

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

Matter of RAYMOND BELL)	
)	
On behalf of himself and all others similarly)	
situated,)	Case No.
Petitioners,)	
)	
-against-)	
)	
NEW YORK CITY DEPARTMENT OF)	
CORRECTION,)	
)	
Respondent.)	

**PETITIONER RAYMOND BELL’S MEMORANDUM OF LAW IN SUPPORT OF HIS
ARTICLE 78 VERIFIED PETITION**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND..... 2

LEGAL STANDARD..... 8

ARGUMENT 9

I. Plaintiff’s Claim Is Meritorious and Likely to Succeed 9

 a. The challenged conditions for current and future incarcerated persons
 constitute an objective deprivation of the right to due process..... 10

 b. Petitioner Bell establishes the *mens rea* prong of the deliberate indifference
 test..... 12

 c. Respondent itself admits it has no interest that can outweigh the harms
 facing current and future Rikers incarcerated persons..... 13

II. Petitioners Face Irreparable Harm 14

III. The Balance of the Equities Favors Petitioners' Request for a Preliminary Injunction..... 15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>People ex rel. Burse v. Schiraldi.</i> 2021 N.Y. Slip. Op. 21351 (N.Y. Co. Dec. 22, 2021).....	9, 11, 12, 13
<i>People ex rel. Coleman v. Brann.</i> 68 Misc.3d 204 (Bronx Co. 2020)	9, 10, 12
<i>Cooper v. Morin,</i> 49 N.Y.2d 69 (1979)	2
<i>Doe v. Axelrod,</i> 136 A.D.2d 410 (1st Dept. 1988).....	9
<i>Helling v. McKinney,</i> 509 U.S. 25 (1993).....	10
<i>Nunez v. City of New York,</i> 1:11-cv-05845-LTS-JCF (S.D.N.Y. Oct. 21, 2015)	3, 13, 15
<i>People ex rel. Stoughton v. Brann (“Williams/Stoughton v. Brann”)</i> 185 A.D.3d 521 (1st Dept. 2020).....	9
<i>People ex rel. Stoughton v. Brann (“Jeffrey/Stoughton v. Brann”)</i> 67 Misc. 3d 629 (N.Y. Co. 2020)	10
Other Authorities	
Alexandra Hutzler, Lawmakers Call NYC Jail ‘Horror Island’ After Seeing Inmate’s Attempted Suicide on Tour, Newsweek (Sept. 14, 2021, 10:36AM), https://www.newsweek.com/lawmakers-call-nyc-jail-horror-island-after-seeing-inmates-attempted-suicide-tour-1628928	5
Beth Schwartzapfel, <i>Dispatch from Deadly Rikers Island: “It Looks Like a Slave Ship in There”</i> , Marshall Project, Oct. 5, 2021, https://www.themarshallproject.org/2021/10/05/dispatch-from-deadly-rikers-island-it-looks-like-a-slave-ship-in-there#:~:text=When%20I%20got%20to%20Rikers%2C%20I%20was%20in%20the,way%20up%20to%20the%20bars	4
Coronavirus in the U.S.: Latest Map and Case Count, N.Y. Times, https://www.nytimes.com/interactive/2021/us/covid-cases.html (last visited Dec. 28, 2021).....	5

Covid Live Updates: Case Records Are Shattered Across U.S. and Europe, The New York Times, https://www.nytimes.com/live/2021/12/29/world/omicron-covid-vaccine-tests (last visited Dec. 29, 2021).	12
CPLR § 6301	1
Deanna Paul, <i>Rikers Island Conditions Spiral Out of Control for Inmates and Officers</i> , Wall St. J., Sept. 19, 2021	4, 5
Gabrielle Fonrouge, <i>Photos Inside Rikers Island Expose Hellish, Deadly Conditions</i> , N.Y. Post. Oct. 21, 2021	4
<i>Hundreds Of Correction Officers Defy New Vaccine Mandate, Compounding Staff Crisis On Rikers</i> , The Gothamist (Dec. 1, 2021), https://gothamist.com/news/hundreds-correction-officers-defy-new-vaccine-mandate-compounding-staff-crisis-rikers	3
Jake Offenhartz, <i>Hundreds Of Correction Officers Defy New Vaccine Mandate, Compounding Staff Crisis On Rikers</i> , The Gothamist (Dec. 1, 2021), https://gothamist.com/news/hundreds-correction-officers-defy-new-vaccine-mandate-compounding-staff-crisis-rikers	7
Jan Ransom, <i>On Rikers, Brooklyn Man Becomes Latest Detainee to Die in Custody</i> , NY Times (Dec. 15, 2021), https://www.nytimes.com/2021/12/15/nyregion/rikers-island-deaths.html	4, 16
Kristine Garcia, Kala Rama, 'A crisis level': Rikers COVID positivity skyrockets, DOC head urges inmate release, PIX11 (Dec. 22, 2021, 1:01PM EST), https://pix11.com/news/coronavirus/rikers-covid-positivity-skyrockets-head-of-doc-calls-for-release-of-inmates/	5, 8, 11, 13, 14
Mark Morales, <i>Inmates at NYC's Rikers Island jail in the midst of 'emerging crisis' related to Omicron surg</i> , CNN (Dec. 22, 2021, 5:47PM EST), https://www.cnn.com/2021/12/22/us/omicron-surge-rikers-jail/index.html	5, 11, 14
Melinda Wenner Moyer, <i>What Are the Symptoms of Omicron</i> , NY Times (Dec. 21, 2021), https://www.nytimes.com/2021/12/21/well/live/omicron-variant-symptoms-covid.html	14
Michael R. Sisak, <i>NYC's Rikers Island Jail Spirals into Chaos Amid Pandemic</i> , Associated Press News, Sept. 16, 2021, https://apnews.com/article/kathy-hochul-health-prisons-new-york-new-york-city-da3d6f8334946cf2cc3eb2bac60538a2	4, 5
<i>NYC ER Doc Breaks Down How Omicron Affects the Boosted, Vaxxed and Unvaccinated</i> , NBC New York 4 (Dec. 27, 2021), https://www.nbcnewyork.com/news/coronavirus/nyc-er-doc-breaks-down-how-omicron-affects-the-boosted-vaxxed-and-unvaccinated/3468742/	14

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People with Certain Medical Conditions, Center for Disease Control and Prevention (Dec. 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.2, 14

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Twelfth Report of the Nunez Monitor, at 6, 7, Dec. 6, 2021, *Nunez v. City of New York*, 1:11-cv-05845-LTS-JCF (S.D.N.Y. Oct. 21, 2015).....3, 15

Petitioner Raymond Bell, on behalf of himself and all others similarly situated (collectively, “Petitioners”), by his attorneys, submits this memorandum of law in support of his Article 78 motion to compel, seeking a preliminary injunction with a temporary restraining order against Defendant New York City Department of Correction (“DOC”) under CPLR § 6301.

PRELIMINARY STATEMENT

Petitioner Bell, an incarcerated person at Rikers Island, commenced this Article 78 proceeding on behalf of himself and a putative class of similarly situated Rikers Island incarcerated persons. Petitioners seek to enjoin the DOC from continuing to admit new incarcerated persons to Rikers Island amid an exploding COVID-19 catastrophe that is coursing unabated throughout the incarcerated population and to which, for numerous reasons discussed herein, there is no end in sight.

Over the past two years, the DOC has continued to admit incarcerated persons to Rikers Island notwithstanding its inability to ensure the safety of its incarcerated population due to various DOC failures, including a staffing crisis that persists despite federal oversight of the facility. Now with the Omicron variant spreading like wildfire throughout the New York metropolitan area and with COVID-19 infections spiraling out of control, the DOC continues to insert more incarcerated persons into facilities that are already poorly staffed and lacking in resources. The Rikers population has become an easy target for an increasingly transmissible virus that has proven deadly to nearly a million people in the United States alone, with a high percentage of unvaccinated incarcerated persons and without sufficient staffing to ensure adequate protections, including that infected incarcerated persons are properly quarantined for the safety of other incarcerated persons.

In an effort to prevent future illness and death and further violations of Article 1, §6 of the New York State Constitution, Petitioners request: (1) a preliminary injunction, pursuant to New

York Civil Practice Law and Rules (“CPLR”) § 6311, forbidding the admission of new incarcerated persons to any Rikers Island detention facility, and the diversion of incarcerated persons to at-home confinement or other facilities as appropriate in light of the exacerbated conditions caused by COVID-19, the ongoing staffing crisis, and the inhumane conditions at Rikers; and (2) a temporary restraining order, pursuant to CPLR § 6313(a), preserving the status quo pending the Court’s determination of the preliminary injunction motion by enjoining the Department of Corrections from admitting new incarcerated persons to any Rikers Island detention facility, and requiring the diversion of incarcerated persons to at-home confinement or other facilities as appropriate in light of the exacerbated conditions caused by COVID-19, the ongoing staffing crisis, and the inhumane conditions at Rikers.

FACTUAL BACKGROUND

Petitioner Raymond Bell is a 27-year-old pre-trial detainee currently housed at Rikers Island. He has suffered from asthma since childhood and, because of a gunshot to his head, fluids excessively gather in his skull on a continual basis. Doctors have informed Mr. Bell that, for him to remain alive, those fluids must be routinely drained, and he must avoid further physical contact to his head. His condition has left him with post-traumatic stress disorder, constant migraines, and a severe limp. His asthma and head injury have been identified by the United States Center for Disease Control and Prevention (CDC) as being associated with a higher risk of severe COVID-19.¹ Nonetheless, Petitioner Bell is one among thousands of Rikers incarcerated persons presently at risk of COVID-19 infection due to the DOC’s documented inability to provide safe conditions

¹ See *People with Certain Medical Conditions*, CENTER FOR DISEASE CONTROL AND PREVENTION (Dec. 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (identifying “asthma,” “mental health conditions,” and “cerebrovascular disease” as preexisting conditions associated with a higher risk of severe COVID-19).

for those incarcerated persons.

In 2015, per the Consent Judgment in *Nunez v. City of New York*, an independent monitor (the “*Nunez Monitor*”) was appointed to oversee the conditions at Rikers Island because of years of chronic neglect and poor treatment of incarcerated persons.² Since then, however, the situation at Rikers has only become more dire. The *Nunez Monitor* reported on December 6, 2021 that “conditions [at Rikers have] been deteriorating along a new trajectory . . . [and] have progressively and substantially worsened.”³ Moreover, the *Nunez Monitor* concluded that the requirements set forth in the aforementioned Consent Judgment “assume a crucial and basic level of capability, competence, and adherence to foundational corrections practices that the [DOC] simply lacks.”⁴ In short, the DOC has failed to “implement and institutionalize . . . remedial measures” to improve the conditions at Rikers.⁵

Looming among DOC’s failures is a staffing crisis. According to the *Nunez Monitor*: “On any given day in October 2021, an average of approximately 80 posts [at Rikers Island] went unmanned – including posts in which Staff directly supervise and facilitate services for people in

² *Nunez* began in 2012, when a class of former and current Rikers incarcerated person-plaintiffs alleged that they had been subject to continuous brutal and unlawful beatings by uniformed DOC staff, violating their rights under the United States Constitution and New York State Constitution. See Amended Complaint, *Nunez v. City of New York*, 1:11-cv-05845-LTS-JCF (S.D.N.Y. May 24, 2012), ECF 15. In 2014, the United States Department of Justice intervened after a multi-year internal investigation confirmed the truth of these claims. United States’ Proposed Complaint-In-Intervention, *Nunez v. City of New York*, 1:11-cv-05845-LTS-JCF (S.D.N.Y. Dec. 18, 2014), ECF 178. By the following year, the *Nunez* parties brokered a consent agreement, which was ultimately approved by the Court. Consent Judgment, *Nunez v. City of New York*, 1:11-cv-05845-LTS-JCF (S.D.N.Y. Oct. 21, 2015), ECF 249. The Consent Judgment mandated, among other things, that the DOC maintain an adequate ratio between incarcerated persons and staff; “develop and maintain a comprehensive staff recruitment program . . . and keep the Department competitive with surrounding law enforcement and correctional agencies;” and supervise “[y]oung inmates . . . at all times in a manner that protects them from an unreasonable risk of harm.” *Id.* To ensure that these provisions were followed, the SDNY appointed Steve J. Martin (the “*Nunez Monitor*”) as an independent monitor. *Id.* at 51.

² *Id.*

³ Twelfth Report of the *Nunez* Independent Monitor at 6-8, *Nunez v. City of New York*, 1:11-cv-05845-LTS-JCF (S.D.N.Y. Oct. 21, 2015), ECF 431 (hereinafter, “Twelfth *Nunez* Report”).

⁴ *Id.* at 8.

⁵ *Id.* at 16.

custody.”⁶ The ongoing shortage has prevented incarcerated persons from receiving basic necessities, such as food, water, and critical medical attention.⁷ For example, on December 16, a Rikers Island incarcerated person died while awaiting urgent medical care for by DOC staff.⁸ He was the 15th incarcerated person to die in 2021.⁹

Further, because of the ongoing staffing problem, newly admitted detainees find themselves languishing in intake units for days, even weeks, longer than what is legally mandated.¹⁰ Recent images published by the *New York Post* show at least 26 men stuffed body-to-body inside of a single cell while being processed.¹¹ Instances of severe overcrowding like this, of which more examples abound, are directly caused by the DOC staffing shortage, as detainees cannot be processed through intake in the time necessary to comply with New York regulations, causing them to be held for extended periods of time in extremely close proximity. Indeed, due to the lack of space within these intake areas, incarcerated persons are commonly left to sleep on floors “sullied with rotten food, maggots, urine, feces, and blood.”¹²

Apart from the overcrowded intake areas, further unsanitary conditions persist throughout Rikers Island. In intake, functional showers are lacking, bathrooms overflow, and sinks remain

⁶ *Id.* at 33.

⁷ See Deanna Paul, *Rikers Island Conditions Spiral Out of Control for Inmates and Officers*, WALL ST. J., Sept. 19, 2021, <https://www.wsj.com/articles/rikers-island-conditions-spiral-out-of-control-for-inmates-and-officers-11632063601>.

⁸ Jan Ransom, *On Rikers, Brooklyn Man Becomes Latest Detainee to Die in Custody*, N.Y. TIMES, Dec. 15, 2021, <https://www.nytimes.com/2021/12/15/nyregion/rikers-island-deaths.html>.

⁹ *Id.*

¹⁰ See Michael R. Sisak, *NYC's Rikers Island Jail Spirals into Chaos Amid Pandemic*, ASSOCIATED PRESS, Sept. 16, 2021, <https://apnews.com/article/kathy-hochul-health-prisons-new-york-new-york-city-da3d6f8334946cf2cc3eb2bac60538a2>.

¹¹ See Gabrielle Fonrouge, *Photos Inside Rikers Island Expose Hellish, Deadly Conditions*, N.Y. POST., Oct. 21, 2021, <https://nypost.com/2021/10/21/photos-inside-rikers-island-expose-hellish-deadly-conditions/>.

¹² *Id.*

inoperable.¹³ Some incarcerated persons have responded by using communal bags as toilets.¹⁴ Lawmakers who toured the Rikers complex in September 2021 confirmed these findings,¹⁵ leading New York Assemblyman Kenny Burgos to characterize Rikers as a “horror island.”¹⁶

Against this calamitous backdrop enters the Omicron variant of COVID-19. The Omicron variant spreads faster than its predecessors.¹⁷ Indeed, as of December 2021, the COVID-19 infection rate has returned to heights not observed since its peak in January 2021.¹⁸ On December 29, 2021, “[t]he U.S. set a one-day record of nearly half a million cases.”¹⁹ Rikers Island has not avoided this unfortunate trend. In fact, DOC Commissioner Vincent Schiraldi noted on December 21, 2021, that COVID-19 infections among incarcerated persons surged from approximately 1% to over 17% in just ten days.²⁰ On December 28, this number went up to 26%, which only includes the detainees who have been tested.²¹ Moreover, the DOC has *admitted* that it cannot adequately

¹³ See Beth Schwartzapfel, *Dispatch from Deadly Rikers Island: “It Looks Like a Slave Ship in There”*, MARSHALL PROJECT, Oct. 5, 2021, <https://www.themarshallproject.org/2021/10/05/dispatch-from-deadly-rikers-island-it-looks-like-a-slave-ship-in-there#:~:text=When%20I%20got%20to%20Rikers%2C%20I%20was%20in%20the,way%20up%20to%20the%20bars.>

¹⁴ See Deanna Paul, *Rikers Island Conditions Spiral Out of Control for Inmates and Officers*, WALL ST. J., Sept. 19, 2021, <https://www.wsj.com/articles/rikers-island-conditions-spiral-out-of-control-for-inmates-and-officers-11632063601>.

¹⁵ See Sisak, *supra* note 10.

¹⁶ Alexandra Hutzler, *Lawmakers Call NYC Jail ‘Horror Island’ After Seeing Inmate’s Attempted Suicide on Tour*, Newsweek (Sept. 14, 2021, 10:36AM), <https://www.newsweek.com/lawmakers-call-nyc-jail-horror-island-after-seeing-inmates-attempted-suicide-tour-1628928>.

¹⁷ *Omicron Variant: What You Need to Know*, CENTER FOR DISEASE CONTROL AND PREVENTION (Dec. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html>.

¹⁸ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (last visited Dec. 30, 2021).

¹⁹ *Covid Live Updates: Incoming Mayor to Keep N.Y.C.’s Private-Sector Vaccine Mandate*, N.Y. TIMES (Dec. 30, 2021, 11:16AM), <https://www.nytimes.com/live/2021/12/30/world/omicron-covid-vaccine-tests>.

²⁰ Mark Morales, *Inmates at NYC’s Rikers Island jail in the midst of ‘emerging crisis’ related to Omicron surg*, CNN (Dec. 22, 2021, 5:47PM EST), <https://www.cnn.com/2021/12/22/us/omicron-surge-rikers-jail/index.html>.

²¹ Vincent Schiraldi (@VinSchiraldi), Twitter (Dec. 30, 2021, 7:20AM), <https://twitter.com/VinSchiraldi/status/1476528598953730049>.

protect its incarcerated persons or its staff from this new outbreak, and has had to cut other “basic services,” including worship services, in light of COVID.²²

The DOC has also mishandled detainees with preexisting conditions and who have already tested positive for COVID-19. For example, despite being told of his preexisting conditions, the DOC has done nothing to protect Petitioner Bell from suffering loss of life and, indeed, has placed him at further risk. To date, Petitioner Bell has yet to have his skull properly drained and as such, suffers from continuous migraines. He has also yet to receive any physical therapy, despite his doctor mandating it. When Petitioner Bell complained to the DOC’s medical unit of his condition, he was told that he “should just die” and was sent back to his cell.

When Petitioner Bell first arrived at Rikers Island, the DOC left him in an overcrowded intake area surrounded by incarcerated persons charged with violent crimes – knowing that a well-placed blow to his head might cause death. Petitioner Bell reports being unable to sleep over the course of his stay at intake (4-5 days) out of fear that another detainee would strike him thus. He was also placed in intake with at least one other incarcerated person who had COVID-19. Since leaving intake, Bell has been attacked on two occasions by fellow incarcerated persons. Yet, because of the ongoing DOC staffing shortage, no staff member intervened until substantial time had passed.

Further, because it is not DOC practice to separate incarcerated persons with preexisting conditions from other incarcerated persons, Petitioner Bell was placed in a housing unit with a large number of potential Omicron carriers. Indeed, despite the pandemic raging through Rikers, proper preventative COVID-19 protocols are not followed. When an incarcerated person does test

²² See Kristine Garcia, Kala Rama, *‘A crisis level’: Rikers COVID positivity skyrockets, DOC head urges inmate release*, PIX11 (Dec. 22, 2021, 1:01PM EST), <https://pix11.com/news/coronavirus/rikers-covid-positivity-skyrockets-head-of-doc-calls-for-release-of-inmates/>.

positive, he is not removed from his dormitory or quarantined away from his fellow incarcerated persons. Instead, the staff merely attempt to seclude the dormitory from other Rikers facilities. During this seclusion, all incarcerated persons – including the incarcerated person who tested positive – are free to walk amongst the dorm’s population without any notice of who is infected. Furthermore, incarcerated persons who have jobs outside of their unit and who have been exposed to the infected incarcerated person – including those incarcerated persons who staff the visiting area and mess hall – continue to leave their housing units to perform those jobs. Thus, the DOC’s own quarantine procedures are woefully incomplete and inadequate, putting incarcerated persons throughout the infected incarcerated person’s dormitory – as well as throughout the facility – at grave risk.

Petitioner Bell has himself been locked in with incarcerated persons who have contracted COVID-19 and was placed in a cell next to another incarcerated person who had COVID and was symptomatic. He has also reported that incarcerated persons are not routinely tested after being exposed to COVID positive persons. Furthermore, Petitioner Bell has already noticed DOC staff numbers dwindling as more of its members test positive for COVID and refuse the vaccine. Petitioner Bell also reports being relocated to a cell previously occupied by another incarcerated person who tested positive for COVID-19 that same day. The cell was not decontaminated prior to his arrival, and neither Petitioner Bell nor the infected incarcerated person were given masks during the transference. In fact, masks are not regularly provided to incarcerated persons except for instances when they attend visitation.

At the same time, despite the City’s mandate, hundreds of DOC staff members remain unvaccinated, while others remain reluctant to show up at a workplace where an outbreak is

ongoing.²³ On December 4, 2021, it was reported that at least 17% of all DOC staff continued to refuse the vaccine,²⁴ 9% of whom have applied for medical or religious exemptions while continuing to report to work.²⁵ Given that quarantining is required for those who test positive, a worsening staff shortage is inevitable.²⁶ This will only aggravate the existing inhumane conditions at Rikers Island, as incarcerated persons cannot get access to necessary medical care or court hearings and attorney appointments, nor can they live without fear of violence from other incarcerated persons, without the presence of sufficient staff.

The worsening DOC staff shortage, the spread of the Omicron variant, and the blithe continued admittance of new incarcerated persons to Rikers Island are a perfect storm for a human rights catastrophe. Due to the lack of strict safety protocols, testing, and contact tracing, detainees at Rikers Island are at significantly higher risk of exposure. A more contagious variant will incapacitate a greater number of staff who test positive, ever exacerbating the problems already persisting at Rikers. In such dire emergencies, detainees with health conditions, like Mr. Bell, are going to bear the brunt of the infections and harm.

The DOC itself recognizes that Rikers stands unsteady on a dangerous precipice. On December 21, 2021, DOC Commissioner Schiraldi sent a letter to several public defender and prosecutor offices expressly pleading with recipients to request the “courts to . . . consider every available option to reduce the number of individuals in our jails,” including “seeking supervised release in more cases or identifying cases that can be resolved with modifications to sentence

²³ Jake Offenhartz, *Hundreds Of Correction Officers Defy New Vaccine Mandate, Compounding Staff Crisis On Rikers*, THE GOTHAMIST, Dec. 1, 2021, <https://gothamist.com/news/hundreds-correction-officers-defy-new-vaccine-mandate-compounding-staff-crisis-rikers>.

²⁴ Rich Calder, *Hundreds of DOC officers put on leave for refusing COVID jab*, CNN (Dec. 4, 2021, 12:01PM EST), <https://nypost.com/2021/12/04/over-500-nyc-doc-officers-on-leave-for-refusing-covid-vaccine/>.

²⁵ *Id.*

²⁶ *See, supra* note 3.

length or requesting compassionate release for individuals who are at higher risk due to underlying medical conditions.”²⁷

This is such a case. Without this Court’s intervention, Petitioner Bell and other incarcerated persons like him not only face the threat of continued loss of their civil rights, but of the loss of their lives. For these and the additional reasons discussed below, this Court should grant: (1) a preliminary injunction, pursuant to New York Civil Practice Law and Rules (CPLR) § 6311, forbidding the admission of new incarcerated persons to any Rikers Island detention facility, and the diversion of incarcerated persons to at-home confinement or other facilities as appropriate in light of the exacerbated conditions caused by COVID-19, the ongoing staffing crisis, and the inhumane conditions at Rikers; and (2) a temporary restraining order, pursuant to CPLR § 6313(a), preserving the status quo pending the Court’s determination of the preliminary injunction motion by enjoining the Department of Correction from admitting new incarcerated persons to any Rikers Island detention facility, and requiring the diversion of incarcerated persons to at-home confinement or other facilities as appropriate in light of the exacerbated conditions caused by COVID-19, the ongoing staffing crisis, and the inhumane conditions at Rikers.

LEGAL STANDARD

A court should grant a temporary restraining order and preliminary injunction upon a petitioner’s showing of: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party’s favor. *See, e.g., Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988).

²⁷ Attached as Exhibit A. *See* Letter from Vincent Schiraldi, Comm’r, Dep’t of Corr., to N.Y.C. Prosecution and Pub. Defender Cmty. (Dec. 21, 2021) [hereinafter “Ex. A”]; Kristine Garcia & Kala Rama, *‘A crisis level’: Rikers COVID positivity skyrockets, DOC head urges inmate release*, PIX11 (Dec. 22, 2021, 1:01PM EST), <https://pix11.com/news/coronavirus/rikers-covid-positivity-skyrockets-head-of-doc-calls-for-release-of-inmates/>.

ARGUMENT

I. Petitioners' Claim Is Meritorious and Likely to Succeed

A Due Process claim brought pursuant to Article 1, §6 of the New York State Constitution and raised by a pre-trial detainee concerning his conditions of incarceration is governed by the legal standard set forth in *Cooper v. Morin. People ex rel. Coleman v. Brann*, 68 Misc.3d 204, 211 (N.Y. Co. 2020) (citing 49 NY2d 69 [1979]). Recently, this court outlined:

To establish a Due Process Clause claim for unconstitutional conditions of confinement, a pretrial detainee must show that prison officials acted with 'deliberate indifference' to the challenged conditions. A pretrial detainee must satisfy two prongs to establish a deliberate indifference claim: an "objective prong" showing that the challenged conditions were sufficiently serious to constitute objective deprivations of the right to due process, and a "*mens rea* prong" showing that the officer acted with at least deliberate indifference to the challenged conditions. To establish an objective deprivation, a pretrial detainee must show that the prison conditions pose an unreasonable risk of serious damage to physical and mental health. There is no 'static test' for determining whether a deprivation is sufficiently serious.

People ex rel. Burse v. Schiraldi, 2021 N.Y. Slip. Op. 21351 at *5 (N.Y. Co. Dec. 22, 2021) (internal citations omitted); *see also People ex rel. Stoughton v. Brann* ("*Williams/Stoughton v. Brann*"), 185 A.D.3d 521, 522 (1st Dept. 2020) ("The State Constitution is violated in condition-of-confinement cases where there is deliberate indifference, but the analysis also requires a balancing of the harm to the individual resulting from the alleged conditions against the benefit sought by the State through the continuation of the condition.").

Further, "[f]or due process claims brought by pretrial detainees seeking their release from Rikers Island because conditions there unduly expose them to the COVID-19 virus and endanger them, the [New York courts] have framed the analysis as a balancing 'between the harm to each petitioner's health caused by their continued detention at Rikers Island and the government's interest in assuring their presence in court as required for the disposition of their cases.'" *People ex rel. Coleman v. Brann*, 68 Misc. 3d 204, 211 (Bronx Co. 2020).

For the following reasons, Petitioner Bell satisfies this standard.

a. The challenged conditions for current and future incarcerated persons constitute an objective deprivation of the right to due process

As the New York Supreme Court found in April 2020 (when the COVID-19 crisis was merely beginning): “There can be no doubt that the presence of a communicable disease in a prison can constitute a serious, medically threatening condition. . . . Covid-19 is at large at Rikers Island. The current epidemic poses a deadly threat to incarcerated persons, and its presence at the prison equates to an ‘unsafe, life-threatening condition’ endangering ‘reasonable safety.’” *People ex rel. Stoughton v. Brann* (“*Jeffrey/Stoughton v. Brann*”), 67 Misc. 3d 629, 631 (N.Y. Co. 2020) (citing *Helling v. McKinney*, 509 US 25, 33 (1993)). After all, “communicable diseases could not ask for a better breeding ground than a crowded prison. Rikers facilities are crowded. . . . Much of the space is so cramped that the incarcerated persons are physically unable to stay far enough from their fellow prisoners to be safe from the risk of contagion. . . . Arrests do not stop for a plague.” *Id.*

In April 2020, at the time the court in *Jeffrey/Stoughton v. Brann* issued its opinion, “the most recent report” showed that “there were 231 sick prisoners, in addition to 223 sick staff members” at Rikers Island. *Id.* The court concluded that, “[g]iven such circumstances and the absence of a viable alternative,” it had “no choice but to order [the] release” of the petitioning Rikers incarcerated persons. This Court should conclude the same because the conditions at Rikers have only worsened. *Id.*

As previously discussed, DOC Commissioner Schiraldi noted on December 21, 2021 that over 17% of incarcerated persons at that time were infected with COVID-19.²⁸ A week later, this

²⁸ Mark Morales, *Inmates at NYC's Rikers Island jail in the midst of 'emerging crisis' related to Omicron surg*, CNN (Dec. 22, 2021, 5:47PM EST), <https://www.cnn.com/2021/12/22/us/omicron-surge-rikers-jail/index.html>.

number went up to 26%, which only includes the detainees who have been tested.²⁹ Thus, on any given day, nearly 1,000 incarcerated persons at Rikers Island sit with a positive diagnosis. According to the Commissioner, “all indications suggest that our jail population faces an equal or greater level of risk from COVID now as it did at the start of the pandemic.”³⁰ Moreover, Commissioner Schiraldi went on to *admit* that the DOC is incapable of adequately protecting its incarcerated persons or staff from this outbreak.³¹ Indeed, the DOC has cut “basic services” in light of COVID-19.³²

In *Burse*, this court rejected the DOC’s arguments that the petitioner’s “injuries were not sufficiently serious to constitute an objective deprivation.” 2021 N.Y. Slip. Op. at *6. Specifically, the DOC argued that (1) no one “suffered any serious injuries that required medical attention during” an incident in which incarcerated persons were pitted against each other in fights and (2) the petitioner’s “diagnoses of anxiety, ADHD, and moderate drug dependency did not constitute serious or life-threatening mental health conditions, such that any failure to provide medication did not constitute an objective deprivation.” *Id.* The Court explicitly rejected these arguments, holding that the petitioner had demonstrated that the “DOC failed to act – and continues to fail to act – with reasonable care to mitigate unreasonable risks to [Petitioner’s] health and safety that were known to DOC.” *Id.* at *6.

The *Burse* court underscored the DOC’s failure to protect the petitioner from constant physical violence. Furthermore, the court highlighted that the “DOC failed to provide [Petitioner]

²⁹ Vincent Schiraldi (@VinSchiraldi), Twitter (Dec. 30, 2021, 7:20AM), <https://twitter.com/VinSchiraldi/status/1476528598953730049>.

³⁰ Kristine Garcia, Kala Rama, ‘A crisis level’: Rikers COVID positivity skyrockets, DOC head urges inmate release, PIX11 (Dec. 22, 2021, 1:01PM EST), <https://pix11.com/news/coronavirus/rikers-covid-positivity-skyrockets-head-of-doc-calls-for-release-of-inmates/>.

³¹ *Id.*

³² *See id.*

with adequate food and medical care on an ongoing basis, particularly within the intake units.” *Id.* This was considered “sufficiently serious to pose a risk of serious damage to the [P]etitioner’s physical and mental soundness.” *Id.*

Here, the DOC knows that Petitioner Bell has a brain injury that requires continuing medical attention. The DOC also knows that Petitioner Bell suffers from asthma severe enough to result in asthma attacks. The DOC was also aware of the several violent incidents that arose in Petitioner Bell’s housing unit and that there were COVID-positive detainees in the same housing unit. Yet the DOC not only continually fails to give Petitioner Bell access to necessary treatment for his brain injury, but it continues to admit ever more detainees into crowded intake facilities where they languish in close proximity for days in unsanitary conditions. The DOC also continues to fail to provide masks to detainees, and necessary protections to incarcerated persons against a raging pandemic, all while the New York metropolitan region breaks new COVID-19 infection numbers.³³ Petitioner Bell and Rikers incarcerated persons like him face the near certainty of contracting a virus that may kill them, which is a harm that certainly outweighs the DOC’s interest in continuing to admit detainees into a cauldron where the COVID-19 situation is rapidly deteriorating. *See Coleman v. Brann*, 68 Misc.3d at 211.

Therefore, Petitioner Bell is likely to succeed on the merits of his claim.

b. Petitioner Bell establishes the mens rea prong of the deliberate indifference test

This court in *Burse* held that neither prong of the deliberate indifference standard “requires a showing of unique injury.” 2021 N.Y. Slip. Op. at *7. In fact, it is sufficient if the petitioner can show that the “DOC officials had actual knowledge of the threats to [the petitioner’s] health and

³³ *Covid Live Updates: Case Records Are Shattered Across U.S. and Europe*, NY TIMES, <https://www.nytimes.com/live/2021/12/29/world/omicron-covid-vaccine-tests> (last visited Dec. 30, 2021).

safety.” *Id.* at *5. In finding sufficient *mens rea*, Judge Newbauer also relied on the facts set forth in the *Nunez Monitor’s Reports*. *Id.* Here, the most recent *Nunez Monitor Report* from December 6, 2021 only further cements the DOC’s awareness of the conditions that threaten Petitioner Bell and other current and future incarcerated persons at Rikers Island. *See Twelfth Nunez Report*, at 6-7, 16, 33 (“conditions [at Rikers have] been deteriorating along a new trajectory . . . [and] have progressively and substantially worsened”; the DOC “simply lacks” a “basic level of capability, competence, and adherence to foundational corrections practices”; the DOC has failed to “implement and institutionalize . . . remedial measures”).

Furthermore, Commissioner Schiraldi’s letter lays plain the DOC’s awareness that the DOC cannot protect incarcerated persons like the Petitioners. In the DOC’s own words, “*the risks to the human beings in our custody are at a crisis level.*”³⁴ The Commissioner admitted that “our jail population faces an equal or greater level of risk from COVID now as it did at the start of the pandemic,”³⁵ and courts should consider options to reduce that population, which, even according to the DOC, should include *seeking supervised release* and *releasing individuals at high risk due to underlying medical conditions*.

Therefore, Petitioner Bell is likely to succeed in establishing the *mens rea* prong of the deliberate indifference test.

c. Respondent itself admits it has no interest that can outweigh the harms facing current and future Rikers incarcerated persons

DOC Commissioner Schiraldi has pleaded with prosecutors and public defenders for help, and has asked the New York “courts to . . . consider every available option to reduce the number

³⁴ Ex. A

³⁵ Kristine Garcia, Kala Rama, ‘*A crisis level*’: *Rikers COVID positivity skyrockets, DOC head urges inmate release*, PIX11 (Dec. 22, 2021, 1:01PM EST), <https://pix11.com/news/coronavirus/rikers-covid-positivity-skyrockets-head-of-doc-calls-for-release-of-inmates/>.

of individuals in our jails,” including, as noted above, “seeking supervised release in more cases or identifying cases that can be resolved with modifications to sentence length or requesting compassionate release for individuals who are at higher risk due to underlying medical conditions.”³⁶ In other words, Respondent itself perceives no real benefit in maintaining current and future incarcerated person capacity at Rikers Island, and the DOC’s statement reflects by its very terms that its interest in admitting additional detainees to Rikers does not outweigh the harm current and future incarcerated persons face under current conditions.

Thus, Petitioner is likely to succeed on the merits of his Due Process claim.

II. Petitioners Face Irreparable Harm

Petitioner Bell, along with the majority of his fellow incarcerated persons, are not vaccinated.³⁷ Further, Petitioner Bell has suffered from asthma since childhood and other underlying health conditions due to his aforementioned brain injury. According to the CDC, this puts Petitioner Bell at a higher risk of severe illness from COVID-19.³⁸ And, while exposure to the virus may present various symptoms, those who are unvaccinated remain at the highest risk for serious injury from the Omicron variant.³⁹ In fact, doctors have warned that “[t]here are people who get severe illness from Omicron,” and that the best way to stay safe is to “be tested and stay home.”⁴⁰

³⁶ *Id.*

³⁷ Mark Morales, *Inmates at NYC’s Rikers Island jail in the midst of ‘emerging crisis’ related to Omicron surge*, CNN (Dec. 22, 2021, 5:47PM), <https://www.cnn.com/2021/12/22/us/omicron-surge-rikers-jail/index.html> (reporting that only 38% of Rikers Island inmates are fully vaccinated).

³⁸ *See People with Certain Medical Conditions*, CENTER FOR DISEASE CONTROL AND PREVENTION (Dec. 14, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (listing moderate asthma as a chronic lung disease that is more likely to cause severe illness).

³⁹ *NYC ER Doc Breaks Down How Omicron Affects the Boosted, Vaxxed and Unvaccinated*, NBC N.Y. 4 (Dec. 27, 2021), <https://www.nbcnewyork.com/news/coronavirus/nyc-er-doc-breaks-down-how-omicron-affects-the-boosted-vaxxed-and-unvaccinated/3468742/>.

⁴⁰ Melinda Wenner Moyer, *What Are the Symptoms of Omicron*, NY TIMES (Dec. 21, 2021), <https://www.nytimes.com/2021/12/21/well/live/omicron-variant-symptoms-covid.html>.

Even prior to the surge of the new variant, Petitioner Bell suffered a severe asthma attack while on Rikers Island, for which he did not receive any medical attention for hours. In fact, even when he did receive medical attention, he was merely administered an intravenous with water. The medical staff did not give him an asthma pump or any other medication that would abate his asthma attack. Additionally, Petitioner Bell had to wait five months before the prison staff gave him access to his inhaler. Prior to incarceration, Petitioner Bell also suffered a brain injury, which requires his skull to be properly drained in order to avoid continuous migraines. Petitioner Bell has also been instructed by his doctor to avoid further physical contact to his head and to get regular physical therapy. However, during his incarceration at Rikers, Petitioner Bell has not received any such necessary treatment. The continuous lack of treatment for these dire health conditions further exposes Petitioner Bell to greater risk of irreparable injury as the Omicron variant spreads.

III. The Balance of the Equities Favors Petitioners' Request for a Preliminary Injunction

The above analysis facially demonstrates that a balance of the equities tips in favor of granting Petitioners' requested relief. Given the rise of the Omicron variant and the ongoing DOC staff shortage, the risk of irreparable injury to Petitioner Bell and those similarly situated far outweighs any potential interest that the DOC may have in continuing to admit new incarcerated persons or maintaining the present population (especially at levels that cannot be accommodated by Rikers's inadequate staffing). This is especially so given that the DOC has requested assistance in reducing the population of Rikers in light of the raging COVID-19 catastrophe.⁴¹

Staffing issues existed prior to the outbreak of the Omicron variant and they will inevitably get worse given the easy transmissibility of Omicron and the resulting upswing in infections already occurring at Rikers. Indeed, the *Nunez* Monitor noted in his December 6 report that staff

⁴¹ Ex. A.

absenteeism had already been higher-than-usual in 2021⁴²—even before this recent increase in COVID-19 infections in New York. The *Nunez* Monitor reported that “on any given day in October 2021, an average of approximately 80 posts went unmanned – including posts in which Staff directly supervise and facilitate services for people in custody.”⁴³ The staffing and protocols at Rikers have long been inadequate to maintain safety amidst the COVID-19 pandemic. As a result, at least four detainees have contracted and subsequently died from the virus.⁴⁴ There is a lack of testing within the jail, a lack of access to basic sanitary equipment to help protect the detainees from contracting the virus, and a lack of staffing sufficient to facilitate quarantining, medical assistance, or other appropriate responses to the COVID-19 virus. Furthermore, the lack of basic services and increased tension has fueled more chaos at Rikers Island, resulting in the deaths of fifteen total individuals in 2021 alone.⁴⁵ In short, nothing suggests that the staffing shortage at Rikers—and hence the DOC’s inability to provide adequate resources and protective measures there—will be remedied anytime soon.

Increased risk of infection, serious lasting injury from contraction, and possible death weigh heavily in favor of stopping admittance of new detainees and releasing certain pre-trial detainees immediately. In the interim, alternative measures such as increased electronic monitoring for at-home confinement can be utilized to address any purported government concern with ensuring detainees appear. Any such interest should not be addressed by injuring and endangering the lives of pre-trial detainees.

⁴² Twelfth *Nunez* Report, at 6-8.

⁴³ *Id.*

⁴⁴ Ransom, *supra* note 8.

⁴⁵ *Id.*

For all the reasons discussed above, Petitioner Bell respectfully requests a temporary restraining order and preliminary injunction on behalf of himself and others similarly situated.

Dated: December 30, 2021

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CERTIFICATE OF COMPLIANCE

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Dated: New York, New York
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