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

THE COUNCIL OF THE CITY OF NEW YORK and THE NEW YORK CITY PUBLIC ADVOCATE,

Petitioners,

For a Judgment Under Article 78 of the Civil Practice Law and Rules,

-against-

MAYOR ERIC ADAMS, in his official capacity as Mayor of the City of New York,

Respondent.

Index No. _____/2024

PETITIONERS' MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

This proceeding raises a simple legal question: after New Yorkers' elected representatives have rejected the mayor's policy preferences by passing a law over his veto, can the mayor use special emergency powers to unilaterally suspend that law? The answer is clearly no. Because we live in a democracy, policy disputes are appropriately resolved by the democratic lawmaking process—not by the iron-fisted will of a single chief executive.

In early 2024, Mayor Eric Adams lost a long, hard-fought policy debate over solitary confinement. Following careful consultation with experts and consideration of best practices, data and evidence, the New York City Council and the Public Advocate concluded that our City's jails would be safer and more humane without any solitary confinement. Mayor Adams, on the other hand, embraced the status quo of outdated practices employed at Rikers Island. After years of legislative deliberation, public hearings, and bill amendments, the Council enacted its solitary confinement ban, Local Law 42, over the Mayor's veto. In response, Mayor Adams did not implement Local Law 42, nor did he challenge the law's validity in court. Instead, he did something no New York City mayor has ever done: he declared that the *local law itself* created a state of emergency, and he unilaterally suspended the law on that ground.

This Article 78 challenge asks the Court to do just one thing: to vacate the Mayor's unlawful, anti-democratic emergency orders in which he unilaterally suspended the jail-conditions law that the Council duly passed over his veto. State law makes clear that a mayor's emergency powers are reserved for *actual emergencies*—situations where the mayor needs to act swiftly to respond to a disaster that the legislative body does not have time to address. Here, we have exactly the opposite scenario: the Council, a co-equal branch of government, passed Local Law 42 after a deliberative process in which it weighed each of the Mayor's putative objections to the bill.

When it passed Local Law 42, the Council was well aware of Rikers' long history and current state of fostering extreme violence. The Council was well aware of staffing shortages, attrition, and the grievous harms faced by correctional staff each day. The Council was well aware of the City's inadequate reentry and recidivism outcomes, and how they harm incarcerated people, staff, and our communities more broadly. Indeed, the Council determined back in 2019 that the permanent solution to those harms and threats posed by Rikers' jails was to close the facilities. Consistent with that broader goal, the Council passed Local Law 42, not in spite of our jails' enduring problems but *because of them*. After the Council rejected the Mayor's policy preferences, he could not then impose them by fiat.

There are at least four separate reasons that the Mayor's suspension of Local Law 42 is illegal under the state emergency-powers law that governs these matters. Any one of these failings requires the Court to invalidate the Mayor's illegal emergency orders. *First*, the passage of Local Law 42 does not constitute an emergency under the emergency-powers law: a duly-enacted local law is not a "disaster, riot, catastrophe or other public emergency," and the Mayor's insistence that his policy disagreement with a co-equal branch of government qualifies as an "emergency" is a clear misapplication of state law. *Second*, there is no rational basis for the Mayor's finding that Local Law 42's enactment "imperils" public safety. *Third*, the Mayor's suspension of Local Law 42 failed to meet specific statutory mandates for the suspension of local laws, including that the suspension be narrowly tailored to the purported emergency. *Fourth*, the Mayor's emergency orders violate both the intent of state law and the City Charter's separation of powers.

The Mayor's unilateral suspension of Local Law 42 silences the voices of millions of New Yorkers whose elected representatives voted, overwhelmingly, to put an end to the deadly violence of solitary confinement. It silences of the voices of advocates, incarcerated people, and community

members who fought so hard for the law's passage. And it makes a mockery of the democratic lawmaking process and our system of checks and balances. It is unfathomable that Albany lawmakers intended this result when they passed the state law that governs mayors' emergency powers. And left in place, the Mayor's illegal suspension of Local Law 42 sets a dangerous precedent for future mayors to abuse their emergency powers when they are dissatisfied with the outcome of lawful democratic processes and have lost a policy debate.

LEGAL AND FACTUAL BACKGROUND

This petition presents a purely legal dispute about whether Mayor Adams has legal authority, under the guise of "emergency" orders, to unilaterally suspend a local law that the Council enacted over his failed veto. The legal framework forbidding this executive overreach is detailed below, along with pertinent facts regarding the Council's deliberative legislative response to the grievous harms of solitary confinement in Department of Correction ("DOC") jails, culminating in the passage of Local Law 42, by a vote of 42 to 9, over the Mayor's veto.

A. The City Charter's separation of powers: The Council makes policy choices and the executive branch implements them

The Council is the "sole legislative branch" of our City's government. *N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 693 (2014); N.Y.C. Charter § 21.[1] Under our Charter, the entire "legislative power of the city" is vested in the Council. *Id.* Our Charter is "unequivocal[]" on this point. *Id.* The Charter empowers the Council with wide ranging power to adopt local laws for the "good rule and government of the city," the "order, protection and government of persons and property," and the "preservation of the public health, comfort, peace and prosperity of the city and its inhabitants." N.Y.C. Charter § 28.

[1] Pursuant to N.Y.C. Charter § 22, the Council consists of fifty-one council members and the public advocate, who serves as a non-voting member.

Under this framework, only the legislature can pass legislation: "[N]o matter how well-intentioned his actions may be, the Mayor may not unlawfully infringe upon the legislative powers reserved to the City Council." *Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 358 (1985). The clear separation of our City's legislative and executive branches mandates that "no one branch be allowed to arrogate unto itself powers residing entirely in another branch." *Roberts v. Health & Hosps. Corp.*, 87 A.D.3d 311, 322 (1st Dep't 2011) (quoting *Under 21*, 65 N.Y.2d at 358).

In this stark division of powers, the "balancing of relative harm, benefit and convenience" is "peculiarly a legislative function" that belongs to the Council. *See Congregation Beth Israel W. Side Jewish Ctr. v. Board of Estimate*, 285 A.D. 629, 635 (1st Dep't 1955). It is the legislative body's job, not the Mayor's, to address "social problems" by making "value judgments entailing difficult and complex choices between broad policy goals." *Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 610 (2015) (cleaned up). A mayor "impermissibl[y] infringe[s]" upon the Council's legislative power when, instead of "implementing a legislative policy" of the Council, he puts in place "a new policy not embraced by the City Council." *Under 21*, 65 N.Y.2d at 358 (1985).

B. The Mayor's limited authority to temporarily suspend local laws on an emergency basis

The purpose of emergency executive powers is "simple": they exist to "temporarily enhance executive power during unexpected crises that are moving too fast for [legislative bodies] to respond."[2] Courts have long recognized that New York State's emergency powers law—which

[2] Brennan Center for Justice, *Emergency Powers*, available at https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers, archived at https://web.archive.org/web/20241204163047/https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/; *see* John A. Ferejohn and Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 Int'l J. Const. L. 210, 212 (2004).

governs the Mayor's issuance of emergency orders here—follows that settled framework. *See, e.g.*, *Prospect v. Cohalan*, 109 A.D.2d 210, 217-18 (2d Dep't 1985), *aff'd*, 65 N.Y.2d 867 (1985). When there is no time for deliberation, the executive branch may act unilaterally to respond to the emergency; but when there is time for the legislative branch to act, the executive cannot—beyond a successful veto—unilaterally overrule the legislature's policy choices.

Consistent with these principles, the State's emergency powers law gives mayors "the power to respond to a local disaster or the immediate threat of a disaster." *Id.* at 217-18 (citing Exec. L. §§ 24(1), 25, 26, 29-b). That targeted delegation of mayoral authority is one of necessity: "in emergency situations prompt and immediate unilateral action is necessary to preserve and protect life and property, the accomplishment of which would be frustrated if left to a deliberative body such as a [local] legislature." *Id.* This delegation of mayoral power enables a quick, nimble response when there is no time for a "deliberative" one. *Id.*

In contrast, state law authorizes local legislative bodies to address disaster preparedness and response on a longer time horizon. *Id.* (citing Exec. L. § 23(1)). To that end, state law makes clear that "the process of planning for a disaster" requires "a deliberative body, such as a [local] legislature," to gather and synthesize "relevant information from a multitude of sources," including impacted New Yorkers, agencies, the executive, community groups, and the public at large. *Id.* (citing Exec. L. § 23(5)).

Under the Executive Law, a mayor may issue emergency executive orders only if he finds that "the public safety is imperiled" by "a disaster, rioting, catastrophe, or similar public emergency" or by the "reasonable apprehension of immediate danger" of one of those enumerated emergencies. Exec. L. § 24(1). The Executive Law defines a "disaster" as the "occurrence or imminent, impending or urgent threat of wide spread or severe damage, injury, or loss of life or property"

resulting from "any natural or man-made causes." Exec. L. § 20(2)(a). That definition includes an illustrative list of occurrences that constitute disasters. The illustrative list is cabined to disease outbreaks, weather and climate-related disasters (*e.g.*, floods and hurricanes), other natural disasters (*e.g.*, earthquakes), and a narrow list of man-made emergencies such as malicious attacks and accidents that result in immediate, true emergencies, such as terrorism, explosions, and nuclear releases. *Id.*

Section 24 also describes the types of emergency actions a mayor may take to address an emergency. These include the targeted, temporary measures that one would typically expect a mayor to take in response to a natural disaster, pandemic, terrorist attack, or other sudden crisis: closing certain streets and places of assembly, suspending alcohol and firearms sales, imposing curfew, and opening emergency shelters. Exec. L. § 24(1)(a) to (f).

The Executive Law similarly provides that, when responding to an emergency, the mayor may suspend "part or all" of any local law to the extent that that local law "may prevent, hinder, or delay necessary action in coping with a disaster or recovery therefrom." Exec. L. § 24(1)(g). But the Executive Law places numerous limits on that authority. These limits include that any mayoral suspension of a local law must:

- be "reasonably necessary to the disaster effort," Exec. L. § 24(1)(g)(ii);
- "safeguard" the "health and welfare of the public," *id.*;
- provide for the "minimum deviation from the requirements" of the local law, "consistent with the disaster action deemed necessary," *id.* § 24(1)(g)(v);
- be accompanied by both (i) a mayoral determination that "the disaster is beyond the capacity of local government to meet adequately" and (ii) a request from the mayor for state assistance, *id.* §§ 24(1)(g) and (7), unless the governor herself has declared a state disaster emergency; and
- last no longer than five days, except that such an order may be renewed for additional five-day periods, *id.* § 24(1)(g)(i).

Even if a mayor's emergency order suspending a local law meets each of these exacting criteria, the State Legislature may nevertheless "terminate" the mayor's emergency order, via resolution, "at any time." *Id.* § 24(8).

C. The Council's law addressing the violence of solitary confinement, which the Mayor unsuccessfully vetoed

There is now a broad scientific consensus that prolonged isolation during incarceration can lead to self-harm, suicide, serious psychological distress, hallucinations, and paranoia (Petition ¶¶ 17-18). Over the past decades, advocacy efforts by impacted community members, an unmistakable scientific consensus, and numerous tragic deaths caused by solitary confinement have collectively spurred increased public awareness of its harms. This has led, in turn, to various efforts to reduce or eliminate solitary confinement in prisons and jails, including the Council's enactment of Local Law 42. That arc of progress is detailed at length in the Verified Petition (*id.* ¶¶ 16-34).

In June 2022, the Public Advocate introduced the bill at issue in this proceeding: a bill to ban solitary confinement in the City's jails that was ultimately enacted, as amended, as Local Law 42 (Petition ¶ 28). That bill, known as Intro. No. 549, had 37 co-sponsors at the time of its introduction in June 2022 (*id.*). Dozens of supporters and opponents of the bill, including the DOC Commissioner, offered written and oral testimony at an all-day public hearing in September 2022 (*id.* ¶ 30).

Over the next 15 months, Council staff revised the bill text and met with key stakeholders, including DOC officials, to discuss the legislation (Petition ¶ 31). This engagement yielded 11 substantive amendments to the bill, including a 120-day extension of the bill's effective date in order to allow additional time to implement the law (*see* Petition ¶ 32). The bill amendments and committee report addressed each of the areas of disagreement raised by the DOC Commissioner

in his September 2022 testimony. In response to the DOC Commissioner's objection to "'prohibit[ing] pre-hearing detention,'" the amended bill eliminated any blanket prohibition and instead set forth detailed "'procedures and policies'" governing the use of pre-hearing restrictive housing (*id.* ¶ 32 (quoting Hearing Transcript and Committee Report)). To address the Commissioner's concern about a "'right to counsel at DOC disciplinary hearings,'" the amended bill made clear that representation at disciplinary hearings could be provided by a lawyer *or* any law student, paralegal, or incarcerated person (*id.* (quoting Hearing Transcript)). As to the Commissioner's views that the bill supposedly incentivized violent conduct and would make it "'impossible'" for DOC to impose "'sanctions'" for violent acts within the jails, the Committee Report detailed numerous studies concluding that solitary confinement has "'hardly any individual or general deterrence effect on violent behavior and misconduct'" (*id.* (quoting Hearing Transcript and Committee Report)).

On December 20, 2023, the Council passed the bill, by a vote of 39 to 7. Mayor Adams vetoed the bill in January 2024 (Petition ¶ 34). In his veto message, he argued that the bill "would make the City's jails less safe" by purportedly (1) eliminating "any negative consequences" for incarcerated people who commit violent acts, (2) imposing a "prohibition on restraining persons during transportation," and (3) removing DOC's "necessary discretion" in conducting lock-downs by limiting their duration to four hours (*id.*).

Ten days later, the Council rejected the Mayor's objections to the law, voting 42 to 9 to enact the law over his veto (Petition ¶ 34). In June 2024, the Board of Correction—DOC's independent oversight board composed of nine appointed board members, including former correctional staff and formerly incarcerated people—adopted rules implementing Local Law 42's requirements (*id.* ¶¶ 4, 11).

D. The Mayor's decision to bypass Chief Judge Swain and issue unprecedented executive orders nullifying the Council's duly-enacted local law

During the 180-day period in which the Administration was given time to implement the law, the Mayor did not take any discernable steps to implement the law. Instead, the Mayor signaled that he would seek judicial relief from Chief Judge Laura Swain, the federal judge presiding over *Nunez v. City of N.Y.*, No. 11 Civ. 5845 (S.D.N.Y.), a constitutional challenge to conditions of confinement at Rikers. DOC informed Chief Judge Swain that it believed Local Law 42 conflicted with court orders she had issued in that case requiring, among other things, a court-appointed monitor's approval of certain security measures (Petition ¶ 44 (citing *Nunez* Doc. No. 724)). Arguing that Local Law 42 was federally preempted by Chief Judge Swain's orders, DOC told the chief judge in a June 2024 letter that it planned to file a motion asking her to issue "an Order suspending the requirements of Local Law 42" (*Nunez* Doc. No. 724). In response, the Council prepared for a court battle over the proper scope of the monitor's authority and whether Local Law 42 was truly preempted by federal court orders. To that end, the Council passed a resolution authorizing the Speaker to "engage in legal action on behalf of the Council to defend Local Law 42" (Res. No. 504-2024, *available at* https://on.nyc.gov/3Nytsvb; Petition ¶ 44).

But Mayor Adams and DOC never filed their promised motion with Chief Judge Swain. Instead, the Mayor took matters into his own hands: he suspended Local Law 42 himself. In doing so, he became the *first mayor* in our City's history to issue an emergency order to prevent the implementation of a local law that passed over his veto (Petition ¶¶ 1, 44).

On July 27, 2024, one day before Local Law 42's effective date, Mayor Adams suspended Local Law 42. He declared a "state of emergency" within DOC facilities "because of the imminent effective date of Local Law 42 and the risks to health and safety that implementation of that law at this time and under current circumstances presents" (Petition, Exhibit B (Emergency Executive

Order ("EEO") 624), at 7). He then issued an emergency executive order that suspended or modified 28 provisions of Local Law 42 (*see* Petition, Exhibit C (EEO 625); Petition ¶¶ 49-71). The Mayor's declaration of emergency raised the same putative public-safety objections that the Mayor raised in his veto message and DOC officials presented during the public hearing on the bill (*see* EEO 624 at 1).

The declaration of emergency also summarized some of the *Nunez* monitor's initial reactions to Local Law 42, which the monitor had communicated to DOC in a letter that DOC filed with Chief Judge Swain (*Nunez* Doc. No. 758-3; *see* EEO 624 at 2). That letter made clear that "more detailed discussions are necessary before the Monitor can make any final determinations regarding which policies and procedures" in Local Law 42 would receive the monitor's ultimate support (*Nunez* Doc. No. 758-3, at 2). The monitor still has not issued any final determinations. His next update to Chief Judge Swain is due in early 2025.

The Mayor has extended his declaration of emergency every 30 days, and has extended his order suspending Local Law 42 every five days, up through the current date.

STANDARD OF REVIEW

Article 78 gives courts the power to invalidate, annul, or enjoin unlawful executive orders. *E.g.*, *Prospect*, 109 A.D.2d at 214-19 (affirming lower court's annulment of executive order under Article 78); *Armer v. City of N.Y.*, No. 156328/2022, 2023 N.Y. Misc. LEXIS 3896, *19 (N.Y. Sup. Ct.. Aug. 1, 2023) (enjoining municipality from enforcing emergency executive order in Article 78 proceeding); *Herkert v. State*, 81 Misc. 3d 526, 536 (N.Y. Sup. Ct. 2023) (same). In an Article 78 challenge to an executive order, the core question is a straightforward one: is the challenged order unlawful or arbitrary and capricious? *See, e.g.*, C.P.L.R. §§ 7803(2) and (3); *Herkert*, 81 Misc. 3d at 536. Here, as detailed below, the Mayor's emergency executive orders are illegal and arbitrary.

ARGUMENT

THE MAYOR'S EMERGENCY ORDERS VIOLATE THE EXECUTIVE LAW AND UNLAWFULLY USURP THE COUNCIL'S POLICYMAKING AUTHORITY

The Executive Law gives mayors emergency authority to suspend local laws. But the Executive Law was not meant to enable autocracy. To that end, Executive Law § 24 imposes numerous strict requirements that must be met before a mayor may issue an emergency executive order that unilaterally suspends a local law.

Mayor Adams' emergency orders violate the Executive Law in at least four separate ways. *First*, the Mayor's unilateral suspension of Local Law 42 was not premised on any "disaster, rioting, catastrophe, or similar public emergency" as those terms are defined by the Executive Law. Exec. L. §§ 20, 24(1). *Second*, there is no rational basis for the Mayor's finding that public safety is imperiled by the law going into effect. Exec. L. §§ 20, 24(1). *Third*, the Mayor failed to meet the multiple enumerated requirements for the suspension of a local law, including that any suspension provide for the "minimum deviation" from the requirements of the local law. Exec. L. § 24(1)(g)(v). *Fourth*, an overbroad interpretation of the Executive Law that enables these sorts of emergency orders runs headlong into both the intent of the Executive Law and the City Charter's separation of powers.

Any one of these four failings, standing alone, renders the Mayor's emergency orders unlawful and invalid.

A. An overridden veto is not an emergency.

Emergency powers may only be exercised in the face of "disaster, rioting, catastrophe, or similar public emergency." Exec. L. § 24(1). But when Mayor Adams declared a state of emergency and suspended Local Law 42, he identified no imminent emergency that required a swift, unilateral response. Instead, the purported "emergency" was the impending "effective date

of Local Law 42" and the supposed "risks" posed by the purposeful implementation of that local law (EEO 624 at 7). But neither of those things constitute a "disaster, rioting, catastrophe, or similar public emergency," as a matter of law. Exec. L. § 24(1). Because this core threshold requirement of the Executive Law has not been met, the Mayor's declaration of emergency and accompanying suspension of Local Law 42 are illegal and invalid.

Neither the passage of a local law nor the consequences anticipated by the law's opponents constitute a "disaster, rioting, catastrophe, or similar public emergency" under the Executive Law. The text, structure and purpose of the Executive Law compel this conclusion for a variety of reasons.

First, courts have found that the Executive Law gives mayors the power to engage in "prompt and immediate unilateral action" when there is no time for "a deliberative body such as a [local] legislature" to respond. *Prospect v. Cohalan*, 109 A.D.2d 210, 217-18 (2d Dep't 1985) (citing Exec. L. §§ 24(1), 25, 26, 29-b), *aff'd*, 65 N.Y.2d 867 (1985). Indeed, the mayor's broad but temporary emergency powers are necessary *because* "emergency situations" require "prompt and immediate unilateral action … to preserve and protect life and property." *Id.* If prompt and immediate unilateral action is not *necessary*, and the situation can instead be addressed by a legislative body, then it is not a "disaster" or "emergency" for the purposes of the Executive Law. *See id.* For that reason alone, deliberative legislation action and its immediate consequences are not a "disaster" or "emergency" sufficient to enable emergency executive measures, as a matter of law.

Second, the plain text of the Executive Law confirms that duly-enacted legislation and its purported consequences are not a "disaster" or "emergency" under the statute. The Executive Law mandates that a mayor's emergency suspension of a local law must be "reasonably necessary to

the disaster effort." Exec. L. § 24(1)(g)(ii). This requirement—and, in particular, the phrase "disaster effort"—makes no sense if the supposed "disaster" is the enactment of a local law. A local law is not a "disaster effort"; it is something that must be done via the democratic lawmaking process. Simply put, the Executive Law's clear requirement that any suspension of a local law be "reasonably necessary to the disaster effort" cannot be squared with the Mayor's unprecedented position that the passage of a local law may itself constitute a disaster.

Third, the Executive Law's detailed definition of "disaster" does not, by its plain text, include the passage of a local law or the law's purported implementation risks. Exec. L. § 20(2)(a) (defining "disaster"). The statutory definition includes a long list of illustrative examples of events that count as "disasters." *Id.* That list consists entirely of disease outbreaks, weather and climate-related disasters (*e.g.*, floods and hurricanes), other natural disasters (*e.g.*, earthquakes), and a narrow set of man-made disasters such as malicious attacks and accidents that result in immediate, true emergencies: terrorism, cyber events, explosions, radiological accidents, bridge failure or collapse, and nuclear, chemical, biological, or bacteriological releases. Exec. L. § 20(2)(a).

None of the statute's examples even remotely resemble the enactment and implementation of a local law over a mayor's veto. That's because the State Legislature did not intend for mayors to be able to declare that the passage of a duly-enacted local law constitutes an emergency. For that reason, the definition of disaster cannot be reasonably read to apply to the facts here. And any contrary interpretation of the statutory definition of disaster would violate clear Appellate Division precedent, because it would impermissibly excise the list of illustrative examples from the statutory text. *Avella v. City of N.Y.,* 131 A.D.3d 77, 85 and n.* (1st Dep't 2015) ("specific examples" listed in the statutory text must inform the statute's meaning; to ignore an illustrative list of examples in a statute's text is to improperly read them out of the law entirely), *aff'd*, 29 N.Y.3d

425 (2017); *see Makhani v. Kiesel*, 211 A.D.3d 132, 145 (1st Dep't 2022) (list of examples limits statute's meaning); *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 255 (2024) (same); *see generally Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 A.D.3d 1, 9 (1st Dep't 2016) (statutes must be "construed so as to give meaning to each word").

For these reasons, courts have repeatedly declined to read the word "disaster" so broadly as to sweep in societal or institutional problems that bear no resemblance to the kind of disasters listed in the Executive Law. In *Herkert*, the court held that a "massive influx of migrant asylum seekers" is not a "disaster" under Executive Law. *Herkert v. State*, 81 Misc. 3d 526, 534 (N.Y. Sup. Ct. 2023). In *Armer*, the court held that the economic impacts of COVID-19 similarly do not support the exercise of emergency powers under Executive Law. *Armer v. City of N.Y.*, No. 156328/2022, 2023 N.Y. Misc. LEXIS 3896, *10-13 (N.Y. Sup. Ct.. Aug. 1, 2023). The Mayor appealed neither of those decisions enjoining his emergency orders, and instead abandoned the emergency actions challenged in those two cases.

Mayor Adams will likely point to Mayor de Blasio's 2021 emergency order to argue that mayors can properly suspend solitary confinement policies based on a possibility of danger or violence. That argument misses two crucial differences between Mayor de Blasio's emergency suspension of Board of Correction rules and Mayor Adams' suspension of a duly enacted local law. *First*—and most importantly—de Blasio modified an executive branch rule, not a legislative enactment. Mayors and Commissioners routinely do exactly that, by either emergency order or emergency rulemaking. *Second*, the basis for de Blasio's emergency order was an extrinsic development—a staffing crisis—that had not been addressed in the rulemaking process. Here, in contrast, Mayor Adams' emergency declarations rely on jail conditions and policy objections that were known to the Council, and which informed the Council's policymaking decisions, throughout

the legislative process. Mayor Adams cannot now wield those same concerns—considered and rejected by the Council—to suspend the very law that the Council ultimately enacted, over his veto, at the conclusion of that deliberative lawmaking process.

Finally, as detailed further below, reading the Executive Law to permit emergency orders like the Mayor's suspension of Local Law 42 would effectively enable a mayoral "super-veto" over any laws that touch on issues of public safety, thereby fundamentally reshaping our system of checks and balances and the separation of powers between the City's executive and legislative branches (Section D, *infra*). There is no evidence that the State Legislature intended that radical, anti-democratic result (*id.*). Indeed, if the Mayor is allowed to ignore a law he does not like throughout the time he was required to implement it, and then claim that having to follow the law is an emergency, he could unilaterally and extrajudicially veto any number of laws he disagrees with (*id.*).

For all of these reasons, the "the imminent effective date of Local Law 42" and the supposed "risks" posed by implementation of that local law are not a "disaster, rioting, catastrophe, or similar public emergency" for the purposes of Section 24 of the Executive Law. The Mayor's emergency orders are therefore unlawful and invalid.

B. There is no rational basis for the Mayor to find that public safety is imperiled by Local Law 42.

Mayors may issue emergency executive orders only upon "a finding by the [mayor] that the public safety is imperiled" by an actual or impending emergency. Exec. L. § 24(1). Here, there is no rational basis for the Mayor to have made a finding that public safety is "imperiled."

The Mayor's executive orders cite various purported risks of implementing Local Law 42, including that the law, once fully implemented, requires DOC to make changes to many of its existing security practices (*e.g.*, EEO 625 at 4-5). By "preventing" DOC from maintaining the

status quo, the Mayor asserts, full and immediate implementation of Local Law 42 would imperil public safety (*id.* at 4). This mayoral finding of "imperiled" public safety lacks a rational basis for two reasons.

First, the Mayor's finding of "imperiled" public safety is foreclosed as a matter of law, because the Mayor's public safety concerns were already addressed, and rejected, in the democratic lawmaking process. The City's lawmakers considered the harms inflicted by solitary confinement, they considered the input of numerous correctional experts, and they considered the Mayor's unsubstantiated belief that Local Law 42's policies would increase violence on Rikers by eliminating "negative consequences," limiting the use of restraints, and capping the duration of lock-downs (Petition ¶ 34 (quoting Mayor's Veto Message)). After hearing those concerns, the Council made the numerous policy choices embodied in the text of the law that they passed over the Mayor's veto. The law on the books reflects our elected leaders' conclusion that the policies of Local Law 42 best serve the public safety goals of the millions of New Yorkers who they represent. And that legislative determination regarding public safety forecloses, as a matter of law, any mayoral "finding" that Local Law 42 imperils public safety. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997) (courts must give "substantial deference to the predictive judgments" of legislatures).

The Mayor will undoubtedly argue—yet again—that he and his experts have the better view of "sound correctional policy" (EEO 625 at 5), and that the Council and its experts' findings, conclusions and priorities are "silly."[3] But that battle of experts is already over: it happened in the

[3] Michael Gartland, *Mayor Adams slams Council solitary confinement ban: "This is silly,"* N.Y. Daily News (Sept. 13, 2022), available at https://www.nydailynews.com/2022/09/13/mayor-adams-slams-council-solitary-confinement-ban-this-is-silly/.

democratic halls of our local legislature, and the Mayor's phalanx lost. And while it bears emphasis that ample evidence and research support the Council's policy choices (*see, e.g.,* Petition, Exhibit D), the courtroom is decidedly not the place to relitigate that policy debate.

Second, and wholly separate from that policy debate, the Mayor's own words and actions prove that Local Law 42 poses no imminent threat to public safety. This is because, even under the Mayor's view of the world, the law will not have any on-the-ground impacts until it is actually implemented by DOC. And by the Mayor's own account, that cannot happen without federal court involvement.

At the threshold, Local Law 42 is not self-executing; it must be implemented. And reports from within Rikers indicate that even though the Mayor's emergency orders purport to suspend only *parts* of Local Law 42, DOC has not meaningfully implemented *any* of the law's provisions. For example, DOC has not followed the law's requirement of quarterly reporting on de-escalation confinement, restrictive housing, or emergency lock-ins. This Court's annulment of the Mayor's emergency orders would not cause the law to be implemented automatically, as DOC's past intransigence shows. Rather, dissolving the Mayor's emergency orders is just one step in enabling the implementation process to move forward.

Furthermore, the Mayor's own position is that the disputed provisions of Local Law 42 cannot go into effect because they conflict with the *Nunez* court's orders (*Nunez* Doc. No. 724). Although the Council vigorously disputes the Mayor's legal position on that issue, the Council recognizes the Mayor's *ability* to argue his position before Chief Judge Swain in *Nunez*—something he said he would do in June 2024, but never did. Again, if *this* Court appropriately vacates the Mayor's unlawful emergency orders, Local Law 42 will not be automatically

implemented. Instead, Mayor Adams will most likely then litigate his federal preemption arguments before Chief Judge Swain in *Nunez*.

And all of this explains why the Mayor waited a full 179 days after the local law's passage to issue his emergency orders. The law itself poses no imminent threat to public safety, even under the Mayor's view of things; if it did, he certainly would have acted sooner. He did not, because Local Law 42 going into effect does not "imperil" public safety. For all of these reasons, there is no rational basis for the Mayor's contrary finding, and his executive orders are invalid as a result.

C. The emergency orders violate at least two other statutory requirements for the mayoral suspension of local laws.

In addition to the failings detailed above, the Mayor's emergency orders violate at least two statutory requirements that are specific to mayoral orders that suspend local laws.

First, a local emergency order that suspends all or part of a local law must "provide for the minimum deviation from the requirements of the local law … consistent with the disaster action deemed necessary." Exec. L. § 24(1)(g)(v). The Mayor's emergency orders fail to satisfy that requirement because the emergency orders suspend parts of Local Law 42 that have no reasonable connection to the purported emergency identified by the Mayor. For example, the emergency orders suspend the law's due process protections for incarcerated people facing disciplinary punishments, but there is no connection between that portion of the suspended law and any public-safety concern identified in the emergency orders. The emergency orders also violate this requirement for the independent reason described above: the emergency orders are unnecessary to address the purported "emergency"—and thus not narrowly tailored to the emergency—because Local Law 42 is not self-executing and, even by the Mayor's account, a federal court should decide whether any parts of the law conflict with Chief Judge Swain's court orders (Section B, *supra*).

Second, to suspend a local law based on a local declaration of emergency, the Mayor must determine that "the disaster is beyond the capacity of local government to meet adequately" and ask the governor for assistance. Exec. L. §§ 24(1)(g) and (7). Upon information and belief, the Mayor has not satisfied this requirement. The Mayor's emergency orders make no assertion that the purported "disaster" is "beyond the capacity of local government to meet adequately"—and, of course, any such claim would be directly at odds with the Mayor's statements made in opposition to a receivership in the *Nunez* litigation (*e.g.*, *Nunez* Doc. No. 688, at 33, 36). Nor do the Mayor's emergency orders indicate that the Mayor has asked the governor for assistance, as the Executive Law requires. The executive orders are unlawful and invalid on this basis as well.

D. It would violate the intent of the Executive Law and core separation-of-powers principles to allow emergency orders like these to stand.

Finally, the Court should invalidate the Mayor's emergency orders because the Executive Law cannot be reasonably read to enable Mayor Adams to use his "emergency" powers to nullify a duly-enacted law that passed over his veto. The granting of such powers would constitute a radical reshaping of the separation of powers in New York City, and there is no evidence that the State Legislature intended to give mayors such broad powers when it enacted the Executive Law's emergency powers provisions.

There is nothing unusual or extraordinary about the disaster-response provisions of our state's Executive Law. Like similar laws around the country, New York's law serves to "temporarily enhance executive power during unexpected crises that are moving too fast for [the legislature] to respond."[4] As the Appellate Division has explained, "deliberative" bodies like

[4] Brennan Center for Justice, *Emergency Powers*, available at https://www.brennancenter.org/issues/bolster-checks-balances/executive-power/emergency-powers.

legislatures are generally ill-equipped to act in a "prompt and immediate" manner; and this necessitates that mayors have "the power to respond" in situations where "prompt and immediate unilateral action is necessary to preserve and protect life and property." *Prospect v. Cohalan*, 109 A.D.2d 210, 217-18 (2d Dep't 1985), *aff'd*, 65 N.Y.2d 867 (1985). At the same time, the Executive Law leaves long-term disaster planning and response in the hands of local legislatures. *Id.*

Those respective duties in the face of disaster are consistent with the traditional separation of powers between the executive and legislative branches. The Council is vested with the entire "legislative power of the city." *N.Y. Statewide Coal. of Hisp. Chambers of Com.*, 23 N.Y.3d at 693. And the Council is thus responsible for addressing enduring societal problems via "value judgments entail[ing] difficult and complex choices between broad policy goals." *Id.* at 698. The Mayor, in turn, must "implement[]" the "legislative policy" of the Council's duly-enacted laws. *Under 21 v. City of N.Y.*, 65 N.Y.2d 344, 358 (1985).

If these bedrock principles are taken seriously, it is impossible to interpret the Executive Law to enable a mayor to do what Mayor Adams has done here: to declare that the passage of local law constitutes an "emergency" necessitating the unilateral suspension of that very law. Allowing these executive orders to stand would amount to endorsing a mayoral "super-veto" over any local laws that touch on issues of public safety.

For example, the Council's 2020 diaphragm-compression law criminalized the type of police restraint that killed George Floyd, but many law enforcement officials claimed the law threatened public safety by "plac[ing] in harm's way both [police] officers and the public whom officers are sworn and trained to protect."[5] Under the Mayor's theory, the diaphragm-compression

[5] Affidavit of Ronald R. Pierone (August 20, 2020), filed at https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=ThwAvm_PLUS_Evjx4Bo1kG1zIvA==.

law's supposed threat to public safety would be sufficient to enable *any* mayor to unilaterally suspend that duly-enacted law via emergency executive order, at any time. Such a misreading of the Executive Law would fundamentally shift the balance of power within City government by giving mayors a "super-veto" over local laws regarding public safety. Had the Legislature intended that radical result, it surely would have said so. *See Haar v. Nationwide Mut. Fire Ins. Co.*, 34 N.Y.3d 224, 231 (2019) (legislative bodies "do not hide elephants in mouseholes"). Nothing in the Executive Law's text or its history remotely suggests that this was the Legislature's intent.

Hard-fought policy debates are supposed to be resolved through the democratic lawmaking process, not in emergency executive orders. *See Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 610 (2015). Any major legislative action has opponents who claim the local law's implementation will harm them. Under our democratic system, the redress for those aggrieved groups is either to (1) get the bill voted down or vetoed; (2) get the law amended or repealed via the regular democratic process; or (3) seek redress from the courts by establishing that the local law is substantively invalid, for example because it violates their constitutional rights or is preempted.

The Mayor seeks to blaze a new, fourth path to undo local laws: a unilateral emergency order, renewed in perpetuity, to effectively veto a law he does not like. A review of every emergency order issued by New York City mayors since 1970 uncovered no analogous use of the power. No mayor has done this before, for good reason—such an order plainly violates the Executive Law and undermines the Council's role as a co-equal branch of City government. The Mayor is free to challenge the validity of Local Law 42 in the appropriate forum; and he has promised to do so before Chief Judge Swain in *Nunez*. But he cannot use invalid executive orders to forestall proper adjudication of the merits of Local Law 42.

By wielding emergency powers to replace the Council's policy choices and priorities with his own, the Mayor has unlawfully usurped the Council's legislative authority. That anti-democratic power grab violates the separation of powers enshrined in both the City Charter and the State Constitution. *See, e.g.*, *Ellicott Group, LLC v. State of N.Y. Exec. Dept. Off. of Gen. Servs.*, 85 A.D.3d 48, 53 (4th Dep't 2011) (executive branch must not "usurp[] the role of the legislative body); *Under 21*, 65 N.Y.2d at 358 (a mayor "impermissibl[y] infringe[s]" upon the Council's legislative power when he puts in place "a new policy not embraced by the City Council").

New Yorkers, through their elected representatives, have overwhelmingly demanded a stark break from our jail system's inhumane past. New Yorkers are not naive, nor is the Council: we all know that the violence and brutality of Rikers Island cannot be fixed overnight. But the work of implementing Local Law 42 cannot begin in earnest until this Court lifts the Mayor's emergency orders, which put up an unnecessary and illegal roadblock to doing the hard work of eliminating solitary confinement, once and for all, in our City's jails.

CONCLUSION

The Court should grant the Petition and vacate the Mayor's unlawful executive orders.

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New York, New York

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