | .17 (78.5) | .07 (35.0) | .02 (10.0) |
| < 10,000 | .29 (140.0) | .15 (127.0) | .03 (27.3) |
| Total | .22 (297.0) | .11 (206.0) | 0.3 (51.3) |

TABLE 2

Average annual measles mortality rate per 100,000 population and (average annual deaths), by year and income level, United States, 1962-1969

| % population in county with income below poverty level* | 1962-1963 | | 1964-1966 | | 1967-1969 | |
|---|-------------|-------------|-------------|-------------|------------|-------------|
| | White | Black/other | White | Black/other | White | Black/other |
| ≤ 19.9 | .13 (147.5) | .03 (0.1) | .10 (114.3) | .03 (1.0) | .02 (17.1) | .00 (0.0) |
| 20.0-39.9 | .25 (92.4) | .13 (8.1) | .22 (80.5) | .16 (10.3) | .03 (12.2) | .05 (3.2) |
| 40.0-59.9 | .33 (23.6) | .49 (23.8) | .40 (29.1) | .32 (15.6) | .08 (5.7) | .05 (2.5) |
| ≥ 60.0 | .87 (10.5) | .97 (79.9) | .75 (9.0) | .72 (59.4) | .07 (0.8) | .09 (7.6) |
| Total | .18 (274.0) | .56 (111.9) | .16 (232.9) | .43 (86.3) | .02 (35.8) | .07 (13.3) |

* 1960 Office of Economic Opportunity standards.

under one year of age and over 15 years experienced the smallest decrease in rates. The mortality rate in 1968-1970 was 0.35 deaths per 100,000 in children under one year of age, more than twice that of children one to four years of age (0.15 deaths per 100,000) (figure 3A).

No differences were noted before or after vaccine licensure in sex-specific mortality rates.

Race. In 1958-1970, race-specific mortality rates for the white population remained lower than for the black/other population despite the introduction of measles vaccine in 1963. Reductions in mortality rates were noted for both groups after vaccine licensure, the rate for white populations remaining at less than half of the 0.05 deaths per 100,000 population recorded for black/other populations in 1968-1970.

The largest differences in age-race-specific mortality rates between the white

and black/other populations were noted for children four years of age and younger and decreased with increasing age. In children under one year of age the disparity was most striking, the rate in 1968-1970 for white children being one-fourth the rate of 0.95 deaths per 100,000 population for black/other children under one year (table 3).

Income-race-specific mortality rates demonstrated no significant differences in mortality rates between the white and black/other populations in lower income strata. In communities having 60 per cent or more of the population with incomes below poverty level, the white and black/other populations had similar mortality rates. Although decreases after vaccine licensure were noted in all groups, no consistent pattern was noted (table 2).

Death-to-case ratio. The death-to-case ratio provides an excellent basis for assess-

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TABLE 3

Average annual measles mortality rate per 100,000 population and (average annual deaths), by year, age and race, United States, 1958-1970

| Age (years) | 1958-1963 | | 1965-1967 | | 1968-1970 | |
|-------------|--------------|-------------|-------------|-------------|------------|-------------|
| | White | Black/other | White | Black/other | White | Black/other |
| <1 | 1.62 (56.5) | 5.10 (31.3) | .97 (30.4) | 2.72 (15.7) | .23 (7.0) | .95 (5.3) |
| 0-5 months | .73 (12.7) | 2.46 (7.5) | .49 (7.7) | 2.05 (6.0) | .09 (1.3) | .00 (0.0) |
| 6-11 months | 2.49 (43.8) | 7.70 (23.8) | 1.46 (22.7) | 3.39 (9.7) | .38 (5.7) | 1.95 (5.3) |
| 1-4 | 1.08 (149.7) | 2.55 (59.8) | .51 (64.0) | 1.56 (35.3) | .13 (14.7) | .27 (6.0) |
| 1 | 1.82 (63.7) | 5.58 (33.6) | .81 (25.7) | 3.48 (19.6) | .24 (7.0) | .94 (5.0) |
| 2 | 1.03 (36.0) | 2.06 (12.2) | .55 (17.0) | 1.25 (7.0) | .11 (3.0) | .13 (0.7) |
| 3 | .73 (25.0) | 1.34 (7.8) | .35 (11.0) | .82 (4.7) | .07 (2.0) | .06 (0.3) |
| 4 | .74 (25.0) | 1.08 (6.2) | .32 (10.3) | .69 (4.0) | .09 (2.7) | .00 (0.0) |
| 5-9 | .43 (69.7) | .41 (10.8) | .20 (33.3) | .30 (8.7) | .05 (9.0) | .04 (1.3) |
| 10-14 | .09 (13.2) | .11 (2.3) | .05 (7.7) | .05 (1.3) | .01 (2.0) | .00 (0.0) |
| 15+ | .02 (22.3) | .02 (2.5) | .01 (9.3) | .02 (0.3) | .004 (5.3) | .001 (0.7) |
| Total | .20 (311.4) | .52 (106.7) | .08 (144.7) | .26 (61.3) | .02 (38.0) | .05 (13.3) |

ing the severity of disease as reflected by death in different age and population groups. Employing reported measles cases compiled by the Center for Disease Control, and deaths, the death-to-case ratio over the 12-year study period was 9.35 deaths per 10,000 reported cases. Similar computations utilizing National Center for Health Statistics disease estimates provide a much lower death-to-case ratio of 0.68 deaths per 10,000 estimated measles cases. The large discrepancy was probably a reflection of the inaccuracies of current data collection procedures.

Although age-specific attack rates decreased in all age groups in 1965-1970 when compared with prevaccine levels, the largest decrease in attack rates was in the preschool and elementary school children who were the focus of measles control programs (figure 3B).

Age-specific death-to-case ratios demonstrated similar trends prior to and after the licensure of vaccine. Children under one year of age consistently had high death-to-case ratios, with a marked reduction in deaths per 10,000 cases with increasing age. The death-to-case ratio for persons 15 years and older was nearly as high as for infants until 1967 and higher in 1968-1970 (figure 3C).

To determine the true death-to-case ratio, both morbidity and mortality components must be analyzed. Current evidence indicates that cases reported to the Center for Disease Control represent 6-8 per cent of the number of cases actually occurring (4). The estimated cases compiled by the National Center for Health Statistics represent an overestimate of true cases, since only 4-5 million cases could have occurred per year prior to the vaccine era, if better than 95 per cent of the adult population were protected as has been documented by numerous epidemiologic and serologic studies (10). In 1958-1963, the National Center for Health Statistics estimated that 6.5 million cases occurred annually. A part of the overestimates result from the difficulty in distinguishing between measles and other rash diseases by household interview techniques. Indeed, the estimates of the National Center for Health Statistics have a relatively large sampling error. (For example, in 1966 the 95 per cent confidence limit based upon the sample estimate of 2,927,000 cases was 2,003,000 to 3,911,000 cases.)

In addition, fewer than the true number of deaths attributable to measles are recorded as such. Measles may have only been considered to have contributed to

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death and the death not be directly attributed to measles in the line listings of recorded deaths.

Considering 1) that cases reported to the Center for Disease Control represent fewer than 10 per cent of actual clinical cases, 2) that the National Center for Health Statistics morbidity data overestimate true morbidity, and 3) that the recorded deaths do not reflect the total directly attributable to measles, the true death-to-case ratio can be estimated to be approximately 1.0 deaths per 10,000 measles cases.

DISCUSSION

This paper has attempted to define the population at greatest risk of dying from measles and assessing the impact of measles vaccine on these risk factors. The delineation of risk factors may provide an indicator of those populations at greatest risk of experiencing serious complications from measles.

In assessing the validity of such an analysis, it is appropriate to recall a statement made in 1933 by A. W. Hedrich:

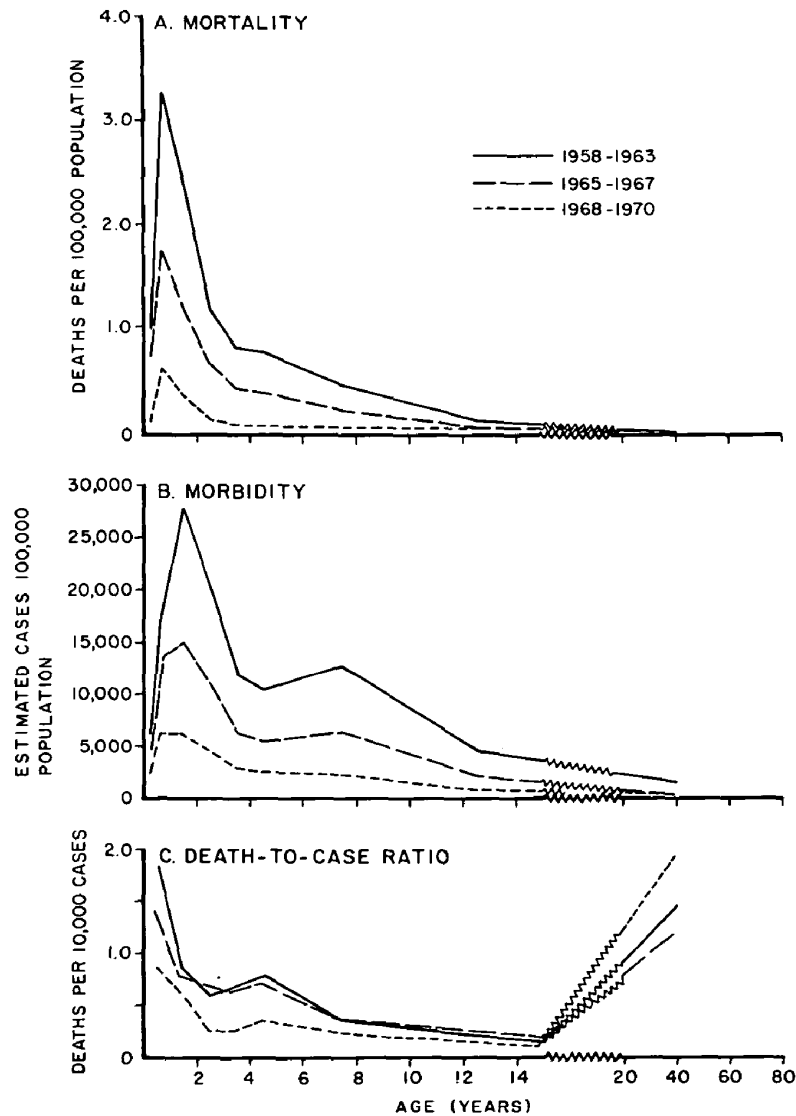


FIGURE 3. Measles age-specific rates, United States, 1958-1970.

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ROGER M. BARKIN

"The research worker in this branch of epidemiology (measles) faces the alternatives of struggling with imperfect raw material or of abandoning his search for information (11)." Data must be interpreted in the context of current local and national priorities, especially when the analysis is retrospective. However, little has changed to make the conclusions less valid and in fact, a resurgence in measles morbidity was noted in 1969-1973.

Since the early 1900's, measles mortality rates have declined subsequent to advances in medical technology and patient management and the introduction of appropriate antibiotic therapy. In the last decade, efforts to vaccinate susceptible children have accounted for recent reductions in measles morbidity and mortality. Quantitatively, the greatest impact was noted in 1968-1970, when reported cases and recorded mortality reached record lows; however, the populations with the highest mortality rates before vaccine licensure continued to have the highest rates after 1963.

Contrary to earlier expectations, measles has not been eradicated (12). Until eradication becomes a reality, programs must be directed at prompt epidemic control combined with vaccination of susceptible populations, particularly those at greatest risk of suffering serious complications.

In focusing attention on children under one year of age, the data serve to define the population at greatest risk of suffering serious measles complications. Respiratory causes of death accounted for nearly 65 per cent of the deaths in this age group (13). The geographic distribution is certainly a reflection of inequities of availability of a host of services, medicine being just one key element. Rural populations residing in counties with a large percentage of the population below poverty levels are reflected in the mortality rates by state (figure 2). The higher mortality rates in some states are not explained simply by a

younger population developing measles.

Certainly, the reported experience in other countries has underlined the greater risk to young children and the importance of poor nutritional and health status in contributing to rates of death associated with measles (14-17). Robson and Jones (18) documented that in the United States, measles deaths primarily occur in individuals below established height and weight norms. The 10-State Nutrition Survey conducted in the United States in 1968-1970 indicated that evidence of malnutrition increased as income level decreased and was least common in white persons (19). Death-to-case ratios generally decrease with improving nutrition and health status of a population (20, 21).

These risk factors must be incorporated in ongoing measles control programs. The primary goal of measles vaccination should be the prevention of measles cases, but perhaps even more importantly, a reduction in complications secondary to measles. Certainly, vaccine should be accessible to all populations, but more intensive efforts need to be directed toward high-risk groups who are no doubt suffering from a myriad of social and economic problems and in all likelihood have the least accessibility to adequate health care.

Despite the decreased efficacy of vaccination of children under 12 months of age, mortality data indicate that selective vaccination of six- to nine-month olds must be considered in highly endemic or epidemic areas. Scheduled revaccination at one year of age must be an integral part of any such program (22). Attention must also be focused on the population over 15 who will represent an increasing percentage of measles cases as declining rates of natural infection are observed. The higher death-to-case ratio in this group may be indicative of a greater risk of complications from measles, exposing the unprotected adult to the potential of substantial morbidity.

Important inroads have been made in

MEASLES MORTALITY

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reducing measles morbidity and mortality since the licensure of live measles vaccine. As the second decade of vaccine availability evolves, the impact of measles vaccine will require careful assessment. Although mortality can only provide a retrospective analysis, it does serve to define populations in need of attention in establishing future priorities.

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**EXHIBIT 20 TO KRAKOW AFFIRMATION -
CHART OF AFFECTED ZIP CODES — DEMOGRAPHIC INFORMATION**

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CHART OF AFFECTED ZIP CODES – DEMOGRAPHIC INFORMATION

| Zip Code | Population | Square Mileage | Web Address |
|----------|------------|----------------|---|
| 11205 | 40,366 | 0.95 | https://www.unitedstateszipcodes.org/11205/ |
| 11206 | 81,677 | 1.43 | https://www.unitedstateszipcodes.org/11206/ |
| 11221 | 78,895 | 1.38 | https://www.unitedstateszipcodes.org/11221/ |
| 11249 | 97,978 | 2.0 | https://www.zipdatamaps.com/11249* |
| 11211 | 90,117 | 2.3 | https://www.unitedstateszipcodes.org/11211/ |
| 11237 | 49,896 | 0.98 | https://www.unitedstateszipcodes.org/11237/ |

6 zip codes affected despite language that 4 were affected.

Total population affected: 438,929 people based on available data

Total square mileage affected: 9.04 square miles affected

dw

Total Population of New York City: 8.6 million

Total square mileage of NYC: 303 square miles

*Demographic information not available on the US zip codes web page.

**EXHIBIT 21 TO KRAKOW AFFIRMATION -
GRANT FINAL REPORT, ELECTRONIC SUPPORT FOR PUBLIC HEALTH-
VACCINE ADVERSE EVENT REPORTING SYSTEM (ESP:VAERS) [162 - 168]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 24

RECEIVED NYSCEF: 04/15/2019

<https://healthit.ahrq.gov/sites/default/files/docs/publication/r18hs017045-lazarus-final-report-2011.pdf>

Grant Final Report

Grant ID: R18 HS 017045

**Electronic Support for Public Health–Vaccine Adverse
Event Reporting System (ESP:VAERS)**

Inclusive dates: 12/01/07 - 09/30/10

Principal Investigator:

Lazarus, Ross, MBBS, MPH, MMed, GDCCompSci

Team members:

Michael Klompas, MD, MPH

Performing Organization:

Harvard Pilgrim Health Care, Inc.

Project Officer:

Steve Bernstein

Submitted to:

The Agency for Healthcare Research and Quality (AHRQ)

U.S. Department of Health and Human Services

540 Gaither Road

Rockville, MD 20850

www.ahrq.gov

Abstract

Purpose: To develop and disseminate HIT evidence and evidence-based tools to improve healthcare decision making through the use of integrated data and knowledge management.

Scope: To create a generalizable system to facilitate detection and clinician reporting of vaccine adverse events, in order to improve the safety of national vaccination programs.

Methods: Electronic medical records available from all ambulatory care encounters in a large multi-specialty practice were used. Every patient receiving a vaccine was automatically identified, and for the next 30 days, their health care diagnostic codes, laboratory tests, and medication prescriptions were evaluated for values suggestive of an adverse event.

Results: Restructuring at CDC and consequent delays in terms of decision making have made it challenging despite best efforts to move forward with discussions regarding the evaluation of ESP:VAERS performance in a randomized trial and comparison of ESP:VAERS performance to existing VAERS and Vaccine Safety Datalink data. However, Preliminary data were collected and analyzed and this initiative has been presented at a number of national symposia.

Key Words: electronic health records, vaccinations, adverse event reporting

The authors of this report are responsible for its content. Statements in the report should not be construed as endorsement by the Agency for Healthcare Research and Quality or the U.S. Department of Health and Human Services of a particular drug, device, test, treatment, or other clinical service.

Final Report

Purpose

This research project was funded to improve the quality of vaccination programs by improving the quality of physician adverse vaccine event detection and reporting to the national Vaccine Adverse Event Reporting System (VAERS), via the following aims:

Aim 1. Identify required data elements, and develop systems to monitor ambulatory care electronic medical records for adverse events following vaccine administration.

Aim 2. Prepare, and securely submit clinician approved, electronic reports to the national Vaccine Adverse Event Reporting System (VAERS).

Aim 3. Comprehensively evaluate ESP:VAERS performance in a randomized trial, and in comparison to existing VAERS and Vaccine Safety Datalink data.

Aim 4. Distribute documentation and application software developed and refined in Aims 1 and 2 that are portable to other ambulatory care settings and to other EMR systems.

Scope

Public and professional confidence in vaccination depends on reliable postmarketing surveillance systems to ensure that rare and unexpected adverse effects are rapidly identified. The goal of this project is to improve the quality of vaccination programs by improving the quality of physician adverse vaccine event detection and reporting to the national Vaccine Adverse Event Reporting System (VAERS). This project is serving as an extension of the Electronic Support for Public Health (ESP) project, an automated system using electronic health record (EHR) data to detect and securely report cases of certain diseases to a local public health authority. ESP provides a ready-made platform for automatically converting clinical, laboratory, prescription, and demographic data from almost any EHR system into database tables on a completely independent server, physically located and secured by the same logical and physical security as the EHR data itself. The ESP:VAERS project developed criteria and algorithms to identify important adverse events related to vaccinations in ambulatory care EHR data, and made attempts at formatting and securely sending electronic VAERS reports directly to the Centers for Disease Control and Prevention (CDC).

Patient data were available from Epic System's Certification Commission for Health Information Technology-certified EpicCare system at all ambulatory care encounters within Atrius Health, a large multispecialty group practice with over 35 facilities. Every patient receiving a vaccine was automatically identified, and for the next 30 days, their health care diagnostic codes, laboratory tests, and medication prescriptions are evaluated for values

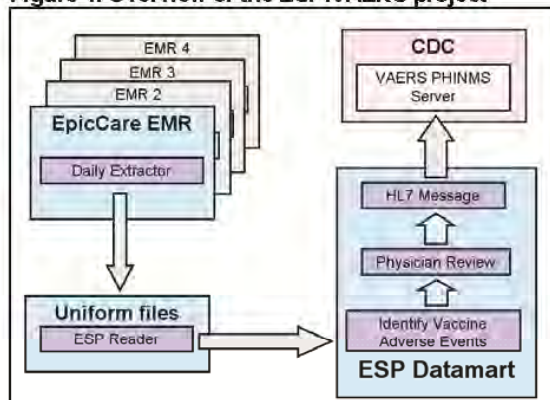
suggestive of an adverse vaccine event. When a possible adverse event was detected, it was recorded, and the appropriate clinician was to be notified electronically.

Clinicians in-basket messaging was designed to provide a preview a pre-populated report with information from the EHR about the patient, including vaccine type, lot number, and possible adverse effect, to inform their clinical judgment regarding whether they wish to send a report to VAERS. Clinicians would then have the option of adding free-text comments to pre-populated VAERS reports or to document their decision not to send a report. The CDC's Public Health Information Network Messaging System (PHIN-MS) software was installed within the facilities so that the approved reports could be securely transferred to VAERS as electronic messages in an interoperable health data exchange format using Health Level 7 (HL7).

Methods

The goal of Aim 1: *Identify required data elements, and develop systems to monitor ambulatory care electronic medical records for adverse events following vaccine administration*, and Aim 2: *Prepare, and securely submit clinician approved, electronic reports to the national Vaccine Adverse Event Reporting System (VAERS)*, was to construct the below flow of data in order to support the first two Aims:

Figure 1. Overview of the ESP:VAERS project



Existing and functioning ESP components are shown on the left, and Aims 1 and 2 on the right. ESP:VAERS flags every vaccinated patient, and prospectively accumulate that patient's diagnostic codes, laboratory tests, allergy lists, vital signs, and medication prescriptions. A main component of Aim 1 was to *Develop AE criteria to assess these parameters for new or abnormal values that might be suggestive of an adverse effect*. A reporting protocol & corresponding algorithms were developed to detect potential adverse event cases using diagnostic codes, and methods were tested to identify prescriptions or abnormal laboratory values that might be suggestive of an adverse effect. These algorithms were designed to seek both expected and unexpected adverse effects.

This reporting protocol was approved by both internal & external partners. We initially prepared a draft document describing the elements, algorithms, interval of interest after vaccination, and actions for broad classes of post-vaccination events, including those to be reported immediately without delay (such as acute anaphylactic reaction following vaccination), those never to be reported (such as routine check-ups following vaccination) and those to be reported at the discretion and with additional information from the attending physician through a feedback mechanism. The draft was then widely circulated as an initial / working draft for comment by relevant staff in the CDC and among our clinical colleagues at Atrius. In addition to review by the internal CDC Brighton Collaboration liaison, this protocol has also received review & comment via the CDC's Clinical Immunization Safety Assessment (CISA) Network.

The goal of Aim 2 was the *Development of HL7 messages code for ESP:VAERS to ensure secure transmission to CDC via PHIN-MS*. The HL7 specification describing the elements for an electronic message to be submitted to Constella, the consultants engaged by CDC for this project was implemented. Synthetic and real test data was been generated and transmitted between Harvard and Constella. However, real data transmissions of non-physician approved reports to the CDC was unable to commence, as by the end of this project, the CDC had yet to respond to multiple requests to partner for this activity.

The goal of Aim 3 was to *Comprehensively evaluate ESP:VAERS performance in a randomized trial, and in comparison to existing VAERS and Vaccine Safety Datalink data*.

We had initially planned to evaluate the system by comparing adverse event findings to those in the Vaccine Safety Datalink project—a collaborative effort between CDC's Immunization Safety Office and eight large managed care organizations. Through a randomized trial, we would also test the hypothesis that the combination of secure, computer-assisted, clinician-approved, adverse event detection, and automated electronic reporting will substantially increase the number, completeness, validity, and timeliness of physician-approved case reports to VAERS compared to the existing spontaneous reporting system; however, due to restructuring at CDC and consequent delays in terms of decision making, it became impossible to move forward with discussions regarding the evaluation of ESP:VAERS performance in a randomized trial, and compare ESP:VAERS performance to existing VAERS and Vaccine Safety Datalink data. Therefore, the components under this particular Aim were not achieved.

Aim 4 *Distribution of documentation and application software developed and refined in Aims 1 and 2 that are portable to other ambulatory care settings and to other EMR systems* has been successfully completed. Functioning source code is available to share under an approved open source license. ESP:VAERS source code is available as part of the ESP source code distribution. It is licensed under the LGPL, an open source license compatible with commercial use. We have added the ESP:VAERS code, HL7 and other specifications and documentation to the existing ESP web documentation and distribution resource center <http://esphealth.org>, specifically, the Subversion repository available at: <http://esphealth.org/trac/ESP/wiki/ESPVAERS>.

Results

Preliminary data were collected from June 2006 through October 2009 on 715,000 patients, and 1.4 million doses (of 45 different vaccines) were given to 376,452 individuals. Of these doses, 35,570 possible reactions (2.6 percent of vaccinations) were identified. This is an average of 890 possible events, an average of 1.3 events per clinician, per month. These data were presented at the 2009 AMIA conference.

In addition, ESP:VAERS investigators participated on a panel to explore the perspective of clinicians, electronic health record (EHR) vendors, the pharmaceutical industry, and the FDA towards systems that use proactive, automated adverse event reporting.

Adverse events from drugs and vaccines are common, but underreported. Although 25% of ambulatory patients experience an adverse drug event, less than 0.3% of all adverse drug events and 1-13% of serious events are reported to the Food and Drug Administration (FDA). Likewise, fewer than 1% of vaccine adverse events are reported. Low reporting rates preclude or slow the identification of “problem” drugs and vaccines that endanger public health. New surveillance methods for drug and vaccine adverse effects are needed. Barriers to reporting include a lack of clinician awareness, uncertainty about when and what to report, as well as the burdens of reporting: reporting is not part of clinicians’ usual workflow, takes time, and is duplicative. Proactive, spontaneous, automated adverse event reporting imbedded within EHRs and other information systems has the potential to speed the identification of problems with new drugs and more careful quantification of the risks of older drugs.

Unfortunately, there was never an opportunity to perform system performance assessments because the necessary CDC contacts were no longer available and the CDC consultants responsible for receiving data were no longer responsive to our multiple requests to proceed with testing and evaluation.

Inclusion of AHRQ Priority Populations

The focus of our project was the Atrius Health (formerly HealthOne) provider & patient community. This community serves several AHRQ inclusion populations, specifically low-income and minority populations in primarily urban settings.

Atrius currently employs approximately 700 physicians to serve 500,000 patients at more than 18 office sites spread throughout the greater Metropolitan Boston area. The majority of Atrius physicians are primary care internal medicine physicians or pediatricians but the network also includes physicians from every major specialty.

The entire adult and pediatric population served by Atrius was included in our adverse event surveillance system (ESP:VAERS). Atrius serves a full spectrum of patients that reflects the broad diversity of Eastern Massachusetts. A recent analysis suggests that the population served by Atrius is 56% female, 16.6% African American, 4% Hispanic. The prevalence of type 2 diabetes in the adult population is 5.7%. About a quarter of the Atrius population is under age 18.

List of Publications and Products

ESP:VAERS [source code available as part of the ESP source code distribution]. Licensed under the GNU Lesser General Public License (LGPL), an open source license compatible with commercial use. Freely available under an approved open source license at: <http://esphealth.org>.

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Klompas M, Lazarus R ESP:VAERS Presented at the American Medical Informatics Association Annual Symposium; 2009 November 17th.

Lazarus R, Klompas M, Kruskal B, Platt R Temporal patterns of fever following immunization in ambulatory care data identified by ESP:VAERS Presented at the American Medical Informatics Association Annual Symposium; 2009 November 14–18: San Francisco, CA.

Linder J, Klompas M, Cass B, et al. Spontaneous Electronic Adverse Event Reporting: Perspectives from Clinicians, EHR Vendors, Biopharma, and the FDA. Presented at the American Medical Informatics Association Annual Symposium; 2009 November 14–18: San Francisco, CA.

**EXHIBIT 22 TO KRAKOW AFFIRMATION -
HEALTH TOPIC: MEASLES, NYC DEPARTMENT OF HEALTH [169 - 173]**

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Measles - NYC Health

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Measles

Measles is a virus that causes fever and a rash. It is highly contagious and anyone who is not vaccinated against the virus can get it at any age.

Although measles is rare in the United States because of high vaccination rates, it is still common in other parts of the world. Measles is common in some countries in Europe, Asia, and Africa and is occasionally brought into the United States by unvaccinated travelers who return with measles infection.

Recent Outbreak in Brooklyn and Queens

As of April 8, 2019, there have been 285 confirmed cases of measles in Brooklyn and Queens since October. Most of these cases have involved members of the Orthodox Jewish community.

The initial child with measles was unvaccinated and acquired measles on a visit to Israel, where a large outbreak of the disease is occurring. Since then, there have been additional people from Brooklyn and Queens who were unvaccinated and acquired measles while in Israel. People who did not travel were also infected in Brooklyn or Rockland County.

Vaccination Requirement in Brooklyn

On April 9, the Health Commissioner ordered (PDF) every adult and child who lives, works or resides in the following ZIP codes and has not received the measles, mumps and rubella (MMR) vaccine to be vaccinated:

- 11205
- 11206
- 11211
- 11249

People who demonstrate they are immune from measles have a medical condition that prevents them from receiving the vaccine will not need to get vaccinated.

If the Health Department identifies a person with measles or an unvaccinated child exposed to measles in one of the above ZIP codes, that individual or their parent or guardian could be fined \$1,000.

You can get vaccinated at a nearby NYC Health + Hospitals facility, or at our immunization clinic in Fort Greene.

Measles Cases by Neighborhood, Age and Date

The following case counts are from September 1, 2018, to April 8, 2019.

Expand All

Collapse All

Cases by Neighborhood

Cases by Age

Cases by Date

How Measles Spreads

Measles is spread through the air when an infected person sneezes or coughs. A person will be contagious four days before the rash appears and for four days after the rash appears. They are no longer contagious on the fifth day after the rash started.

The virus remains active and contagious in the air and on surfaces for up to two hours.

Symptoms

Symptoms usually appear 10 to 12 days after exposure to the virus. In some cases, symptoms may start as early as seven days or as late as 21 days.

Early symptoms include:

- Fever
- Cough

- Runny nose
- Red, watery eyes

Three to five days after initial symptoms, a rash of red spots appears on the face that then spreads over the entire body.

Anyone can become infected with measles, but the virus is more severe in infants, pregnant women and people whose immune systems are weak. Complications of measles include:

- Diarrhea
- Ear infections
- Pneumonia (infection of the lungs)
- Encephalitis (swelling of the brain)
- Premature birth or low-birth-weight in pregnancy
- Death

Prevention

Vaccination is the best way to prevent measles. Anyone who has received two doses of a measles-containing vaccine is considered immune and highly unlikely to get measles.

MMR Vaccine

A child should get a measles vaccine on or after their first birthday. The vaccine is combined with mumps and rubella vaccines into one vaccine called MMR (measles, mumps and rubella). A second dose of MMR vaccine is recommended before children enter school at 4 to 6 years of age. Infants ages 6 to 11 months should also receive MMR vaccine before travelling internationally.

Providers serving the Orthodox communities in Borough Park and Crown Heights should administer an additional, early dose of MMR vaccine to all patients aged 6 to 11 months during the current outbreak. In Williamsburg (ZIP codes 11205, 11206, 11211 and 11249), this extra dose of MMR is required under the Public Health Emergency declaration. This dose would not count toward the routine, two-dose vaccine series.

Also, providers may give children younger than 4 the routine second dose of MMR, provided it has been at least 28 days since the child received a previous dose of MMR, varicella or live intranasal influenza vaccine.

Anyone born after January 1, 1957, who has not received two doses of a measles-containing vaccine, or who does not have a blood test proving that they are already immune to measles, should receive two doses of the MMR vaccine.

For information on where you or your child can get vaccinated, **call 311**.

Vaccination Requirements Citywide

- All children enrolled in pre-kindergarten, nursery school, daycare programs, and Head Start are required to receive one dose of the measles vaccine.
- Children enrolled in grades K through 12 and college students are required to have two doses of the MMR vaccine.
- Health care workers are required to receive two doses of a measles-containing vaccine, or have a blood test showing that they are immune.

Side Effects

Most people who receive the MMR vaccine do not have any side effects. Some people experience mild side effects, such as fever, mild rash or swelling. Severe problems are very rare.

Vaccine ingredients do not cause autism. More than 25 articles have been published since 1999 that have found no link between thimerosal-containing vaccines and autism spectrum disorder (ASD), as well as no link between the MMR vaccine and ASD in children.

Diagnosis and Treatment

There is no specific medicine to treat the measles virus. Most of the time, people with measles will get better on their own. For example, in some situations vitamin A may be recommended if a child is malnourished. Treatment may be given for the symptoms of the virus.

Additional Resources

- Frequently Asked Questions (PDF)
Other Languages: Español | عربي | 中文 | Français | Creole | Italiano | 한국어 | Русский | יידיש | বাংলা
- Measles Outbreaks in the United States

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More Information

- Vaccine-Preventable Childhood Diseases
- Immunization Clinics
- Pregnancy: Immunizations
- Vaccine Basics
- Vaccine Information Statements
- Measles Information for Providers

**EXHIBIT 23 TO KRAKOW AFFIRMATION -
REPORTED CASES AND DEATHS FROM VACCINE PREVENTABLE DISEASES,
UNITED STATES, CENTERS FOR DISEASE CONTROL, DATED MARCH 2018 [174 - 177]**

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Appendix E

Reported Cases and Deaths from Vaccine Preventable Diseases, United States

| Year | Diphtheria | | Tetanus | | Pertussis | | Polio (paralytic) | | Measles | | Mumps | | Rubella | | CRS |
|------|------------|--------|---------|--------|-----------|--------|-------------------|--------|---------|--------|---------|--------|---------|--------|-------|
| | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases |
| 1950 | 5,796 | 410 | 486 | 336 | 120,718 | 1,118 | 33,300† | 1,904 | 319,124 | 468 | NR | | NR | | NR |
| 1951 | 3,983 | 302 | 506 | 394 | 68,687 | 951 | 28,386† | 1,551 | 530,118 | 683 | NR | | NR | | NR |
| 1952 | 2,960 | 217 | 484 | 360 | 45,030 | 402 | 57,879† | 3,145 | 683,077 | 618 | NR | | NR | | NR |
| 1953 | 2,355 | 156 | 506 | 337 | 37,129 | 270 | 35,592† | 1,450 | 449,146 | 462 | NR | | NR | | NR |
| 1954 | 2,041 | 145 | 524 | 332 | 60,886 | 373 | 18,308 | 1,368 | 682,720 | 518 | NR | | NR | | NR |
| 1955 | 1,984 | 150 | 462 | 265 | 62,786 | 467 | 13,850 | 1043 | 555,156 | 345 | NR | | NR | | NR |
| 1956 | 1,568 | 103 | 468 | 246 | 31,732 | 266 | 7,911 | 566 | 611,936 | 530 | NR | | NR | | NR |
| 1957 | 1,211 | 81 | 447 | 279 | 28,295 | 183 | 2,499 | 221 | 486,799 | 389 | NR | | NR | | NR |
| 1958 | 918 | 74 | 445 | 303 | 32,148 | 177 | 3,697 | 255 | 763,094 | 552 | NR | | NR | | NR |
| 1959 | 934 | 72 | 445 | 283 | 40,005 | 269 | 6,289 | 454 | 406,162 | 385 | NR | | NR | | NR |
| 1960 | 918 | 69 | 368 | 231 | 14,809 | 118 | 2,525 | 230 | 441,703 | 380 | NR | 42 | NR | 12 | NR |
| 1960 | 617 | 68 | 379 | 242 | 11,468 | 76 | 988 | 90 | 423,919 | 434 | NR | 53 | NR | 14 | NR |
| 1962 | 444 | 41 | 322 | 215 | 17,749 | 83 | 762 | 60 | 481,530 | 408 | NR | 43 | NR | 8 | NR |
| 1963 | 314 | 45 | 325 | 210 | 17,135 | 115 | 396 | 41 | 385,156 | 364 | NR | 48 | NR | 16 | NR |
| 1964 | 293 | 42 | 289 | 179 | 13,005 | 93 | 106 | 17 | 458,083 | 421 | NR | 50 | NR | 53 | NR |
| 1965 | 164 | 18 | 300 | 181 | 6,799 | 55 | 61 | 16 | 261,904 | 276 | NR | 31 | NR | 16 | NR |
| 1966 | 209 | 20 | 235 | 158 | 7,717 | 49 | 106 | 9 | 204,136 | 261 | NR | 43 | 46,975 | 12 | NR |
| 1967 | 219 | 32 | 263 | 144 | 9,718 | 37 | 40 | 16 | 62,705 | 81 | NR | 37 | 46,888 | 16 | NR |
| 1968 | 260 | 30 | 178 | 66 | 4,810 | 36 | 53 | 24 | 22,231 | 24 | 152,209 | 25 | 49,371 | 24 | NR |
| 1969 | 241 | 25 | 192 | 89 | 3,285 | 13 | 18 | 13 | 25,826 | 41 | 90,918 | 22 | 57,686 | 29 | 62 |
| 1970 | 435 | 30 | 148 | 79 | 4,249 | 12 | 31 | 7 | 47,351 | 89 | 104,953 | 16 | 56,552 | 31 | 67 |
| 1971 | 215 | 13 | 116 | 64 | 3036 | 18 | 17 | 18 | 75,290 | 90 | 124,939 | 22 | 45,086 | 20 | 44 |
| 1972 | 152 | 10 | 129 | 58 | 3,287 | 6 | 29 | 2 | 32,275 | 24 | 74,215 | 16 | 25,507 | 14 | 32 |
| 1973 | 228 | 10 | 101 | 40 | 1,759 | 5 | 7 | 10 | 26,690 | 23 | 69,612 | 12 | 27,804 | 16 | 30 |
| 1974 | 272 | 5 | 101 | 44 | 2,402 | 14 | 7 | 3 | 22,094 | 20 | 59,128 | 6 | 11,917 | 15 | 22 |
| 1975 | 307 | 5 | 102 | 45 | 1,738 | 8 | 13 | 9 | 24,374 | 20 | 59,647 | 8 | 16,652 | 21 | 32 |
| 1976 | 128 | 7 | 75 | 32 | 1,010 | 7 | 10 | 16 | 41,126 | 12 | 38,492 | 8 | 12,491 | 12 | 22 |
| 1977 | 84 | 5 | 87 | 24 | 2,177 | 10 | 19 | 16 | 57,345 | 15 | 21,436 | 5 | 20,395 | 17 | 29 |
| 1978 | 76 | 4 | 86 | 32 | 2,063 | 6 | 8 | 13 | 26,871 | 11 | 16,817 | 3 | 18,269 | 10 | 30 |
| 1979 | 59 | 1 | 81 | 30 | 1,623 | 6 | 22 | 1 | 13,597 | 6 | 14,255 | 2 | 11,795 | 1 | 57 |
| 1980 | 3 | 1 | 95 | 28 | 1,730 | 11 | 9 | 2 | 13,506 | 11 | 8,576 | 2 | 3,904 | 1 | 14 |
| 1981 | 5 | 0 | 72 | 31 | 1,248 | 6 | 10 | 0 | 3,124 | 2 | 4,941 | 1 | 2,077 | 5 | 10 |
| 1982 | 2 | 1 | 88 | 22 | 1,895 | 4 | 12 | 0 | 1,714 | 2 | 5,270 | 2 | 2,325 | 4 | 13 |
| 1983 | 5 | 0 | 91 | 22 | 2,463 | 5 | 13 | 0 | 1,497 | 4 | 3,355 | 2 | 970 | 3 | 7 |
| 1984 | 1 | 0 | 74 | 20 | 2,276 | 7 | 9 | 0 | 2,587 | 1 | 3,021 | 1 | 752 | 1 | 2 |
| 1985 | 3 | 0 | 83 | 23 | 3,589 | 4 | 8 | 0 | 2,822 | 4 | 2,982 | 0 | 630 | 1 | 2 |
| 1986 | 0 | 0 | 64 | 22 | 4,195 | 6 | 10 | 0 | 6,282 | 2 | 7,790 | 0 | 55 | 1 | 13 |
| 1987 | 3 | 1 | 48 | 16 | 2,823 | 1 | 9 | 0 | 3,655 | 2 | 12,848 | 2 | 306 | 0 | 3 |

†Total reported cases (i.e., including non-paralytic)

Appendix E

| Year | Diphtheria | | Tetanus | | Pertussis | | Polio (paralytic) | | Measles | | Mumps | | Rubella | | CRS |
|------|------------|--------|---------|--------|-----------|--------|-------------------|--------|---------|--------|-------|--------|---------|--------|-------|
| | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases |
| 1988 | 2 | 0 | 53 | 17 | 3,450 | 4 | 9 | 0 | 3,396 | 3 | 4,866 | 2 | 225 | 1 | 2 |
| 1989 | 3 | 0 | 53 | 9 | 4,157 | 12 | 11 | 0 | 18,193 | 32 | 5,712 | 3 | 396 | 4 | 2 |
| 1990 | 4 | 1 | 64 | 11 | 4,570 | 12 | 6 | 0 | 27,786 | 64 | 5,292 | 1 | 1,125 | 8 | 32 |
| 1991 | 5 | 0 | 57 | 11 | 2,719 | 0 | 10 | 1 | 9,643 | 27 | 4,264 | 1 | 1,401 | 1 | 34 |
| 1992 | 4 | 1 | 45 | 9 | 4,083 | 5 | 6 | 0 | 2,237 | 4 | 2,572 | 0 | 160 | 1 | 11 |
| 1993 | 0 | 0 | 48 | 11 | 6,586 | 1 | 4 | 0 | 312 | 0 | 1,692 | 0 | 192 | 0 | 4 |
| 1994 | 2 | 0 | 51 | 9 | 4,617 | 8 | 8 | 0 | 963 | 0 | 1,537 | 0 | 227 | 0 | 7 |
| 1995 | 0 | 1 | 41 | 5 | 5,137 | 6 | 7 | 1 | 309 | 2 | 906 | 0 | 128 | 1 | 3 |
| 1996 | 2 | 0 | 36 | 1 | 7,796 | 4 | 7 | 0 | 508 | 1 | 751 | 1 | 238 | 0 | 2 |
| 1997 | 4 | 0 | 50 | 4 | 6,564 | 6 | 6 | 0 | 138 | 2 | 683 | 0 | 181 | 0 | 9 |
| 1998 | 1 | 1 | 34 | 7 | 6,279 | 5 | 3 | 0 | 100 | 0 | 666 | 1 | 364 | 0 | 9 |
| 1999 | 1 | 1 | 40 | 7 | 7,288 | 7 | 2 | 0 | 100 | 2 | 387 | 1 | 267 | 0 | 6 |
| 2000 | 1 | 0 | 35 | 5 | 7,867 | 12 | 0 | 0 | 86 | 1 | 338 | 2 | 176 | 0 | 8 |
| 2001 | 2 | 0 | 37 | 5 | 7,580 | 17 | 0 | 0 | 116 | 1 | 266 | 0 | 23 | 2 | 3 |
| 2002 | 1 | 0 | 25 | 5 | 9,771 | 18 | 0 | 0 | 44 | 0 | 270 | 1 | 18 | 0 | 1 |
| 2003 | 1 | 1 | 20 | 4 | 11,647 | 11 | 0 | 0 | 56 | 1 | 231 | 0 | 7 | 0 | 4 |
| 2004 | 0 | 0 | 34 | 4 | 25,827 | 16 | 0 | 0 | 37 | 0 | 258 | 0 | 10 | 1 | 0 |
| 2005 | 0 | 0 | 27 | 1 | 25,616 | 31 | 1§ | 0 | 66 | NA | 314 | 0 | 11 | 0 | 1 |
| 2006 | 0 | 0 | 41 | 4 | 15,632 | 9 | 0 | 0 | 55 | 0 | 6,584 | 1 | 11 | 0 | 1 |
| 2007 | 0 | 0 | 28 | 5 | 10,454 | 9 | 0 | 0 | 43 | 0 | 800 | 0 | 11 | 1 | 0 |
| 2008 | 0 | 0 | 19 | 3 | 13,278 | 6 | 0 | 0 | 140 | 0 | 454 | 2 | 16 | 0 | 0 |
| 2009 | 0 | 0 | 18 | 6 | 16,858 | 1 | 1§ | 0 | 71 | 2 | 1991 | 2 | 3 | 2 | 2 |
| 2010 | 0 | 0 | 26 | 3 | 27,550 | 5 | 0 | 0 | 63 | 2 | 2,612 | 1 | 5 | 2 | 0 |
| 2011 | 0 | 0 | 36 | 6 | 18,719 | 1 | 0 | 0 | 220 | 0 | 404 | 0 | 4 | 1 | 0 |
| 2012 | 1 | 0 | 37 | 4 | 48,277 | 4 | 0 | 0 | 55 | 2 | 229 | 0 | 9 | 0 | 3 |
| 2013 | 0 | 0 | 26 | 3 | 28,639 | 2 | 1§ | 0 | 187 | 0 | 584 | 1 | 9 | 0 | 1 |
| 2014 | 1 | 0 | 25 | 1 | 32,971 | 7 | 0 | 0 | 667 | 0 | 1,223 | 0 | 6 | 0 | 1 |
| 2015 | 0 | NA | 29 | NA | 20,762 | NA | 0 | NA | 188 | NA | 1,329 | NA | 5 | NA | 1 |
| 2016 | 0 | NA | 34 | NA | 17,972 | NA | 0 | NA | 85 | NA | 6,369 | NA | 1 | NA | 2 |

§ Vaccine-associated/derived paralytic polio.

Appendix E

| Year | Hepatitis A | | Hepatitis B | | Haemophilus | | Varicella | |
|------|-------------|--------|-------------|--------|-------------|--------|-----------|--------|
| | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths |
| 1966 | 32,859 | NA | 1,497 | NA | NR | NR | NR | NA |
| 1967 | 38,909 | NA | 2,458 | NA | NR | NR | NR | NA |
| 1968 | 45,893 | NA | 4,829 | NA | NR | NR | NR | NA |
| 1969 | 48,416 | NA | 5,909 | NA | NR | NR | NR | NA |
| 1970 | 56,797 | NA | 8,310 | NA | NR | NR | NR | NA |
| 1971 | 59,606 | NA | 9,556 | NA | NR | NR | NR | NA |
| 1972 | 54,074 | NA | 9,402 | NA | NR | NR | 164,114 | 122 |
| 1973 | 50,749 | NA | 8,451 | NA | NR | NR | 182,927 | 138 |
| 1974 | 40,358 | NA | 10,631 | NA | NR | NR | 141,495 | 106 |
| 1975 | 35,855 | NA | 13,121 | NA | NR | NR | 154,248 | 83 |
| 1976 | 33,288 | NA | 14,973 | NA | NR | NR | 183,990 | 106 |
| 1977 | 31,153 | NA | 16,831 | NA | NR | NR | 188,396 | 89 |
| 1978 | 29,500 | NA | 15,016 | NA | NR | NR | 154,089 | 91 |
| 1979 | 30,407 | 129 | 15,452 | 260 | NR | NR | 199,081 | 103 |
| 1980 | 29,087 | 112 | 19,015 | 294 | NR | NR | 190,894 | 78 |
| 1981 | 25,802 | 93 | 21,152 | 394 | NR | NR | 200,766 | 84 |
| 1982 | 23,403 | 83 | 22,177 | 375 | NR | NR | 167,423 | 61 |
| 1983 | 21,532 | 82 | 24,318 | 438 | NR | NR | 177,462 | 57 |
| 1984 | 22,040 | 77 | 26,115 | 465 | NR | NR | 221,983 | 53 |
| 1985 | 23,210 | 80 | 26,611 | 490 | NR | NR | 178,162 | 68 |
| 1986 | 23,430 | 65 | 26,107 | 557 | NR | NR | 183,243 | 47 |
| 1987 | 25,280 | 77 | 25,916 | 595 | NR | NR | 213,196 | 89 |
| 1988 | 28,507 | 70 | 23,177 | 621 | NR | NR | 192,857 | 83 |
| 1989 | 35,821 | 88 | 23,419 | 711 | NR | NR | 185,441 | 89 |
| 1990 | 31,441 | 76 | 21,102 | 816 | NR | NR | 173,099 | 120 |
| 1991 | 24,378 | 71 | 18,003 | 912 | 2,764 | 17 | 147,076 | 81 |
| 1992 | 23,112 | 82 | 16,126 | 903 | 1,412 | 16 | 158,364 | 100 |
| 1993 | 24,238 | 95 | 13,361 | 1041 | 1,419 | 7 | 134,722 | 100 |
| 1994 | 26,796 | 97 | 12,517 | 1120 | 1,174 | 5 | 151,219 | 124 |
| 1995 | 31,582 | 142 | 10,805 | 1027 | 1,180 | 12 | 120,624 | 115 |
| 1996 | 31,032 | 121 | 10,637 | 1082 | 1,170 | 7 | 83,511 | 81 |
| 1997 | 30,021 | 127 | 10,416 | 1,030 | 1,162 | 7 | 98,727 | 99 |
| 1998 | 23,229 | 114 | 10,258 | 1,052 | 1,194 | 11 | 82,455 | 81 |
| 1999 | 17,047 | 134 | 7,694 | 832 | 1,309 | 6 | 46,016 | 48 |
| 2000 | 13,397 | 106 | 8,036 | 886 | 1,398 | 6 | 27,382 | 44 |
| 2001 | 10,609 | 83 | 7,843 | 769 | 1,597 | 11 | 22,536 | 26 |
| 2002 | 8,795 | 76 | 7,996 | 762 | 1,743 | 7 | 22,841 | 32 |
| 2003 | 7,653 | 54 | 7,526 | 685 | 2,013 | 5 | 20,948 | 16 |
| 2004 | 5,970 | 58 | 6,741 | 643 | 2,085 | 11 | 26,659 | 19 |

Appendix E

| Year | Hepatitis A | | Hepatitis B | | Haemophilus | | Varicella | | Meningococcal ACWY* | | Meningococcal B* | |
|------|-------------|--------|-------------|--------|-------------|--------|-----------|--------|---------------------|--------|------------------|--------|
| | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths | Cases | Deaths |
| 2005 | 4,488 | 43 | 5,119 | 642 | 2,304 | 4 | 32,242 | 13 | 297 | NA | 156 | NA |
| 2006 | 3,579 | 34 | 4,713 | 700 | 2,436 | 4 | 48,445 | 18 | 318 | NA | 193 | NA |
| 2007 | 2,979 | 34 | 4,519 | 719 | 2,541 | 10 | 40,146 | 6 | 325 | NA | 167 | NA |
| 2008 | 2,585 | 37 | 4,033 | 671 | 2,886 | 3 | 30,386 | 18 | 330 | NA | 188 | NA |
| 2009 | 1,987 | 26 | 3,405 | 597 | 3,022 | 7 | 20,480 | 22 | 301 | NA | 174 | NA |
| 2010 | 1,670 | 29 | 3,374 | 588 | 3,151 | 4 | 15,427 | 15 | 280 | NA | 135 | NA |
| 2011 | 1,398 | 25 | 2,903 | 614 | 3,539 | NA | 14,513 | 14 | 257 | NA | 159 | NA |
| 2012 | 1,562 | 23 | 2,895 | 581 | 3,418 | NA | 13,447 | 16 | 161 | NA | 110 | NA |
| 2013 | 1,781 | 24 | 3,050 | 573 | 3,792 | NA | 11,359 | 8 | 142 | NA | 99 | NA |
| 2014 | 1,239 | 26 | 2,791 | 535 | 3,541 | NA | 10,172 | 4 | 123 | NA | 89 | NA |
| 2015 | 1,390 | NA | 3,370 | NA | 4,138 | NA | 9,789 | NA | 120 | NA | 111 | NA |
| 2016 | 2,007 | NA | 3,218 | NA | 4,895 | NA | 8,953 | NA | 126 | NA | 86 | NA |

*Meningococcal cases were not separated by serogroup prior to 2005.

Notes

NA - Not Available

NR - Not nationally reportable

CRS: Congenital Rubella Syndrome

Prior to 1966, hepatitis A and B were not separated from other types of hepatitis. Prior to 1978, deaths from hepatitis A and B were not separated from deaths from other types of hepatitis.

Haemophilus (Hi) reporting includes all serotypes and all ages. In 2016, 159 cases of invasive Hi type b disease were reported among children younger than 5 years of age.

Varicella was removed from the nationally notifiable disease list in 1991. In 2015, varicella cases were reported from 47 states, the District of Columbia, New York City, Guam, Puerto Rico, the Northern Mariana Islands and the U.S. Virgin Islands.

Sources:

Final totals for nationally reportable infectious diseases are reported in *Morbidity and Mortality Weekly Report (MMWR)*. Tables are published for the previous year in August or September of the following year. Final totals for 2016 were published by the National Notifiable Diseases Surveillance System (NNDSS), accessible through *MMWR* 2017;66(38). CDC also publishes a more comprehensive surveillance document, the annual *Summary of Notifiable Diseases*. The most current annual summary was published on August 11, 2017 for calendar year 2015. This document and annual summaries for previous years are available on the MMWR website at <http://www.cdc.gov/mmwr/>.

**COMBINED MEMORANDUM OF LAW, BY PETITIONERS, IN SUPPORT OF ARTICLE 78,
DECLARATORY RELIEF AND ISSUANCE OF A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION, DATED APRIL 15, 2019 [178 - 203]**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 26

RECEIVED NYSCEF: 04/15/2019

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,

Index No. _____

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

-----X

**COMBINED MEMORANDUM OF LAW IN SUPPORT OF
ARTICLE 78, DECLARATORY RELIEF AND ISSUANCE OF A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Petitioners respectfully submit this combined Memorandum of Law in support of their Article 78 requesting the Court to vacate the emergency Orders promulgated by respondents as arbitrary, capricious, illegal and unconstitutional. Petitioners submit this Memorandum of Law in support of their Order to Show Cause for a Temporary Restraining Order and for a Preliminary Injunction.

INTRODUCTION

On April 9, 2019, the above-captioned respondents issued several Orders that imposed onerous and highly unusual mandates on all persons who reside or work within certain zip codes in the Williamsburg section of Brooklyn.

The emergency Orders command that all persons over six months of age who work, reside or attend school in specified zip codes “*shall be vaccinated against measles*” if they are not vaccinated and not immune to the measles. The emergency Orders deem any unvaccinated person a “nuisance,” as defined in New York City Administrative Code §17-142. The emergency Orders are annexed to the Krakow Affirmation as Exhibit 1.

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 3.¹ For reasons specified below, the terms of these emergency Orders exceed the authority of the respondents because, among other reasons, the grounds upon which these Orders are predicated are insufficient to justify the drastic and extraordinary emergency measures contained in the Orders and because respondents failed to employ the least restrictive measures to end the measles outbreak.

¹ 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.

The emergency Orders, Exhibit 1, 2 and 3, are 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 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.

Rather than using available legal mechanisms such as isolation and 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.

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 have obtained in full compliance with Public Health Law §2164(9).

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. 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 UNESCO Declaration on Human Rights and Bioethics, governing biomedical treatment. See Exhibit 5, para 6, annexed to the Krakow Affirmation.

Under the 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.

Plaintiffs therefore respectfully seek temporary and permanent injunctive relief to merely maintain the *status quo*, to avoid deprivation of constitutional rights and to prevent irreparable physical, economic, and social harms to parents and their children.

ARGUMENT

A preliminary injunction is appropriate where petitioners show “a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor.” *Gerald Modell Inc. v. Morgenthau*, 196 Misc. 2d 354, 359 (Sup. Ct. N.Y. County 2003); *see also* CPLR §§ 6301, 7805. Plaintiffs amply satisfy those factors here. Based on the evidence that they have produced in their expert affidavits, Exhibits 6, 8, 9, 10, 11 and 12 that respondents have failed to consider many public health considerations that strongly argue against the extreme action taken in their Orders.

I. THERE EXISTS NO IMMINENT PUBLIC HEALTH THREAT – PETITIONERS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS

Petitioners have demonstrated that they should prevail on the merits as set out in detail in their Verified Petition and the Affirmation of Robert J. Krakow, which are incorporated in this Memorandum as if fully set forth herein.

Petitioners seek a temporary restraining order, preliminary injunction, and a declaratory judgment vacating the Orders as beyond the powers of the Commissioner or *ultra vires* because the emergency Orders have an insufficient factual predicate. There is insufficient evidence of a measles epidemic or dangerous outbreak to justify the respondents’ extraordinary measures.

including forced vaccination. The Orders are, therefore, arbitrary, capricious, contrary to law and in violation of petitioners' rights under the United States Constitution and New York State law.

In directing that petitioners must take the MMR vaccine or be subject to severe penalties, criminal and civil, including imprisonment, respondents have relied on authority that is silent on the extraordinary directives in the emergency Orders.

The respondents have predicated their authority to declare a public health emergency and issue the emergency Orders on Section 3.01 of the New York City Health Code. Section 3.01(d) provides, as follows:

§3.01 General powers of the Department.

- (a) Where urgent public health action is necessary to protect the public health against an imminent or existing threat, the Commissioner may declare a public health emergency. Upon the declaration of such an emergency, and during the continuance of such emergency, the Commissioner may establish procedures to be followed, issue necessary orders and take such actions as may be necessary for the health or the safety of the City and its residents. Such procedures, orders or actions may include, but are not limited to, exercising the Board's authority to suspend, alter or modify any provision of this Code pursuant to subdivision b of section 558 of the New York City Charter, or exercising any other power of the Board of Health to prevent, mitigate, control or abate an emergency, provided that any such exercise of authority or power shall be effective only until the next meeting of the Board, which meeting shall be held within five business days of the Commissioner's declaration if a quorum of the Board can be convened within such time period. If a quorum of the Board cannot be so convened, then said meeting shall be held as soon as reasonably practicable. At its next meeting, the Board may continue or rescind the Commissioner's suspension, alteration, modification of Health Code provisions or exercise of power. An order issued pursuant to this subdivision shall be effective from the time and in the manner prescribed in the order and shall be published as soon as practicable in a newspaper of general circulation in the city and transmitted to the radio and television media for publication and broadcast. In the alternative, in circumstances where the order is directed at a finite number of known persons, the Commissioner may transmit the order to such persons in a manner the Commissioner deems practicable under the circumstances, including but not limited to mail, electronic mail, facsimile, closed electronic network, in person, or by telephone. Copies of orders

issued pursuant to this subdivision shall be immediately circulated to and filed with the Board, and the Department shall maintain records attesting to the manner and timing of their publication or transmittal.

The issue, then, is whether “urgent public health action is necessary to protect the public health against an imminent or existing threat.”

A. Issuing Emergency Orders with Incorrect Zip Codes Itself Shows Lack of Emergency

The respondents’ recklessness in issuing orders with incorrect zip codes affecting tens of thousands of people and then failing even to inform the public or explain the errors reeks of carelessness that betrays the emptiness of respondent’s claim of a public health emergency. A *Newsweek* article that describes the exceedingly confusing zip code discrepancies in the respondents’ three Orders is annexed to the Krakow Affirmation as Exhibit 5.²

The first published Order further mandated “that the parent or guardian of any child older than six months of age who lives, works or resides within the 11205, 11206, 11221 and/or 11237 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this order being signed by me *shall* cause such child to be vaccinated against measles unless such parent or guardian can demonstrate that the child has immunity to the disease or document that he or she should be medically exempt from this requirement.” Exhibit 1, Order.

When initially issued, the first emergency Order specified in its first paragraph that “there is an active outbreak of measles among people” who reside in zip codes 11205, 11206, 11221, and 11249. Zip code 11221 is not located in Williamsburg, but rather is part of Bushwick. The

² The *Newsweek* article that describes with references to Tweets from New York residents is titled, “NYC Officials Listed Wrong Zip Code For Measles Vaccination Order Then Changed It Without Telling Anyone,” *Newsweek*, 4/10/19 at 9:45 AM, URL: <https://www.newsweek.com/nyc-measles-vaccine-vaccination-irder-zip-1391831> (Accessed 4/13/19, 1:29 AM).

first Order directed that every person who “lives works or resides” in zip codes 11205, 11206, 11221 and 11249 must be vaccinated with the MMR within 48 hours of the Order’s signing unless the person can “demonstrate immunity to the disease” or “document to the satisfaction of the Department” that he or she should be “medically exempt.” The first Order also directed parents of children in zip codes 11205, 11206, 11221 and 11249 to have their children vaccinated with the MMR vaccine. The first Order issued on April 9, 2019 is annexed to the Krakow Affirmation as Exhibit 1.

Without explanation from respondents, sometime after the first Order was issued on April 9, 2019, respondents issued a second emergency Order. The second Order is annexed as Exhibit 2. The second Order specifies zip codes 11205, 11206, 11211, and 11249. This Order includes zip codes 11211 and 11249, in the “whereas” clauses of the emergency Order, which the first Order did not include. This second Order omits zip code 11221, which was included in the first Order. This second Order, however, names a non-Williamsburg zip code, 11237, which is located in Bushwick, in the crucial “It is Further Ordered” paragraph on page 2, which directs that people “shall” be vaccinated. This second Order is annexed to the Krakow Affirmation as Exhibit 2. Finally, a third emergency Order was issued that removed both zip codes 11211 and 11237 and included zip codes 11211 and 11249. The respondents thereby inconsistently specified the zip codes to which their emergency mandate applies. The respondents have failed to clarify the glaring inconsistencies among their three Orders. These glaring inconsistencies have caused confusion, anxiety and fear among residents of at least two zip codes who cannot determine whether an Order applies to them and if they face “civil and/or criminal fines, forfeitures and penalties, including imprisonment” for non-compliance. Exhibits 1, 2 and 3.

Thus, respondents have not taken the required care or exercised the most minimal due diligence to get the zip codes right in these unusual emergency Orders. It should be expected that the Health Department would exercise appropriate care in issuing these extraordinary emergency public health directives, rare in New York City's history, commanding New Yorkers to be vaccinated under penalty of imprisonment. To compound respondents' malfeasance in executing their duty to protect public health, the respondents, having initially failed to identify the correct zip codes, issued second and third emergency Orders, without telling New York City residents about their mistakes and the changes in the zip codes specified in the Orders. Whether due to typographical, geographical, or other ineptness, the zip code errors affect the lives of all New Yorkers. Such malfeasance by respondents, especially coupled with the lack of planning for enforcement of the Orders, reveals that the emergency Orders are arbitrary, capricious and contrary to law *ab initio*.³

The respondents' conduct in issuing orders that incorrectly affect tens of thousands of people belies the credibility of their claim that there is an imminent threat to public health.

B. The Respondents' Admitted Lack of Planning Shows There is No Public Health Emergency

The respondents' actions 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

³ The New York Civil Liberties Union has been reported to have "blasted" the Health Department Orders as "illegal" because, "[m]easures such as quarantine or penalties for non-vaccination may be permissible, but forced vaccination is not." See Exhibit 18, annexed to the Krakow Affirmation. The NYCLU is published by the *Daily Beast* on April 9, 2019, at 5:15 p.m. The *Daily Beast* article is published at URL: <https://www.thedailybeast.com/measles-crisis-new-york-civil-liberties-union-blasts-forced-vaccination-in-nyc> (last accessed 4/13/19, 2:43 PM).

health emergency does not exist. The respondents have admitted that they have no “blueprint” and no plan for enforcement of the emergency Orders.

Amazingly, *after* issuing the emergency Orders the respondents said that would require legal counsel to construct a plan of enforcement. See Exhibit 3 to Krakow Affirmation.⁴

The respondents’ lack of planning and lack of a plan reveals that there exists no emergency requiring the extraordinary measures in the emergency Orders. To force vaccination on human beings in such circumstances is unnecessary and cruel. To threaten criminal sanctions against people whose only criminal conduct would be to object on religious grounds to having vaccines injected betrays the most fundamental principles of American Democracy. To do all this without a plan is thoughtless, reckless, arbitrary and capricious.

For these reasons alone the Court should grant a temporary restraining order enjoining respondents from further reckless conduct.

C. Failure to Use the Least Restrictive Legally Available Means Shows Lack of Emergency

The respondents’ actions that are disproportionate to the provable factual circumstances and that 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.

⁴ 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)

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.

1. 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.

Public Health Law 2100 allows respondent's Commissioner of Health to isolate persons who have a communicable disease like measles. She has not used that authority. 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.

The respondents' failure to use legal available least restrictive means to control a public health concern and, instead, use virtually unprecedented and unnecessary threats of criminal prosecution and forced vaccination shows that there is no imminent threat to public health and safety.

For these reasons, the emergency Orders are arbitrary, capricious, contrary to law and exceed the authority vested in respondents.

II. THE RISK OF IRREPARABLE HARM FROM THE MMR VACCINATION IS SUFFICIENT TO ISSUE IMMEDIATE INJUNCTIVE RELIEF AND VACATE THE EMERGENCY ORDERS

A. The Petitioners Face Imminent Harm Due to the Severe Penalties Imposed by the Emergency Orders

By their very terms, threatening imprisonment and fines for noncompliance, the emergency Orders pose an immediate threat of irreparable harm to petitioners. By doing nothing – simply by continuing to parent the way they have for years, with approval from the State under Public Health Law §2164(9) that recognizes their religious exemptions, petitioners will be harmed. Petitioners will be punished for their status as persons who choose not to vaccinate.

In addition, the utter disrespect for petitioners’ religious beliefs will irreparably damage petitioners.

The petitioners are irreparably harmed by the stigma that has attached to petitioners by the emergency Order’s labeling them a legal “nuisance” and rendering petitioners prone to scorn from their neighbors and other members of the community. As set forth below, the reports of the petitioners’ experts show that petitioners are not a threat to anyone. They have not contracted measles, nor can they transmit measles. The respondents’ failure to quarantine those who do have measles has needlessly permitted the panic among public health officials, which has transmitted panic to the public.

Petitioners will thus be harmed in their standing in the community, in their legal standing as law-abiding citizens who have been criminalized for their status, and in the damage and persecution heaped upon them, all unnecessarily, by the emergency Orders.

B. There Is A Risk of Harm To the Petitioners

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 vaccinated “shed” the virus, which can infect other people, they are likely a greater threat to public health than people who are unvaccinated.

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, and including the right to practice their religion, which are enshrined in the public laws of New York, the Nuremberg Code of Human rights, the Helsinki Code.

Dr. Tina Kimmel, a former long-time and experienced 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 who 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_i_i_pi.pdf.

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

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, which do not abridge the civil rights of families who had had no exposure to the virus.

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."

Dr. Orient and Dr. Fitzpatrick explain that vaccines themselves cause injuries, as recognized by the Supreme Court of the United States in enacting 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).

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:

it 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 s a method for managing measles outbreaks.

It is the law and policy of the United States that vaccines carry known risks of harm.

The legislative history of the National Childhood Vaccine Injury Act shows that as of 1983 it "was known that about one half of one percent of apparently normal infants experience a serious adverse reaction to vaccine. *See* S. Hrg. 98-1060, at 21 (1984)." *Oliver v. Sec'y of Health & Human Servs.*, 900 F.3d 1357, 1364 (Fed. Cir. 2018). In 1983, one half of one percent of children translated to approximately 20,000 children whom Congress acknowledged would be seriously harmed by routine vaccination.

The fact that the MMR can cause injury to children and adults is well-recognized. In the Vaccine Injury Compensation Program formed under the 1986 National Childhood Vaccine

Injury Act (NCVIA or the “Vaccine Act”), there is a Table promulgated by rule by the Secretary of Health and Human Services. 42 U.S.C.A. § 300aa-14; 42 C.F.R. § 100.3.

The Vaccine Injury Table includes the following serious adverse outcomes or injuries resulting from the MMR vaccine, causation for which is presumed under the Vaccine Act: anaphylaxis, encephalopathy, encephalitis, shoulder injury related to vaccine administration, vasovagal syncope, chronic arthritis, thrombocytopenic purpura, and vaccine-strain measles viral disease in an immunodeficient recipient. 42 C.F.R. § 100.3(a) III and IV.

According to statistics of the Federal Health Resources & Services Administration (“HRSA”), the sub-agency within the Department of Health and Human Services that administers the Vaccine Injury Compensation Program (“VICP”), more than \$4.1 Billion dollars have been paid to 6,465 vaccine-injured persons since 1988. Source HRSA, URL: <https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/data/monthly-stats-april-2019.pdf>.

This significant number of compensated vaccine injury cases exists even though the Department of Health and Human Services has failed to comply with its statutory mandate to publicize the VICP. The Vaccine Act directs: “The Secretary shall undertake reasonable efforts to inform the public of the availability of the Program.” 42 U.S.C.A. § 300aa-10. Furthermore, a 2014 Government Accountability Office (“GAO”) report to Congress found the following:

In its 2006 VICP strategic plan, HRSA noted that one of the critical issues facing the program from 2005 to 2010 was that many parents, the general public, attorneys, and health care professionals were not aware VICP existed.

GAO Report on VICP: <https://www.gao.gov/assets/670/667136.pdf> at 31.

The GAO report found, “Without awareness of the program, individuals who might otherwise receive compensation for a vaccine-related injury or death could be denied compensation because of a failure to file their claim within the statutory deadlines.” *Id.* The GAO report also found that because HRSA’s mission of promoting vaccines conflicts with its statutory mission to promote the VICP, efforts at promotion have been limited. *Id.* As a result, there are likely far fewer vaccine injury claims submitted to the VICP than otherwise would be the case because the public is unaware of it.

In addition, a study of the Vaccine Adverse Event Reporting System (“VAERS”), the voluntary vaccine injury reporting system established under the Vaccine Act, reported to HHS that “ fewer than 1% of vaccine adverse events are reported.” See Exhibit 21 annexed to Krakow Affirmation at 6.

Thus, the true incidence of vaccine injuries in the United States is unknown. It is well-documented, however, that vaccine injuries are grossly underreported. The fact that vaccine injuries occur, including MMR vaccine-caused injuries, is undisputed and uncontroversial.

The United States Court of Federal Claims has found that the understanding of vaccine injury is a “field [of medicine] bereft of complete and direct proof of how vaccines affect the human body.” *Althen v. Sec’y of Health & Human Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

Pursuant to the Vaccine Act, the Supreme Court of the United States has held that because vaccines are “unavoidably unsafe,” vaccine manufacturers are immune from liability for design defects. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

For this reason, lawsuits for vaccine injury against vaccine manufacturers are all but nonexistent in the United States, despite the fact that tens of thousands of vaccine injuries occur every year. Against this backdrop evidencing vaccine injury, and notwithstanding the risk of

serious harm from vaccination, and without any reference to such risk, the emergency Orders have declared that the MMR vaccine is “safe and effective,” a patently and dangerously misleading statement.

The manufacturer’s package insert for the MMR vaccine lists multiple risks of adverse effects. See Exhibits 6 and 7 to the Krakow Affirmation. The MMR vaccine insert contains information suggesting that giving the MMR vaccine before 12 months of age is neither effective nor safe. See Exhibits 6 and 7 to the Krakow Affirmation. The package insert for the MMR vaccine actually states, “Safety and effectiveness of mumps and rubella vaccine in infants less than 12 months of age have not been established.” See Exhibits 6 and 7 to the Krakow Affirmation.

The MMR package insert warns against MMR vaccination of adolescent and young adult females who may be or are about to become pregnant. (“Women of childbearing age should be advised not to become pregnant for 3 months after vaccination...”). Exhibit 7 at 3, which is referenced in Exhibit 6, an exhibit to the Krakow affirmation.

The MMR package insert states that the vaccine presents the risk of adverse reactions affecting the nervous system, including seizures and brain injury. See Exhibit 6 and Exhibit 7 at 7, annexed as exhibits to the Krakow affirmation.

Contrary to representations by respondents and public health authorities, the data show that in the 1970’s, at a time when measles vaccination was nearly as widespread as it is today and when outbreaks were more common and widespread than the Williamsburg outbreak, measles deaths were “estimated to be approximately 1.0 deaths per 10,000 measles cases.” See Exhibit 19 in the Krakow Affirmation, a medical journal article titled, *Measles Mortality: A*

Retrospective Look At the Vaccine Era, American Journal of Epidemiology, The Johns Hopkins University, 1975.

According to the CDC, there have been two deaths from measles in 2012 and none thereafter throughout the United States. By comparison, there have been 13 deaths from pertussis and 141 deaths from tetanus during the same period. Notably, there were 667 measles cases in 2014. See Exhibit 23 annexed to Krakow Affirmation, also at URL:

<https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/E/reported-cases.pdf>

By contrast, the Centers for Disease Control reports the following mortality rate from smallpox on its website: "Smallpox was a devastating disease. On average, 3 out of every 10 people who got it died. Those who survived were usually left with scars, which were sometimes severe." URL: <https://www.cdc.gov/smallpox/history/history.html>.

The World Health Organization ("WHO") has classified adverse drug events that occur at a frequency of 1:1000 to 1:10,000 as "rare." It considers an adverse drug event that happens at a frequency of less than 1:10,000 as "very rare." It classifies an adverse event that happens at a frequency greater than 1:1000 but less than 1:100 as "uncommon (infrequent)." URL: https://www.who.int/medicines/areas/quality_safety/safety_efficacy/trainingcourses/definitions.pdf.

The rate for measles mortality at 1 in 10,000 infections, which likely prevails today given contemporary standards of nutrition and sanitation by WHO classifications for drugs adverse events, would be a "rare" to "very rare," or at the very worst "uncommon (infrequent)." Thus, the rate of measles mortality, which is rare or very rare under WHO definitions, or at the worst uncommon or infrequent, cannot be easily compared with the death rate of 1 in 3 people infected with smallpox during outbreaks, as the CDC reports.

Respondents have reported no deaths associated with the Williamsburg measles outbreak or in the zip codes named in the emergency Orders.

The risk of harm associated with measles infection for a healthy preschool child in the United States is less than the risk of harm associated with the MMR vaccine. See Exhibit 6 to the Krakow Affirmation, Affidavit of Dr. Hendrieka Fitzpatrick, M.D. Unvaccinated people pose no increased risk of measles to people who have been vaccinated. Exhibit 5 at para. 2.

By forcing children to receive the MMR vaccination, especially those under 12 months of age, the emergency Orders enhance the risk of harm from injury by the MMR vaccination. By forcing adults to receive the MMR vaccination, the emergency Orders enhance the risk of harm from injury by the MMR vaccination. By forcing children and adults to receive the MMR vaccination, the emergency Orders fail to reduce the risk of measles to people who have been vaccinated.

Vaccinating people with the MMR vaccine and allowing them to associate immediately with other people in public actually enhances the risk of harm to the public because the measles can spread through viral shedding of those recently vaccinated. See Exhibit 5, para. 4, annexed to the affirmation of Robert Krakow.

The emergency Orders' mandate of measles vaccination restricted to four shifting and ill-defined zip codes is medically nonsensical, will fail to prevent measles outbreaks, and thus represents an irrational public health intervention. See Exhibit 5 at para. 7.

For these reasons, to promote and serve public health the emergency Orders should be immediately and permanently enjoined

III. THE BALANCE OF THE EQUITIES FAVORS PETITIONERS

There is an insufficient predicate for the extraordinary emergency measures taken by

respondents. Correspondingly, there is risk of harm to petitioners in multiple ways.

The balance of the equities favors petitioners.

IV. RESPONDENTS HAVE CRIMINALIZED UNVACCINATED PEOPLE AS “NUISANCES”

The emergency Orders state that the mere “presence of any person in Williamsburg” who has not received the MMR vaccine or is not immune to measles “creates an unnecessary and avoidable risk of continuing the outbreak and is therefore a nuisance” under New York City Administrative Code Section 17-142. Respondents thus not only stigmatize those who refuse to vaccinate, they criminalize them.

Petitioners’ decisions to refuse vaccination are lawful and not subject to arbitrary and capricious criminal sanction. Section 3.07 of the New York City Health Code explicitly recognizes that acting pursuant to law is an exception to its command to “fail to do any reasonable action or take any necessary precaution to protect human life and health.” The petitioner parents are under no obligation to vaccinate themselves with the MMR and petitioner children all have lawful religious exemptions.

As the Verified Petition makes clear, protecting human life and health is far more complicated than the maxim “the MMR vaccine is good and non-vaccination is bad.” Both the disease and the MMR vaccine carry potential risks, and such risks are not uniform for all. Some people may be more susceptible to harm from the disease; others may be more vulnerable to harm from the vaccine. Some hold religious and conscientious convictions making all vaccines unacceptable. These highly personal choices are best left to parents and their healthcare practitioners, not City health officials. While respondents can recommend, exhort, and cajole people to vaccinate, and can isolate and quarantine those who are infectious, they cannot

arbitrarily criminalize the lawful choice not to vaccinate, even in the context of a disease outbreak. Such criminalization of lawful choices violates their duty to uphold the law.

New York State case law offers no precedent where individuals have been branded criminals for failing to vaccinate. On the contrary, New York precedent specifically states that even an individual who is contagious with smallpox may not be considered a nuisance. “We cannot admit that a person sick of an infectious or contagious disease, in his own house, or in suitable apartments at a public hotel or boarding house, is a *nuisance*.” *Boom v. Utica*, 2 Barb. 104, 109 (1848). In light of this unchallenged precedent, it is inconceivable that perfectly healthy individuals making lawful choices may be treated as criminals for nuisance.

Respondents have twisted New York State nuisance law to novel and potentially dangerous ends. Precedent cases regarding nuisance are about buildings and human acts of commission and omission, not biological status. *Copart Indus. V. Consolidated Edison Co.* of N.Y. 41 N.Y.2d 564, 568 (1977). Conduct that courts have found to constitute nuisance includes permitting excessive emissions from power plants, improper use of pesticides, pollution of waterways, and making unreasonably loud noise. *See, e.g., id., State v. Fermenta ASC Corp.*, 630 N.Y.S.2d 884 (1995), *Leo v. General Elec. Co.*, 145 A.D.2d 290 (1989), *State v. Waterloo Stock Car Raceway, Inc.*, 409 N.Y.S.2d 40. None of the precedents resemble respondents’ use of the definition here.

If this Court were to permit respondents to apply this novel and expansive definition for nuisance, where would it end? Would those who fail to get annual flu shots be criminally liable for nuisance? What about the parents of children with attention deficit disorder? Should they be criminally liable if the children are not on pharmaceutical medications? This Court should not permit respondents to criminalize non-vaccination by executive fiat.

V. **SMALLPOX IS NOT MEASLES and JACOBSON V. MASSACHUSETTS IS NOT C.F. v. THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE**

Respondents seem to assume that their measles vaccination mandate in 4-6 zip codes in Brooklyn sits squarely within the *Jacobson v. Massachusetts* landmark precedent. 197 U.S. 11 (1905). It does not. The distinctions between *Jacobson* and this case far outweigh the similarities.

As the Verified Petition makes clear, a measles outbreak is a far cry from a smallpox epidemic. The smallpox fatality rate was 1 in 3 cases. The measles fatality rate in the United States is 1 in 10,000. While courts have interpreted *Jacobson* liberally in the context of school vaccination mandates, there have been few recent occasions for courts to interpret *Jacobson* in light of a mandate for a whole population as here. *Jacobson* sets a high bar for such a mandate. There must be “an emergency,” “imminent danger,” and “an epidemic of disease...[that] threatens the safety of [society’s] members.” The epidemic must “imperil...an entire population.” *Id.*, 27-31. While the measles outbreak of 250 cases in Brooklyn is of concern, it does not rise to the level of a deadly epidemic that characterized *Jacobson*.

Mr. Jacobson faced a penalty for non-compliance of a \$5 fine. No imprisonment; no forced vaccination; just a fine that would be approximately \$145 in today’s dollars. By contrast, respondents seek to impose draconian punishment on petitioners: \$1,000 fines, forced vaccination, and potential imprisonment and civil forfeitures. And respondents seek to impose these harsh punishments on 48 hours’ notice for the exercise of lawful rights.

In Massachusetts of the early 1900’s, there were no lawful religious exemptions to vaccination. By contrast, the petitioner children all have lawful exemptions. While petitioner

children have accepted the risk that in the event of disease outbreaks in their schools they must remain at home, they are not criminal pariahs, as respondents seek to paint them.

Finally, law and science have evolved greatly since the Supreme Court's 1905 decision. The petition and expert affidavits outline what the medical and scientific community now know about the risks of vaccination that were not known in the early 1900's. In the area of law, there have been arguably even greater transformations. The right to prior, free and informed consent to medical intervention is now accepted around the globe. The New York Court of Appeals articulated one of the important first statements of this right in *Schloendorff v. Soc'y of New York Hosp.*, 211 N.Y. 125, 135 (1914) (" [e]very human being of adult years and sound mind has a right to determine what shall be done with his [or her] own body.")

In the area of privacy, the U.S. Supreme Court has identified a right of privacy that did not exist at the time of *Jacobson*. In *Roe v. Wade*, the Court applied strict scrutiny to find that a woman may terminate her pregnancy in the first trimester based on her right to privacy. *Roe v. Wade*, 410 U.S. 113, 154 (1973). In a similar vein, the Court recognized a prisoner's right to refuse unwanted medical care under the due process clause of the Fourteenth Amendment. *Washington v. Harper*, 494 U.S. 210 (1990) (recognizing significant liberty interest in avoiding the unwanted administration of drugs under the due process clause of the Fourteenth Amendment), *see also Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) ("[a]t common law, even the touching of one person by another without consent and without legal justification was a battery.").

More recent Supreme Court decisions have articulated a right to autonomy in intimate relations, decriminalizing homosexuality based on Fourteenth Amendment due process and equal protection clauses. *Lawrence v. Texas*, 539 U.S. 558, 585 (2003), (citing *Ry. Express Agency*,

Inc. v. New York, 336 U.S.106, 112-13 (1949)) (“[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”)

In addition to these new developments related to bodily integrity, privacy, and autonomy, the Supreme Court continues to uphold individuals’ rights to free exercise of religion under the First Amendment and parental rights to raise children and to teach religious as they choose with minimal restriction. *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (“The Fourteenth Amendment guarantees the right of the individual ... to establish a home and bring up children, to worship God according to his own conscience.”) While respondents’ measles mandate may appear on the surface to resemble the facts and context of *Jacobson*, that similarity is skin deep.

More than one-hundred years of legal and scientific developments divide these cases, making the distinctions outweigh the analogies between them.

VI. CONCLUSION

The facts presented in the Verified Petition, as supported by Petitioners’ exhibits, and the emergency Orders themselves, demonstrate that there is no “imminent or existing threat.” The emergency Orders themselves state that cases of measles were first identified in September 2018, almost seven months ago. The respondents have pointed to no significant upsurge in cases of measles. that presents an imminent threat to public health. Respondents have carelessly issued emergency Orders containing inconsistencies that confuse the public and have failed to communicate effectively with the same public it purports to serve. Respondents have admitted that they have no blueprint and plan to implement their reckless emergency Orders and conceded

that to determine how they should proceed with implementation *after* issuing the emergency Orders they would need to consult with legal counsel.

The petitioners, therefore, have shown that the emergency Orders are arbitrary, capricious, and contrary to the law and the Constitution. There is a significant likelihood that petitioners will prevail on the merits.

Respondents have invented novel and dangerous legal concepts to weaponize public health measures when existing legally tested measure like quarantine have been ignored. They have irreparably harmed petitioners by criminalizing benign conduct, stigmatizing and demeaning religious beliefs that are recognized by law, and forcing vaccinations that have a risk of harm. Respondents have undermined petitioners right to informed consent and their right to bodily autonomy.

Absent the issuance of immediate injunctive relief petitioners and their children will be irreparably harmed by the continuation of respondents' extreme, unnecessary, disproportionate, illegal and unnecessary emergency Order.

VII. RELIEF REQUESTED

Petitioners, therefore, respectfully request that this Court enter an Order:

- (a) Enjoining and permanently 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) Declaring the Orders arbitrary, capricious and contrary to law, the imposition of which is beyond respondents' authority, and
- (c) Vacating the mandatory vaccination Orders issued on and around April 9, 2019, and

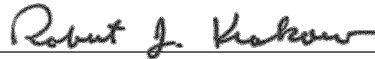
(d) Granting such other and further relief which it deems just and proper.

Dated: New York, New York

April 15, 2019

Respectfully submitted,

LAW OFFICE OF ROBERT J. KRAKOW



ROBERT J. KRAKOW

LAW OFFICE OF ROBERT J. KRAKOW, P.C.

Attorney for Petitioners

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**AFFIRMATION OF ROBERT J. KRAKOW, FOR PETITIONERS, OF GOOD FAITH
IN COMPLIANCE WITH 22 CRR-NY 202.7, DATED APRIL 15, 2019**

FILED: KINGS COUNTY CLERK 04/15/2019 05:19 AM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 27

RECEIVED NYSCEF: 04/15/2019

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.

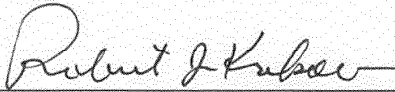
AS AND FOR A PROCEEDING BROUGHT
PURSUANT TO ARTICLE 78 OF THE CPLR

-----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.
2. In compliance with 22 CRR-202.7(d) and (f) I have notified the respondents by fax and email and also by email and telephonic communication with Sherril Kurland, Assistant Corporation Counsel, respondents' attorney, notifying respondents and their attorney of the time, date and place that the application for temporary and permanent injunctive relief will be made.
3. Said notification to respondents was made in a manner sufficient to permit respondents an opportunity to appear in response to the application.

Dated: April 15, 2019


ROBERT J. KRAKOW

**AFFIRMATION OF DEMETRE DASKALAKIS, FOR RESPONDENTS, IN OPPOSITION
TO PRELIMINARY INJUNCTION, DATED APRIL 16, 2019 [205 - 221]**

FILED: KINGS COUNTY CLERK 04/16/2019 11:04 PM

INDEX NO. 508356/2019

NYSCEF DOC. NO. 33

RECEIVED NYSCEF: 04/16/2019

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; A. L. on her own behalf and on behalf of her minor child; and M.N.. 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
PUSUANT TO ARTICLE 78 OF THE CPLR

**AFFIRMATION IN
OPPOSITION TO
PRELIMINARY
INJUNCTION**

Index Number: 508356/2019

..... X

DEMETRE DASKALAKIS, a physician licensed to practice medicine in the State of New York, affirms, pursuant to CPLR 2106, the following to be true subject to penalties of perjury:

1. I have been employed by the New York City Department of Health and Mental Hygiene of the City of New York (the "Department" or "DOHMH") since 2014 and I have been Deputy Commissioner of the Division of Disease Control (the "Division") since 2017. I hold an M.D. degree awarded by the New York University School of Medicine and a Master of Public Health degree from the Harvard School of Public Health. In addition to being a licensed physician, I am Board Certified in Internal Medicine and Infectious

Diseases. In my capacity as Deputy Commissioner, I am responsible for all of the infectious disease programming at DOHMH. My responsibilities include oversight of several Bureaus within the Department, including the Bureau of Immunization and the Citywide Immunization Registry ("CIR"). Additionally, I have served as the Incident Commander in several infectious disease responses, including the current response to a measles outbreak in Brooklyn. Since joining the Health Department in 2014 as an Assistant Commissioner, I have participated as leadership in urgent and emergent outbreak responses including the public health responses to Ebola, Zika, and multiple outbreaks of Legionnaire's Diseases in NYC.

2. I make this affirmation in opposition to Petitioners' application for a preliminary injunction, and to provide background information about the work of the Department in the control of infectious diseases, and particularly the control of measles.

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE

3. Pursuant to section 556 of the Charter of the City of New York, the Department is responsible, among other things, for controlling communicable diseases within the City of New York and for supervising the abatement of nuisances that affect or are likely to affect the public health.

4. The activities of the Division include keeping a registry of cases of infectious diseases, including measles, that are reported to us by physicians, hospitals, and laboratories. City and State regulations mandate such reporting of infectious diseases, and the maintenance of such records by the DOHMH. On the basis of the data we collect, we prepare epidemiological reports and other materials.

5. The Division conducts investigations of all reported measles cases including where the infection was acquired, identifying contacts exposed to a measles case when that person was infectious, checking the vaccination status of the contacts and when indicated recommending, if the contact is within 72 hours, or six days, of his or her exposure, rapid vaccination or the administration of immune globulin respectively to prevent infection or prevent the likelihood of severe complications. Exposed persons who are not immune and receive vaccine or immune globulin are told to stay home for the 21 day incubation period. Further, steps are taken to limit exposure and infections in settings such as health care facilities and schools.

6. The Division is also responsible for collection of vaccine records of New York City residents to help ensure that people receive life-saving immunizations, to monitor vaccination rates and to protect public health which are maintained in the Citywide Immunization Registry ("CIR"). The CIR vaccine records are confidential and contain all immunizations reported by NYC health care providers for city residents younger than 19, including immunizations against measles. Providers are required by law to make these reports. Immunizations may also be reported for adults, with their consent. This record is official and may be submitted to child care centers, schools, camps and employers.

7. The Bureau of Immunization in the Division is responsible for compliance with school immunization requirements, case management of pregnant women with chronic hepatitis B infection and their infants, maintenance of the CIR, the Vaccines for Children program (VFC), conducting office visits to practices participating in VFC to ensure proper storage and handling of vaccine and compliance with program requirements, quality assurance activities to achieve high vaccination rates at VFC practices, promotion of adult

vaccination, delivery of immunization services at DOHMH's immunization clinic, provider and public education about vaccines as well as surveillance of vaccine-preventable diseases like measles. Further, each year the Bureau distributes about \$2.6 million worth of Measles-Mumps-Rubella (MMR) vaccine to approximately 1400 providers citywide who are enrolled in VFC.

BACKGROUND INFORMATION ON MEASLES¹

8. According to the United States Center for Disease Control ("CDC"), measles is a highly contagious viral disease that can result in serious health complications, such as pneumonia and swelling of the brain. About a third of reported measles cases have at least one complication and in some cases, measles can cause death. Measles can be serious in all age groups. However, infants, young children, pregnant persons, people whose immune systems are weak and adults are more likely to suffer from measles complications.

9. Measles is easily transmitted from a sickened person to others who lack immunity to the disease. Measles is one of the most contagious of all infectious diseases; up to 9 out of 10 non-immune persons (90 percent) who come into contact with a measles patient, or a space where a measles patient recently has been, will develop measles. The virus is transmitted by direct contact with infectious droplets or by airborne spread when an infected person breathes, coughs, or sneezes. The virus can live for up to two hours in air or on surfaces where an infected person coughed or sneezed and people who lack immunity are highly likely to become sick if they are in contact with an infectious person or near where an

¹ Information contained in this section may be found on the publicly available United States Center for Disease Control (CDC) website section on Measles, located at <https://www.cdc.gov/measles/index.html> and on other webpages found through the embedded links to the Measles subsections (last accessed April 16, 2019.)

infectious person recently has been. If other people breathe the contaminated air or touch the infected surface, then touch their eyes, noses, or mouths, they can become infected. A person can spread measles from four days before through four days after the appearance of the rash.

10. Measles can be serious in all age groups. However, children younger than 5 years of age and adults older than 20 years of age are more likely to suffer from measles complications. Common measles complications include ear infections and diarrhea. Some people may suffer from severe complications, such as pneumonia (infection of the lungs) and encephalitis (swelling of the brain). They may need to be hospitalized and could die. As many as one out of every 20 children with measles gets pneumonia, the most common cause of death from measles in young children. About one child out of every 1,000 who get measles will develop encephalitis (swelling of the brain) that can lead to convulsions and can leave the child deaf or with intellectual disability. For every 1,000 children who get measles, one or two will die from it. Measles may cause a pregnant woman to give birth prematurely, or have a low-birth-weight baby.

11. Measles can also result in long-term complications. Subacute sclerosing panencephalitis (SSPE) is a rare, but fatal disease of the central nervous system, characterized by behavioral and intellectual deterioration and seizures, that results from a measles virus infection acquired earlier in life. SSPE generally develops 7 to 10 years after a person has measles, even though the person seems to have fully recovered from the illness. Since measles was eliminated in 2000, SSPE is rarely reported in the United States. The CDC reports that among people who contracted measles during the resurgence in the United States in 1989 to 1991, 4 to 11 out of every 100,000 were estimated to be at risk for

developing SSPE. The risk of developing SSPE may be higher for a person who gets measles before they are two years of age.

MEASLES PREVENTION

12. Measles is so contagious that each new case of it that occurs severely hinders the ability of health officials to curb an outbreak, especially in under-vaccinated communities with higher rates of unvaccinated, non-immune individuals.

13. Although measles is highly contagious, the Measles-Mumps-Rubella (MMR) vaccine is an effective and safe vaccine that will prevent its transmission. Measles remains one of the leading causes of death worldwide, according to the World Health Organization, an estimated 110,000 deaths in occurred in 2017, mostly among children under the age of five. Measles transmission was declared eliminated in the United States in 2000, though there have been limited outbreaks reported since then.

14. The CDC recommends that children get two doses of MMR vaccine, with the first dose at 12 through 15 months of age, and the second dose at 4 through 6 years of age.

15. Before the measles vaccination program started in 1963, an estimated 3 to 4 million people got measles each year in the United States. Of these, approximately 500,000 cases were reported each year to CDC; of these, 400 to 500 cases resulted in death, 48,000 cases required hospitalization, and 1,000 infected people developed encephalitis (brain swelling) from measles. Since then, widespread use of measles vaccine has led to a greater than 99% reduction in measles cases compared with the pre-vaccine era. However, recently there has been an increase in outbreaks, which the CDC defines as three or more cases. The CDC reports that the U.S. experienced 17 outbreaks in 2018. These outbreaks

have occurred in under-vaccinated communities when a member of that community has returned from travel infected with the disease. Three outbreaks in New York State, New York City, and New Jersey, respectively, contributed to most of the cases. Cases in all three states occurred primarily among unvaccinated people in Orthodox Jewish communities. The CDC reports that from January 1 to April 11, 2019, a preliminary count of 555 individual cases of measles have been confirmed in 20 states. This is the second-greatest number of cases reported in the U.S. since measles was eliminated in 2000.

16. According to the CDC, prompt recognition, reporting, and investigation of measles is important because the spread of the disease can be limited with early case identification and public health response including vaccination.

17. Persons who received MMR do not infect other people and are not responsible for measles transmission. Person-to-person transmission of the vaccine virus has never been documented.

18. I am aware that the reasons some parents cite for not vaccinating their children include concerns about the safety of the MMR vaccine and that the vaccine causes autism. The current MMR vaccine used in the United States was licensed in 1971 and has a long and strong safety record. The article that first suggested a relationship between measles vaccine and brain damage was based on a now discredited article published in 1998. Those finding could never be reproduced, and the article was retracted in 2010. The lead author of that article can no longer practice medicine in the United Kingdom. Since 1999, there have been over 25 articles published in the scientific literature that demonstrate the lack of such an association including reviews by the Institute of Medicine (source: <http://immunize.org/talking-about-vaccines/mmr.asp>).

19. Some parents also say that it is safer and better to get the ‘natural’ wild-type measles infection but this could not be further from the truth. This is best demonstrated by the reduction in measles cases and measles deaths (cited above) in the US and worldwide (80% reduction in deaths from 2000 to 2017, preventing an estimated 21.1 million measles deaths, source <https://www.who.int/en/news-room/fact-sheets/detail/measles>) after the introduction of an effective measles vaccine. While in some cases a person will develop a rash and/or fever following receipt of the MMR vaccine, the fever and rash are both less serious than with natural measles and non-transmissible, meaning other people cannot contract this measles by coming in contact a vaccinated person. During this outbreak investigation, 17 persons have been reported to the Health Department who developed these symptoms after vaccination and were found to have vaccine-related virus. These cases are not included in the count of confirmed measles cases reported during the outbreak because the vaccine-related strain is not transmissible and does not cause the severe illness characterized by wild-type infection.. It should be noted that if a person is exposed to measles and is vaccinated afterwards, in particular after the 72 hour window, they may still develop wild-type measles that is unrelated to having been vaccinated.

EFFORTS OF DEPARTMENT TO CONTROL THE MEASLES OUTBREAK IN NYC

20. There is currently an active measles outbreak within neighborhoods in ZIP codes 11205, 11206, 11211 and 11249 (“Williamsburg”) and ZIP codes 11204, 11218, 11219, 11230 (“Borough Park”) in Brooklyn that qualifies as a public health threat. The outbreak began in early October 2018 and, as of April 15, 2019, has resulted in over 300 cases of this vaccine-preventable disease. In the last three months, the vast majority of these cases have been in Williamsburg residents in ZIP codes 11205, 11206, 11211 and 11249.

21. As of April 15, there have been a total of 329 reported measles cases in the current outbreak in NYC: 267 in Williamsburg; 52 in Borough Park; 25 individuals have been hospitalized, of which 6 were in Intensive Care. 52 chains of transmission, discrete outbreaks that comprise the bigger outbreak of measles in Brooklyn, have been identified, including 32 that are still in the window of active transmission.

22. The Department has tried multiple strategies to end this outbreak, including intensive outreach to the affected community and the healthcare providers who serve them. Additionally, the Health Department required any unvaccinated children to be excluded from yeshivas and child care programs serving this community. However, the outbreak continues due to low vaccination rates in various locations.

23. DOHMH has engaged in the following community outreach initiatives:

- DOHMH personnel, officials from city agencies, and elected officials have held meetings with community leaders to provide information and discuss means of outreach to the community.
- Robo-calls from DOHMH were made to 30,000 households, with additional calls are planned.
- DOHMH has sent six rounds of letters to the principals of yeshivas and to parents of students at schools within the affected zip codes.
- DOHMH has placed three rounds of ads in eighteen newspapers since November.
- DOHMH has made widespread distribution of measles informational booklets to nearly 30,000 community households, and has distributed approximately 13,000 informational booklets through DOHMH community partners.
- DOHMH has been in communication with all elected officials in the affected communities, including provision of weekly updates for measles case counts.

24. DOHMH has engaged in the following outreach initiatives with healthcare providers:

- DOHMH distributed an additional 18,000 doses of the MMR vaccine to community healthcare providers serving the affected community early in the outbreak, which was twice as many as the same time last year. There is a good supply of MMR vaccine and DOHMH has continued to supply MMR vaccine to healthcare providers through the current distribution system.
- DOHMH staff were embedded in medical centers in the affected community to ensure compliance with infection control.
- DOHMH issued three Health Alerts citywide, each distributed to nearly 13,000 providers which were in addition to several communications with health care providers serving the affected community.
- DOHMH advised providers to add an extra dose of MMR between 6-11 months old, in order to protect more children.
- DOHMH conducted training for the Jewish Orthodox Nurses organization and medical providers serving the affected community, and have had multiple meetings with key community health care coalitions/committees.
- DOHMH distributed informational posters and booklets about measles to community-based clinics.
- DOHMH has regularly consulted with the New York State Department of Health and the CDC, as well as with other jurisdictions experiencing outbreaks.

25. These DOHMH efforts have resulted in more than 8,700 additional MMR vaccinations in Williamsburg and Borough Park between October 1, 2018 and April 14, 2019 compared to the same time period last year.

26. On November 7, 2018, a letter was sent to the principals/directors of yeshivas and child care facilities in Williamsburg informing them about the measles outbreak.

27. Starting in December, the City mandated that over 300 yeshiva schools and childcare centers in the outbreak zip codes must exclude unvaccinated, under-vaccinated and/or non-immune children – even those children with religious or medical exemptions.

- On December 6, 2018, letters were sent to principals/directors of yeshivas and child care facilities in certain zip codes, within the neighborhoods where the outbreak is occurring informing them that, effective December 7, 2018, every student who is not vaccinated with the required number of doses of measles-mumps-rubella (MMR) vaccine will not be permitted to attend school, regardless of whether a case of measles has occurred in the school. The letter stated that principals or directors are responsible for enforcing exclusion of students and compliance with all school-required immunizations and that to ensure compliance, every yeshiva is subject to audit by the Department of Health, and noncompliance can result in Commissioners Orders and fines.
- On December 21, 2018, letters were sent to yeshiva and child care principals/directors stating that as recognized by the State Education Department and pursuant to New York State Department of Health Regulation §66-1.10, the New York City Department of Health and Mental Hygiene has the authority to order school heads to exclude children without the required number of doses, including those who have been granted religious or medical exemptions, when there is an outbreak of specific diseases including measles. The authority to exclude includes schools in the affected neighborhoods even where there are no cases of measles in those particular schools.
- On February 13, 2019, letters were sent to yeshiva and child care principals/directors stating that students attending day care programs or yeshivas in zip codes 11230 and 11220 and students in grades kindergarten through grade 12 attending yeshivas in zip codes 11204, 11218 and 11249 may return to school if they are in compliance with routine school immunization requirements. The letters stated that for children attending day care programs, including nursery, Head Start, and pre-kindergarten serving the Orthodox Jewish community in zip codes 11204, 11218 and 11249 and for children attending day care programs and yeshivas in zip codes 11205, 11206, 11211 and 11219, the current exclusions continue to apply; students without the required number of doses of MMR cannot return to school until they are appropriately vaccinated, or until the outbreak is declared over, even if they have an approved religious or medical exemption to measles immunization.
- DOHMH has conducted 255 audits of the affected schools and child care facilities. DOHMH has issued 113 Commissioner Orders, as well as 16 Notices of Violation to 9 sites for failure to comply with DOHMH audits and/or directives to exclude children without the recommended doses of

MMR.

28. However, currently the measles outbreak persists in ZIP codes 11205, 11206, 11211 and 11249 despite these efforts taken by the Department of Health and Mental Hygiene to stop it, because a high rate of people living within Williamsburg have not been vaccinated against measles despite the efforts enumerated above.

CURRENT STATUS OF MEASLES IN WILLIAMSBURG, BROOKLYN

29. The following charts provide information about measles in New York City, which is current as of 4/15/19:

30. CONFIRMED NEW CASES IN PAST WEEK

| | Confirmed Cases | New Cases in Past Week |
|---------------------|--------------------|------------------------|
| Bensonhurst | 1 | None |
| Borough Park | 52 | 3 |
| Brighton Beach | 1 (travel-related) | None |
| Crown Heights | 1 | None |
| Midwood/Marine Park | 4 | 1 |
| Williamsburg | 267 | 39 |
| Flushing | 2 | None |
| Far Rockaway | 1 | 1 |
| Total | 329 | 44 |

CASES BY AGE

| Age Range | Confirmed Cases |
|---------------|-----------------|
| Under 1 year | 56 |
| 1 – 4 years | 162 |
| 5 – 18 years | 66 |
| Over 18 years | 45 |

CASES BY DATE

| Month | New Cases |
|----------------|-----------|
| April 2019 | 62 |
| March 2019 | 114 |
| February 2019 | 63 |
| January 2019 | 34 |
| December 2018 | 14 |
| November 2018 | 28 |
| October 2018 | 13 |
| September 2018 | 1 |

31. In summary, the incidence of measles continues to spread within New York City, and in particular in Williamsburg, Brooklyn.

32. Consequently there remains an on-going threat to public health.

ORDER OF THE COMMISSIONER

33. Pursuant to section 3.01 of the New York City Health Code, Oxiris Barbot, M.D., as the DOHMH Commissioner of Health (“Commissioner”) has authority to declare a public health emergency when there is an urgent threat to the health of New York City residents, and to take such actions that the Commissioner deems necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat.

34. On April 9, 2019, Commissioner Barbot declared a public health emergency and issued a measles vaccine order in response to the measles outbreak in ZIP codes 11205, 11206, 11211 and 11249 in Brooklyn.

35. Commissioner Barbot declared the emergency at a press conference she attended with Mayor De Blasio in Williamsburg. She announced that she was ordering

residents of ZIP codes 11205, 11206, 11211 and 11249 to be vaccinated against measles or face a \$1000 fine² because of the continuing outbreak in the affected zip codes. Early versions of the written order mistakenly identified other zip codes as being covered by the declaration. These typographical errors were corrected later in the day to align with the Commissioner's announcement of where the outbreak persists.

36. The current measles outbreak began in early October 2018 and has resulted in over 300 cases of this vaccine-preventable disease. As previously noted, in the last three months, the vast majority of these cases have been in residents of ZIP codes 11205, 11206, 11211 and 11249. The Department has tried multiple strategies to end this outbreak, including intensive outreach to the affected community and the medical providers who serve them. Additionally, the Health Department required any unvaccinated children to be excluded from yeshivas and child care programs serving this community. Yet, the outbreak continues due to low vaccination rates in these four ZIP codes.

37. The Commissioner determined the ongoing measles outbreak in Williamsburg to be an existing threat to public health in the City of New York.

38. The Commissioner determined that the presence of any person in Williamsburg lacking the MMR vaccine, unless that vaccine is otherwise medically contraindicated or such person has demonstrated immunity against measles, creates an unnecessary and avoidable risk of continuing the outbreak.

39. Pursuant to New York City Health Code §3.07, no person "shall do or assist in any act which is or may be detrimental to the public health or to the life or health of any

² <https://www1.nyc.gov/office-of-the-mayor/news/186-19/de-blasio-administration-s-health-department-declares-public-health-emergency-due-measles-crisis#/0>

individual... or ...shall fail to do any reasonable act or take any necessary precaution to protect human life and health.”

40. As a result, on April 9, 2019 the Commissioner issued an Order directed to “[A]ll persons who reside, work or attend school in the neighborhood of Williamsburg, Brooklyn, New York and to the parents and/or guardians of any child who resides, works or attends school in the neighborhood of Williamsburg, Brooklyn, New York” (the “Order”) (copy annexed as Exhibit “A”), which ordered the following:

IT IS HEREBY ORDERED that any person who lives, works or resides within the 11205, 11206, 11211 and/or 11249 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this Order being signed by me shall be vaccinated against measles unless such person can demonstrate immunity to the disease or document to the satisfaction of the Department that he or she should be medically exempt from this requirement.

IT IS FURTHER ORDERED that the parent or guardian of any child older than six months of age who lives, works or resides within the 11205, 11206, 11211 and/or 11249 zip codes and who has not received the MMR vaccine within forty eight (48) hours of this order being signed by me shall cause such child to be vaccinated against measles unless such parent or guardian can demonstrate that the child has immunity to the disease or document that he or she should be medically exempt from this requirement.

41. The Order warns that failing to comply with it is a violation of §3.05 of the New York City Health Code. While such a violation is potentially criminal, the Department is enforcing violations of this order civilly. Violators are going to be issued a Notice of Violation (NOV) returnable in the Office of Administrative Trials and Hearings (OATH) where a fine of \$1000 may be upheld against them.

42. The Order lasts until the Board of Health meets tomorrow on April 17, 2019 at which time the Board will determine whether the vaccination requirement should be continued or rescinded.

43. Vaccinations are the most effective way to stop this outbreak. Isolating persons with measles would not work because people with measles are infectious before their rashes appear and it is known that they have the disease. Many of the people who have contracted measles during this outbreak were infected because they came into contact with infected person during his or her prodromal period. Quarantining contacts – anyone who might have come into contact with an infectious person – would be both logistically impossible and a much greater infringement of people’s liberty than simply fining people who chose not to be vaccinated during an outbreak.

44. Finally, I have reviewed the affidavits submitted by Drs. Richard Moskowitz, Tina Kimmel, Jane Orient, Hendricks Fitzpatrick and Shira Miller. They make many false statements about both measles and the safety of the MMR vaccine. These false statements include suggesting that people who are vaccinated can transmit measles, that measles is virtually always benign and never serious unless occurring with malnutrition, and that the MMR vaccine is linked to autoimmune disorders. These opinions are not supported in the generally accepted medical literature, but come from “experts” on the fringes of the medical community. Dr. Orient, for instance, is the Executive Director of the American Association of Physicians and Surgeons. She is noted for opposing health care of any kind and it publishes a journal with extreme articles like one questioning whether the HIV virus causes AIDS.³ Dr. Moskowitz, who practices homeopathic medicine, has acknowledged

³ See <https://aapsonline.org> and <http://www.jpands.org/jpands1503.htm>

FILED: KINGS COUNTY CLERK 04/16/2019 11:04 PM

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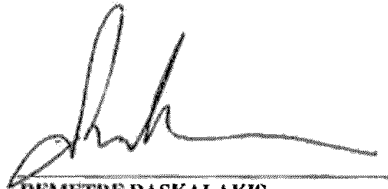
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that he "hasn't given any vaccines in over 45 years" and has had "very few things ... published in the mainstream media or scientific journals."⁴

45. Accordingly, the Commissioner's Order to vaccinate was properly issued in order to abate the resurgence of this highly preventable disease and protect the public health and should be upheld.

Dated: New York, New York
April 16, 2019


DEMETRE DASKALAKIS

⁴ See <https://www.ageofautism.com/2017/10/an-interview-with-richard-moskowitz-md-author-of-vaccines-a-reappraisal.html>

**EXHIBIT A TO DASKALAKIS AFFIRMATION -
ORDER OF THE COMMISSIONER, OXIRIS BARBOT, M.D., NYC DEPARTMENT
OF HEALTH AND MENTAL HYGIENE, DATED APRIL 9, 2019
(REPRODUCED HEREIN AT PP. 64–66)**

**MEMORANDUM OF LAW, BY RESPONDENTS, IN OPPOSITION TO PETITIONERS'
APPLICATION FOR AN INJUNCTION, DATED APRIL 16, 2019 [223 - 245]**

FILED: KINGS COUNTY CLERK 04/16/2019 11:04 PM

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NYSCEF DOC. NO. 34

RECEIVED NYSCEF: 04/16/2019

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-

Index Number: 508356/2019

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, and DR. OXISRIS 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
PUSUANT TO ARTICLE 78 OF THE CPLR

----- X

**RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO
PETITIONERS' APPLICATION FOR AN INJUNCTION**

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City of New York
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Tel: 212-356-2605

SHERRILL KURLAND
SHERYL NEUFELD
Of Counsel.

April 16, 2019

PRELIMINARY STATEMENT

Petitioners, five parents of unvaccinated children, commenced this Article 78 proceeding by Order to Show Cause seeking a preliminary injunction¹ enjoining and restraining the New York City Department of Health and Mental Hygiene (“DOHMH” or “Department”) from implementing and enforcing an Order of Oxiris Barbot, M.D., as the Commissioner of DOHMH (“Commissioner”) issued on April 9, 2019, which mandates vaccination with the Measles-Mumps-Rubella (“MMR”) vaccine for residents of four zip codes located within the Williamsburg neighborhood of Brooklyn, New York (the “Order”), unless they can establish that they have immunity to measles, or that they should be medically exempted from the requirement.² A failure to comply with the Order may subject an individual to civil penalties.³ The Order remains in effect until the Board of Health meets on April 17, 2019, at which time the Board will determine whether the vaccination requirement should be continued or rescinded.

Measles is a highly contagious viral disease that can result in serious health complications, such as pneumonia and swelling of the brain. About a third of reported measles

¹ Petitioners’ Order to Show Cause states that their papers are submitted in support of their request for a “preliminary” injunction, yet the Order to Show Cause states that it seeks what it apparently erroneously refers to as a “permanent” injunction. Respondents submit that the request for, or issuance of, a permanent injunction at this stage in the proceeding is not proper, as the respondents have not had an opportunity to file an answer, and the granting of a permanent injunction, which is the ultimate relief sought herein, is thus premature. In any event, Petitioners are also not entitled to a permanent injunction for the reasons set forth herein.

² The Order does not mandate that people be forcibly vaccinated without consent.

³ While the Order warns that a violation of §3.05 of the New York City Health Code is potentially a criminal offense, the Department is enforcing the Order civilly. Violators are going to be issued a Notice of Violation (NOV) returnable in the Office of Administrative Trials and Hearings (OATH) where a fine of \$1000 may be imposed.

cases have at least one complication and in some cases, measles can cause death. Measles can be serious in all age groups. However, infants, young children, pregnant persons, people whose immune systems are weak and adults are more likely to suffer from measles complications. Although measles is highly contagious, the Measles-Mumps-Rubella (MMR) vaccine is an effective and safe vaccine that will prevent its transmission.

There is currently an active measles outbreak in New York City, which began in early October 2018. As of April 16, 2019, the Outbreak has resulted in over 300 cases of this vaccine-preventable disease. In the last three months the vast majority of these cases have been in Williamsburg residents in ZIP codes 11205, 11206, 11211 and 11249. The Department has tried multiple strategies to end this outbreak, yet the outbreak continues due to low vaccination rates in these four ZIP codes. The Commissioner determined that the presence of any person in Williamsburg lacking the MMR vaccine, unless that vaccine is otherwise medically contraindicated or such person has demonstrated immunity against measles, creates an unnecessary and avoidable risk of continuing the outbreak. As a result the Commissioner issued the Order.

Petitioners seek to enjoin the Order, alleging (1) that the Order is outside the scope of the Commissioner's authority because there is no real emergency; (2) that the Order is arbitrary and capricious because the Order ignores the risk of harm from compulsory vaccination; (3) that the Order illegally declares unvaccinated persons to be a nuisance; (4) that the Order is a de facto override of state law governing religious exemptions; (5) that the Order violates the right to due process under the First and Fourteenth Amendments to the United States Constitution, and under the New York Constitution by imposing Civil and Criminal penalties; (6) that the Order violates the Constitutional protection to Equal Protection; and (7) that the Order

has collateral effects beyond the scope of the Order. However, all of Petitioners arguments fail for the reason described below.

Petitioners' request for a preliminary injunction while this matter is pending should be denied, as it does not satisfy any of the three conditions required for the granting or preliminary relief. To begin with, petitioners are not likely to succeed on the merits of their claims because the Order is reasonable and rational, falls fully within the powers of the Commissioner, and does not violate the federal or state Constitutions. Further, petitioners cannot satisfy the irreparable harm prong of the preliminary injunction standard since the potential harm is solely economic in nature and is speculative. Finally, as any injunction would disrupt the significant public policy goals of the DOHMH Order to stem the threat to public health the balance of the equities tips decidedly in favor of respondents and mandates that no preliminary injunctive relief should be issued.

For all of the reasons set forth herein, the petition must be denied in its entirety and petitioners' request for a preliminary injunctive relief must be denied.

STATEMENT OF FACTS

Respondents respectfully refer the Court to the Affirmation of DOHMH Deputy Commissioner Demetre Daskalakis, M.D., M.P.H., signed on April 16, 2019 ("DOHMH Aff."), along with the Order, attached as Exhibit "A" thereto, for the facts relevant herein.

APPLICABLE LAW

Section 556 of the New York City Charter provides, in relevant part:

§ 556 Functions, powers and duties of the department [of Health and Mental Hygiene].

Except as otherwise provided by law, the department shall have jurisdiction to regulate all matters affecting health in the city of

New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city The jurisdiction of the department shall include but not be limited to the following:

(a) General functions. (1) Enforce all provisions of law applicable in the area under the jurisdiction of the department for the preservation of human life, for the care, promotion and protection of health. . . . ;

(2) supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health; exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health.

* * *

The New York City Administrative Code- Health

Section 17-142 of the Administrative Code, defines a public health “nuisance,” in relevant part, as follows:

The word “nuisance” shall be held to embrace public nuisance, as known at common law or in equity jurisprudence; whatever is dangerous to human life or detrimental to health; . . . and whatever renders the air or human food or drink, unwholesome. All such nuisances are hereby declared illegal.

The New York City Health Code

Health Code § 3.01 provides General Powers of the Department. Health Code § 3.01(c) authorizes DOHMH to “take such action as may become necessary to assure the maintenance of public health, prevention of disease, or safety of the City and its residents.” Health Code § 3.05 (a) states that “[n]o person shall violate an order of the Board, Commissioner or Department. Health Code § 3.01(d) states, in part “Where urgent public health action is necessary to protect the public health against an imminent or existing threat, the Commissioner

may declare a public health emergency. Upon the declaration of such an emergency, the Commissioner may establish procedures to be followed, issue necessary orders and take such actions as may be necessary for the health and safety of the City and its residents. ...” Pursuant to Health Code § 3.11, violations of the Code are subject to civil enforcement, punishable by a fine. Notices of violation which are issued by DOHMH are returnable at the Office of Administrative Trials and Hearings, known as OATH, for a hearing. Health Code § 3.12.

ARGUMENT

POINT I

THE DOHMH ORDER IS REASONABLE AND RATIONAL.

Administrative agencies enjoy broad discretionary power when making determinations on matters they are empowered to decide. CPLR § 7803 provides for very limited judicial review of administrative actions and states, in pertinent part: “The only questions that may be raised in a proceeding under this article are ...(2) whether the body or officer proceeded ... without or in excess of jurisdiction; or (3) whether a determination ... was arbitrary and capricious or an abuse of discretion.” The arbitrary and capricious standard is not a demanding one. It requires only that the administrative agency determination be reasonable and supported by the record taken as a whole. Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974). A court “may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency’s determination is predicated.” Purdy v. Kreisberg, 47 N.Y.2d 354, 358 (1979). If the record supports the acts of the administrative agency, then its determination is conclusive. Cohen v. State of New York, 2 A.D.3d 522, 525 (2d Dep’t 2003).

Moreover, agencies are presumed to have developed an expertise and judgment that requires the courts to accept the agency judgment if not unreasonable. Lynbrook v. N.Y. State Pub. Employment Relations Bd., 48 N.Y.2d 398, 404 (1979). When matters of specialized knowledge or judgment are entrusted to an agency – such as DOHMH with its well-established broad delegation of authority – the Court may not substitute its own judgment. National Restaurant Ass’n v. New York City Dep’t of Health and Mental Hygiene, 2016 Slip Op. 30330(U), *5, 2016 N.Y. Misc. LEXIS 603, ** 9-10 (Sup. Ct. N.Y. County Feb. 26, 2016), aff’d, 148 A.D.3d 169 (1st Dep’t 2017); Antell v. Bd. of Educ., 21 Misc. 2d 119, 125, (Sup. Ct. N.Y. Co. 1959), aff’d, 10 A.D.2d 699 (1st Dep’t 1960). A “presumption of regularity attends to the action of the [agency], and it is incumbent upon the petitioner to overcome that presumption and establish the action to have been without reasonable foundation.” Kayfield Constr. Corp. v. Morris, 15 A.D.2d 373, 379 (1st Dep’t 1962); see also NYS Restaurant Ass’n, 148 A.D.3d at 179 (“Administrative rules are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context.... The challenger must establish that a regulation is so lacking in reason for its promulgation that it is essentially arbitrary [quoting Axelrod, 78 N.Y.2d at 166].”).

A. The DOHMH Order is Entirely Rational

Pursuant to section 556 of the Charter of the City of New York, the Department is responsible, among other things, for controlling communicable diseases within the City of New York and for supervising the abatement of nuisances that affect or are likely to affect the public health.

There is currently an active measles outbreak within New York City. The outbreak began in early October 2018 and, as of April 9, 2019, has resulted in nearly 300 cases

of this vaccine-preventable disease. In the last three months, the vast majority of these cases have been in Williamsburg residents in ZIP codes 11205, 11206, 11211 and 11249. DOHMH Aff. ¶ 20.

Measles is easily transmitted from a sickened person to others who lack immunity to the disease. Measles is one of the most contagious of all infectious diseases; up to 9 out of 10 susceptible persons (90 percent) who come into contact with a measles patient, or a space where a measles patient recently has been, will develop measles. The virus is transmitted by direct contact with infectious droplets or by airborne spread when an infected person breathes, coughs, or sneezes. The virus can live for up to two hours in air or on surfaces where an infected person coughed or sneezed and people who lack immunity are highly likely to become sick if they are in contact with an infectious person or near where an infectious person recently has been. If other people breathe the contaminated air or touch the infected surface, then touch their eyes, noses, or mouths, they can become infected. A person can spread measles from four days before through four days after the appearance of the rash. DOHMH Aff. ¶ 9.

As of April 15, there have been a total of 329 reported measles cases in the current outbreak in NYC: 267 in Williamsburg; 52 in Borough Park; 25 individuals have been hospitalized, of which 6 were in Intensive Care. Fifty-two chains of transmission, discreet outbreaks that comprise the bigger outbreak of measles in Brooklyn, have been identified, including 32 that are still in the window of active transmission. DOHMH Aff. ¶ 21.

The Department has tried multiple strategies to end this outbreak, including intensive outreach to the affected community and the healthcare providers who serve them. Additionally, the Health Department required any unvaccinated children to be excluded from yeshivas and child care programs serving this community. However, the outbreak continues due

to low vaccination rates in various locations. DOHMH Aff. ¶¶ 22-27. Moreover, currently the measles outbreak persists in ZIP codes 11205, 11206, 11211 and 11249 despite these efforts taken by the Department of Health and Mental Hygiene to stop it, because a high rate of people living within Williamsburg have not been vaccinated against measles despite the efforts of the DOHMH. DOHMH Aff. ¶ 28.

Pursuant to section 3.01 of the New York City Health Code, the Commissioner has authority to declare a public health emergency when there is an urgent threat to the health of New York City residents, and to take such actions that the Commissioner deems necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat. The Commissioner reasonably determined that the presence of any person in Williamsburg lacking the MMR vaccine, unless that vaccine is otherwise medically contra-indicated or such person has demonstrated immunity against measles, creates an unnecessary and avoidable risk of continuing the outbreak. Thus, it was reasonable and rational for the Commissioner to declare a public health emergency on April 9, 2019, and issue the measles vaccine Order in response to the measles outbreak in ZIP codes 11205, 11206, 11211 and 11249 in Brooklyn.

B. Petitioners Have Failed to Establish that the Order is Arbitrary and Capricious, or in Excess of the Commissioner's Authority

i. Petitioners Have Failed to Establish that the Order is Arbitrary or Capricious

Petitioners have failed to establish that the Order is arbitrary or Capricious in any manner. To begin with Petitioners challenges the validity of the Order because it does not specify the exact number of active measles cases when it was issued. However, this argument fails, as there is no requirement to include such information in the Order. Additionally,

Petitioners seem to assert that there were insufficient numbers of measles cases in the City, or in the affected area to warrant the declaration of a public health emergency. Yet, the incidence of measles in the City, and in the affected zip codes is well-documented. In addition, both the CDC, and the DOHMH recognize that even three or more cases of measles constitute an outbreak. DOHMH Aff. ¶ 15. Thus the incidence of measles in New York City, and in the affected zip codes is far in excess of the number that is recognized as an outbreak. Furthermore, the incidence of new measles cases in the affected area continues to increase. DOHMH Aff. ¶ 30. Thus, the Commissioner's declaration of a public health emergency was neither arbitrary nor capricious.

Petitioners also argue that the Order is arbitrary, because there is a potential for confusion about the correct zip codes covered by the Order. However, on April 9, when Commissioner Barbot declared the emergency at a press conference she attended with Mayor de Blasio in Williamsburg, she announced that the Order covered residents of ZIP codes 11205, 11206, 11211 and 11249. While early versions of the written order mistakenly identified other zip codes as being covered by the declaration, these typographical errors were corrected that day to align with the Commissioner's announcement of where the outbreak persists. DOHMH Aff. ¶ 35. The corrected version was posted on the DOHMH website where it remains. The correct zip codes covered by the Order are properly identified, and easily found, and thus the Order is neither arbitrary nor capricious as a result of typographic errors that were promptly corrected.

Petitioners also allege that it is arbitrary and capricious to require vaccinations due to the risk of harm from vaccines. However, the current MMR vaccine used in the United States was licensed in 1971 and has a long and strong safety record. In fact, the article that first suggested a relationship between measles vaccine and brain damage was based on a now

discredited article published in 1998. Those finding could never be reproduced, and the article was retracted in 2010. The lead author of that article can no longer practice medicine in the United Kingdom. Since 1999, there have been over 25 articles published in the scientific literature that demonstrate the lack of such an association including reviews by the Institute of Medicine (source: <http://immunize.org/talking-about-vaccines/mmr.asp>). DOHMH Aff. ¶ 18. Moreover, contrary to Petitioners' claims, it is not safer and better to get the 'natural' wild-type measles infection. This is demonstrated by the reduction in measles cases and measles deaths (cited above) in the US and worldwide (80% reduction in deaths from 2000 to 2017, preventing an estimated 21.1 million measles deaths, source <https://www.who.int/en/news-room/fact-sheets/detail/measles>) after the introduction of an effective measles vaccine. While in some cases a person will develop a rash and/or fever following receipt of the MMR vaccine, the fever and rash are both less serious than with natural measles and non-transmissible, meaning other people cannot contract this measles by coming in contact a vaccinated person. DOHMH Aff. ¶ 19. In addition, as described in the DOHMH Aff. at paragraph 44, the affidavits submitted by Drs. Richard Moskowitz, Tina Kimmel, Jane Orient, Hendricks Fitzpatrick and Shira Miller make many false statements about both measles and the safety of the MMR vaccine. These false statements include suggesting that people who are vaccinated can transmit measles, that measles is virtually always benign and never serious unless occurring with malnutrition, and that the MMR vaccine is linked to autoimmune disorders. These opinions are not supported in the generally accepted medical literature. DOHMH Aff. ¶ 44. In any event, in light of the measles outbreak, the perceived risk from the MMR vaccine is far outweighed by the City's obligation to protect public health, as explained above. See e.g. Jacobson v. Massachusetts, 197 U.S. 11 (1905) Petitioners cite no case law to the contrary.

Thus, Petitioners have failed to show that the Order is arbitrary or capricious.

ii. **Petitioners Have Failed to Establish that the Order was Issued in Excess of the Commissioner's Authority**

Petitioners incorrectly allege that the Order was issued in excess of the Commissioner's authority. First, Petitioners' alleged concerns about forcible vaccination are not pertinent, as the Order does not contemplate or require forcible vaccination. While the Order mandates vaccination for people that are not immune to the measles virus (subject to a medical exemption), people are not required to be vaccinated against their will. Rather, non-compliance will subject an individual to possible civil fines, after receiving a Notice of Violation and an opportunity to be heard at the OATH administrative tribunal. DOHMH Aff. ¶ 41.

Petitioners also claim that the Commissioner, in issuing the Order, had no basis to declare unvaccinated people in the affected zip codes to be a public nuisance. However, Petitioners misrepresent the Commissioner's declaration. The declaration did not declare persons that lack the vaccine to be nuisances, rather it declared that "the presence of any person in Williamsburg lacking the MMR vaccine ... creates an unnecessary and avoidable risk of continuing the outbreak and is therefore a nuisance ... ". (Emphasis added.) See DOHMH Aff., Exhibit "A". The declaration properly falls within the definition of "nuisance" contained within Section 17-142 of the Administrative Code, and was therefore properly within the Commissioner's authority.

Petitioners next argue that the Order overrides the petitioners' and their children's "lawful exemptions from vaccination to attend school, which they obtained in full compliance with New York Public Health Law § 2164(9)." Public Health Law § 2164 is neither relevant nor applicable to the Order as that section of law applies to vaccination requirements for school

children, whereas the Order applies to all persons living or working in four specified zip codes in Brooklyn New York.

In any event, even if Public Health Law § 2164 were applicable here, the Order is nonetheless proper as New York State law recognizes that the exception provisions contained therein do not apply in emergency situations. Public Health Law § 2164 generally requires children in New York to receive immunizations for diseases such as measles prior to enrollment in school or child care. The law recognizes exemptions from the immunization requirement for children who are medically unable to be vaccinated and for children whose parents or guardians have sincerely held religious beliefs that are contrary to the State's vaccination requirements. See Public Health Law 2164(8), (9). However, religious exemption requests need not be accepted at face value; schools and child care facilities are specifically authorized to request information from a parent who submits a request for a religious exemption and may, ultimately, deny the exemption. See, e.g., Caviezel v. Great Neck Pub. Sch., 739 F. Supp. 2d 273 (E.D.N.Y. 2010), aff'd 500 Fed. Appx. 16, 2012 U.S. App. LEXIS 21109 (2d Cir. 2012). While Respondents do not now seek to doubt the sincerity of Petitioners' espoused religious beliefs, we note that in the months following this measles outbreak, religious leaders in the Community have urged parents to vaccinate their children. See, e.g., <https://nypost.com/2019/04/12/yiddish-newspaper-publishes-editorial-to-support-vaccinations-amid-measles-outbreak/>;
<https://www1.nyc.gov/site/doh/about/press/pr2018/pr091-18.page>

In addition, a recent newspaper article reports that over 500 doctors serving Jewish communities over North America have signed a letter which confirms the need for children and adults to get immunized. See, <https://www.theyeshivaworld.com/news/general/1715579/unprecedented-over-five-hundred-doctors-serving-jewish-communities-across-north-america-say-vaccinate.html>

Moreover, New York State law further recognizes that in the case of an outbreak (defined as an increased incidence of disease above its expected or baseline level, which may, for serious diseases including measles consist of just one case see 10 NYCRR 2.2(d)), the Commissioner of the New York City Department of Health and Mental Hygiene can order the appropriate school officials to exclude students who have been exempted from vaccination requirements. See 10 NYCRR 66-1.10. The exclusion from school of unvaccinated children holding religious exemptions during an outbreak of chicken pox was recently upheld by the Second Circuit Court of Appeals. See Phillips v. City of New York, 775 F.3d 538 (2d Cir. 2015). In denying plaintiffs' claim that the temporary school exclusion burdened their free exercise of religion, the Second Circuit stated as follows:

[A] parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S. Ct. 438, 88 L. Ed. 645 (1944). That dictum is consonant with the Court's and our precedents holding that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); accord, Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003) (holding that parental claims of free exercise of religion are governed by rational basis test). Accordingly, we agree with the Fourth Circuit, following the reasoning of Jacobson and Prince, that mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause. See Workman v. Mingo County Bd. of Educ., 419 F. App'x 348, 353-54 (4th Cir. 2011) (unpublished). New York could constitutionally require that all children be vaccinated in order to attend public school. New York law goes beyond what the Constitution requires by allowing an exemption for parents

with genuine and sincere religious beliefs. Because the State could bar Phillips's and Mendoza-Vaca's children from school altogether, *a fortiori*, the State's more limited exclusion during an outbreak of a vaccine-preventable disease is clearly constitutional.

Id. at 543.

Finally, Petitioners argue that the Order isn't the least restrictive means to handle the measles public health issue. However, no Petitioners cite no cases to support their claim that DOHMH is required to use the least restrictive means. In contrast, the law does not require DOHMH to use the least restrictive means available, and moreover, in light of her public health expertise, the Commissioner's exercise of discretion to issue this order to protect the public health is entitled to great deference. In any event, this Order is less restrictive than that proposed by Petitioners. This Order is restricted solely to those zip codes where the incidence of measles is greatest, and continues to rise, despite other DOHMH efforts to contain it. Moreover, it is disingenuous for Petitioners to argue that isolation or quarantine of infected persons is less restrictive than an Order that merely provides for a fine in the event of non-compliance. In any event, isolation or quarantine of infected persons is not likely to be effective since a person with measles will be infectious for four days before developing a rash, they are likely to expose other persons to the disease before they are even aware that they have the measles.

Thus the Petitioners have failed to establish that the Order was issued in excess of the Commissioner's authority.

POINT II

THE ORDER DOES NOT VIOLATE THE FEDERAL OR STATE CONSTITUTIONS.

Petitioners also assert several claims under the United States and New York State constitutions, including violation their right to freely exercise their religion, due process and equal protection. Petitioners are unlikely to succeed on the merits of any of these claims. As to their First Amendment claim, the Supreme Court has long recognized that the right to freely exercise one's religion is not limitless. In this regard in Prince v. Massachusetts, 321 U.S. 158, 166-67, 64 S. Ct. 438, 88 L. Ed. 645 (1944), the Supreme Court stated as follows:

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States*, 98 U.S. 145; *Davis v. Beason*, 133 U.S. 333. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youths well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. *People v. Pierson*, 176 N. Y. 201, 68 N. E. 243. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

As detailed in the DOHMH Affirmation, in the four zip codes covered by the Commissioner's Order the current measles outbreak has become a public health emergency. Taking steps to address this emergency and curb the further spread of the measles

virus is precisely the type of situation where the rights of an individual must cede to the interests of the public at large. See e.g., Caviezel, *supra*, 739 F. Supp. 2d at 285 (“In light of the Supreme Court’s direction in this area of law, and finding the District Court opinions disfavoring a First Amendment exception to mandatory vaccination laws to be persuasive, the Court finds that the free exercise clause of the First Amendment does not provide a right for religious objectors to be exempt from New York’s compulsory inoculation law.”).

Turning to Petitioners’ due process claim, while it is unclear whether Petitioners are raising a substantive or procedural due process claim, both are unlikely to succeed. First, as recognized by the Second Circuit in Caviezel, the Supreme Court’s decision in Jacobson, *supra*, which rejected a challenge to a Massachusetts mandatory smallpox vaccination law, forecloses a substantive due process challenge by Petitioners here. See *id.* 2012 U.S. App. LEXIS 21109, **6. In Jacobson, the Supreme Court recognized that “the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety.” *Id.* 197 U.S. at 27. As detailed in the Commissioner’s Order and in the DOHMH Affirmation, the same is true here. Thus, for the same reasons that the vaccination requirement at issue in Jacobson did not violate the plaintiff’s substantive due process rights, neither does the Order violate Petitioners’ substantive due process rights.

Nor does the Order violate Petitioner’s procedural due process rights. As noted in the DOHMH Affirmation, while the Order warns that failing to comply with the Order is potentially criminal, the Department is enforcing violations of the order civilly. DOHMH Aff. at ¶ 41. That means that violators will be issued a Notice of Violation (NOV) returnable in the Office of Administrative Trials and Hearings (OATH), where they will be afforded a full

administrative hearing prior to the imposition of any potential penalty. See Rules of the City of New York, Title 48, Chapter 6, Subchapter C, §§ 6-08, et. seq. Thus, as a matter of law, if they were to receive violations for failure to comply with the Commissioner's Order, Petitioners would have both notice and an opportunity to be heard, thereby protecting their due process rights. See, e.g., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

Petitioners' equal protection claim, which purports to challenge as lacking a rational basis, the Commissioner's decision to impose a mandatory vaccination requirement on only those individuals who reside, work or attend school in one of the four designated zip codes, also lacks merit. As set forth in the Order itself and in the DOHMH Affirmation, the Order was issued after other extensive efforts failed to stem the current outbreak and is tied solely to those areas of the City where measles cases are still occurring (in fact there were 39 new cases of measles in the last week in Williamsburg). Id. at 22-32. Individuals covered by the Order are simply not similarly situated to individuals in the rest of the City where a measles outbreak is not underway. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Bower Assocs. v. Town of Pleasant Valley, 2 N.Y.3d 617 (N.Y. 2004) (equal protection requires only that similarly situated individuals be treated similarly).

Moreover, the Order, which applies across the board to anyone who resides, works or attends school in the four affected zip codes, is the most effective way to stop the current outbreak. As stated in the DOHMH Affirmation:

Isolating persons with measles would not work because people with measles are infectious before their rashes appear and it is known that they have the disease. Many of the people who have contracted measles during this outbreak were infected because they came into contact with infected person during his or her prodromal

period. Quarantining contacts – anyone who might have come into contact with an infectious person – would be both logistically impossible and a much greater infringement of people’s liberty than simply fining people who chose not to be vaccinated during an outbreak.

Id. at ¶ 43. Petitioners will thus, not be successful on their equal protection claim.

POINT III

PETITIONERS’ REQUEST FOR A PRELIMINARY INJUNCTION MUST BE DENIED.

A preliminary injunction is an extraordinary and drastic remedy that should not be routinely granted, and the party seeking such relief bears a heavy burden of proof. See Rosa Hair Stylists, Inc. v. Jaber Food Corp., 218 A.D.2d 793, 794 (2d Dep’t 1995); MacIntyre v. Metropolitan Life Ins. Co., 221 A.D.2d 602 (2d Dep’t 1995); Chester Civic Improvement Ass’n, Inc. v. New York City Transit Authority, 122 A.D.2d 715, 717 (1st Dep’t 1986). “It is well established that the drastic remedy of a preliminary injunction is not to be granted unless a clear right to the relief demanded is established under the undisputed facts upon the moving papers, and that the burden of showing such an undisputed right is on the person seeking such relief.” Brandt v. Bartlett, 52 A.D.2d 272, 275 (3d Dep’t 1976). See also East 13th St. Homesteaders’ Coalition v. Lower East Side Coalition Housing Dev., 230 A.D.2d 622, 623 (1st Dep’t 1996).

A party seeking a preliminary injunction must establish each of the following: (1) the likelihood of its ultimate success on the merits; (2) that it will suffer irreparable injury if the preliminary injunction is not granted; and (3) that, on balance, the equities favor granting the preliminary injunction. See State of New York v. Fine, 72 N.Y.2d 967, 968-69 (1988); W.T. Grant Company v. Srogi, 52 N.Y.2d 496, 517 (1981); Schneider Leasing Plus, Inc. v. Stallone,

172 A.D.2d 739 (2d Dep't), app. dism'd, 78 N.Y.2d 1043 (1991); Application of J.O.M. Corp. v. Dep't of Health, 173 A.D.2d 153, 154 (1st Dep't 1991). As detailed herein, petitioners have not established entitlement to the extraordinary relief that they request and thus, their request for a preliminary injunction must be denied.

A. Petitioners Have Not Established Likelihood of Success on the Merits.

Petitioners cannot establish that they have a likelihood of success on the merits when, as detailed more fully above, the Order was reasonable and rational. Petitioners have failed to establish that the Order was arbitrary and capricious. Moreover, Petitioners have failed to establish that the Order was issued in excess of the Commissioner's authority. See Point I, above. Finally, the Petitioners have failed to show that the Order violates their constitutional rights. See Point II, above. Thus, Petitioners cannot establish a likelihood of success on the merits to justify the extraordinary relief of a preliminary injunction.

B. Petitioners Have Not Established Irreparable Harm.

In order to prevail on an application for a preliminary injunction, the moving party must demonstrate a danger of irreparable injury if an injunction were not issued. See Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862 (1990). It is well settled that irreparable harm "must be shown by the moving party to be imminent, not remote or speculative." Golden v. Steam Heat, 216 A.D.2d 440, 442 (2d Dep't 1995); see also Willow Media, LLC v. City of New York, 78 A.D.3d 596, 596 (1st Dep't 2010); Buffalo v Mangan, 49 A.D.2d 697, 697 (4th Dep't 1975).

In support of the instant application for a preliminary injunction, petitioners allege that they will suffer irreparable harm in the absence of a preliminary injunction. However, Petitioners claims are speculative and remote. To begin with, Petitioners allege that the vaccines themselves pose a risk of harm. Respondents dispute the vaccine risks described by Petitioners,

as described above. However, even if they were true, while the Order mandates vaccination, the vaccinations themselves are not forcibly administered. In fact a failure to comply with the Order merely poses a risk of receiving a Notice of Violation that may ultimately result in the imposition of a fine, after an opportunity to be heard at the OATH tribunal. Thus, Petitioners true risk of injury is purely economic. However, it is well settled that economic injury alone, which may be compensable by money damages, does not constitute irreparable harm. See Wall Street Garage Parking Corp. v. New York Stock Exchange, Inc., 10 A.D.3d 223, 228 (1st Dep't 2004); Di Fabio v. Omnipoint Communications, Inc., 66 A.D.3d 635, 636-37 (2d Dep't 2009); 330 East 72nd Street Condominium v. Colmenares, 2014 N.Y. Slip Op. 31301(U), 2014 N.Y. Misc. LEXIS 2291, **5-6 (Sup. Ct., N.Y. County May 19, 2014).

Plaintiff also attempts to argue that they are harmed by the stigma attached to Petitioners by being labeled a legal "nuisance". However, as described above, the Order does not describe the Plaintiffs as a nuisance, rather the nuisance is the "the presence of any person in Williamsburg lacking the MMR vaccine... ." In addition, Petitioners allege that "utter disrespect for petitioners' religious beliefs will irreparably damage petitioners." However Petitioners fail to describe how Petitioners' religious beliefs have been disrespected, and moreover how they have been damaged thereby.

A preliminary injunction "should be awarded sparingly, and only where the party seeking it has met its burden of proving both the clear right to the ultimate relief sought, and the urgent necessity of preventing irreparable harm." Buffalo v. Mangan, 49 A.D.2d at 697 (emphasis added); see also Board of Educ. of Union Free School Dist. No. 3 v. National Educ. Ass'n of U.S., 63 Misc. 2d 338, 341 (Sup Ct, Suffolk County 1970) ("an injunction should issue only where the peril to the plaintiff is very substantial and imminent").

Accordingly, Petitioners have failed to demonstrate imminent irreparable harm and the instant application for a preliminary injunction should be denied.

C. The Balance of Equities Clearly Favors the City.

Finally, Petitioners have not shown that on balance the equities lie in their favor. It is beyond dispute that in order for petitioners to show that the balancing of equities weighs in their favor, they “must [show] that the irreparable injury to be sustained . . . is more burdensome to [the petitioners] than the harm caused to the [City] through imposition of the injunction.” Nassau Roofing & Sheet Metal Co. v. Facilities Development Corp., 70 A.D.2d 1021, 1022 (3d Dep’t 1979), app. dismissed, 48 N.Y.2d 654 (1979). In making this determination, the Court must weigh the interests of the general public as well as the interests of the parties to the litigation. See DePina v. Educational Testing Service, 31 A.D.2d 744, 745 (2d Dep’t 1969); Hill v. Boufford, 141 Misc. 2d 654, 658 (Sup. Ct., N.Y. Co. 1988). In balancing the equities, a court is required to consider the public interest. Depina v. Educ. Testing Svc., 31 A.D.2d 744, 744 (2d Dep’t 1969); Greenwich Towers Associates v. McLean, Grove & Co., Inc., 17 A.D.2d 733, 733 (1st Dep’t 1962); International Railway Co. v. Barone, 246 App. Div. 450 (4th Dep’t 1935). In fact, it has been stated that “the court must consider and attach paramount importance to the public interest aspects of the litigation.” Metropolitan Transp. Auth. v. Village of Tuckahoe, 67 Misc.2d 895, 900 (Sup. Ct. Westchester Co. 1971), aff’d, 38 A.D.2d 570 (2d Dep’t 1972).

While Petitioners maintain that that the balance of equities are in their favor, they do not articulate any reason for their claim. In contrast, it is clear that the equities weigh heavily in favor of the need to protect the public health, in contrast to the possible harm faced by Petitioners, which is a mere civil fine.

CONCLUSION

For the foregoing reasons, the Petitioners' request for an injunction should be denied.

Dated: New York, New York
April 16, 2019

Respectfully submitted,

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BY:



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Assistant Corporation Counsel

**MEMORANDUM IN REPLY, BY PETITIONERS, TO RESPONDENTS'
MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' APPLICATION FOR AN
INJUNCTION, AND IN FURTHER SUPPORT OF ARTICLE 78 PETITION
AND ORDER TO SHOW CAUSE, DATED APRIL 17, 2019 [246 - 263]**

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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,

Index No.508356/2019

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

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**MEMORANDUM IN REPLY TO RESPONDENTS' MEMORANDUM OF LAW IN
OPPOSITION TO PETITIONERS' APPLICATION FOR AN INJUNCTION**

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April 17, 2019

PRELIMINARY STATEMENT

Petitioners respectfully submit this Memorandum in reply to the respondents' responsive submission. This Reply is submitted in further support of the petitioners' Article 78 Petition and Order to Show Cause requesting the Court to impose preliminary injunctive relief to vacate the emergency Orders promulgated by respondents.

At the outset, it is important to note that the respondents have stated, both in their oral argument on Monday, April 15, 2019, regarding the temporary restraining order or stay, that respondents are not enforcing the Order, except for imposing fines. Even imposing fines, which are wildly excessive in light of precedent,¹ however, goes well beyond an economic penalty. This is because of the intentionally coercive effect of the threat of a fine that will likely compel a family to vaccinate against their wishes, thereby overriding religious exemptions obtained in full compliance with New York Public Health Law §2164(9). The emergency Orders' command that petitioners "shall be vaccinated" violates the principle of informed consent, which is incorporated in the New York Public Health Law. N.Y. Pub. Health Law § 2805-d.

The respondents' position begs the question as to why an emergency Order is necessary if it is not going to be enforced. The respondents' position suggests that the New York City Department of Health and Mental Hygiene has engaged in rattling its saber rather than enforcing

¹ In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 13, 25 S. Ct. 358, 359, 49 L. Ed. 643 (1905), Pastor Henning Jacobson was issued a \$5 fine. The Supreme Court found it to be a "reasonable and proper exercise of police power" but there are limits. The Court found that the police power may be exerted, but regulations should not be arbitrary and oppressive and that "extreme cases can be readily suggested." Suggested. *Jacobson*, 197 U.S. at 25.(1905). A fine equivalent to the \$5 fine imposed in *Jacobson*, where the public health concern was the deadly smallpox variola virus, would today be \$125.52. See URL: <https://www.dollartimes.com/inflation/inflation.php?amount=5&year=1914>

its Order. This approach, which serves to intimidate and bully the affected Williamsburg residents, is counterproductive from the standpoint of public health because it undermines public trust and degrades the likelihood of community cooperation when a true emergency exists. The DOHMH has changed their tune from the content of their initial emergency Orders, which warned of severe criminal sanctions. The respondents' have issued a false alarm and cried "wolf". The respondents' empty threats betray the emergency Orders' unreasonableness and irrationality, which are key characteristics of an arbitrary and capricious order.

While not necessarily central to petitioners' argument, it is relevant to emphasize that the mantra that the Measles-Mumps-Rubella (MMR) vaccine is "an effective and safe" vaccine is not fully accurate. Respondents' Memorandum ("Respt. Mem.") at 3. As presented in the petitioners' Petition, and supporting documents, including the affidavits of medical experts and Exhibit 7, the manufacturer's package insert, the MMR carries risk. This is especially the case for infants under 12 months, which is specifically cited in the package insert and for persons who may be susceptible to vaccine injury.

The emergency Orders are based, in part, on the Commissioner's determination that the "presence of any person in Williamsburg" who is unvaccinated and not immune to measles or where the vaccine is medically contraindicated, "creates an unnecessary and avoidable risk of a continuing the outbreak." Respt. Mem. at 3.² The respondents, however, have failed to explain how a person's status as merely being present in Williamsburg leads to transmission of measles or infection. As petitioners pointed out in their submissions, the appropriate and least restrictive response by respondents to measles concern is to implement isolation or, if necessary,

² References to pagination in the Respondent's Memorandum will be to page numbers that appear at the very bottom of the Memorandum, ("3 of 23") as there is a discrepancy in pagination in the document, possibly due to automated electronic pagination systems.

quarantine, to stop transmission, not to issue blanket orders against unvaccinated persons that will not even be enforced. As petitioners have pointed out in their initial submissions in support of the Petition, the absence of an enforcement plan betrays that the emergency Orders were ill-conceived and poorly thought out. The fact that respondents now concede that the emergency Orders are largely not being enforced serves to confirm petitioners' argument.

The claim by respondents that the "potential harm [to petitioners] is solely economic in nature and is speculative" is wholly without merit. Respt. Mem. at 4. Surely, if the respondents do not intend to enforce their emergency Orders then harm will be minimized. If that is the case, then the emergency Orders are utterly unnecessary. Enforcement of the civil penalties and fines damages petitioners because in its coercive effect the emergency Orders undermine religious exemptions and operate to overcome the will of the petitioners.³ Instilling fear and anxiety in petitioners and challenging the integrity of duly recognized and lawful religious exemptions is a tangible harm that should not be minimized.

The respondents claim that enforcement is being pursued pursuant to Health Code § 3.11. Respt. Mem. at 6. This is not what the respondents advertised. The position taken by respondents conspicuously ignores the promulgation of emergency Orders that contain a "WARNING" in bold that violation can and will be prosecuted criminally with the threat "including imprisonment." Exhibits 1, 2, and 3, annexed to the Affirmation of Robert J. Krakow at 3. The respondents' conspicuous omission of the criminal aspect of the emergency Orders is a tacit admission that criminal penalties are inappropriate and should not be enforced. This part of the

³ It should be noted that contrary to some reports in the media and elsewhere, two of the five petitioners are not Jewish and thus are not members of the Orthodox Jewish community. The zip codes involved in Williamsburg comprise a religiously heterogeneous population in which persons with valid religious exemptions follow diverse faiths.

emergency Orders itself constitutes overreaching that renders the emergency Orders arbitrary and capricious and merits the granting of petitioners' requests for a preliminary injunction and invalidation of the emergency Orders.

ARGUMENT

POINT I

THE DOHMH ORDERS ARE UNREASONABLE AND IRRATIONAL

Respondents' submission and their conduct serves to emphasize the irrational and unreasonable nature of the emergency Orders.

First, the respondents' identification of incorrect zip codes and issuance of a series of three emergency Orders correcting their initial errors only serves to illustrate the lack of care and planning underlying the emergency declaration. It also emphasizes the pattern of respondents' conduct that engenders distrust in the community. These circumstances illustrate the lack of reason behind the emergency Orders.

Second, petitioners emphasize again that the issuance of broad, rare and intimidating Orders that, by respondents' own admission, will not be fully enforced, betrays the irrational approach taken by the respondents to control petitioners' behavior, overriding rights duly recognized by New York State under Public Health Law §2164(9), the religious exemption to vaccination. As has been presented in petitioners' affidavits, they each have children who have valid religious exemptions, which are each based on a finding that they hold sincere religious beliefs.

Thus, in using intimidating "warnings" that are not being enforced the respondents' have conceded the arbitrariness and capriciousness of their emergency Orders. By their own conduct post-issuance of the emergency Orders, including the position taken at the hearing regarding the

Order to Show Cause held on Monday, April 15, 2019, where the respondents argued they were not enforcing criminal penalties, just fines, respondents have established that “scrutinized for genuine reasonableness and rationality in the specific context” the emergency Orders are “so lacking in reason for [their] promulgation that [they] are essentially arbitrary. [quoting Axelrod, 78 N.Y.2d at 166].” Resp. Mem. at 7.

The respondents claim that they have tried “multiple strategies to end this outbreak” (Resp. Mem. at 8), which are not clearly set out, but have not employed isolation and quarantine of infected individual, which is authorized by N.Y. State law under PHL § 2100.

Belying the reasonableness of the emergency Orders is the Commissioner’s determination that they proscribe the “presence” of any person in the identified zip codes. The only option available to an unvaccinated person is to vaccinate or subject themselves to civil and criminal penalties. That is no reasonable and violated the petitioners’ status under New York law, their validly obtained religious exemptions, and the principles of informed consent. PHL §2164(9), and §2805-d.

Respondents, moreover, have failed to define what constitutes an emergency. The number of active measles infections constitute far less than .01 percent of the population of the affected zip codes and, as many cases fall outside the zip codes and have occurred elsewhere in Brooklyn and Queens, constitute a minuscule percentage of the more than 5,000,000 people who reside in the two boroughs. Petitioners have never challenged the claim that a measles outbreak has occurred and agree that the outbreak merits public health concern. What petitioners challenge is whether there is a need for emergency declarations overriding civil rights and individual autonomy over their bodies, when less severe methods of disease control will suffice.

References to A Discredited 1998 paper are irrelevant and unnecessarily inflammatory

Respondents inappropriately inject into the case the specter of the paper by Dr. Andrew Wakefield, who the respondents claim first “suggested a relationship between measles and brain damage.” Respt Mem. at 10. This allegation by respondents is inapposite to the issues in the case and false. This case has nothing to do with these assertions, which serve only to divert attention from the arbitrary and capricious emergency Orders and are simply and unnecessarily inflammatory. Petitioners have not mentioned this in their Article 78 Petition or supporting papers. What petitioners did cite is the manufacturers’ package insert, annexed as Exhibit 7 to the Affirmation of Robert J. Krakow (Document 9), which spells out the multiple contraindications to MMR vaccination at page 3-5, the precautions to be taken in administering the MMR vaccination (page 6) and adverse reactions to MMR vaccination, which is a long list including diabetes mellitus, anaphylaxis, vasculitis, thrombocytopenia, epididymitis, and death (page 8). These are undisputable and have nothing, whatsoever, to do with the 1998 article.

By attempting to divert and distract from the harms of MMR vaccination, respondent only emphasizes the arbitrary nature of their compulsory vaccination emergency Orders.

Respondents allege that petitioners’ experts have made “false statements” (Respt. Mem. at 11) but fail to document how they are false except to refer to the assertions contained in a supporting affirmation by a DOHMH official, without sufficient specificity.

The Emergency Orders Were Issued in Excess of Respondents’ Authority

Respondents are walking back the plain content and meaning of the emergency Orders. They argue that “con-compliance will subject an individual to *possible* civil fines, after receiving a Notice of Violation and an opportunity to be heard at the OATH administrative tribunal.” Contrary to this post-Order revisionary argument, the emergency Orders go well beyond this

reasonable sounding version of the emergency Orders. Were the emergency Orders originally cast in such limited terms, respondents may not have invited the petitioners' legal challenge, although the heavy fines themselves contain elements of coercion and are excessive, as compared with *Jacobson*, as presented above.

In addition, as explained in petitioners' Memorandum of Law (NYSCEF Doc. Number 26), the application of "nuisance" under New York law is a novel but legally strained overreach by respondents. By declaring people who do not vaccinate a nuisance, the emergency Orders would direct people to move out of their homes. It is not at all clear what is intended by respondents in invoking Section 17-142 of the Administrative Code. The lack of clarity of what respondents intend is itself arbitrary warranting the grant of the relief requested by petitioners.

As to respondents' claim that Public Health Law §2164(9) is irrelevant, goes to the point. It is arbitrary for respondents to issue an Order that operates to override duly obtained religious exemptions to vaccination for the children living in the affected zip codes. That respondents finds the effect of the emergency Orders in this regard irrelevant, itself shows arbitrariness and capriciousness.

Respondents Misconstrue and Denigrate the Validity of the Religious Exemption

Respondents' denigration of the religious exemption ("...religious exemption requests need not be accepted at face value". Respt. Mem. at 13), reveals another arbitrary aspect of respondents' emergency Orders. Respondents mistakenly suggest that statements of community leaders and religious leaders are somehow relevant to the religious exemption. This assertion is contrary to law and disrespects the recognized religious exemptions of the petitioners in this case. First, two of the petitioners are not Jewish, as are many other families with religious exemptions in the affected zip codes. Secondly, the pronouncements of religious leaders are not

relevant to a determination whether an individual has a sincere religious belief justifying an exception to vaccination. The preferences of religious leaders is irrelevant and suggests a disrespect for the principles of the Free Exercise Clause of the First Amendment. Such disregard for the rights of petitioners' sincere religious beliefs shows the arbitrary and capricious nature of the respondents' entire approach in this case *See Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81 (EDNY 1987) (established that the New York religious exemption is individual matter, not a doctrinal matter of an organized group.) The views, letters and pronouncement of religious leaders is irrelevant to the validity of each of petitioners' religious beliefs.

POINT II

THE EMERGENCY ORDER VIOLATE THE FEDERAL AND STATE CONSTITUTIONS

Respondents' reliance on the Second Circuit's sanction of exclusion of children from school is also inapposite. Respt. Mem. at 14, citing *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015). Arguments against the validity of the religious exemption often claim that *Jacobson* gives the state the absolute right to impose mandatory vaccination requirements on its citizens. What is usually lost on those espousing such a view, however, is that the *Jacobson* Court "did not address the free exercise of religion because, at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states." *See Phillips*. The *Jacobson* decision also contains no examination of whether denying access to a state constitutional right—such as public education—on the basis of a protected class—such as religion—would violate the constitutional guarantee of equal protection.

Least Restrictive Means

The failure of the respondents to use least restrictive means goes plainly to the arbitrariness of the emergency Orders. The harm caused to petitioners by the loss of their civil rights due to the compulsory vaccination order is unnecessary.

Respondent claims petitioners are “disingenuous” (Respt. Mem. at 14) for arguing that isolation or quarantine is less restrictive than “an Order that merely provides for a fine in the event of non-compliance.” Respt. Mem. at 14. The respondents claim is itself duplicitously disingenuous. Were the emergency Orders limited to providing for a reasonable fine in the event of non-compliance, respondents’ accusation of disingenuousness might make sense. The emergency Orders, however, went well beyond reasonable. The repeated attempt by respondents to move the target after issuance of arbitrary, overreaching emergency Orders is a form of confession that the Orders were inappropriate, arbitrary and capricious in the first instance. Respondents entire presentation supports petitioners’ argument that the emergency Orders were unnecessary and should never have been issued in the first place, in favor of more conventional methods of controlling disease.

Respondents’ reliance on *Prince v. Massachusetts*, 321 U.S. 158 (1944) is unavailing for the claim that the right to exercise one’s religion is not limitless. First, the pronouncements about vaccines in *Prince* is dicta. In the circumstances at bar, the respondents are barring children from schools in the affected areas. That issue has not been raised by petitioners except where children are being barred from schools located *outside* the affected zip codes.

When the Court is ready to consider these important Constitutional issues petitioners respectfully reserve the opportunity to address these issues more fully. In the interim, petitioners

respectfully submit that the issues before the Court on the request for preliminary injunction can be resolved based on other issues raised by petitioners.

Due Process – The Emergency Orders Go Beyond The Limited Civil Penalties Represented by Respondents in Their Memorandum

Respondents argue that the emergency Orders do not violate petitioners' due process rights on the same ground as *Jacobson*. Respondent claims, "[t]hus, for the same reasons that the vaccination requirement at issue in *Jacobson* did not violate the plaintiff's due process rights, neither does the Order violate Petitioners' substantive due process rights." Respt. Mem. at 17. Respondent's attempt at equivalency between the case at bar and *Jacobson* fails because, unlike *Jacobson*, and notwithstanding respondents' shifting characterization of the emergency Orders, they "warn" and carry penalties of criminal conviction and imprisonment. This aspect of the emergency Orders is something that respondents are looking to escape but respondents cannot run away from the plain language of the emergency Orders.

The respondents state, "while the Order warns that failing to comply with the Order is potentially criminal, the Department is enforcing violations of the order [sic] civilly." Respt. Mem. at 17 citing DOHMH Aff., at ¶41.

Respondent cannot issue an Order stating one thing and then claim the Order is "reasonable" because they choose not to enforce the Order. This is the very definition of arbitrary and capricious. It serves to mislead the public as to the effect of the Order. Whether this divergence between the clear statement contained in the Order and its enforcement was intentional, with the purpose of intimidating or bullying petitioners, cannot at present be determined. As to the respondents' often repeated claim that they are enforcing the emergency Orders only "civilly", however, (Respt. Mem. at 17), the emergency Orders should so state plainly the intended enforcement of the Orders. The Mayor's spokesperson conceded that the

enforcement of the emergency Order were not fully thought out. The scope of the enforcement of the emergency Orders should have been made plain to the public. It was not. That the emergency Orders conveyed threats of criminal prosecution to the public that respondents never intended and do not intend to enforce, as conceded in respondents' submission, reveals the profoundly arbitrary and capricious nature of the emergency Orders.

Equal Protection

Respondents defend against petitioners' Equal Protection claim by citing to "extensive efforts" that failed to stem the outbreak. The nature of the "extensive efforts" is not clearly set out by respondents.

Respondents claim that 39 new cases of measles occurred in the "last week". Respt. Mem. at 18. Respondents fail to specify whether the "new" cases were active cases or previously unreported cases. Respondents also have failed to specify whether or not any of the measles cases involved the vaccine strain of the measles or measles wild type strain, which has been done in other outbreaks. In addition, the respondents have not specified how many MMR-vaccinated individuals were among the cases reported. All these claims by respondents should be subject to verification of all the data revealed by their investigation of the outbreak.

Respondents cite their DOHMH Affirmation for the claim that isolation or quarantine would be "a much greater infringement of people's liberty than simply fining people who chose not to be vaccinated during an outbreak. Respt. Mem. at 17-18, citing DOHMH Affirmation at ¶43.

Respondents' argument might rise to the level of persuasion if they had not, yet again, conspicuously omitted the threat of imprisonment contained in the emergency Orders. The

disingenuousness of the respondents' presentation in this regard is clear evidence of the arbitrary and capricious nature of respondents' emergency Orders.

The respondents also ignore the compulsory nature of onerous fines (the fine here is many times the fine that was upheld in *Jacobson*). Respondents minimize the serious penalties that they have imposed and blithely ignore the criminal penalties plainly contained in the Order. The intent of the penalties is coercive, notwithstanding the respondents' protestations *after* issuance of the emergency Orders.

**III. PETITIONERS HAVE DEMONSTRATED IRREPARABLE HARM AND
LIKELIHOOD OF PREVAILING ON THE MERITS; THE EQUITIES
BALANCE IN FAVOR OF THE PETITIONERS**

While respondents characterize the preliminary injunction as a drastic remedy, it pales in comparison with the drastic nature of the compulsory vaccination orders promulgated by respondents.

**A. Petitioners Have Amply Demonstrated That the Emergency Orders are
Unreasonable, Irrational and, as such, are Arbitrary and Capricious**

Petitioners have demonstrated that the emergency Orders were carelessly promulgated, misleadingly framed and were disproportionate to the circumstances. Respondents have consistently described their own conduct and intentions in a manner that varies from the plain text of the emergency Orders. Petitioners have likely done this because on their face the Orders are arbitrary and capricious. Respondents cannot escape the arbitrariness of the emergency Orders, no matter how much they cast the clear commands in the emergency Order in a fashion at odds with their plain language.

The emergency Orders and the respondents' shifting statements about their enforcement is the very definition of arbitrary and capricious. Respondents have repeatedly misled the public. The Orders should be vacated to allow a more sensible public health approach to prevail.

B. Petitioners Have Established Irreparable Harm

An emergency Order that threatens criminal sanctions for a person's inaction and renders a non-vaccinated status as criminal when two days earlier it was legal and officially recognized, cannot be said to have a speculative and non-imminent effect on those subject to it. The emergency Orders stated that all persons in the designated zip codes "shall be vaccinated" under penalty of imprisonment. Respondent repeated has disowned this part of their emergency Orders, but they cannot escape. The effect of the Orders, with only two day's notice, denigrated the petitioners' duly recognized religious beliefs, vitiated their right to informed consent, and made the petitioners criminals subject to imprisonment. This harm is real and present, was imminent on April 11, 2019, when the two days expired and exists at this very moment. The harm is palpable to each of the families who are the petitioners in this case.

The petitioners are presented with a choice: become a criminal and face imprisonment or submit to vaccination or have their children vaccinated. While respondents dispute the vaccine risks described by petitioners, (Respt. Mem. at 19-20) it is difficult to understand their lack of comprehension of the package insert prescribing information prepared for dissemination to each vaccine by the manufacturer, Merck, which describes the risks in detail. Respondents' argument on this point defies reality. Petitioners know better and respondents' willingness to ignore the risks only promotes the very distrust that appears to be frustrating their effort at universal vaccination.

Respondents deny the compulsory vaccination aspect of their emergency Orders, which are backed by criminal sanctions and imprisonment. If, as respondents claim, the emergency Orders were not going to be enforced then the emergency Order constitute government misinformation designed to improperly manipulate the public. Again, the only result flowing

from respondents' misguided approach is to sow public distrust, an outcome that serves no New Yorker.

Respondents have branded an individual who does not comply with the emergency Orders as a "nuisance" under the Administrative Code by sophisticated parsing of the language of the emergency Orders, claiming that the individual is not a nuisance, only his presence in the zip codes is the nuisance. Respt. Mem. at 20. Such sophistic interpretation of the emergency Orders should be utterly rejected by this Court as an affront to all New Yorkers.

Respondents claim that petitioners have failed to describe how respondents have disrespected petitioners' religious beliefs. Respt. Mem. at 20. Petitioners each have a duly recognized sincere religious belief exempting them from vaccination. The emergency Orders direct that each "shall be vaccinated." The emergency Orders, moreover, implement criminal sanctions threatening criminal prosecution for each petitioner's betrayal of her religious beliefs. Respondents' failure to understand how the emergency Orders disrespect petitioners' religious beliefs reveals a colossal lack of sensitivity for the effect on ordinary people of the extreme terms of the emergency Orders.

C. The Balance of Equities Favors Petitioners

The respondents claim that all petitioners face is a "mere civil fine." Respt. Mem. at 21. Perhaps respondents meant to issue an emergency Order different from the one they actually issued. Perhaps respondents have realized they made a mistake in issuing the emergency Orders. No one in the community affected will buy the shifting stories that the respondents are selling. The emergency Orders threaten criminal penalties. This is the case no matter how many times respondents claim it is not the case.

The Orders before the Court are the Orders as written, not the post-hoc interpretation that the respondents would like, as now revised in their disingenuous reality-altering argument to the Court. If the emergency Orders had been limited to a *reasonable* civil fine, as in *Jacobson*, perhaps the situation would be different. The issues presented to the Court, however, involve the Orders before the Court, not the orders as the respondents would now like them to be.

CONCLUSION

The facts presented in the Verified Petition, as supported by Petitioners' exhibits, and the emergency Orders themselves, demonstrate that there is no "imminent or existing threat" presented by the measles outbreak.

Respondents have admitted that they have no blueprint and plan to implement their reckless emergency Orders and conceded that to determine how they should proceed with implementation *after* issuing the emergency Orders they would need to consult with legal counsel. Recognizing that the emergency Orders overreached the situation at hand, respondents are now rewriting the Orders in the hope that the Court will uphold an order that the respondent would like to and should have issued. Unfortunately, the respondents failed to issue rational and reasonable emergency orders. Instead, perhaps with the purpose to intimidate ordinary New Yorkers, the respondents issued orders that are patently arbitrary and capricious.

The petitioners, therefore, have shown that the emergency Orders are arbitrary, capricious, and contrary to the law and the Constitution. There is a significant likelihood that petitioners will prevail on the merits. The petitioners have been harmed and there is continuing and additional imminent harm. Based on the emergency Orders as written and promulgated, they are plainly arbitrary and capricious.

Absent the issuance of preliminary injunction, petitioners and their children will be irreparably harmed by the continuation of respondents' extreme, unnecessary, disproportionate, illegal and unnecessary emergency Orders.

II. RELIEF REQUESTED

Petitioners, therefore, respectfully request that this Court enter an Order:

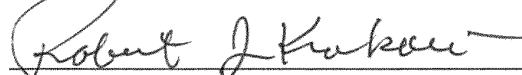
- (a) Enjoining and permanently restraining respondents and any of their agents, officers and employees from implementing or enforcing the emergency Orders of the Commissioner issued and dated on or around April 9, 2019; and
- (b) Declaring the Orders arbitrary, capricious and contrary to law, the imposition of which is beyond respondents' authority, and
- (c) Vacating the mandatory vaccination Orders issued on and around April 9, 2019, and
- (d) Granting such other and further relief which it deems just and proper.

Dated: New York, New York

April 17, 2019

Respectfully submitted,

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CERTIFICATION PURSUANT TO CPLR 2105

I, Robert J. Krakow, attorney for the Petitioners-Appellants, do hereby certify, pursuant to CPLR 2105, that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and found to be true and complete copies of those originals and the whole thereof now on file in the office of the Clerk of the County of Kings.

Dated: October 18, 2019



Robert J. Krakow
Attorney for Petitioners-Appellants