

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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INDEPENDENT RESTAURANT OWNERS
ASSOCIATION RESCUE (I.R.O.A.R.), EVOLVE33LLC
d/b/a EVOLVE-33, STATEN ISLAND JUDO JUJITSU,
DELUCA'S ITALIAN RESTAURANT INC., PROJECT
VISUAL INC. d/b/a MAX'S ESCA, & ROCCO'S
BROOKLYN BAKERY d/b/a PASTICCERIA ROCCO

Plaintiff-Petitioners

-against-

BILL DE BLASIO, in his official capacity
as MAYOR of the City of New York and the CITY OF
NEW YORK,

Defendant-Respondents.

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**VERIFIED PETITION
PURSUANT TO
ARTICLE 78**

Index No.:

PRELIMINARY STATEMENT

1. Faced with arbitrary, irrational, unscientific, and unlawful vaccine mandates in the form of NYC Executive Order 225 (the "Executive Order") enacted by Mayor Bill De Blasio putatively to curb the spread of Covid-19 and the so called "Delta Variant"---mandates that would severely impact Plaintiff-Petitioner's business, life savings, and livelihood --- Plaintiff-Petitioner seek a permanent injunction against NYC Executive Order 225 to prevent such damage from occurring.

STATEMENT OF FACTS

2. The Covid-19 Pandemic has been a fact of life since early 2020. There have been mandatory lockdowns, mask mandates, capacity limits, and many other restrictions imposed by

City, State and Federal Government since the beginning of the pandemic. These restrictions have severely and irreparably damaged small businesses all over the City. In mid-June, Governor Cuomo lifted all remaining Covid-19 restrictions in the State of New York. Since then, businesses have been struggling to bounce back. Now, only two months later, NYC Mayor Bill De Blasio, through NYC Executive Order 225, has implemented a mandatory vaccine mandate to work in or patronize any indoor establishment in the food service, entertainment and recreation, and gym and fitness industries. Unlike previous Executive Orders, there is no option to provide a negative Covid test or to wear a mask in lieu of vaccination. Also, there are no accommodations for those who cannot get the vaccine.

PARTIES TO THIS ACTION

3. All Plaintiff-Petitioners are small business owners and entities who will be directly, severely, and irreparably harmed by NYC Executive Order 225.
4. Defendant-Respondents are the Mayor of New York City, Bill De Blasio, and The City of New York itself.

AS FOR THE FIRST CAUSE OF ACTION

New York City Executive Order 225 is Arbitrary and Capricious

5. This vaccine mandate is arbitrary and capricious due to the fact that it targets certain establishments but not others with no rational what so ever. Vaccinations are now required for indoor dining, indoor fitness facilities, and indoor entertainment facilities. Both staff and the public must show proof of at least one (1) dose of vaccination to be allowed to work in or enter such establishments. What makes these particular establishments so dangerous? Nothing.

6. According to December, 2020 data released by Governor Cuomo and the State of New York themselves, contact at bars and restaurants account for only a miniscule 1.4% of the state's Covid-19 infection. (Dana Schulz, "74% of New York's Covid spread is coming from at-home gatherings," (Dec.11, 2020), <https://www.6sqft.com/74-of-new-yorks-covid-spread-is-coming-from-at-home-gatherings>) (displaying New York statewide data provided by Governor Cuomo). By contrast, almost 75% (three quarters) of New York's infections are being spread through social gatherings inside people's homes, where there is more physical contact and social distance rules tend not to be followed. *Id.*

7. NYC Executive Order 225 states that "56% of New York City residents are fully vaccinated and 62% have received at least one dose." <https://www1.nyc.gov/office-of-the-mayor/news/225-001/emergency-executive-order-225>. However, that statistic is misleading. According to Census.gov, the April 1, 2020 census estimated the population of New York City to be about 8.8 million. Of that 8.8 million, 20% of that population are under age 18. <https://www.census.gov/quickfacts/newyorkcitynewyork>. Since children 12 or under are not eligible to receive the vaccine, which is about 10%-15% of the population, the percentage of eligible residents is actually much higher, about 70% and 77% respectively.

8. Another example of the arbitrariness of Executive Order 225 is the statement that "indoor entertainment, recreation, dining and fitness settings generally involve groups of unassociated people interacting for a substantial period of time." <https://www1.nyc.gov/office-of-the-mayor/news/225-001/emergency-executive-order-225>. However, there are many other venues that involve groups of "unassociated people interacting for a substantial period of time" such as grocery stores, pharmacies, hair salons, churches, office buildings, schools, healthcare facilities etc. and yet these venues will not require vaccination of all workers and patrons.

9. It is also an uncontested fact that unvaccinated and vaccinated individuals can ***both*** contract Covid-19 and the so called “Delta” variant, further illustrating the arbitrariness of this Executive Order. Despite this massive disparity and the minimal number of infections being caused, Mayor De Blasio is still mandating people be vaccinated and show proof of such to participate in everyday society.

*Constitutional Prohibitions Do Not Change in an Emergency,
and the Constitution Requires Governments to Narrowly Tailor
Their Covid-19 Measures Over Time as More Data and
Evidence Concerning the Pandemic Become Known.*

10. While government is fully empowered to take emergency action against life-threatening dangers, it is bedrock law in this country that constitutional rights and prohibitions do not change in an emergency. “The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934) (emphasis added). Thus “even in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 210 (2020).

11. Temporary emergency government by executive decree, with unprecedented restraints on constitutional liberties, has now been the rule in New York for almost two years. While judicial “deference to executive orders” might have been proper “in the pandemic’s early stages based on the newness of the emergency and how little was then known about the disease,” now, “the rational has expired according to its own terms. Even if the Constitution has taken a holiday during the pandemic, it cannot become a sabbatical.” *Id.* at 212 (Gorsuch, J., concurring).

12. Far from demanding blanket judicial reference to Covid-19 lockdown orders, the Constitution requires governments to more narrowly tailor those orders as more data concerning the pandemic emerges. As Justices Alito, Gorsuch and Kavanaugh put it:

For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty. . . . This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency --- and the opening days of the Covid-19 outbreak plainly qualified --- public officials may not be able to craft tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the Covid-19 pandemic.

But a public health emergency does not give Governors and other public officials carte blanche to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in the light of the evidence, courts should expect policies that more carefully account for constitutional rights.

Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604-05 (2020) (Alito, J., joined by Gorsuch, J., and Kavanaugh, J., dissenting from denial of emergency application for injunctive relief) (emphasis added), *quoted and relied on in, e.g., Cty. Of Butler v. Wolf*, No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 167544 at * 21-22 (W.D. Pa. Sept. 14, 2020).

13. The City of New York did the opposite here. As more medical and scientific data became available, New York City did not adopt regulations “more carefully accounting for constitutional rights.” Instead, the Mayor implemented even more arbitrary executive orders, trampling more recklessly on constitutional rights.

*Covid-19 Mandates are Constitutionally Reviewed
not Under the Lenient Jacobson Standard but Rather
Under the Traditional Legal Tests Applicable to the Right at Issue*

14. The City will likely seek to defend the new Mandate under the century-old case of *Massachusetts v. Jacobson*, 197 U.S. 11 (1905). But the Supreme Court’s recent decision in

Roman Catholic Diocese of Brooklyn v. Cuomo, *supra*, made clear that *Jacobson* does not govern and that Covid-19 regulations are subject to the same constitutional standards as any other measures.

15. In *Jacobson*, the court in 1905 --- when most constitutional rights had not even been incorporated against the states under the Fourteenth Amendment --- upheld a mandatory vaccination law, holding that states have “authority . . . to enact quarantine laws and ‘health laws of every description’” unless such laws bear “no real or substantial relation” to “public health.” 197 U.S. 11 at 25, 28, 31. Prior to *Roman Catholic Diocese*, numerous lower courts had relied on *Jacobson* as setting forth a highly permissive standard requiring judicial deference to Covid-19 lockdown orders. *See, e.g., Bimber’s Delwood, Inc. v. James*, No. 20-CV-1043S, 2020 U.S. Dist. LEXIS 195823 (W.D.N.Y. Oct. 21, 2020).

16. Other lower courts, however, rejected *Jacobson*, holding that Covid-19 regulations must, like any other measures, be tested under post-1905 Supreme Court case law. *See, e.g., Bayley’s Campground, Inc. v. Mills*, 463 F. Supp. 3d 22, 32 (D. Me. 2020). (“The permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review. This may help explain why the Supreme Court established the traditional tiers of scrutiny in the course of the 100 years since *Jacobson* was decided.”); *Cty. Of Butler v. Wolf*, *supra*, at * 25 (rejecting “an extraordinarily deferential standard based on *Jacobson*” and “applying ‘regular’ constitutional scrutiny” instead).

17. In its November 25, 2020 decision in *Roman Catholic Diocese*, the Supreme Court settled this dispute, making clear that *Jacobson* does not govern. Reviewing New York’s color-coded Covid-19 regulations --- the same regulations at issue here --- and finding that these

measures violated the Free Exercise Clause, the Court in *Roman Catholic Diocese* pointedly did not apply *Jacobson*. Instead, the Court simply applied well-established post-1905 free exercise doctrine. See *Roman Catholic Diocese*, 208 L. Ed. 2d at 208-09. Indeed, not a single Justice in *Roman Catholic Diocese*, whether in the majority or dissenting, took the position that *Jacobson* provided the operative framework for Covid-19 regulations.

18. The lesson of *Roman Catholic Diocese* is clear. Covid-19 regulations no talismanic immunity from established constitutional doctrine, and *Jacobson* does not magically jump over and override a century of Supreme Court case law. Like any other measures, Covid-19 regulations are to be reviewed under “*the traditional legal test associated with the right at issue.*” *Id.* at 213 (Gorsuch, J., concurring) (emphasis added). See, e.g., *Lawrence v. Polis*, No. 1:20-cv-00862 2020 U.S. Dist. LEXIS 236713 (D. Colo. Dec. 4, 2020) (holding that under *Roman Catholic Diocese*, the permissive *Jacobson* standard does not supplant traditional constitutional review of Covid-19 regulations).

19. So tested, the Mandate at issue here are plainly unconstitutional.

The Mandate Violates Equal Protection of the Law

20. The Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike.” *Cty. of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); see *Bey v. Falk*, 946 F.3d 304, 327-28 (6th Cir. 2019) (“The Equal Protection Clause embodies the principle that all persons similarly situated should be treated alike.”) “The framers of the Constitution knew, and we should not forget today, that . . . nothing opens the door to arbitrary actions 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

large numbers were affected.” *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (quoting *Railway Express v. New York*, 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring)).

21. It is hornbook equal protection law that measures impinging upon or interfering with a fundamental right is subject to the exacting strict scrutiny standard of review. *E.g.*, *San Antonio Ind. School Dist. V. Rodriguez*, 411 U.S. 1, 17 (1973) (courts “must first decide” whether a challenged measure “impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny”); *Butts v. Aultman*, 953 F.3d 353, 358 (5th Cir. 2019) (Strict scrutiny is required if the legislative classification . . . impinges upon a fundamental right explicitly or implicitly protected by the Constitution.”); *Jesus Christ is the Answer Ministries v. Balt. Cty.*, 915 F.3d 256, 265 (4th Cir. 2019) (courts “apply strict scrutiny under the Equal Protection Clause where (as here) the challenged action interferes with a fundamental right”); *Miller v. Cty. of Nassau*, 467 F. Supp. 2d 308, 319 (E.D.N.Y. 2006) (if “government action interferes with a ‘fundamental right’ . . . it must be reviewed using the strict scrutiny analysis”); *People ex rel. Wayburn v. Schupt*, 39 N.Y. 2d 682, 687 (1976) (strict scrutiny required where measure “impinges” on “fundamental” right); *New York State United Teachers v. New York*, 140 A.D. 3d 90, 98 (N.Y. App. Div. 3d Dept. 2016) (same).

22. As applied in this case, the Executive Order plainly impinges on and significantly interfere with at least one fundamental right --- the right to pursue a lawful calling --- and cannot satisfy strict scrutiny.

*The Mandate Impinge on the
Fundamental Right to Pursue a Lawful Calling*

23. “The right to pursue a lawful calling has long been recognized as a fundamental right.” *Connecticut ex rel. Blumenthal v. Crotty*, 346 F. 3d 84, 95 (2nd Cir. 2003); *Madera v. Bd. Of Ed.*

Of City of N.Y., 386 F.2d 778, 784 (2nd Cir. 1967) (Fourteenth Amendment protects an individual's freedom "to earn his livelihood by any lawful calling; and to pursue any livelihood or avocation"); *Hund v. Cuomo*, No. 20-cv-1176, 2020 U.S. Dist. LEXIS 212 * 29 (W.D.N.Y. Nov. 13, 2020) (Recognizing "fundamental" "right to pursue lawful calling" and "to pursue an economic livelihood").

24. Again, there can be little doubt that Executive Order 225 impinge on and significantly interfere with the right to pursue a lawful calling and livelihood. The Executive Order has rendered it impossible for anyone who chooses not to be vaccinated, for whatever reason, to work in the designated industries, wholly depriving them of their livelihood. *Hund*, 2020 U.S. Dist. LEXIS 212 at 29 (holding that New York's Covid-19 regulations "impermissibly interfere" with plaintiff's "right to pursue an economic livelihood by performing live music"). For this reason too, the Mandate is subject to strict scrutiny.

The Executive Orders Cannot Satisfy Strict Scrutiny

25. Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To pass strict scrutiny, a measure "must be 'narrowly tailored' to serve a 'compelling' state interest" and must use the "least restrictive means" of doing so. *Roman Catholic Diocese, supra*, 2008 L. Ed. 2d at 209; *McCullen v. Coakley*, 573 U.S. 464, 478 (2014); *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 246 (2nd Cir. 2014).

26. As will be discussed *infra*, the Executive Order is so arbitrary it fails the more lenient "arbitrary and irrational" standard of review. It certainly cannot satisfy strict scrutiny.

27. Indeed, the Supreme Court so held in *Roman Catholic Diocese, supra*, finding that the similarly arbitrary New York color-coded Covid-19 regulations did not survive strict scrutiny:

Stemming the spread of Covid-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as 'narrowly tailored.' They are far more restrictive than any Covid-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus

208 L. Ed. At 209.

AS FOR THE SECOND CAUSE OF ACTION

THE MANDATE MAKES NO EXCEPTIONS AND GRANTS NO ACCOMODATIONS FOR INDIVIDUALS WHO CANNOT, OR SHOULD NOT, BE VACCINATED

People Who Have Had, and Recovered from, Covid-19

28. People who have contracted Covid-19 and recovered from it have natural antibodies. “Although the immune correlates of protection are not fully understood, evidence indicates that antibody development following infection likely confers some degree of immunity from subsequent infection for at least six (6) months.” <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html>. Another study found on the CDC website states “we confirmed that rates of antibody positivity according to 3 commercial kits was still high at 8 months after infection, even in asymptomatic or mildly symptomatic participants (69.0%–91.4%).” https://wwwnc.cdc.gov/eid/article/27/3/20-4543_article. Therefore, people who have the antibodies should not be mandated to get vaccinated to participate in normal, every day activities due to the fact that they likely have just as much or even more antibodies than those who do get vaccinated.. However, there are no accommodations in this Executive Order for such people.

*People Who Have Pre-Existing Conditions for
Whom the Vaccine Could be Dangerous*

29. People with certain pre-existing conditions may experience severe complications of exacerbate their condition by receiving the Covid-19 vaccine. According to the CDC, "People with HIV and those with weakened immune systems due to other illnesses or medication **might** be at increased risk for severe Covid-19. They **may** receive a Covid-19 vaccine. However, they should be aware of the **limited safety data**."

*Information about the safety of Covid-19 vaccines for people who have weakened immune systems in this group is **not yet available**;*

*People living with HIV were included in clinical trial, though safety data specific to this group are **not yet available** at this time;*

*If you have a condition or are taking medications that weaken your immune system, you may **NOT** be fully protected even if you are fully vaccinated.*

30. Furthermore, there are other conditions for which there is little or no safety data available. These include, but are not limited to, other autoimmune conditions, Guillain-Barre syndrome, Bell's Palsy, and anyone who is allergic to one or more ingredients of the vaccine. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/underlying-conditions.html> Given the fact that there is still not enough known about the effects of the vaccine on so many pre-existing conditions, the decision to get the vaccine should ultimately lie with the individual and his doctor, who knows that persons complete medical history, rather than a politician.

*This Mandate Infringes on People's First Amendment Right
to Freely Practice Their Religion*

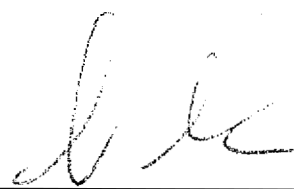
31. It is against certain religious beliefs to inject a relatively unknown foreign substance into ones body. By mandating such a thing, the Mayor is essentially violating people freedom of religion. Also, by mandating all employees of certain establishments to be vaccinated while knowing in is against certain groups religious beliefs, an argument could be made that the Mayor is in essence forcing employers to violate Title VII of the Civil Rights Act of 1964 which states in relevant part "It shall be an unlawful employment practice for an employer todiscriminate against any individual with respect to his....religion."

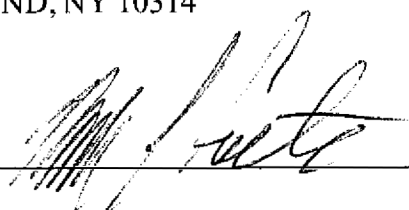
WHEREFORE Plaintiff-Petitioners demand judgement against Defendant-Respondents as follows:

- A. With respect as to the FIRST CAUSE OF ACTION, a permanent injunction from the New York City Executive Order 225.
- B. With respect as to the SECOND CAUSE OF ACTION, a permanent injunction from the New York City Executive Order 225.
- C. Such other and further relief as the Court deems just and proper.

DATED: August 17, 2021

ATTORNEYS FOR PLAINTIFF-PETITIONERS
MARK FONTE & LOUIS GELORMINO
2550 VICTORY BLVD. SUITE 304
STATEN ISLAND, NY 10314

X 

X 

VERIFICATION

STATE OF NEW YORK)
 :SS.:
COUNTY OF RICHMOND)

Rocco's Brooklyn Bakery, a Plaintiff-Petitioner in this action, swears that he has read the forgoing Article 78 Petition, dated August 17, 2021, and know the content thereof, and that it is true to the best of his knowledge, based upon the information they possess and their first-hand knowledge of the circumstances.

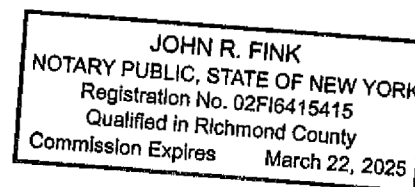
DATED: August 17, 2021

X Rocco's Bakery

Sworn to before me this 17 day of August, 2021.

X John R. Fink

NOTARY PUBLIC



VERIFICATION

STATE OF NEW YORK)
 :SS.:
COUNTY OF RICHMOND)

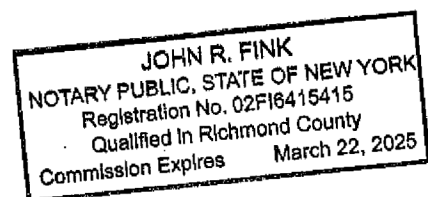
Project Visual INC ^{D/B/A MAX ESCA}, a Plaintiff-Petitioner in this action, swears that he has read the forgoing Article 78 Petition, dated August 17, 2021, and know the content thereof, and that it is true to the best of his knowledge, based upon the information they possess and their first-hand knowledge of the circumstances.

DATED: August 17, 2021

X Alison Marchese

Sworn to before me this 17 day of August, 2021.

X John R. Fink
NOTARY PUBLIC



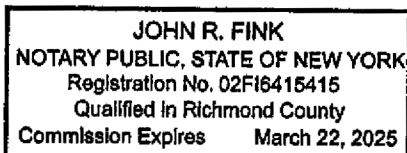
VERIFICATION

STATE OF NEW YORK)
 :SS.:
COUNTY OF RICHMOND)

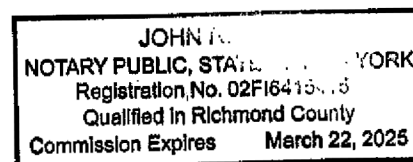
Evolve 33 LLC, a Plaintiff-Petitioner in this action, swears that he has read the forgoing Article 78 Petition, dated August 17, 2021, and know the content thereof, and that it is true to the best of his knowledge, based upon the information they possess and their first-hand knowledge of the circumstances.

DATED: August 17, 2021

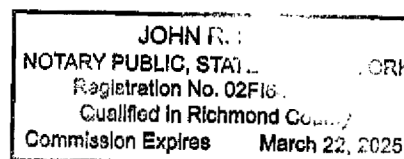
X *John R. Fink*



Sworn to before me this 17 day of August, 2021.



X *John R. Fink*
NOTARY PUBLIC



VERIFICATION

STATE OF NEW YORK)
 :SS.:
COUNTY OF RICHMOND)

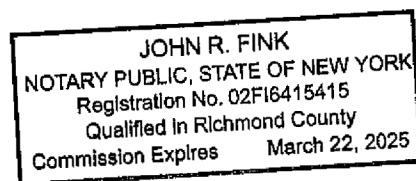
DeLuca's Italian Restaurant, INC, a Plaintiff-Petitioner in this action, swears that he has read the forgoing Article 78 Petition, dated August 17, 2021, and know the content thereof, and that it is true to the best of his knowledge, based upon the information they possess and their first-hand knowledge of the circumstances.

DATED: August 17, 2021

x Robert DeLuca

Sworn to before me this 17 day of August, 2021.

x John R. Fink
NOTARY PUBLIC



VERIFICATION

STATE OF NEW YORK)
 :SS.:
COUNTY OF RICHMOND)

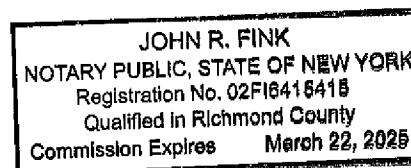
Staten Island Judo Jujitsu, a Plaintiff-Petitioner in this action, swears that he has read the forgoing Article 78 Petition, dated August 17, 2021, and know the content thereof, and that it is true to the best of his knowledge, based upon the information they possess and their first-hand knowledge of the circumstances.

DATED: August 17, 2021

X Joseph Cannizzo

Sworn to before me this 17 day of August, 2021.

X John R. Fink
NOTARY PUBLIC



VERIFICATION

STATE OF NEW YORK)
 :SS.:
COUNTY OF RICHMOND)

Independent Restaurant Owners, Pcs, a Plaintiff-Petitioner in this action, swears that he has read the forgoing Article 78 Petition, dated August 17, 2021, and know the content thereof, and that it is true to the best of his knowledge, based upon the information they possess and their first-hand knowledge of the circumstances.

DATED: August 17, 2021

x Robert Deluca

Sworn to before me this 17 day of August, 2021.

x John R. Fink
NOTARY PUBLIC

