IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

MICHAEL CORRIN STRONG, Plaintiff

vs.

HOWARD ZUCKER, MD, in his official capacity as Commissioner of the New York State Department of Health, Defendant

Case No. 21-CV-6532

LEGAL MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Submitted Electronically by

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MEMORANDUM OF LAW

PART 1: INTRODUCTION: LIMITATION OF THIS MOTION

1. Although Plaintiff has filed two complaints and a motion in this matter covering a wide range of scientific facts, allegations and legal arguments, this case boils down to one consistent claim that he has made in all the documents: It is illegal under Equal Protection Clause of the 14th Amendment for Defendant, the New York Health Department, to discriminate in their rules and regulations against Plaintiff and millions like him across the state who are not vaccinated against Covid-19, and especially those like Plaintiff who have survived Covid-19 and have strong and lasting "Natural Immunity" against catching or spreading the virus to anyone.

2. It is important to note that this is not a case about whether the Defendant can require masking under any circumstances, and it is not a case about whether the Defendant can require vaccination in certain settings or for employment.

3. Plaintiff has argued consistently, and is prepared to show by the testimony of medical experts, that there is no scientific basis for such discrimination, since vaccinated people can both catch and spread the disease as easily as the unvaccinated in general, and are much more likely to do so than those, like Plaintiff, who have "Natural Immunity" by virtue of a prior Covid-19 infection.

4. Plaintiff anticipates that Defendant will make procedural arguments that the Motion for a Preliminary Injunction filed on Dec. 13 by Plaintiff against the most recent state regulations issued on December 10, 2021, is invalid because it was filed after Plaintiff's Amended Complaint on October 13, 2021 and therefore is an attempt to raise a new claim.

5. The fact is, however, that the most recent regulations are merely the latest iteration of an ongoing and consistent strategy of the State to discriminate against the Unvaccinated by a series of regulations and policies. This discrimination started in March of 2021 with the announcement of the Excelsior Pass program which is a digital passport that is designed to help businesses bar the Unvaccinated from their premises.

6. It continued with the publication on July 14, 2021 of "Emergency" regulations adding a new subpart 10 to NYCRR §66-3 requiring that only unvaccinated people had to wear masks in public places. Among other things, those regulations also required owners or managers of real estate to make sure that only unvaccinated patrons wore masks in their premises. Those regulations were the cause for Plaintiff's filing his original complaint on August, 10, 2021.

7. Even though, those "emergency" regulations were repealed just a few weeks later on August 27, 2021, they were in part replaced by a new regulation 10NYCRR§2.60 on the same day. Despite the repeal of the complained of regulations, the State continued to pursue discriminatory policies against the Unvaccinated, including the further encouragement and implementation of the Excelsior Pass program and requiring testing programs that discriminated against the Unvaccinated. For this reason, Plaintiff filed an amended complaint on October 13, 2021.

8. Finally with the declaration of a new "Emergency," and purportedly acting under the authorization of 10NYCRR§2.60, new regulations were announced by the Defendant on Dec. 10, 2021. Under these latest regulations, the State adopted an even more discriminatory policy of allowing and encouraging business owners to bar unvaccinated patrons from their premises and again promoted the Excelsior Pass as the best way to achieve this goal.

9. Although the most recent regulations are touted as possibly temporary, with a promise to review them on Jan.15, 2022, there is no doubt that, even if these regulations are rescinded, the state will continue to unjustly discriminate against the Unvaccinated in many ways well into the future unless this court enjoins them from this illegal conduct.

10. While Plaintiff has speculated in his amended complaint that the true motive of the Defendant in carrying on this pattern of discrimination is to illegally coerce the Unvaccinated into getting an experimental treatment, it would be difficult to conclusively prove that theory without extensive discovery of communications within the Department of Health and between them and the Governor's office. Nevertheless, it is not necessary to prove that motive for purposes of this Motion for a Preliminary Injunction. It should be enough to establish that the State is discriminating without any scientific or legally justifiable basis.

11. On the other hand, Plaintiff reserves the right to argue that, to the extent that it can be shown that the discriminatory policies are motivated by a desire to increase the number of people vaccinated by coercion, the State's compelling interest argument must fail. For surely no state can have a compelling interest in violating international, federal and its own state laws and regulations against such coercion as outlined in the Amended Complaint.

PART II: ANALYSIS OF COMPELLING STATE INTEREST, FUNDAMENTAL RIGHTS AND THE STANDARD OF SCRUTINY

12. Defendant will no doubt claim that they have a "Compelling State Interest" in stopping the spread of Covid-19. Plaintiff does not deny that interest, however, argues that the means chosen by Defendant to reach that goal, the wholesale discrimination against all unvaccinated people, has no rational basis in science for achieving that goal, and especially with respect to Covid-19 survivors who have "Natural Immunity."

13. Further, the discriminatory means chosen by the Defendant violates the most "Fundamental Rights" of Plaintiff and many other similarly situated. These fundamental rights include the right to participate in society as an equal citizen, to travel freely, patronize stores, restaurants and entertainment venues, and to receive other services. The most recent regulations have the potential to bar plaintiff from "all indoor public spaces," creating in effect a system of "medical segregation." It would not be any exaggeration to say that these regulations infringe on the most basic freedoms enshrined in our country's founding document to "Life, Liberty and the Pursuit of Happiness."

14. Such "Fundamental Rights" were perhaps best described in *Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)* as, "...those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]'

15. Glucksberg held that the liberty protected by substantive due process includes the right to bodily integrity; see also, *Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 277 (1990)* (stating that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment"). These fundamental rights of informed consent and bodily integrity are infringed if the State may punish those who exercise them without a showing that their actions pass strict scrutiny.

16. The right of bodily integrity has long been recognized by the Supreme Court starting with the case of *Union Pacific Railway. Co. v. Botsford, 141 U.S. 250, 251 (1891)*, where the court said, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." See also *Washington v. Harper, 494*

U.S. 210, 229 (1990) ("The forcible injection of medication into a non-consenting person's body represents a substantial interference with that person's liberty.") Is there much difference between "forcible injection" and taking away fundamental civil rights from those who decline an injection?

17. As stated in *Harris v. McRae, 448 U.S. 297, 312 (1980)* ("[i]t is well settled that...if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional"); see also, *Regents of Univ. of California, 438 U.S. at 357*(stating that "a government practice or statute which restricts 'fundamental rights'...is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available".)

18. There would be little argument about the standard of scrutiny that would be used if the Defendants were to adopt a similar regulation allowing businesses to bar entry based on the race of the customer. Such segregation would be given the strictest scrutiny requiring the State to show that they had "narrowly tailored" the regulation to accomplish the State's interest.

19. As a matter of fact, the black population of this state has been shown to be the least likely group to be vaccinated and thus is suffering a disparate impact from these rules, although as a white plaintiff, I may not have standing to raise that as part of my complaint.

20. The race of the Unvaccinated should actually play no part in the consideration of whether Equal Protection applies. As Justice O'Connor noted in *City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)*, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."

21. The fact that the unvaccinated people being discriminated against in the current regulations are not of any one race, however, does not mean that they are not being discriminated against because of hostility and prejudice. In recent months, a high level of public prejudice has been created against the Unvaccinated, similar to what has existed in some historic cases involving racial discrimination.

22. The court can take judicial notice of the fact that recent statements of public officials from the President of the United States and the Governor of New York on down have tended to cast negative perceptions and scorn on the Unvaccinated falsely characterizing them as unclean carriers of disease, being to blame for the spreading of the disease and thus creating great stress on the medical system.

23. As recently as Dec. 21, 2021 President Biden repeated his often made claim that it is every American citizen's "patriotic duty" to get vaccinated. Presumably, those who don't choose to take an experimental treatment for whatever reason, are unpatriotic and un-American in his eyes. This is bullying from the highest level and of the worst sort.

24. On Sept. 26, 2021, New York Governor Kathy Hochul gave a "sermon" from the pulpit of New York City's Christian Cultural Center in Brooklyn, NY and stated that the vaccine was a gift from God. "I know you're vaccinated, you're the smart ones, but you know there's people out there who aren't listening to God and what God wants. You know who they are," she said. So in one sentence she alleged that the Unvaccinated were "not smart" and "not listening to God." Her speech was recorded and is available on YouTube.

25. As Plaintiff's expert medical testimony will establish, these arguments about the Unvaccinated being a cause for the spreading of the disease have no basis in fact and are simply propaganda, again apparently intended to invidiously create

public hostility and prejudice and help coerce people into getting vaccinated so they can remove the supposed stigma. This character assassination on the Unvaccinated continues despite the fact that there are many legitimate medical and religious reasons for an individual to refrain from taking the vaccination, as outlined in the amended complaint.

26. As Plaintiff's expert witness will testify, even Doctors and other members of the medical profession have begun to discriminate against the Unvaccinated by denying them needed medical treatment based upon their vaccination status.

27. This pernicious attempt to scapegoat the Unvaccinated is very worrisome when we remember it is exactly the same strategy that was used in Nazi Germany against the Jews. As Justice Brennan noted in U*nited States Department of Agriculture v. Moreno 413 U.S. 528 (1073)*, "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare (congressional) desire to harm a politically unpopular group cannot constitute a legitimate government interest." That case was about a law attempting to prevent so-called "hippies" living in communal homes from getting food stamps.

28. At its heart, the whole attempt to brand the Unvaccinated as "unclean," "disease spreaders", "not smart," "not listening to God" and other slurs is an attempt to politicize a public health issue. When Gov. Hochul says, "You know who they are," to a no-doubt very liberal congregation, can there be any doubt that she is referring to people that hold conservative political values? Conservatives as a group are much more likely to be suspicious of and resist government mandates of any kind.

29. It can be argued that the whole effort to sensationalize the Covid-19 pandemic and create unnecessary fear by over-broad regulations is part of a national Democrat Party political strategy. The fact that many states loosened standards for mail-in ballots because of Covid-19 concerns may have changed the outcome of the 2020

Presidential election. Having succeeded there, they hope to keep the fear pandemic going and repeat that success in the upcoming 2022 Congressional elections.

30. This invidious effort to demonize and exclude the Unvaccinated from the public square is meant to stir up the passions of the mob and perhaps deflect blame for the failure of public health measures to get the pandemic under control. To many of her supporters, Gov. Hochul's words confirm their pre-existing prejudices against people who revere the Constitution and the liberties enshrined there-in. Shaming and banning them appeals to the vindictive streak in such partisans. It has little to do with public health or a reasoned analysis of relative risk.

31. Considering the prejudicial comments of public officials, the over-broad restrictions on the freedom of unvaccinated people and the growing level of infringement of fundamental constitutionally protected liberties embodied in these regulations, the court should examine them with a heightened level of scrutiny. In Equal Protection jurisprudence terms, in addition to infringing "Fundamental Rights" of the Unvaccinated, the State has gone so far out of it's way to demonize them, that they have created, at the very least, a new "Quasi-Suspect Classification," that requires stricter scrutiny.

32. The fact that New York State government has been dominated for many years by a very liberal Democrat Party, that holds all state-wide offices and solid majority control of both houses of the legislature, suggests that those of a more conservative philosophy may have trouble having their rights protected or even considered. As Justice Stone wrote in his famous footnote #4 in the case of *United States v. Carolene Prods. Co., 304 U.S. 144 (1938)*, "...prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

33. It would not be too great an exaggeration to say that in New York, at the state level at least, Republicans and especially conservatives are in effect "politically powerless." In addition, the implementation of so many authoritarian measures in this state in the past two years of the War on Covid-19, such as business lockdowns and harsh regulations, have discouraged so many, that New York has just seen the greatest one-year loss of population in its history (with over 350,000 people moving out of state between July of 2020 and July of 2021). No doubt even more have left in the past 6 months because of forced vaccination in certain professions and loss of employment. As freedom-loving citizens flee the state, the permanent minority status of the few remaining conservatives is made worse.

34. However, as the Supreme Court said in *West Virginia Bd. of Ed.v. Barnette, 319 U. S. 624, 638 (1943)*, the idea of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."

PART III : PROBLEMS WITH THE JACOBSON PRECEDENT

35. The State's regulations turn hundreds of years of public health policy upside down. While it has always been the accepted practice to quarantine those who carry a serious infectious disease to prevent its spread, these regulations, in effect, quarantine those who are not ill and represent no greater threat of spreading the virus, than those who are not quarantined, (and in the case of Natural Immunity a lesser threat!) With the use of high tech means such as the Excelsior Pass, the Defendant is setting up a state-wide system of "medical apartheid."

36. The Supreme Court case often cited in discussion of vaccines is *Jacobson v. Massachusetts 97 U.S. 11 (1905)*. In that case Mr Jacobson was brought up on criminal charges for refusing a required smallpox vaccination authorized by state law. While the court affirmed the conviction, it is important to realize that under that law the maximum punishment allowed was a $5 fine.

37. Again, the present case is not about the legality of any such vaccination requirement, and in fact, there is no current state or federal law or regulation requiring everyone to get one. Despite the Unvaccinated being innocent of any criminal violation, however, they are being dealt with much more harshly than the small fine that Mr. Jacobson was forced to pay. The Unvaccinated are increasingly being barred from participating in society, without even the protection of due process that any other criminal defendant would enjoy.

38. It is also noteworthy that Judge Harlan in his opinion appeared to carve out a possible exception to the right of a state to require vaccination if the subject was "not a fit subject at the time or that vaccination would seriously injure his health or cause his death." As discussed in Plaintiff's amended complaint, and as will be confirmed by his medical expert's testimony, there are many for whom the vaccination is not medically recommended and there is ample evidence that the current Covid-19 vaccines in use have caused many injuries to health and death.

39. The only other instance in which the government can force free people to risk the well-being of their body to further a government interest is explicitly granted to the legislative branch of government in the Constitution. Specifically, Congress has the power to raise an army and send that army to war. Other than that, there is no other authority granted to government to intrude on the liberty of a free citizen, not accused of any crime, and require them to do something with their body that carries a risk of death or permanent disability or punish them if they decline to do so.

40. It should be further noted that Jacobson is not on point because the pharmaceuticals being required are not "vaccines" within the meaning of Jacobson and are excluded from many, if not most, dictionary definitions of the word "vaccine." They are in fact a new kind of gene therapy that presents novel legal issues. Those who would seek to apply Jacobson to the current legal and scientific environment must deal with this threshold issue.

41. The fact that certain government agencies have recently changed the definition of a "vaccine" so that this treatment can be so classified is not binding on the court. The Supreme Court has noted that courts must look at substance over form and are not bound by agency classifications. *Azar v. Allina Health Servs., 139 U.S. 1804, 1812 (2019)* (noting that "courts have long looked to the contents of the agency's action, not the agency's self-serving label.")

42. Few courts have grappled with the question of what constitutes a "vaccine," but of those that have, most have used a microorganism definition. See *Blackmon v. American Home Products Corp., 267 F.Supp.2d 667, 674 (S.D. Tex. 2003)* (relying on definition of vaccine in Dorland's Medical Dictionary 1799 (27th ed.1988)("a suspension of attenuated or killed microorganisms") and Webster's 9th New Collegiate Dictionary 1301 (9th ed.1991) ("a preparation of killed microorganisms, living attenuated organisms, or living fully virulent organisms").

43.That definition in no way describes the mRNA technology now in use in the major Covid-19 "vaccines" produced by Pfizer and Moderna. There are no "killed microorganisms, living attenuated organisms, or living fully virulent organisms" in this vaccine. Instead, it contains "a synthetic messenger RNA" (mRNA) that modifies the body's genes and instructs them to make a "spike protein" similar to the one that the virus contains.

44. As more fully explained in the Plaintiff's original complaint and in his motion, this new technology is in every sense still experimental, including legally. The human body would never create these spike proteins without this genetic modification and the long-term safety of this new technique has not been established. For these reasons the current "vaccines" continue to be given under an Emergency Use Authorization (EUA) from the FDA. As explained in Plaintiff's motion and amended complaint, this is despite any false claims that the Pfizer is "fully approved." Further, drugs given under a EUA enjoy substantial protection from liability from injuries.

45. That the word "vaccine's" definition is elastic and has been recently expanded to accommodate new technology would be nothing more than a cultural curiosity, except that if Jacobson applies to all vaccines without any balancing required, every expansion of the word "vaccine" triggers an accompanying expansion of government power and diminution of individual liberty for every American. Shouldn't the courts review the implications of these recent technological changes, instead of continuing to march in the lockstep of the 115-year-old precedent of a medical case from the horse and buggy era? There can be no more fundamental right for a person to have than the choice of whether he wants his own genetic code overwritten, without being discriminated against and punished if he chooses not to.

46. To balance the state and individual interests, it is not necessary to know the exact infection mortality rate of Covid-19, although it is generally agreed to be something less than 1%. Viruses have a range of mortality rates ranging from 100% fatal (rabies) to essentially zero. Smallpox in the early 20th Century had a mortality rate of up to 30% or more. The government's interest in stemming the spread of viruses through coerced medical procedures is logically more compelling with more fatal viruses and less compelling with less fatal viruses.

47. Using the Jacobson precedent for an illness that is approximately 50 times less fatal seems like a stretch, especially when you consider the advances in medicine over the last 115 years. In fact, as my expert witness will testify, there are many early treatments available for those who get Covid-19 that can significantly reduce mortality, although regrettably many of them have been suppressed by government action.

48. It is worth noting that in recent weeks the new "Omicron" variety of the virus has become the dominant strain in the United States. The appearance of this new "more contagious" variety was cited by Governor Hochul as one of the reasons for her Dec. 10 "Declaration of Emergency" and the adoption of the latest regulations. Multiple scientific reports, however, have indicated that despite being more contagious, Omicron actually causes much less severe illness, with virtually no reported deaths "from" it, although perhaps a few "with" it. Further, a recent study has suggested that those who have been vaccinated had little protection against the new variety and may, as the vaccine's effectiveness declines, actually be more likely to catch the new variety than those who are unvaccinated!

49. Lower level federal courts seem to be trying to read the tea leaves in Chief Justice Robert's dictum in the recent case of *South Bay United Pentecostal Church, Et Al., v. Gavin Newsom, Governor of California, Et Al. 592 U.S. __ (2021)* in which he said, "I adhere to the view that the 'Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.' But the Constitution also entrusts the protection of the people's rights to the Judiciary... Deference, though broad, has its limits." Plaintiff humbly submits that the limits of deference have been reached in this case.

50. The dangers of blindly following the Jacobson precedent were shown in the case of *Buck v. Bell 274 U.S. 200 (1927)* in which the court used Jacobson to

uphold a Virginia law that authorized the involuntary sterilization of "feeble minded" persons in state institutions. As Justice Oliver Wendell Homes infamously opined in that case, "Society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *(Jacobson v Massachusetts, 197 US 11.)* Three generations of imbeciles are enough." It is clear that a law of such barbarity would never pass scrutiny today, nor should such a misreading of Jacobson.

51. Justice Harlan himself foresaw the possible need for future judicial oversight writing that, "...it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all, might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Jacobson v. Massachusetts 97 U.S. at 28 (1905).*

PART IV: THE REGULATIONS ARE NOT NARROWLY TAILORED IN RESPECT TO THOSE WITH "NATURAL IMMUNITY"

52. Plaintiff understands that this court will not undertake to re-write the State's regulations on these matters. Assuming that a strict scrutiny standard will apply, however, it is instructive to consider how the State could have more narrowly tailored their regulations to meet an Equal Protection standard.

53. For starters, the State could take notice of the overwhelming and ever-increasing scientific evidence that "Natural Immunity" is strong and long-lasting for Covid-19 survivors and that re-infection is an extremely rare event. In fact, Plaintiff's medical expert will testify that most cases of suspected "re-infection," are in reality the result

of a false positive tests either in the first or second illness, or perhaps both, since the PCR tests in use to diagnosis Covid-19 are extremely inaccurate.

54. Since re-infection is so rare, or perhaps non-existent, it is obvious that those with "Natural Immunity" are unlikely or unable to spread the virus to anyone and should not be discriminated against in favor of the vaccinated, who in fact, are much more likely to catch and spread the virus.

55. Second, it is well established that antibody testing is a much more accurate way to determine whether a person has in fact had the Covid-19 virus in their system and thus has "Natural Immunity." Since the PCR tests in use have so many false positives, this would be a preferred method to use in deciding whether a person is "safe" to mingle in "public indoor spaces," and for other regulatory purposes.

56. While Plaintiff argues against the adoption of a Covid-19 passport system such as the Excelsior Pass as inimical to our American way of life, at the very minimum, if such passports are to be used, they should be granted to all Covid-19 survivors with "Natural Immunity."

57. To any argument that such a change would be too costly for the State to implement, look at the waste that is currently occurring in the State's War on Covid-19. If those with "Natural Immunity" truly are virtually immune from a second case, than a huge amount of the State's resources are being wasted on regularly testing and contact tracing of such people who are not at risk –not to mention the lost productivity from putting these people in needless quarantine or firing them when they quite logically decline to be vaccinated.

58. Although this case is not about the mask mandate part of the new regulations, a similarly large amount of State and personal resources are being

wasted providing masks and enforcing mask mandates on people with "Natural Immunity" who don't need them for their own or anybody else's protection.

59. Changing to, or enhancing, the current vaccine-based system of classification with an antibody-testing system would be much more fair, since many have already had Covid-19 and carry "Natural Immunity" without even knowing it. This is especially true for younger people who tend to have much less severe symptoms. The CDC has estimated that only 1/3rd of Covid-19vinfections are ever officially diagnosed

60. Since the long term effects of the mRNA gene therapy are unknown, it would be safer to discourage its use in younger people who have a full life ahead and will possibly want to be parents in the future, especially as their mortality risk from the virus is much lower than that of older people. As Plaintiff's medical expert will testify, there is troubling evidence that the artificially generated "spike proteins" tends to accumulate in the reproductive organs of both men and women and may affect future fertility and successful child bearing, not to mention the unknown effects on the children of vaccinated parents.

61. By following this analysis, all restrictions on the Unvaccinated who have "Natural Immunity"regarding entry into buildings and discriminatory masking and testing rules should be eliminated as unconstitutional and irrational

62. The fact that the State has not adopted these more narrowly tailored rules tends to prove Plaintiff's thesis that the real reason for these regulations is to illegally coerce the Unvaccinated into taking an experimental treatment by making their lives as difficult as possible, an improper motive that public officials are making less and less effort to conceal.

PART V: THE CASE FOR THE UNVACCINATED WITHOUT NATURAL IMMUNITY

63. Whether these regulations can pass strict scrutiny for the Unvaccinated who do not yet enjoy "Natural Immunity" is a closer question.

64. Plaintiff's expert will testify that there is little or no difference in the rate at which vaccinated and unvaccinated people, who do not have "Natural Immunity," acquire and spread the virus.

65. As Plaintiff's expert will also explain, the effectiveness of the vaccines are actually much less than they appear because the manufacturers used a "relative" risk reduction model during their clinical trials rather than an "absolute" one. In absolute terms, the EUA gene therapy "vaccines" have little effect in preventing the vaccinated from catching the virus.

66. Plaintiff's expert will also testify that up to 85% of the spreading of the virus occurs in private homes because it requires prolonged contact with an infected person to catch the virus. Spending tremendous resources and infringing on many people's fundamental rights trying to keep even unvaccinated people without "Natural Immunity" out of public places is of limited utility.

67. Also the over-broad nature of these regulations should be examined. They purport to cover all "indoor public spaces," which is defined in the new regulations as, "any space other than a private residence." This means the Unvaccinated could potentially be banned from all stores, all office buildings, all factories and other places of employment, any place that has a roof overhead, other than a private residence. Is this type of medical segregation contemplated under our founding documents?

68. Owners and operators of such premises are asked to either enforce mask wearing on all people who enter the premises or check for vaccination status at the door. If they bar all those who are not vaccinated, then those allowed entry are freed of the masking requirement.

69. A regulation that was more narrowly tailored to fit the risks would perhaps limit such a vaccination requirement to locations where there is a known higher risk of infection, such as bars, restaurants and other places where people congregate for extended periods of time in close proximity. Just such limited regulations have recently been imposed by large cities such as New York, Boston and Chicago.

70. It should not take much imagination to see that there are many "indoor public spaces" where the risk of infection would be much lower or even negligible because of the sparseness of people and the openness of the architecture providing ample opportunity for "social distancing." Also some indoor venues have special air filters and other systems that can remove virus particles from the air. Since it is generally agreed that Covid-19 is an airborne virus, this eliminates all risk.

71. Again, it appears that the over-broadness of these regulations is intended more to illegally coerce and punish the Unvaccinated, than for any legitimate public health reason.

PART V: CONCLUSION

72. The arguments made in this legal memorandum are simple and can be summed up in a few sentences:

A. The State does have a legitimate and compelling interest in trying to control the spread of the Covid-19 virus.

B. Despite some interpretations of the Jacobson case, however, the State's right to take police action is not absolute.

C. Any State regulation which interferes with "Fundamental Rights" of people must be judged by a stricter level of scrutiny.

D. The right of citizens to travel freely in their communities, patronize local business and services and enter their place of employment without unnecessary restrictions is one of the most "Fundamental Rights" of a free citizen and should not be lightly infringed without strict scrutiny.

E. Further, the rights to bodily autonomy and informed consent are also "Fundamental Rights" enjoyed by all Americans. These rights include the right to refuse any medical treatment including vaccination and not be unduly punished for it for no rational reason.

F. The Unvaccinated are being publicly denigrated by high public officials in an effort to create public hostility against them for political purposes. This invidious effort has succeeded in creating a level of prejudice similar to that seen in racial cases and should qualify the Unvaccinated as at least a "Quasi-Suspect" Class also entitling them to "strict scrutiny."

G. Under "strict scrutiny," the State's regulation allowing the banning of Unvaccinated people with "Natural Immunity" from "all indoor public spaces" is a violation of the Equal Protection Clause of the Constitution, because they, as a class, present a much lesser threat of spreading the disease than vaccinated people.

H. Likewise, even the Unvaccinated who do not yet enjoy "Natural Immunity" should still be treated in a way similar to the vaccinated, as they have similar risks of contracting and spreading the virus.

I. Regardless of the "Natural Immunity" status of the Unvaccinated, the State's regulations are over broad in allowing the Unvaccinated to potentially be banned from all "public indoor spaces," in a system of medical apartheid which is a very severe punishment infringing the Constitutional freedom of the Unvaccinated and not narrowly tailored to the risk of infection.

J. Further, other policies of the State that discriminate against the Unvaccinated, including the operation of the Excelsior Pass system and requirements for more frequent testing are likewise violations of the Equal Protection Clause for similar reasons.

73. The standard for a preliminary injunction requires a movant to show (1) the substantial likelihood of success on the merits, (2) that he is likely to suffer irreparable harm in the absence of a preliminary injunction, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *John Benisek et. al. v. Lamone et.al. 138 S. Ct. at 1944 (2018)*. Plaintiff's case meets all four of these requirements

74. First, since the Plaintiff's arguments above are backed by the weight of current scientific evidence and controlling legal precedent, there is a substantial likelihood that he will ultimately prevail in court on the merits.

75. Second, if Defendant's illegal regulations and policies are allowed to continue there is a substantial likelihood that they will cause continued irreparable harm to the Plaintiff, in restricting his ability to enter a large number of public spaces, including his preferred gym, local restaurants and entertainment venues, thus greatly diminishing his quality of life and physical health. These losses, once incurred, are permanent and can not be repaired by the State.

76. Third, the balance of equities is clearly on the Plaintiff's side since Defendant's regulations are not actually accomplishing anything with respect to those with "Natural Immunity. They are not stopping the spread of Covid-19, since those with "Natural Immunity" are not spreading the disease. Therefore granting an injunction would do no harm to the State's legitimate efforts to slow the spread of the virus.

77. And finally, an injunction would also be in the public interest as there are millions of other Unvaccinated citizens across the state, many with "Natural Immunity," who are similarly unjustly being held in medical apartheid. The policies are also causing untold economic damage to small businesses who are being required to restrict their customers either by requiring masks or barring the Unvaccinated. For many businesses this is a lose-lose proposition.

78. It may be that this matter will ultimately be decided by a higher court than this one. However, it is important to preserve the status quo in this case. The liberty interests of the Unvaccinated requires nothing less. Plaintiff therefore requests this court to immediately issue a Temporary Restraining Order and/or a Preliminary

Injunction ordering the Defendant to:

A. Immediately stop enforcing any part of the latest emergency regulations that discriminate against the Unvaccinated ability to enter "public indoor spaces."

B. Bring an immediate halt to the State's operation of the Excelsior Pass system as it's only purpose is to discriminate unlawfully against the Unvaccinated.

C. Prohibit the Defendant from requiring more Covid-19 testing of the Unvaccinated in any situation than that required of the vaccinated.

79. Additionally, Plaintiff asks that such orders prohibit the Defendant from passing any additional regulations containing any further unequal restrictions on the Unvaccinated until this matter can be finally determined by this court.

80. And finally Plaintiff asks that the court direct the Defendant to publish a press release on their website informing the public that they will be following the order of this court. Much confusion was created and still exists from when Defendants repealed and replaced their prior regulations in August of 2021, but never informed the public.

By

December 27, 2021 s/Michael Corrin Strong

Plaintiff, Pro Se