

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

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In the Matter of the Application of

INDEX NO.

BARRY SIMON, PICTURE THE HOMELESS, INC.  
and URBAN JUSTICE CENTER – SAFETY NET  
PROJECT,

Petitioners,

For a Judgment Pursuant to Section 3001 and Article 78  
of the Civil Practice Law and Rules,

**VERIFIED PETITION**

-against-

PATRICK J. FOYE as Chairman and CEO of the Metropolitan  
Transportation Authority, SARAH E. FEINBERG as the Interim President  
of the New York City Transit Authority, METROPOLITAN  
TRANSPORTATION AUTHORITY,  
NEW YORK CITY TRANSIT AUTHORITY, and  
MANHATTAN AND BRONX SURFACE TRANSIT  
OPERATING AUTHORITY.

Respondents,  
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**PRELIMINARY STATEMENT**

1. Petitioners BARRY SIMON, PICTURE THE HOMELESS INC., URBAN  
JUSTICE CENTER – SAFETY NET PROJECT (“Petitioners”), by their attorneys, Urban  
Justice Center, ERIC WACHS, of Counsel to Marika Dias, Esq., MARIKA DIAS, and JAMES  
FENTON, of Counsel to Marika Dias Esq., respectfully show and allege that this is an  
application pursuant to Section 3001 and Article 78 of the Civil Practice Law and Rules  
challenging rules adopted by Respondents METROPOLITAN TRANSPORTATION  
AUTHORITY (“MTA”), NEW YORK CITY TRANSIT AUTHORITY (“NYCTA”),

## MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY

("MBSTOA"), PATRICK J. FOYE as Chairman and CEO of the Metropolitan Transportation Authority and SARAH E. FEINBERG as Interim President of the New York City Transit Authority ("Respondents") which amend the MTA Code of Conduct (21 NYCRR §1050) (hereinafter "the Rules"). **Exhibit A** is a copy of the text of the final Rules and Notice of Adoption which was published in the October 14, 2020 edition of the New York State Register and **Exhibit B** is a copy of the text of the proposed Rules which was published in the May 20, 2020 edition of the New York State Register. The Rules encompass two rules that are identical in content, one promulgated by the MBSTOA and one promulgated by the NYCTA.

2. Homeless New Yorkers are persons regulated by the Rules, which were adopted on an emergency basis on April 29, 2020 in the early weeks of the COVID-19 pandemic and made permanent on September 23, 2020, based on a permanent rule making process that was commenced with a dual Notice of an Emergency Rule and Notice of Proposed Rulemaking, with respect to each rule, and which appeared in the May 20, 2020 edition of the State Register.

**Exhibit B.** The Rules amend the MTA Code of Conduct in three (3) ways which have the effect of excluding homeless New Yorkers from the subway system. The Rules (i) ban people from taking wheeled carts of over thirty (30) inches long or wide into the subway system (21 NYCRR §1050.9[g]), (ii) ban people from staying in a subway station for longer than one (1) hour (21 NYCRR §1050.6[c]) and (iii) ban people from staying in a subway terminal after a train is taken out of service (21 NYCRR §1050[h]). By banning these three (3) activities, the Rules ban the manner in which homeless persons, because they lack access to safe and secure shelter, use the

subway system. By subjecting the manner in which they use the subway system to prohibition, the Rules have the effect of excluding them from the subway system.

3. The Rules are arbitrary and capricious, and were enacted in violation of Article 2 of the State Administrative Procedure Act (“SAPA”), which sets forth the steps a state agency must follow in promulgating a rule.

4. First, the Rules fail to state a non-pretextual purpose and necessity for the Rules, in violation of SAPA §202-a(3)(b). Respondents’ purported necessity for the Rules was to safeguard public health and safety and help essential workers maintain social distancing, however this is simply a pretext to exclude homeless New Yorkers from the subway system. This is demonstrated by (i) Respondents’ own public statements at the time the Rules were proposed and adopted on an emergency basis, as well as prior to and afterwards; (ii) the fact that the Rules specifically target the activities of a few thousand homeless New Yorkers as opposed to millions of other riders who make up the overwhelming majority of transit users; (iii) the fact that the Rules carve out various non-homeless nontransit uses as exempt from the Rules’ application, such as public speaking, leafletting, and artistic performances, *inter alia*; (iv) the fact that Respondents provide no scientific evidence of the basis for the Rules’ content; and (v) the fact that Respondents are adopting permanent Rules in response to the temporary COVID-19 pandemic.

5. In violation of SAPA §202-a(3)(b), Respondents have failed to set forth any “scientific or statistical study, report or analysis” which shows that the Rules’ bans on wheeled carts, on remaining in a subway station for more than one (1) hour, and on remaining in a subway terminal after a train is taken out of service, safeguard public health and safety and

ensure social distancing during the COVID-19 pandemic. The complete lack of any scientific evidence to demonstrate that the Rules would achieve their stated purpose, also renders them arbitrary and capricious.

6. Respondents have failed to set forth an ongoing necessity for the Rules, in violation of SAPA §202-a(3)(b). Due to the changing nature of the COVID-19 pandemic and the New York State government's response to it, the factual circumstances present at the time the Rules were proposed in April 2020 and which gave rise to the Rules' purported necessity, no longer existed when the Rules were permanently adopted in September 2020. In particular, the users of the subway system were no longer limited to "healthcare providers, first responders, and other essential workers," as was the case in April 2020 when there was a statewide shut-down in place. By the time the Rules were permanently adopted the subway system was open to the public at large. Therefore, the statement of necessity set forth in the proposed rule no longer applied, rendering the Rules both a violation of SAPA and arbitrary and capricious.

7. Respondents also failed to set forth a statement detailing the projected costs of the Rules to homeless persons, in violation of SAPA §202-a(3)(c)(1). Homeless persons are those customers who are most directly regulated by the Rules, and as a result of the Rules, they experience a range of fiscal and non-fiscal burdens. Not having studied the burden of the Rules on their homeless customers, in their "Costs" assessments, Respondents falsely asserted that the Rules would not impose any costs on homeless persons.

8. Respondents also failed to consider utilizing approaches designed to have a less burdensome impact upon homeless persons, in violation of SAPA §202-a(1), which requires an agency to consider alternative approaches which are designed to "avoid undue deleterious

economic effects or overly burdensome impacts of the rule upon persons... directly or indirectly affected by it.” In their regulatory impact statement, Respondents expressly stated that they did not consider any alternative approaches, thereby confirming their own failure to comply with SAPA §202-a(1).

9. The population of riders predominantly impacted by the Rules, that is the population experiencing homelessness in New York City, are disproportionately people of color and people living with disabilities. The Rules thus have a discriminatory impact on these groups, in violation of New York City Human Rights Law (“NYCHRL”) §8-107(4)(a)(1)(a), New York State Human Rights Law (“NYSHRL”) §296.2(a) and New York State Civil Rights Law (“NYSCRL”) §40-c(2), all of which prohibit discrimination in places of public accommodation on the basis of a person’s race, color or disability.

10. Petitioners seek an order declaring that the Rules are arbitrary and capricious, an abuse of discretion, made in violation of lawful procedure, and affected by an error of law, and as such are null and void, for the following reasons:

- a. The Rules fail to state a non-pretextual purpose and necessity for the Rules, that is, while Respondents assert that the Rules are necessary to safeguard public health and safety and help essential workers social distance, the purpose of the Rules are actually to permanently exclude homeless persons from the subway system, in violation of SAPA §202-a(3)(b);
- b. Respondents fail to set forth any scientific evidence showing how each element of the Rules achieves the stated purpose of safeguarding public health and safety and helping essential workers social distance, in violation of SAPA §202-a(3)(b);

- c. The factual circumstances which gave rise to the Rules' purported necessity no longer existed when the Rules were permanently adopted, and as such the Rules failed to set forth a valid purpose for adoption, in violation of SAPA §202-a(3)(b);
  - d. The Rules fail to set forth a statement detailing the "costs" of the Rules to the regulated persons most impacted by them, that is, homeless persons, in violation of SAPA §202-a(3)(c)(i);
  - e. Respondents failed to consider approaches designed to have a less burdensome impact on homeless persons who are the ridership predominantly impacted by the Rules, in violation of SAPA §202-a(1); and
  - f. Respondents are adopting permanent Rules in response to a temporary set of circumstances, that is, the COVID-19 pandemic.
11. Petitioners further seek a finding that the Rules are in:
- a. Violation of the NYCHRL §8-107(4)(a)(1)(a), which prohibits unlawful discriminatory practice in places of public accommodation on the basis of race, color or disability.
  - b. Violation of the NYSHRL §296.2(a), which prohibits unlawful discriminatory practice in places of public accommodation on the basis of race, color or disability.
  - c. Violation of NYSCRL §40-c(2), which prohibits discrimination by a state agency in a person's civil rights on the basis of race, color or disability.

### **THE PARTIES**

12. Petitioner Barry Simon is a homeless individual who is Black. Petitioner Simon is also a customer of the New York City subway system operated by Respondents and he has been directly impacted by the Rules.

13. As a result of a lack of housing, Petitioner Simon uses the subway system to shelter and to travel to other locations throughout the City. During the time that the emergency and permanent Rules were in place, Petitioner Simon has been impacted by the Rules as he used and attempted to use the subway for travel and as a safe place to stay during the day given the chaotic and negative environment of his current shelter. Petitioner Simon was a street homeless New Yorker from early 2018 until he entered into shelter in approximately February 2020.

14. Since the Rules were adopted on an emergency basis on April 29, 2020, Petitioner Simon estimates that he was kicked out of Respondents' stations dozens of times due to the Rules. Because he lacks a safe place to store his belongings, Petitioner Simon transports many of his belongings in a cart. On approximately ten separate occasions, Petitioner Simon was told that he had to leave the station because of the cart and that if he didn't leave the station, that the Respondents' agents would take his belongings. Petitioner Simon has ongoing health issues, including swelling of his feet, ankles, and legs. He has a Reduced Fare Metrocard based on his disability and receives federal disability benefits. As a result of his health conditions and housing status, he sometimes spends more than 1 hour in a station while he rests. On dozens of occasions after the adoption of the Rules, Petitioner Simon was approached by New York Police Department officers and told that because he was spending too long in the station, that he had to leave the station. On several occasions he was threatened with arrest if he did not leave immediately.

15. Petitioner Picture the Homeless, Inc., a New York not-for-profit corporation, is an organization founded and led by homeless persons which, through grass roots organizing, direct action and educating homeless persons about their rights, works to change laws and policies criminalizing homelessness as well as challenge the root causes of homelessness. It was founded on the principle that homeless persons have civil and human rights regardless of their race, color, creed, sexual orientation or identity, or immigration or economic status. Among other things, Picture the Homeless works to protect the civil rights of people who are homeless and living outside of the shelter system. The homeless New Yorkers Picture the Homeless works with are persons regulated by the Rules and have been directly impacted by being removed from the subway terminals when trains were taken out of service, a particular hardship given that they oftentimes are carrying many or all of their belongings with them and are often brought into conflict with the New York Police Department as they are removed, and then left in remote locations. Many of the street homeless persons on whose behalf Picture the Homeless advocates are people of color and disabled fare-paying subway customers, who have been directly impacted by the Rule.

16. Petitioner Urban Justice Center-Safety Net Project (“UJC-SNP”), a New York not-for-profit corporation, is an organization which provides legal and support services to and advocates on behalf of street homeless individuals throughout New York City, many of whom utilize the New York City subway system and who are therefore persons regulated by the Rules. UJC-SNP’s direct services to homeless people include: help with securing permanent housing, access to City stabilization beds, advocacy with the City shelter system, assistance to street homeless and sheltered homeless New Yorkers in meeting immediate needs and responding to

crises, and access to Public Assistance and SNAP benefits. Many of the street homeless people to whom UJC-SNP provides direct advocacy, legal and support services are people of color and disabled fare-paying subway customers.

17. Petitioners Picture the Homeless, Inc. and UJC-SNP are collectively referred to herein as “Organizational Petitioners.”

18. New York Courts recognize that Organizational Petitioners and similar organizations attain organizational standing by virtue of their role in serving homeless individuals.

19. Upon information and belief, Respondent Metropolitan Transportation Authority (“MTA”) is a public benefit corporation existing pursuant to Title 9 of Article 5 of the Public Authorities Law of New York State. The MTA maintains its principal office at 2 Broadway, 4<sup>th</sup> floor, New York, NY 10004.

20. Upon information and belief, Respondent New York City Transit Authority (“NYCTA”) is an agency of the MTA, which conducts its business of providing transit services in all five boroughs of New York City, while having its principal office at 130 Livingston Street, Brooklyn, NY 11201.

21. Upon information and belief, Respondent Manhattan and Bronx Surface Transit Operating Authority (“MBSTOA”) is a public benefit corporation and a subsidiary of Respondent NYCTA, which conducts its business of providing surface transit services in New York City, while having its principal office at 130 Livingston Street, Brooklyn, NY 11201.

22. Upon information and belief, Respondent Patrick J. Foye is the Chairman and CEO of Respondent MTA whose principal place of business is 2 Broadway, 4<sup>th</sup> floor, New York, NY 10004.

23. Upon information and belief, Respondent Sarah E. Feinberg is the Interim President of Respondent NYCTA whose principal place of business is 130 Livingston Street, Brooklyn, NY 11201.

### **JURISDICTION**

24. The court has jurisdiction over Petitioners' claims pursuant to C.P.L.R. §7801.

### **VENUE**

25. Venue is proper in New York County, pursuant to C.P.L.R. §§ 506(b) and 7804(b) in that it is where Respondents made the determination complained of, it is where the material events otherwise took place, it is where Respondent MTA's principal office is located, and it is where all Respondents operate transit services.

### **STATUTORY AND REGULATORY FRAMEWORK**

#### **A. New York State Administrative Procedure Act**

26. SAPA §202 et. seq. prescribes the process and procedures that must be followed for a state agency to adopt a rule. Subsection (1) provides that prior to adopting a permanent rule, an agency must submit to the secretary of state a notice of proposed rule making to be published in the New York State Register, and sets forth the process and procedure for doing so.

27. SAPA §202(1)(f)(vi) provides that a notice of proposed rule making shall include a "regulatory impact statement" prepared pursuant SAPA §202-a.

28. SAPA §202-a(3)(b) requires a “statement setting forth the purpose of, necessity for, and benefits derived from the rule” and “summary...of each scientific or statistical study, report or analysis that served as the basis for the rule.”

29. SAPA §202-a(1) provides that in crafting a rule, an agency shall “consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons, including persons residing in New York state's rural areas, directly or indirectly affected by it...”

30. SAPA §202-a(3)(c)(i) provides that each regulatory impact statement shall contain a statement which indicates “the costs for the implementation of, and continuing compliance with, the rule to regulated persons.”

31. SAPA §202-a(3)(g) provides that a regulatory impact statement shall include a statement indicating whether any significant alternatives to the rule were considered, including a discussion of such alternatives and the reasons why they were not incorporated into the rule.

32. SAPA §202(8) provides that a proceeding may be commenced to contest a rule on grounds of noncompliance with the procedural requirements of SAPA. Subsection (8) further provides that each rule must promulgated “in substantial compliance” with the provisions of SAPA.

**B. New York City Human Rights Law, New York State Human Rights Law and New York State Civil Rights Law**

33. NYCHRL §8-107 sets forth what constitute unlawful discriminatory practices in New York City. Subsection (4)(a)(1)(a) provides that it shall be unlawful discriminatory practice for the owner, manager or agent of any place or provider of public accommodation, because of any person’s race, color or disability, to deny to such person the full and equal enjoyment of any

of the accommodations, advantages, facilities or privileges of the place or provider of public accommodation.

34. NYCHRL §8-107(17)(a) provides that unlawful discriminatory practice based on disparate impact is established when a policy or practice of a covered entity disparately impacts a covered group and the covered entity fails to show that the policy or practice complained of bears a significant relationship to a significant business objective of the covered entity or that the policy or practice does not contribute to the disparate impact.

35. NYSHRL §296 sets forth what constitutes unlawful discriminatory practices in New York State. Subsection 2(a) provides that it shall be unlawful discriminatory practice for the owner, manager or agent of any place of public accommodation, because of the race, color, or disability of any person, to deny to such person any of the accommodations, advantages, facilities or privileges thereof.

36. NYSHRL §292(9) provides that the term “place of public accommodation” shall include “all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof.”

37. NYSCRL §40-c(2) provides that no person shall, because of their race, color or disability, be subjected to any discrimination in his or her civil rights by the state or any agency or subdivision of the state.

### **STATEMENT OF FACTS**

38. Each day thousands of fare-paying, homeless New Yorkers who lack access to safe, secure housing use the subway system. In comparison to the millions of people who ride the subway each day, the few thousand homeless New Yorkers who shelter in the subway system

is insignificant. However, they are now being excluded from the subway system by Rules that directly target the manner in which they use the subway system because they lack access to housing.

39. Just like all New Yorkers, homeless people rely on the subway for a variety of reasons, including travelling to work, visiting friends and family, attending appointments, shopping, and all other manners of travel needs, as well as for non-transit purposes as are expressly contemplated in the MTA rules. However, unlike other subway users, many homeless subway users do not have a safe place in which to keep their belongings, either because they are unsheltered or because shelter residents who leave their belongings in the shelter often have their belongings stolen. This means that they are more likely to have more things with them when they use the subway, and may need use carts so that they can practically transport their belongings with them while travelling. In addition, many homeless subway users, who cannot simply “go home” to their apartment like other subway users, may spend longer in the stations or trains due to weather and safety concerns since the subway is one of the few accessible public places where they can stay safe, warm and dry. For unsheltered people, the subway provides temporary refuge from the elements which may be life-threatening, including rain, snow, extreme cold, and heat. Additionally, for years, many homeless New Yorkers in shelters have been encouraged to leave the shelter during the day. Some spend time on the subway or in stations in order to stay safe and warm and remove themselves from the shelter setting, which many experience as chaotic or unhealthy.

40. As a public benefits corporation of New York State, the MTA has an obligation to provide safe, quality service to all its riders, regardless of race, disability or housing status.

However, Respondents have now enacted the Rules under the pretense of safeguarding public health and safety and helping essential workers social distance, while actually effectuating exclusion of homeless New Yorkers from the subway system.

41. In March 2020 the COVID-19 pandemic hit New York City. Shortly thereafter the City shut down, when effective March 22, 2020, Governor Cuomo instituted a stay-at-home Order, in which all non-essential workers were required to stay at home. Whereas pre-pandemic over 5.5 million people a day rode the subway system, by mid-April 2020 that had dropped to a little over 200,000 people a day. NYU Rudin Center for Transportation, *Transportation During Coronavirus in New York City*, July 2020, at 1.

42. On April 29, 2020, pursuant to Public Authorities Law §§ 1204(5-a), 1266(4) and (5), Respondents adopted the Rules on a temporary emergency basis and proposed the Rules for permanent adoption. They submitted to the secretary of state dual Notices of Emergency/Proposed Rule Making, which were published in the May 20, 2020 edition of the New York State Register at pages 12-17. **Exhibit B**. On September 23, 2020 Respondents approved the Rules on a permanent basis. The notices of adoption for the Rules were published in the October 14, 2020 edition of the New York State Register. **Exhibit A**.

43. *Inter alia*, the Rules amend the MTA Code of Conduct (21 NYCRR §1050) to ban three (3) activities which homeless people regularly engage in because they lack access to shelter: remaining in a subway station for more than one (1) hour, remaining in a subway terminal after a train is taken out of service, and bringing wheeled carts more than 30 inches long or wide into a subway station.

44. The Rules ban people from spending more than an hour in a subway station, amending subdivision (c) of section 1050.6 to read in relevant part as follows (additions in *italics*):

(c) Except as expressly permitted in this subdivision, no person shall engage in any nontransit uses upon any facility or conveyance. Nontransit uses are noncommercial activities that are not directly related to the use of a facility or conveyance for transportation, *and include remaining in the paid fare zone of a particular subway station for more than one hour.*

Notably, the Rules maintain the exception for the following nontransit uses: "...public speaking; campaigning; leafletting or distribution of written noncommercial materials; activities intended to encourage and facilitate voter registration; artistic performances, including the acceptance of donations; solicitation for religious or political causes; solicitation for charities..."

45. The Rules ban people from remaining in a subway terminal after a train is taken out of service, adding a new subdivision (h) to section 1050.6 which reads as follows:

*(h) During a disaster emergency relating to public health declared by the Governor of the State of New York, no person who is on a subway car shall remain on such car, train, or in the station after the subway car has entered a terminal station and the authority has announced that the train is being taken out of service and instructed passengers to leave the train.*

46. The Rules ban people from bringing in wheeled carts more than thirty (30) inches long or wide, amending Subdivision (g) of section 1050.9 to read as follows:

(g) No person may carry on or bring to any facility or conveyance *any wheeled cart greater than thirty inches in either length or width, including but not limited to shopping or grocery store carts or baskets, but excluding any stroller which is, at the time it is on or in the facility or conveyance, being utilized for children;*

47. By enacting bans on wheeled carts, remaining in the subway station over an hour and remaining in a subway terminal after a train is taken out of service, the Rules specifically target the manner in which homeless persons use the subway system because they lack access to shelter.

48. The Rules were not enacted in substantial compliance with Article 2 of SAPA, which sets forth the requirements for permanently adopting a rule. The Rules are arbitrary and capricious and violate SAPA in the following ways:

**I. Respondents Failed to State a Valid Purpose and Necessity for the Rules**

49. Section 202-a(3)(b) of SAPA provides that each regulatory impact statement shall contain a statement detailing the purpose of, need for and benefits derived from the rule. It provides as follows:

3. Each regulatory impact statement shall contain:

...

(b) A statement setting forth the purpose of, necessity for, and benefits derived from the rule, a citation for and summary, not to exceed five hundred words, of each scientific or statistical study, report or analysis that served as the basis for the rule, an explanation of how it was used to determine the necessity for and benefits derived from the rule, and the name of the person that produced each study, report or analysis;

50. Respondents' regulatory impact statements for the Rules are identical in content and assert that the Rules are necessary to "safeguard public health and safety and to ensure immediately that health care providers, first responders, and other essential workers who rely on subways and trains to get to and from work and also our employees are able to maintain social distancing during the COVID-19 outbreak." **Exhibit B** at p. 12 and p. 17.

51. That statement lacks veracity. The Rules are not about “safeguarding public health” and ensuring that essential workers are “able to maintain social distancing,” but rather are about permanently excluding homeless persons from the subway system. This is clearly apparent from (i) statements made by Respondents and their agents, (ii) the fact that the Rules target the activities of homeless persons who only number a few thousand compared to the millions of riders who use the subway system, (iii) the fact that the Rules contain a carve-out provision for non-homeless nontransit activities, (iv) the fact that Respondents provide no scientific evidence for how the Rules will achieve their stated purpose, and (v) the fact that Respondents are enacting permanent Rules in response to a temporary event, the COVID-19 pandemic.

52. First, Respondents’ public statements made around the time the Rules were proposed, as well as before and after it demonstrate that Respondents’ motivation was not to “safeguard public health,” but rather to permanently exclude homeless New Yorkers from the subway system. In particular,

- a. Upon information and belief, on or about July 24, 2019, Respondent MTA announced the formation of a task force “to combat the persistent and growing issue of homelessness in the New York City subway system.” The task force announcement alleged that “homeless individuals are increasingly occupying subways not for transportation, but for shelter or in some cases illegal activity. These non-transportation activities frequently disrupt service, create delays, and can pose a risk to riders on the trains. In addition, by allowing homeless individuals to stay within the system – rather than finding them supportive

housing or other resources – it poses a risk to their own health and safety.” See MTA Press Release, *MTA Announces Task Force to Address Growing Homelessness in New York City Subways*.

- b. Upon information and belief, on or about October 4, 2019, the Respondent MTA issued findings of the Task Force on Homelessness in the NYC Subway System. See MTA Press Release, *MTA, State Agencies Announce Action Plan to Address Homelessness Crisis on the Subways*.
- c. Upon information and belief, on or about October 4, 2019 the MTA’s report from the Task Force on Homelessness in the NYC Subway System noted that “the MTA is in the midst of a significant reorganization and transformation. This reorganization provides an important opportunity for the MTA to rethink its operations including its response to issues such as homelessness. This is the right time and right opportunity for MTA to evaluate the safety and comfort of its system, its approach to a population in need but inappropriately seeking shelter in the transit system, and to assess its working relationship with partner agencies and others organizations.” The third recommendation of the Task Force was “MTA will do more to publicize longstanding MTA Rules of Conduct and to inform the ridership about applicable rules and regulations as well as assistance available for those experiencing homelessness.” As part of fulfilling this recommendation the Task Force report stated that “The MTA will review New York City Transit, Metro-North Railroad and the Long Island Rail Road Rules of Conduct and propose any needed plain language changes to improve consistency among

agencies as needed and to provide clarity regarding the appropriate interpretation of those rules to aid in enforcement”. See *Task Force on Homelessness* report.

- d. Upon information and belief, on or about February 14, 2020, Respondent MTA representative Shams Tarek said in statement that Respondent MTA’s removal of the backs from subway station benches “has successfully led to a reduction in people sleeping in that problematic station; an improvement in employee safety and comfort; improved cleanliness; and an increase in the amount of customers using the benches as they wait for trains,” and “We will always stand up for the subway riding public as we work to keep stations safe, clean and orderly,” he added, noting that the agency’s homeless task force has convinced over 2,800 people to accept social services since July. See New York Post, *MTA removes backs from benches at subway station to stop homeless sleepers*, February 14, 2020.
- e. Upon information and belief, on or about March 31, 2020 Respondent Foye stated that “There are fewer people overall on the subways which makes, frankly, the homeless situation appear bigger.” He also stated that “A normal ridership on the subways has a social check in terms of the homeless.” See *MTA Boss Pat Foye: Low Ridership ‘Makes Homeless Situation Appear Bigger’*, March 31, 2020.
- f. Upon information and belief, on or about April 22, 2020 Respondent Feinberg, acting in her official capacity stated the MTA was changing its code of conduct to make it “abundantly clear that the transit system must be used by people for transport only — not for sheltering, sleeping, storing belongings or

panhandling...” and that the new regulation will be enforced in close coordination with the NYPD and the MTAPD. See, Forest Hills Post, *MTA Wants City Hall to Help Solve Subway Homeless Crisis*, April 22, 2020.

- g. Upon information and belief, on or about April 22, 2020, Respondent Feinberg, acting in her official capacity, stated that the city was not being aggressive enough to address subway homelessness and that “We ... urge the city to take more aggressive steps to address this problem. It is, without a doubt, a city obligation and responsibility,” and “We stay in close contact with the NYPD and the city, but I think it’s safe to say everyone here is losing patience with the situation.” See, New York Post, *MTA honcho ‘losing patience’ with NYC on subway homelessness*, April 22, 2020.
- h. Upon information and belief, on or about April 27, 2020, Respondent Feinberg acting in her official capacity wrote an opinion piece in which she stated: “As the pandemic rages on, the MTA is ramping up its response — increasing the number of cleaners in train cars and at end-of-line stations, and adding more police underground. We have also brought in private contractors to assist in the work of alerting authorities to homelessness and other deteriorating conditions. And we are changing our Code of Conduct to make it abundantly clear that the transit system must be used by people for transport only — not for sheltering, sleeping, storing belongings or panhandling. We *will* enforce these new regulations in close coordination with our NYPD partners and the MTAPD.” See, NY Post, *New York City must not let the subways turn into a homeless shelter*, April 27, 2020

- i. Upon information and belief, on or about April 28 2020, Abbey Collins, official MTA spokesperson, stated that the MTA was “happy the city has agreed to do more to provide safe shelter for homeless New Yorkers as we have been asking for months.” and “We thank NYPD for their partnership, and urge City Hall to take additional aggressive actions so we can focus on safely running transit service and not providing social services...” See NY Post, *De Blasio demands MTA close subway terminals for nightly homeless clearance*, April 28, 2020.
- j. Upon information and belief, on or about April 29, 2020, Respondent Feinberg, acting in her official capacity, stated of the Rules “Individuals sleeping and living on trains is unacceptable for a lot of reasons, but mostly it’s unacceptable because people deserve better lives than that,” and “This is something that we were seeing long before the pandemic and it’s something that we will see beyond this wave and into the second wave and subsequent waves,” See AM New York, *It’s the end of the line: new rider guidelines aim to guide homeless off subways*, April 29, 2020.
- k. Upon information and belief, on or about May 4, 2020, Respondent MTA’s official spokesperson Abbey Collins, acting in her official capacity, stated that the MTA had alerted the NYPD of the possibility of homeless people who normally sleep in the subways turning to the free buses to shelter overnight and that “The city should do everything possible to reach homeless New Yorkers and connect them with services during this unprecedented public health crisis.” See, NY Daily

News, *MTA releases plan for first-ever overnight NYC subway shutdown due to coronavirus*, May 4, 2020

- l. Upon information and belief, on or about May 6, 2020, Respondent Foye, acting in his official capacity, stated “I think at this point, especially during the pandemic, that no one is doing the homeless a favor by allowing them to live or sleep on subway cars or in subway tunnels...” See NY Daily News, *Homeless removed from trains as coronavirus ends NYC’s 24-hour subway service, with trains scrubbed clean during four-hour closure*, May 6, 2020
- m. Upon information and belief, on or about May 8, 2020, on WCBS 880 radio, Respondent Foye, acting in his official capacity, stated regarding the Rules implementation during 1A.M. subway closures “Obviously the homeless don’t benefit, especially during a pandemic, from sleeping or living on the subways, neither do New York City Transit workers on the subways including conductors, operators, cleaners. Not good for the homeless at any time, especially during a pandemic, like the horrific pandemic we’re living through.”

53. Second, the Rules, by targeting the manner in which homeless persons use the subway system, address the activities of only a few thousand homeless people as their purported approach to ensuring health and safety and social distancing, while declining to target the conduct of the overwhelming majority of transit users.

54. Third, while the Rules specifically ban a nontransit activity which homeless persons engage in (remaining in a subway station for more than one (1) hour), they carve out a hefty exception for a variety of other nontransit activities that ostensibly impact health and safety

and social distancing, equally if not more so than the conduct targeted by the Rules. In amending 21 NYCRR §1050.6(c) to ban remaining in a subway station for more than one (1) hour, the Rules left in place the following language directly after it:

The following nontransit uses are permitted by the a[A]uthority, provided they do not impede transit activities and they are conducted in accordance with these rules: public speaking; campaigning; leafletting or distribution of written noncommercial materials; activities intended to encourage and facilitate voter registration; artistic performances, including the acceptance of donations; solicitation for religious or political causes; solicitation for charities....

Thus, Respondents banned an activity which homeless persons engage in (remaining in a subway station for over one (1) hour) but still permitted people to engage in public speaking, campaigning, leafletting, voter registration activities, artistic performances, solicitation for religious institutions and solicitations for charities in the subway. Not only does this raise questions about the veracity of the stated purpose and necessity of the Rules, but it also further demonstrates their arbitrary and capricious nature.

55. Fourth, Respondents did not provide any scientific evidence to substantiate the necessity for the Rules. Respondents did not submit a summary of any “scientific or statistical study, report or analysis that served as the basis for the rule” and “how it was used to determine the necessity for and benefits derived from the rule” pursuant to SAPA §202-a(3)(b). There is therefore no evidence that the measures instituted by the Rules do anything whatsoever to enhance health, safety and social distancing as purported. However, what they do achieve, is a concerted exclusion of homeless New Yorkers from the subway system.

56. Fifth, even though the COVID-19 pandemic is temporary and the specific conditions which gave rise to the Rules’ purported necessity no longer existed a few months later

when the Rules were permanently adopted, Respondents have adopted permanent Rules which were not demonstrably necessary to begin with and will continue to regulate the homeless population in a burdensome manner long after the COVID-19 pandemic has subsided.

57. In combination, these factors all demonstrate that Respondents' stated purpose and necessity for the Rules is entirely pretextual and thus the Rules are both arbitrary and capricious and not in compliance with SAPA §202-a(3)(b).

## **II. Respondents Produced No Scientific Evidence to Demonstrate How Each Prong of the Rules Achieves its Stated Purpose**

58. SAPA §202-a(3)(b), which is set forth in full in a paragraph 48 above, provides in relevant part that a regulatory impact statement shall contain a statement setting forth the "purpose of, necessity for, and benefits derived from the rule," as well as a summary of "each scientific or statistical study, report or analysis that served as the basis for the rule."

59. Respondents' regulatory impact statement, which is identical for both Rules, does not include a summary of any "scientific or statistical study, report or analysis."

60. This makes it clear that Respondents did not rely on any scientific evidence in coming to the conclusion that banning wheeled carts, remaining in a subway station for over one (1) hour and remaining in a subway terminal when there are no trains running safeguards public health and helps essential workers maintain social distancing.

61. Respondents have failed to show how banning wheeled carts safeguards public health and safety and helps essential workers maintain social distancing. A few thousand street homeless persons use the subway system every day, and an even smaller number of them bring wheeled carts with them. Respondents have failed to show how banning a few thousand wheeled carts, in a sea of over 200,000 daily riders in April 2020 and over 1.5 million daily riders in

September 2020, would have any measurable impact on safeguarding public health and safety and helping essential workers maintain social distancing. Similarly, Respondents have not demonstrated how prohibiting carts that are greater than 30 inches in length contributes to improved health and safety in the subway. Without scientific evidence, it is not apparent why 30-inches was chosen as the threshold dimension, as opposed to setting a 20-inch or a 40-inch threshold or any other number, nor how prohibiting large carts contributes to health and safety at all.

62. Similarly, Respondents have also not shown how the Rules' 1-hour threshold for remaining in the fare-paying area of the subway corresponds with increased health and safety and social distancing, as opposed to say 30 minutes or 2 hours or any other timeframe. Without any scientific evidence for the timeframe chosen, this aspect of the Rules can only be described as arbitrary and capricious.

63. Finally, in making the Rules, Respondents failed to demonstrate any scientific basis for the presumption that removing persons from subway terminals when trains are taken out of service will increase health and safety.

64. Respondents have failed to show how banning remaining in a subway terminal from 1 AM to 5 AM after a train is taken out of service safeguards public health and safety and helps essential workers using the train system social distance. During the hours from 1 AM to 5 AM after a train is taken out of service, there are no essential workers (or any commuters for that matter) using the subway station. There are no commuters whose health and safety needs to be safeguarded during these hours. The only people otherwise using the subway system during this time are street homeless persons who lack shelter and who would remain in the terminals

awaiting the resumption of train service, were it not for the Rules. These Rules force a small number of people out of the subway system during a time when there are no commuters, under the rationale of protecting a group of people (essential workers) who cannot and do not use the subway system during those hours.

65. The arbitrary, unscientific nature of the Rules in this regard, is further evidenced by the fact that the Rules do not distinguish between underground/indoor and elevated/outdoor terminals. This prong of the Rules is therefore also arbitrary and capricious.

### **III. The Factual Circumstances Present at the Time of the Impact Statement and the Proposal to Make the Rules No Longer Existed by the Time the Rules were Made**

66. Respondents' purported purpose of and necessity for the Rules when they were proposed on April 29, 2020 was that they were necessary to "safeguard public health and safety" and help essential workers reliant on the subway system to "maintain social distancing during the COVID-19 outbreak."

67. When the Rules were proposed on April 29, 2020 New York City was under a stay-at-home Order and no one was allowed to use the trains except essential workers. Only a little more than 200,000 people used the trains each day. These were the conditions which gave rise to the Rules' purported necessity, and the Rules were in essence about protecting essential workers using the subway to commute since these were the only people who were still allowed to use the subway system, in addition to Respondents' employees.

68. However, by the time the Rules were permanently adopted on September 23, 2020, those conditions no longer existed. New York City was no longer under a stay-at-home Order, non-essential workers were using the subway to commute, and over 1.5 million people

were using the subway system per day. NY Post, *Subway Ridership tops 1.5 million for first time since start of COVID-19*, September 4, 2020.

69. Any assertion that by September 2020 the exclusion of a few thousand homeless persons from the subway system was still necessary to protect the health and safety of essential workers and maintain social distancing, where stay-at-home orders had been lifted and millions of non-essential workers were riding the subway each day, is spurious.

70. That the Rules were ultimately made permanent is arbitrary and capricious, as the facts underlying them at the time the rule-making was proposed had ceased to exist.

#### **IV. Respondents' Regulatory Impact Statement Failed to Consider the "Costs" to Homeless New Yorkers who are the Regulated Persons Most Impacted by the Rules**

71. Section 202-a(3)(c) of SAPA provides that each regulatory impact statement shall contain a statement detailing the projected costs of the rule to regulated persons. It provides as follows:

3. Each regulatory impact statement shall contain:

...

(c) A statement detailing the projected costs of the rule, which shall indicate:

(i) the costs for the implementation of, and continuing compliance with, the rule to regulated persons;

72. The Rules' regulatory impact statements do not include a statement detailing "the costs for the implementation of, and continuing compliance with, the [R]ule to regulated persons," in violation of SAPA §202-a(3)(c)(i).

73. Homeless New Yorkers who ride the subway are clearly regulated persons in that they are directly impacted by the Rules and we would argue, intentionally so. The Rules' regulatory impact statements fails to acknowledge any cost to homeless persons, simply stating

“[t]he proposed amendments to the rules governing conduct and safety do not impose new costs on passengers or others.” **Exhibit B** at p. 14 and p. 17. In this regard, Respondents regulatory impact statements are both deficient and disingenuous.

74. That statement is clearly without merit, as the amendments effectuated by the Rules impose a tremendous cost on homeless persons by targeting and banning the manner in which homeless persons use the subway system. Respondents’ failure to include any discussion of the costs of these Rules to homeless persons is a violation of SAPA §202-a(3)(c)(i).

75. The Rules impose substantial economic and non-economic costs on homeless persons, none of which were discussed in the regulatory impact statement.

76. The ban on wheeled carts essentially forces homeless persons to choose between their belongings and using the subway system. The Rules require that in order to use the subway system homeless persons must part with their wheeled carts and the belongings in them. Forcing a homeless person to part with their belongings as a condition of using the subway system imposes a substantial economic cost on them, in addition to the emotional cost of losing valued possessions.

77. The Rules also impose a tremendous cost on homeless persons by banning the manner in which they use the subway system as a means of shelter and permanently excluding them from the subway system. As a result of the Rules, people may be removed from the stations whenever a train is taken out of service. In practice, Respondents have used this rule to remove homeless people from the stations both throughout the day and every night when the trains are taken out of service between 12 A.M. and 1 A.M. This forcible removal, which is often enforced by the New York Police Department, forces homeless people to try to shelter outside in

the elements at significant risk to their own physical health and wellbeing. When the Rules were first announced in April of 2020, media documented the disastrous impact as hundreds of homeless people were forced out of stations across the City and at the end of the lines in Code Blue temperatures, sometimes without even warm clothing and shoes. In the week of February 8, 2021, several news outlets interviewed homeless New Yorkers struggling to survive this winter. As a result of the Rules, for the first time, homeless New Yorkers were unable to stay safe and warm in stations overnight. See, New York Times, *The Subway Was Their Refuge On Cold Nights Now It's Off Limits*, February 8, 2021. One man saw his friend lose three fingers to frostbite after waking up from a night sleeping outside, while another couple described their struggle to survive this winter as “impossible.” See, New York Focus, *“It's a Life of Death Situation Out Here”: A Brutal Winter for Unsheltered New Yorkers*, February 8, 2021.

78. In addition to the overnight removals, the Rules resulted in Respondents removing homeless New Yorkers if Respondents determined that the train needed to abruptly be “taken out of service.” Instead of being allowed to wait for the next train, Respondents and the New York Police Department have required that homeless people exit the station and have not allowed them to remain in the station to wait for the next train, even if the system itself remained open. Petitioner Simon was repeatedly removed from the stations and trains on the basis of the Rules, both during the day and at night.

79. Furthermore, the Rules’ restriction limiting customers time to one hour in the fare paying areas has a significant impact on homeless people seeking refuge, safety, and shelter from the elements. While previously, homeless people could stay dry and safe in the stations, now Respondents and the New York Police Department take action to remove them if they spend

more than one hour in the station, often threatening homeless New Yorkers with summons or threatening to seize the belongings if they do not leave the station. This again may cause significant health and safety burdens since homeless New Yorkers do not have other spaces to stay safe.

80. Many homeless people who are removed from the stations in remote locations as a result of the Rules will travel to a different station or wait and re-enter at the same station, requiring them to pay a full additional fare that they otherwise would not have incurred. The Rules thereby impose a significant economic cost on some of Respondents' lowest-income riders, who now must often pay "double fare" compared to the single fare paid prior to the Rules.

#### **V. Respondents Failed to Consider Less Burdensome Alternatives to the Rules**

81. Section 202-a(1) of SAPA provides that in developing a rule an agency shall consider utilizing approaches designed avoid an overly burdensome impact on persons. It provides as follows:

In developing a rule, an agency shall, to the extent consistent with the objects of applicable statutes, consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons, including persons residing in New York state's rural areas, directly or indirectly affected by it or upon the economy or administration of state or local government agencies. Such approaches shall include, but not be limited to, the specification of performance standards rather than design standards.

82. In addition, Section 202-a(3)(g) of SAPA provides that each regulatory impact statement shall contain a statement as to whether any alternative approaches to the rule were considered. It provides as follows:

3. Each regulatory impact statement shall contain:

...

(g) A statement indicating whether any significant alternatives to the rule were considered by the agency, including a discussion of such alternatives and the reasons why they were not incorporated into the rule;

83. In developing the Rules, Respondents completely and self-admittedly failed to “consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon [homeless] persons,” in violation of SAPA §202-a(1). The statement in the proposed rule-making that “[n]o significant alternatives to these amendments were considered” demonstrates that Respondents simply did not consider any less burdensome or less costly approaches. Thus the Rules violate SAPA §202-a(1).

84. In fact, the Rules accomplish the opposite of avoiding an overly burdensome impact on homeless persons, and instead prohibit the exact ways in which homeless persons use the subway system, thereby having the extremely burdensome impact of effectively excluding them from the subway system. Yet Respondents admit that they completely failed to consider alternative, less burdensome approaches with respect to this part of their ridership who are most impacted by the Rules.

#### **V. Respondents Adopted Permanent Rules with Respect to the Temporary Circumstances of the COVID-19 Pandemic**

85. Respondents adopted permanent Rules in response to a temporary event.

86. As detailed above, during the initial spike of the COVID-19 pandemic in New York City, on April 29, 2020, Respondents adopted the Rules on a temporary emergency basis and proposed the Rules for permanent adoption. Respondents did this by submitting dual Notices of Emergency/Proposed Rule Making, which were published in the May 20, 2020 edition of the New York State Register at pages 12-17. **Exhibit B.**

87. On September 23, 2020 Respondents approved the Rules on a permanent basis.

88. In their rule-makings, Respondents specifically identified the COVID-19 pandemic as the impetus for making the emergency Rules and for necessitating permanent Rules. However, the circumstances of the COVID-19 pandemic in place in April 2020 were not permanent and the pandemic is itself not permanent.

89. An epidemic, is by definition, the *temporary* high prevalence of a disease, and a pandemic is an epidemic that occurs over a particularly wide geographic area. COVID-19 has been characterized by the World Health Organization and the US Centers for Disease Control and Prevention as a pandemic. It is therefore a temporary set of circumstances.

90. Nonetheless, based on these temporary circumstances, Respondents adopted permanent Rules that will target and burden their homeless ridership long after the pandemic subsides.

#### **VI. The Persons Regulated by the Rules are Disproportionately People of Color and People with Disabilities**

91. The population of riders most impacted by these Rules are homeless New Yorkers, and those riders are disproportionately people of color and people with disabilities.

92. The most recent census data, from the US Census Bureau's 2019 American Community Survey, shows that 42.4% of New York City's population identify as white, 24.7% identify as Black, 14.4% identify as Asian, and less than one percent identify as American Indian or Alaskan Native, Native Hawaiian or Other Pacific Islander. Nearly four percent (3.8%) of people identify as being multi-racial.

93. Federal data shows that people of color face homelessness at disproportionate levels relative the entire New York City population. A 2019 federally-mandated point in time

estimate found a total of 78,604 people in some type of homelessness in New York City. Of this group, 81.25% are people of color: Black (74%), Asian (1.3%), American Indian or Alaskan Native (.3%), Native Hawaiian or Other Pacific Islander (1.1%), or are identified as being multi-racial (4.4%). See, U.S. Department of Housing and Urban Development, *2019 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations*.

94. Federal data also shows that people of color face unsheltered homelessness at disproportionate levels relative to the entire New York City population. The aforementioned 2019 point in time estimate found that of the 78,604 homeless people in New York City there were 3,622 people unsheltered. Of this group, 54.5% of these people are identified as people of color: Black (50.8%), Asian (2.4%), American Indian or Alaskan Native (.4%), Native Hawaiian or Other Pacific Islander (.27%), or are identified as being multi-racial (.55%). See, U.S. Department of Housing and Urban Development, *2019 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations*.

95. The most recent census data, from the US Census Bureau's 2019 American Community Survey, shows that people with disabilities are 10.8% of New York City's population. In contrast, a November 2017 New York City Department of Homelessness Services snapshot study of the shelter population found that 67% of single homeless New Yorkers in shelter have a disabling condition. The same study found that 51% of families with children and 78% of adult families in the New York city shelter system have a disabling condition. See Coalition for the Homeless, *State of the Homeless 2020*, March 2020

96. Given the racial composition of Respondents' homeless ridership and the percentage of homeless New Yorkers who are people with disabilities, both coupled with the fact

that the Rules expressly target usage of the subway engaged in by homeless riders, the Rules have a discriminatory impact on people of color and people with disabilities.

### **LEGAL CLAIMS**

#### **As and for a First Cause of Action: The Rules are Arbitrary and Capricious and Violates SAPA 202-a(3)(b) in that they Fail to State a Valid Purpose and Necessity for the Rules**

97. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

98. The Rules fail to state a non-pretextual purpose and necessity for the Rules, in violation of SAPA §202-a(3)(b). Respondents' purported necessity for the Rules, to safeguard the public health and safety and help essential workers maintain social distancing, is merely a pretext to permanently exclude homeless New Yorkers from the subway system. This is shown by (i) Respondents' own public statements at the time the Rules were promulgated, (ii) the fact that the Rules specifically target the activities of a few thousand homeless New Yorkers as opposed millions of other riders who make up the overwhelming majority of transit users, (iii) the fact that the Rules carve out non-homeless nontransit uses, (iv) the fact that Respondents provide no scientific evidence for the basis for the Rules and (v) the fact that Respondents are adopting permanent Rules in response to a temporary event.

99. For this reason, the Rules are arbitrary and capricious, an abuse of discretion, a violation of lawful procedure and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

**As and for a Second Cause of Action: The Rules are Arbitrary and Capricious and Violate SAPA 202-a(3)(b) in that Respondents Failed to Set Forth Any Scientific Study Underlying the Rules**

100. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

101. The Rules fail to set forth any scientific evidence demonstrating how each prong of the Rules is meant to achieve its stated purpose, in violation of SAPA §202-a(3)(b). Respondents have failed to set forth any “scientific or statistical study, report or analysis” which shows that the Rules’ bans on wheeled carts, remaining in a subway station for more than one (1) hour and remaining in a subway terminal after a train is taken out of service safeguard public health and safety and allow essential workers to maintain social distancing in the subway system.

102. For this reason, the Rules are arbitrary and capricious, an abuse of discretion, a violation of lawful procedure and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

**As and for a Third Cause of Action: The Rules are Arbitrary and Capricious and Violate SAPA 202-a(3)(b) in that the Facts Underlying Necessity for the Rules Did Not Exist At the Time of Adoption**

103. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

104. The factual circumstances present at the time the Rules were proposed in April 2020 and which gave rise to the Rules’ purported necessity no longer existed when the Rules

were permanently adopted in September 2020. Therefore, Respondents have failed to set forth a necessity for the Rules, in violation of SAPA §202-a(3)(b).

105. For this reason, the Rules are arbitrary and capricious, an abuse of discretion, a violation of lawful procedure, and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

**As and for a Fourth Cause of Action: The Rules are Arbitrary and Capricious and Violate SAPA 202-a(3)(c)(i) in that they Fail to State the Costs to Regulated Persons**

106. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

107. The regulatory impact statement fails to include a statement detailing the “costs” of the Rules to the regulated persons most impacted by it, that is, homeless New Yorkers, in violation of SAPA §202-a(3)(c)(i).

108. For this reason, the Rules are also arbitrary and capricious, an abuse of discretion, a violation of lawful procedure and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

**As and for a Fifth Cause of Action: The Rules are Arbitrary and Capricious and Violate SAPA 202-a(1) in that Respondents Failed to Consider Less Burdensome Measures**

109. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

110. Respondents failed to consider utilizing approaches less burdensome to homeless persons who are regulated by the Rules, in violation of SAPA §202-a(1). The Rules were

tailored to ban those activities which homeless persons engage in and impose tremendous burdens on them.

111. For this reason, the Rules are also arbitrary and capricious, an abuse of discretion, a violation of lawful procedure and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

**As and for a Sixth Cause of Action: The Rules are Arbitrary and Capricious in that they Impose Permanent Regulations in Response to Temporary Circumstances**

112. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

113. In response to a temporary set of circumstances caused by the COVID-19 pandemic, Respondents have adopted permanent Rules which exclude homeless persons from the subway system.

114. For this reason, the Rules are arbitrary and capricious, an abuse of discretion, a violation of lawful procedure and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

**As and for a Seventh Cause of Action: The Rules Violate NYCHRL Section 8-107(4)(a)(1)(a) in that they have a Discriminatory Impact Based on Race, Color and Disability**

115. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

116. Under NYCHRL Section 8-107(4)(a)(1)(a), “[i]t shall be an unlawful discriminatory practice for any person who is the owner...agent or employee of any place or

provider of public accommodation, [b]ecause of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status, directly or indirectly...[t]o refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation.”

117. The subway system is a “place or provider of public accommodation” as that term is defined in NYCHRL §8-102.

118. The Rules enacted by Respondents have a discriminatory impact on people of color and disabled persons and constitute unlawful discriminatory practice in violation of NYCHRL §8-107(4)(a)(1)(a).

119. For these reasons also, the Rules are arbitrary and capricious, an abuse of discretion, a violation of lawful procedure, and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

**As and for a Eighth Cause of Action: The Rules Violate NYSHRL Section 296.2(a) in that they have a Discriminatory Impact Based on Race, Color and Disability**

120. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

121. Under NYSHRL Section 296.2(a), “[i]t shall be unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, or disability

or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person of the accommodations, advantages, facilities or privileges thereof....”

122. The subway system is a public accommodation. Public accommodation includes “all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof.” NYSHRL §292(9).

123. The Rules enacted by Respondents have a discriminatory impact on people of color and disabled persons and constitute unlawful discriminatory practice in violation of NYSHRL §296.2(a).

124. For these reasons also, the Rules are arbitrary and capricious, an abuse of discretion, a violation of lawful procedure and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

**As and for a Ninth Cause of Action: The Rules Violate NYSCRL Section 40-c(2) in that they have a Discriminatory Impact Based on Race, Color and Disability**

125. Petitioners reallege and incorporate herein all previously alleged paragraphs of the Petition.

126. Under NYSCRL §40-c(2), “[n]o person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation, gender identity or expression, or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his or her civil rights, or to any harassment, as defined in section 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.”

127. The Rules enacted by Respondents have a discriminatory impact on people of color and disabled persons and discriminate against their exercise of their civil rights in violation of NYSCRL §40-c(2).

128. For these reasons also, the Rules are arbitrary and capricious, an abuse of discretion, a violation of lawful procedure, and affected by an error of law pursuant to C.P.L.R. §7803(3), and as such should be declared null and void.

### **RELIEF REQUESTED**

WHEREFORE, Petitioners respectfully request that the Court issue an Order and Judgment:

1. Declaring that the Rules are arbitrary and capricious, an abuse of discretion, a violation of lawful procedure and affected by an error of law, and as such are null and void, for the following reasons:
  - a. The Rules fail to substantially comply with the regulations under SAPA in the following ways:
    - i. The Rules fail to state a non-pretextual purpose and necessity for the Rules, in violation of SAPA §202-a(3)(b);
    - ii. The Rules fail to set forth any scientific evidence to demonstrate how each prong of the Rules achieves its stated purpose, in violation of SAPA §202-a(3)(b);
    - iii. The factual circumstances which existed at the time the Rules were proposed and which gave rise to their purported necessity no longer existed at the time the Rules were adopted, and therefore Respondents

- failed to set forth a valid necessity for the Rules, in violation of SAPA §202-a(3)(b);
- iv. The regulatory impact statement failed to set forth the “costs” of the Rules to the regulated persons who are most impacted by them, that is, homeless New Yorkers, in violation of SAPA §202-a(3)(c)(i);
  - v. Respondents failed to consider utilizing approaches designed to avoid overly burdensome impacts of the Rules upon homeless persons, in violation of SAPA §202-a(1); and
  - vi. Respondents adopted a permanent Rule in response to a temporary set of circumstances, the COVID-19 pandemic.
- b. The Rules violate the NYCHRL, which prohibits unlawful discriminatory practice in places of public accommodation on the basis of race, color or disability, pursuant to NYCHRL §8-107(4)(a)(1)(a).
  - c. The Rules violate the NYSHRL, which prohibits unlawful discriminatory practice in places of public accommodation on the basis of race, color or disability, pursuant to NYSHRL §296.2(a).
  - d. The Rules violate the NYSCRL, which prohibits discrimination by a state agency in a person’s civil rights on the basis of race, color or disability, pursuant to NYSCRL §40-c(2);
2. Awarding costs and disbursements pursuant to Article 81 and 83 of the C.P.L.R.; and counsel fees pursuant to Article 86 of the C.P.L.R. and any other relevant state or federal provision;

3. To vindicate the public interest, imposing a civil penalty of \$125,000, pursuant to NYCHRL §8-126(a).
4. By reason of Respondents' willful, wanton or malicious acts in enacting the Rules, to vindicate the public interest, imposing a civil penalty of \$250,000, pursuant to NYCHRL §8-126(a)
5. Extending to Petitioner Simon and Organizational Petitioners' constituencies, the full, equal and unsegregated accommodations, advantages, facilities and privileges of the subway system, pursuant to NYCHRL §8-120(a)(5).
6. Awarding compensatory damages to Petitioner Simon who was aggrieved by the Rules, pursuant to NYCHRL §8-120(a)(8).
7. Requiring Respondents to cease and desist from such unlawful discriminatory practice, pursuant to NYSHRL §297(4)(c).
8. Extending the full, equal and unsegregated accommodations, advantages, facilities and privileges of the subway system to Petitioners, pursuant to NYSHRL §297(4)(c).
9. Awarding compensatory damages to Petitioner Simon who was aggrieved by the Rules, pursuant to NYSHRL §297(4)(c).
10. Assessing a civil fine and penalty in the sum of \$50,000, to be paid to the state by Respondents, pursuant to NYSHRL §297(4)(c).
11. By reason of Respondents' willful, wanton and malicious acts in adopting the Rules, assessing a civil fine and penalty in the sum of \$100,000 to be paid to the state by Respondents, pursuant to NYSHRL §297(4)(c).

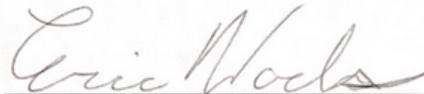
12. Imposing a penalty of \$500 on Respondents for each and every violation thereof resulting from their adoption of the Rules, pursuant to NYSCRL §40-d.

13. Granting Petitioners such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to Section 7804 of the C.P.L.R., any answering papers shall be served on the undersigned no later than five (5) days before the return date of the Petition.

Dated: February 12, 2021  
New York, New York

Yours truly,



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New York City Transit Authority  
130 Livingston Street, Brooklyn, NY 11201

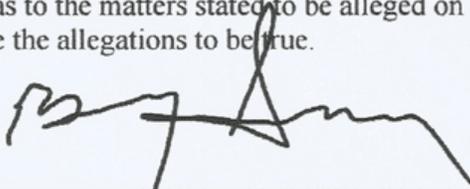
Letitia James  
Office of the Attorney General  
Managing Attorney's Office  
28 Liberty Street  
New York, NY 10005

VERIFICATION

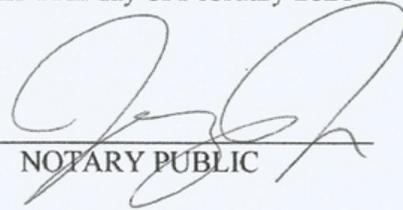
STATE OF NEW YORK )  
 : ss.  
COUNTY OF NEW YORK )

Barry Simon, being duly sworn, deposes and says:

I am one of the petitioners in this proceeding; I have read the petition and know its contents, which are true to my own knowledge except as to the matters stated to be alleged on information and belief, and as to those matters I believe the allegations to be true.

  
\_\_\_\_\_  
Barry Simon

Sworn to before me  
on the 11th day of February 2021

  
\_\_\_\_\_  
NOTARY PUBLIC

JAMES G. FENTON  
Notary Public, State of New York  
No. 02FE6356847  
Qualified in Queens County  
Commission Expires Apr. 10, 2021

VERIFICATION

STATE OF NEW YORK )  
 : ss.  
COUNTY OF NEW YORK )

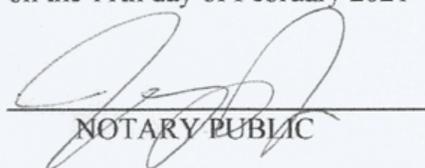
Marcus Moore, being duly sworn, deposes and says:

I am a representative of Picture the Homeless, one of the petitioners in this proceeding; I have read the petition and know its contents, which are true to my own knowledge except as to the matters stated to be alleged on information and belief, and as to those matters I believe the allegations to be true.



\_\_\_\_\_  
Marcus Moore

Sworn to before me  
on the 11th day of February 2021

  
\_\_\_\_\_  
NOTARY PUBLIC

**JAMES G. FENTON**  
Notary Public, State of New York  
No. 02FE6356847  
Qualified in Queens County  
Commission Expires Apr. 10, 2021

VERIFICATION

STATE OF NEW YORK )  
 : ss.  
COUNTY OF NEW YORK )

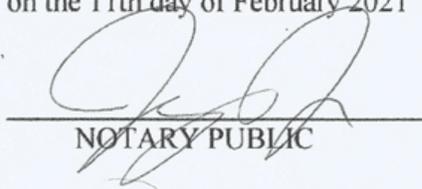
Helen Strom, being duly sworn, deposes and says:

I am a representative of Urban Justice Center – Safety Net Project, one of the petitioners in this proceeding; I have read the petition and know its contents, which are true to my own knowledge except as to the matters stated to be alleged on information and belief, and as to those matters I believe the allegations to be true.



Helen Strom

Sworn to before me  
on the 11th day of February 2021

  
NOTARY PUBLIC

JAMES G. FENTON  
Notary Public, State of New York  
No. 02FE6356847  
Qualified in Queens County  
Commission Expires Apr. 10, 2021