UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NEW YORK INDEPENDENT VENUE ASSOCIATION, ET AL.,

Plaintiffs,

v. 20-CV-6870 (GHW)
Remote Telephone Conference

VINCENT G. BRADLEY,

Defendant.

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New York, N.Y.
September 23, 2020
2:00 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

JONATHAN CORBETT
Attorney for Plaintiffs

LETITIA JAMES
New York State
Office of Attorney General
MATTHEW L. CONRAD
Assistant Attorney General

(The Court and all parties appearing telephonically)

THE COURT: This is Judge Woods. Do I have a court reporter on the line?

(Court reporter responds affirmatively)

THE COURT: Good. Thank you very much. Let me begin by hearing who is on the line on behalf of each of the parties in this case.

First, let me hear who is on the line as counsel for plaintiff. Who is on the line for plaintiffs?

MR. CORBETT: Good afternoon, your Honor. Jonathan Corbett for plaintiffs.

THE COURT: Thank you.

Who is on the line on behalf of defendant?

MR. CONRAD: Good afternoon, your Honor. This is Assistant Attorney General Matthew Conrad of the New York State Office of the Attorney General for defendant.

THE COURT: Good. Thank you very much.

So before we begin with the substance of the conference I'd like to begin with a few remarks about the protocol that I expect the parties to follow during this conference.

At the outset, let me remind you that this is a public proceeding, as you know. The dial-in information for today's conference is available on the Court's website. Any member of the public or press is welcome to audit the conference.

Second, I'd like to ask that each of you please state your name each time that you speak during this conference. You should state your name each time that you speak during this conference regardless of whether or not you've spoken previously. That will help the court reporter identify who it is that's speaking and as a result will help us keep a clearer record of today's conversation.

Third, I'd like to ask everyone to keep their phones on mute at all times except when a party or the representative is speaking to the Court or, with my permission, their adversary. That will help us to eliminate unnecessary background noise and as a result will help us keep a clearer record of the conversation.

Fourth, I'm inviting our court reporter to let us know if she has any difficulty in hearing or understanding anything that we say here today. If she asks you to do something that will make it easier for her to do her job, I ask that you please accommodate the request to the extent that you can. Again, that will help us keep a clear record of today's conversation.

And finally, in part because we do have a court reporter who is transcribing these proceedings, I'm ordering there be no recording or rebroadcast of any portion of the conference.

So with that, I'd like to turn to the substance of

today's conference. This was scheduled as a hearing with respect to an application by plaintiffs for the entry of a preliminary injunction order with respect to the guidance that is challenged in this action. I've reviewed the submissions by each of the parties in connection with this application. I believe that I have a clear view from the submissions regarding your positions on the issues. I will invite you to make any comments that you wish with respect to the application but I would ask you to be mindful of the fact that I have reviewed the submissions that have been made on the docket to date and I will ask principally whether there's anything that you would like to add to those submissions and in particular if there is additional evidence that either party wishes to place before the Court before I resolve this application.

So, with that, let me turn to counsel for plaintiffs. Counsel, is there anything that you'd like to add to your written submissions to the Court to date?

Counsel.

MR. CORBETT: Thank you, your Honor. Jonathan Corbett for plaintiffs. I'll be brief.

The government in their briefs tried to portray the advertising or ticketing ban as a restriction solely on illegal activity. If the SLA had phrased the rule as a ban on advertising or ticketing illegal events, we wouldn't be here. But it's clear, even just from reading that opposition to this

motion filed by the government, that the ban goes further than affecting just illegal events.

Incidental music, that is music that is secondary to the food service is allowed. The government admits that in their briefs. But you'll notice that nowhere in their briefs did they say that so long as the music is incidental it's allowed to advertise it. The ban still applies even if the music is incidental and therein lies the problem.

The same applies to the ban on charging admission.

THE COURT: I'm sorry, counsel. I'm sorry, counsel. Can I just pause you.

Is that accurate? Doesn't the State say in their brief that they believed that incidental music can be advertised?

MR. CORBETT: No, your Honor.

THE COURT: Let me turn to counsel for defendant.

Counsel, can incidental music be advertised? I recall you saying that it can be.

MR. CONRAD: I'm fairly certain I did say that in my brief. I am trying to locate where in the briefs I said it now.

THE COURT: Thank you.

Good. Thank you very much.

So, counsel for plaintiffs, I apologize for the interruption. Please proceed.

MR. CORBETT: Thank you.

And to clarify, if the government's position is that only illegal music cannot be advertised, we're good here. If they want to stipulate to that and get an order on the record that nonillegal music can be advertised, as far as the advertising ban we're done.

Regarding the ticketing ban, it is much the same thing. You'll see that they speak of those who would ticket large concerts, other gatherings but you'll notice that again in the brief they did not say the rule doesn't apply to legitimate endeavors. An establishment can't charge a dollar at the door even if they have no music, even incidental or otherwise. The ticketing ban also goes far beyond the evils that they're allegedly trying to address.

I think beyond that I'll rest on my briefing unless the Court has additional questions.

THE COURT: Good. Thank you very much.

Let me turn to counsel for defendant. My first -- I'll invite you to add anything that you'd like to add to your written submissions but I'd invite you at the outset to respond to the second point raised by counsel for plaintiffs.

The argument is that what is described as the "ticketing ban" prohibits things like a per table minimum at a restaurant that is charging -- that is performing incidental music.

Does the regulation prohibit that?

MR. CONRAD: Well, if you look at the guidance, the guidance that's being challenged here just says, "Please note that only incidental music is permissible at this time. This means that advertised and/or ticketed shows are not permissible. Music should be incidental to the dining experience and not the draw itself."

And that's I think the only language at issue here. I don't think it specifically says anything about, for example, table minimums. And I'm not sure that -- I'm not sure where that comes from, their argument that that's been prohibited.

I think just more generally the question isn't really whether selling tickets or anything or per table minimums or cover charges or anything like that is illegal in itself.

The guidance here is only guidance meant to help SLA licensees stay in compliance with the executive orders.

So what is temporarily prohibited here is putting on a concert, a performing art production or something like that.

So the question is whether the mode of sale changes the restaurant service into a concert which is what the executive orders that the -- that are underlying this SLA guidance is trying to avoid.

So the guidance just says that ticketed shows are not permissible. And if an establishment has a way to modify their payment structure in a way that clearly is not turning a

restaurant into a concert with food and the music is still just incidental to the dining experience, then the executive orders would seem to allow it and I don't think the SLA's guidance would prohibit it.

THE COURT: Thank you. So I appreciate that. Good.

Anything, counsel for plaintiffs, that you'd like to say in rebuttal or response?

MR. CORBETT: Thank you, your Honor. Jonathan Corbett.

The problem here is that my clients and all licensees in this State face stiff penalties based on the SLA's interpretation of whatever rules they put up. So for defendants to say that this is simply guidance that maybe the licensee should follow is incorrect. If they don't follow it, they will have their license suspended. They will lose their business. Or at least that's the threat that the SLA makes when they put something like this onto their FAQ page. They're foreshewing speech they're foreshewing the restaurant's ability to charge admission.

Again, I hear it as counsel for defendant thinks that the ban might not apply to this or that. We need an order. We need something that says the ban does not apply to lawful music. The ticketing ban does not apply to lawful gatherings, lawful restaurants, whatever it is in order for our clients to be able to go about their business without fear of being

destroyed at any moment by an inspection team coming in and getting an emergency suspension of their license the next day.

MR. CONRAD: Well, this is Matthew Conrad for defendants.

I note here that the plaintiffs, what they're seeking here is to have this guidance declared unconstitutional on its face with respect to all possible plaintiffs. And the fact that there are conceivable edge cases doesn't mean that the guidance should be held to be unconstitutional in its entirety which is what they seem to be asking for here.

And I would also point out that if a venue believes that they're being penalized by the SLA for something that doesn't violate the executive orders, I would suggest that an Article 78 proceeding in state court is probably a better way to address that than the extremely broad remedy that they're asking for here.

THE COURT: Thank you very much, counsel. I appreciate your arguments. Good.

So, counsel, I will ask you to just hold on for just a moment as I consider your arguments.

(Pause)

Good. So thank you very much, counsel. As I said, I've read the materials in connection with this application. I believe that I'm prepared to rule on the application for injunctive relief now. I can do so orally.

I'm going to ask you to keep your phones on mute as I describe the rationale for my decision here. At the end of my explanation of the basis for my decision I hope that we'll be able to turn to a discussion regarding ways in which the parties may be able to resolve any residual disputes. I'm happy that during the oral argument it appears that as to at least one of the issues there may be clarity that the regulation does not do as much as plaintiffs were concerned it does.

But let's talk about that after I've had the opportunity to give you a sense of the rationale for my decision regarding this application. In sum, I'm going to deny the request for the reasons that follow.

1. Background.

New York continues to face an unprecedented global pandemic. According to the World Health Organization, COVID-19 is a highly infectious and potentially deadly respiratory disease caused by a newly discovered coronavirus that spreads easily from person to person. See Exhibit B, docket no. 13-3.

I note that the Court may also take judicial notice of "relevant matters of public record." See *Giraldo v. Kessler*, 694 F.3d 161, 163 (2d Cir. 2012).

There is no preexisting immunity against this new virus which has spread worldwide in an exceptionally short period of time, posing a serious public health risk. *Id.* In

New York alone, 25,382 people have died of COVID-19 as of September 11, 2020. Declaration of Elizabeth M. Dufort, M.D. ("Dufort declaration") docket no. 13-1 paragraph 17, n. 3.

A. This Lawsuit.

Plaintiffs describe themselves as an industry group representing "food service establishments" that "also provide live entertainment such as musical acts, theatrical performances, comedy shows and the like," along with some of its members. Complaint, docket no. 1, paragraphs 6, 7. Like many New York businesses, plaintiffs were forced to close at the start of the COVID-19 pandemic. They continue to face significant restrictions during the ongoing phased reopening. Plaintiffs challenge guidance issued by the New York State Liquor ("SLA") through a "frequently asked questions" posting on its website. Plaintiffs motion for TRO (Plaintiffs' TRO Mot."), Dkt No. 9 at 1, and sue the Chairman of the SLA in his official capacity.

The challenged guidance permits restaurants to offer on-premises music if their licenses provide for it. But the guidance also provides that "only incidental music is permissible at this time. This means that "advertised and/or ticketed shows" are not permissible. "Music should be incidental to the dining experience and not the draw itself." Docket no. 13-27, Exhibit Y (SLA Guidance"). It is worthy to note at the outset that the guidance permits restaurants to

play incidental music; significantly, as I will discuss later in this decision, the guidance does not permit other types of venues -- like a concert hall or a club to host music performances of any type. So much of the tension in this litigation derives from the fact that the members of the plaintiff organizations straddle both categories—they are restaurants, in that they provide food, but they are also, and perhaps principally as indicated by their name, venues for musical and other performances.

Plaintiffs allege that what they call the "advertising ban" violates their First Amendment rights and what they call the "ticketing ban" violates their substantive due process rights and is arbitrary and capricious in violation of N.Y. CPLR § 7803(3). Complaint. ¶¶ 52-66; Plaintiffs' TRO Motion at 2. As an aside, while pleaded in the complaint, plaintiffs do not mention their state law claim in their motion for TRO so the Court does not consider that claim here. Plaintiffs allege that because of the SLA guidance, they expect "severe damage to, and/or destruction of their businesses," and that as a result they "will be required to permanently close their doors." Complaint ¶¶ 48, 51. Plaintiffs sought injunctive relief with respect to the SLA guidance. In particular, they have asked that I prevent "defendant and his agents from enforcing the advertising and ticketing bans." Plaintiffs' TRO Motion at 13.

Plaintiffs contend that the SLA guidance "does not prohibit music, or attending establishments with music events." Complaint paragraph 39. "The rule prohibits only the advertising of the same or the charging of money to attend the same." *Id.* (emphasis in original). Defendant points out, however, that "performance venues" are "prohibited by executive order and [New York State's Department of Health ("DOH")] guidance." Chairman Bradley's memo of law in opposition to Plaintiffs' Motion for TRO and Preliminary Injunction ("defendant's opposition"), docket no. 13 at 2. So, in defendant's view, the general rule is that musical performances are barred by other executive action. In that context, the SLA guidance is a carve-out to the general bar on musical performances—permitting restaurants to have incidental music.

Plaintiffs filed their complaint on August 25, 2020. Complaint. Plaintiffs filed an ex parte motion for a TRO and preliminary injunction on August 31, 2020. Plaintiffs' TRO motion. The Court denied plaintiffs' motion on September 1, 2020, noting that plaintiffs did not "certify in writing... why notice should not be required." Order docket no. 12. That same day, the Court issued an order to show cause why a TRO and preliminary injunction should not issue in this case, and scheduled today's hearing to rule on that issue. Order to show cause, docket no. 11. The Court has reviewed the materials submitted by the parties on the docket.

B. New York's Restrictions in Response to COVID-19.

Plaintiffs only challenge the SLA guidance. They have not challenged other orders issued by the State to protect New Yorkers' and visitors' health and safety. And, indeed, they reasonably acknowledge the compelling need for such action. But because the government's position is that the SLA guidance operates in conjunction with other restrictions issued by the governor's office and DOH guidance, the Court begins by outlining the relevant restrictions and their purported justifications. This summary is just that—a summary—as a reference. The Court refers to the complete record of executive action presented to the Court in connection with defendant's opposition.

1. Summary of Relevant Restrictions.

On March 7, 2020 in response to the COVID-19 pandemic, Governor Cuomo issued executive order ("EO") 202, declaring a statewide disaster emergency. Exhibit 1, docket no. 13-10. EO 202 suspended state and local laws, rules and regulations to the extent necessary to cope with the COVID-19 disaster emergency. See *Id.* Governor Cuomo has since issued multiple supplemental EOs continuing the temporary suspension and modification of certain laws related to the state of emergency.

On March 16, 2020, EO 202.3 prohibited "gatherings in excess of 50 people" and "on-premises service of food and beverages in all bars and restaurants," and closed "gambling

establishments, gyms, and movie theaters." Exhibit J, docket no. 13-11. See also Dufort declaration ¶ 27.

On March 18, 2020 EO 202.5 closed "all places of public amusement." Exhibit L, docket no. 13-13; see also Dufort declaration ¶ 56. Venues at which the public would assemble to watch "any type of entertainment... or event—including musical performances—were included in this closure." Dufort declaration ¶ 57. Also issued on March 18, 2020 EO 202.6 listed which businesses were deemed "essential" and directed the Empire State Development Corporation ("ESD") to "issue guidance to further clarify which businesses are determined to be essential." Exhibit S, docket no. 13-20; see also Dufort declaration ¶ 55. ESD guidance pursuant to this EO clarified that "event venues, including but not limited to establishments that host concerts, conferences, or other in-person performances or presentations in front of an in-person audience" were among those nonessential businesses that must remain closed. Exhibit T, docket no. 13-21; see also Dufort declaration ¶ 58. Further, on March 20, 2020 EO 202.8 required that all nonessential businesses reduce their in-person workforce by one hundred percent. Exhibit U, docket no. 13-22.

On March 20, 2020, Governor Cuomo announced the "New York State on Pause" initiative. By EO 202.10, issued on March 23, 2020 Governor Cuomo required the closure of "all

nonessential businesses statewide" and prohibited "nonessential gatherings of individuals of any size for any reason." Exhibit M, docket no. 13-14; see also Dufort declaration ¶¶ 29-32.

In May and June, as New York's infection and death rates began to stabilize and then decline, Governor Cuomo issued additional EOs permitting nonessential gatherings for "any lawful purpose" of increasing numbers of people. As of June 15, 2020 social gatherings of up to 50 people are permissible.

As an aside, defendants have clarified that "large social gatherings" are categorized differently from performances by the DOH's guidance." See Dufort declaration ¶¶ 80-81.

See Exhibit O, docket no. 13-16; and Exhibit P, docket no. 13-17; Exhibit Q, docket no. 13-18; see also Dufort declaration ¶¶ 33-36.

On June 26, 2020 Governor Cuomo issued EO 202.45, which permitted "low risk" indoor and out door "entertainment" to reopen in areas that had reached phase 4, provided that such business followed DOH guidance. Exhibit Q; see also Dufort Declaration ¶ 61. DOH subsequently released Phase 4 Guidance pursuant to this EO. DOH defined "low-risk outdoor arts and entertainment" as "outdoor zoos, botanical gardens nature parks, grounds of historic sites and cultural institutions, outdoor museums, outdoor agritourism/agricultural

demonstrations, and other related institutions or activities." Exhibit V-2, Docket No. 13-24. DOH defined "low-risk indoor arts and entertainment" as "indoor museums, historical sites, aquariums, and other related institutions or activities." Exhibit V-1, Docket No. 13-23. Both DOH guidance documents note that "concerts," "performing arts," and "theatrical productions" are "higher-risk" activities that remain closed. Exhibits V-1 and V-2; Dufort Declaration ¶ 61. Various EOs have given the SLA the authority to present reasonable limitations in connection with food service through published guidance. See defendant's opposition at n. 8 (linking to EOs 202.38 and 202.43). On August 18, 2020, the SLA issued the challenged SLA guidance, explaining that restaurants could offer live music, but that only incidental music was permissible, and that, as such, restaurants could not offer "advertised and/or ticketed shows." Exhibit Y. The SLA guidance further noted that "incidental music" remains permissible. *Id.* The government alleges that this was in response to an increase in licensees' violations of the EOs and the DOH's phase 4 guidance regarding the closure of performance venues. Defendant's opposition at 9.

2. Concerns Driving New York's Restrictions.

Plaintiffs allege that the government has "offered nothing but speculation" and failed to "show that the challenged order is actually necessary to protect the public

health." Plaintiffs' TRO motion at 14; plaintiffs' reply to defendant's opposition to motion for TRO and preliminary injunction ("plaintiffs' reply"). Docket No. 18 at 13.

The government, however, has detailed some of the concerns driving both the challenged SLA guidance and the underlying EOs and DOH guidance. The Court lists some of the most salient here.

The DOH's medical director of the division of epidemiology has explained that performance events "that are the primary attraction for customers" "usually involve large gatherings or crowds, with common arrival, seating, viewing, and departure times," which is why they "continue to be restricted statewide." Dufort declaration ¶ 64. The "narrowly tailored exception" for incidental background music in restaurants" does not present the same concerns because "different groups of people do not tend to coordinate their arrival at and departure from, a dining experience at the same time, which avoids unnecessary congregation, and because such music serves as a background accompaniment to a meal, as opposed to an event in and of itself, which would be an attraction that is distinct from the dining experience." *Id.* ¶ 66.

The "risks of congregating and mingling" associated with performance events are "not associated with incidental live music." *Id.* ¶ 67. A performance event is typically

"scheduled to take place as a particular time, which means the guests all arrive and leave together at roughly the same time, a fact that increases the chances of further mingling and transmission of the virus. *Id.* ¶ 69. Such events "generally last for much longer period of time than ordinary restaurant dining," and people "arrive early to get good seats and may linger after the performance is finished." *Id.* ¶ 70.

Dr. Dufort has further explained that "a lengthy period of time occupying the same space was an important factor in increased risk of transmitting the COVID-19 virus." *Id.* For this reason, any gathering "poses a significant risk of becoming a super-spreader event." *Id.* ¶ 71.

Plaintiffs have not provided any facts contesting the government's facts regarding the public health justifications for these restrictions. See plaintiffs' TRO motion; plaintiffs' reply.

II. Legal Standard.

"The purpose of a preliminary injunction is to maintain the status quo pending a final determination on the merits." *Diversified Mortg. Investors v. U.S. Life Ins. Co. of New York*, 544 F.2d 571, 576 (2d Cir. 1976). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008); see also *Grand River Ent. Six Nations, Limited. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (per curiam)

(noting that a preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.") (internal quotation marks omitted). Generally, a party seeking a preliminary injunction must demonstrate "(1) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor, and (2) irreparable harm in the absence of the injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 116 (2d Cir. 2009) (citation and internal quotation marks omitted). The standard for a TRO and a preliminary injunction is the same. See, e.g., *Berg v. Village of Scarsdale*, 2018 WL 740997, at *1 (S.D.N.Y. Feb. 6, 2018) ("The Court applies the same standard to defendant's applications for a preliminary injunction and a temporary restraining order.")

"The burden is even higher" when a party seeks "a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo." *Cacchillo v. Insmed,* 638 F.3d 401, 406 (2d Cir. 2011) (quoting *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Limited*, 598 F.3d 30, 35 n.4 (2d Cir. 2010)). To meet that higher burden, a party seeking a mandatory injunction must show a "'clear' or 'substantial' likelihood of success on the

merits." *Doninger v. Neihoff*, 527 F.3d 41, 47 (2d Cir. 2008) (quoting *Sunward Elecs., Inc. v. McDonald*, 362 F.3d 17, 24 (2d Cir. 2004)). "A heightened standard has also been applied where an injunction—whether or not mandatory—will provide the movant with substantially 'all the relief that is sought.'" *Tom Doherty Assoc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995) (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

III. Discussion.

A. Merits.

Plaintiffs have failed to show a "likelihood of success"—let alone a "clear" or "substantial" likelihood—on the merits of either of their claims.

1. First Amendment Claim.

The Court first turns to plaintiffs' First Amendment claim. Although a showing of irreparable harm is often considered the "single most important prerequisite for the issuance of a preliminary injunction," *Wabtec Corp.*, 559 F.3d at 118 (citation omitted), "consideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive factor." *N.Y. Progress and Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

Plaintiffs contend that the SLA guidance violates the First Amendment because it "prohibits lawfully operating

establishments from advertising the entertainment that is lawfully available" and operates as "a ban on advertising music at food services establishments." Complaint ¶ 3. Defendant's position is that the challenged SLA guidance "merely states that advertising and selling tickets to an illegal event is not permitted." Defendant's opposition at 2. Fundamentally, as illustrated by our colloquy earlier in today's conference, defendant is right—the guidance by its terms prohibits only advertising of shows—not a ban on advertising music at all food services establishments. It permits advertising incidental music at restaurants.

(i). Legal Standard.

In general, "content-based" restrictions on speech are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

However, there are exceptions to the usual rule. "The Constitution [] accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Commission*, 447 U.S. 557, 563-64 (1980); see also *United States v. Williams*, 553 U.S. 285, 298 (2008) (remarking on "the less privileged First Amendment status of commercial speech"). Advertising is

a classic form of commercial speech. *Central Hudson Gas & Electric Corp.*, 447 U.S. at 563-64. The court evaluates a restriction on commercial speech using *Central Hudson*'s intermediate scrutiny test, namely "whether: (1) the speech restriction concerns lawful activity; (2) the [government's] asserted interest is substantial; (3) the prohibition 'directly advances' that interest; and (4) the prohibition is no more extensive than necessary to serve that interest." *Vugo, Inc. v. City of New York*, 931 F.3d 42, 51 (2d Cir. 2019) (citing *Central Hudson*, 447 U.S. at 566).

As an aside, plaintiffs argue that "strict scrutiny" and "narrow tailoring" are the appropriate standards here. Plaintiffs' TRO motion at 2. But that is not correct because what they describe as the "advertising ban" concerns only commercial speech. Moreover, the strict scrutiny inquiry looks only to the nature of the constraint on speech. The court notes the creativity of plaintiffs' arguable conflation of the standard in order to argue that the substantive constraints imposed by the State's guidance should be subject to strict scrutiny rather than the *Jacobson* test. Plaintiff's attempt to argue that "it is highly unlikely the government will be able to demonstrate that this rule is narrowly tailored," appearing to refer to the entirety of the SLA guidance. Plaintiffs' TRO motion at 7. But narrow tailoring is not the appropriate standard here and plaintiffs cannot transform the standard of

review for the "ticketing ban" under *Jacobson* to strict scrutiny. The court cannot embrace that effort.

(ii). The SLA Guidance Survives Scrutiny Under *Central Hudson*.

Under prong 1, the Court must first determine whether "the speech restriction concerns lawful activity." Commercial speech concerning unlawful activity is not protected by the First Amendment. *Central Hudson*, 447 U.S. at 566 ("For commercial speech to come within the [First Amendment], it at least must concern lawful activity."). The SLA Guidance states that "advertised... shows are not permissible." So the question here is whether the activity—music "shows"—is lawful.

To determine whether "shows" are lawful, the Court looks to the underlying EOs and DOH guidance. EO 202.5 closed "all places of public amusement" on March 18, 2020. Exhibit L. EO 202.6 closed "all nonessential businesses statewide" on March 20, 2020. Exhibit S. ESD guidance pursuant to this EO clarified that "event venues, including but not limited to establishments that host concerts... or other in-person performances... in front of an in-person audience" were among those nonessential businesses that must remain closed. Exhibit T. On June 26, 2020, EO 202.45 lifted some of these restrictions as they applied to a subset of establishments, including by permitting "low-risk indoor entertainment" and "low-risk outdoor entertain." Exhibit Q. DOH issued guidance

pursuant to this EO, and characterized "places of public amusement," "concerts," and "performing arts" as "higher-risk" "arts and entertainment activities." Exhibits V1, V2.

The Oxford Dictionaries defines the noun "show" to mean "a play or other stage performance, especially a musical," and lists synonyms to include "public performance," "concert," and "theatrical performance." Show, Oxford Dictionaries; available at https://premium.oxforddictionaries.com/us/definition/american_english/show. "Shows" performed in front of an audience are thus not "low-risk" "arts and entertainment." Rather, they are "higher-risk" "arts and entertainment" as defined by DOH—synonymous with "concerts," "performing arts," and "theatrical productions"—and are not permitted under the current phase of reopening.

It is clear that a "show" is not permitted under the current backdrop. So by prohibiting the advertising of a "show" the SLA guidance is prohibiting otherwise illegal activity. A "show" is different from incidental music at a restaurant, which is permitted, and may, as the State concedes, be advertised.

I just note that plaintiffs state in their complaint that they received advice from SLA over the telephone that "there may be no advertising of anything to do with the music to be found at these establishments." Complaint ¶ 37. But

this is not what the text of the SLA guidance says. And the government has explicitly clarified that advertising for incidental music is permitted. Defendant's opposition at 14. ("The advertising of music incidental to the central draw of dining, such as a jazz brunch, would not conflict with the SLA guidance"). The State's representative confirmed that during our argument here.

Because the speech restricted by the SLA guidance concerns currently unlawful activity, it is not protected by the First Amendment. And because plaintiffs have not shown a likelihood—let alone a clear substantial likelihood—of success on their claim that the speech forbidden by the SLA guidance is prohibited by the First Amendment, the Court declines to consider the remaining *Central Hudson* factors.

2. Substantive Due Process Claim.

The Court next turns to plaintiffs' challenge to what plaintiffs called the "ticketing ban." Plaintiffs allege the "ticketing ban" violates their substantive due process rights under the U.S. Constitution. Again, it's worth emphasizing that plaintiffs' arguments tarring the SLA guidance as a "ticketing ban"—like their argument that the advertisement bar barred all evidence to music—is somewhat overwrought, and is not supported by the text of the SLA guidance. Again, the SLA guidance permits incidental music in restaurants. The so-called "ticketing ban" just makes it clear that an SLA

licensee cannot sell tickets to "shows"—which are, as I have already described, prohibited under existing executive guidance. If you cannot hold a show, obviously you cannot sell tickets for it. So the question here is not whether a State constraint on ticketing shows is appropriate as plaintiffs argue, but whether the State's broader limitation on the types of activities encompassing "shows" is appropriate.

(i). Legal Standard.

In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905), the U.S. Supreme Court taught that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson* thus guides this Court's evaluation of whether a COVID-19 public health measure violates plaintiffs' constitutional rights.

Under *Jacobson*, during such times, judicial review is reserved for a government measure that "has no real or substantial relation to" the object of protecting "the public health, the public morals or the public safety," or is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* a lot 31. A "court would usurp the functions of another branch of government if it is adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Id.* at 27-28.

More recently, in *South Bay Pentecostal Church v.*

Newsom, 140 S. Ct. 1613, 1613-14 (2020), Chief Justice Roberts noted that "the precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." "Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the states 'to guard and protect.'" *Id.* (quoting *Jacobson*, 197 U.S. at 38). The Chief Justice continued:

"When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people."

Id. (internal quotations and citation omitted).

Our sister courts in this district and across the country have followed suit, utilizing the *Jacobson* standard in upholding the overwhelming majority of COVID-19 related public health restrictions that have been challenged. See, e.g., *Geller v. Cuomo*, 2020 WL 4463207, at *10 (S.D.N.Y. Aug. 3, 2020) ("Public officials responding to a public health crisis must be afforded especially broad latitude, such that they should not be open to 'second-guessing' by an 'unelected

federal judiciary which lacks the background competence, and expertise to assess public health and is not accountable to the people.") (citing *South Bay Pentecostal Church*, 140 S.Ct. at 1613-14); *Association of Jewish Camp Operators v. Cuomo*, 2020 WL 3766496, at *8 (N.D.N.Y. July 6, 2020); *Luke's Catering Serv., LLC v. Cuomo*, No. 20-cv-1086, ECF no. 39 (W.D.N.Y. Sept. 10, 2020. See also, e.g., *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*, 2020 WL 3468281 (6th Cir. June 24, 2020) (order closing indoor gyms); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir 2020) (order limiting size of religious services).

(ii). The Limitation on Ticketed Shows is Constitutional Under *Jacobson*.

The SLA guidance prohibiting tickets -- plaintiffs from selling "tickets" to "shows" is constitutional because it bears a "real and substantial" relationship to promoting public health. Here, plaintiffs do not dispute that the State has a compelling interest in protecting the public from COVID-19. Plaintiffs' TRO motion at 6.

The SLA guidance prohibits "ticketed shows." But as previously explained in the advertising ban analysis, "shows" are already not permitted by the underlying EOs and DOH guidance. The *Jacobson* analysis here thus focuses on the prohibition against "shows" generally.

The State has provided ample evidence regarding the

concerns that drove the prohibition against performance events. The DOH's medical director of the division of epidemiology has explained that performance events "that are the primary attraction for customers" "usually involve large gatherings or crowds, with common arrival, seating, viewing and departure times," which is why they "continue to be restricted statewide." Dufort Dec. ¶ 64. These events are very different from "ordinary restaurant service," with or without "incidental background music," because "different groups of people do not tend to coordinate their arrival at, and departure from, a dining experience at the same time, which avoids unnecessary congregation." *Id.* ¶¶ 67–70. Concerts and performances are not "low risk" because they have the potential to become "super-spreader" events. See *Id.* ¶ 71. The State currently has "no guidelines for... indoor performances or concerts... because they are not permitted," even absent the SLA guidance. *Id.* ¶ 87.

As Chief Justice Roberts has explained, the State should be afforded "especially broad" latitude and generally "should not be subject to second guessing" by the judiciary as long as it stays within this latitude. Here, the State has stayed well within this broad latitude in banning performance events. The State has demonstrated a "real and substantial relationship" between the prohibition of performance events and protecting public health. So the prohibition is constitutional

under *Jacobson*. The Court therefore declines to second guess its judgment.

The Court next turns to the SLA Guidance, which simply bans tickets for "shows" that are already prohibited under the EO regime in place and DOH guidance implementing it. The ban on "ticketed shows" is constitutional under *Jacobson* for the same reasons that the prohibition of shows is constitutional. Because the State has demonstrated a "real and substantial relationship" between the prohibition of "ticketed shows" and protecting public health, plaintiffs have not shown a likelihood—let alone a clear or substantial likelihood—of success on the merits of their substantive due process claim.

(iii). The "Incidental Music" Carve-Out Is Also Constitutional Under *Jacobson*

The Court understands plaintiffs' briefing on this motion to be challenging what they refer to as the "ticketing ban" and the advertising ban." Plaintiffs do not expressly challenge the fact that the SLA guidance permits "incidental music" in restaurants. That probably makes sense because if I were to strike down the carve-out permitting incidental music in restaurants, I would close an opportunity for plaintiffs to enhance the experience at their restaurants with incidental music. That is, perhaps, why they wish to frame language that appears to design the scope of the carve-out permitting incidental music as independent restrictions—the so called

"ticketing" and "advertising" bans—rather than as limitations on the scope of the incidental music in restaurants carve-out to the broader ban of carve out of live music pursuant to various EOs and DOH guidance. But to the extent plaintiffs are concerned about the State's differentiation between incidental music at restaurants and other types of live entertainment, such as musical performances and shows, the distinction passes muster under *Jacobson*.

Dr. Dufort clarifies that incidental music in a restaurant "serves as a background accompaniment to a meal, as opposed to an event in and of itself," and that this is different from a "venue that relies on musical performance to attract customers." Dufort Declaration ¶¶ 66, 67. In its brief, defendant describes "incidental music" as "live or recorded ancillary background music that does not operate as the primary draw to the venue" and is "incidental to the designing experience." Defendant's opposition at 9, 14.

The State has explained why it is that the State has concluded that limited, incidental music performances in restaurants may be permissible, while "shows" and other performances of live entertainment are not. Dr. Dufort explains that while performance events "that are the primary attraction for customers" "usually involve large gatherings or crowds, with common arrival, seating, viewing, and departure times," "incidental background music in restaurants" does not

present the same concerns because "different groups of people do not tend to coordinate their arrival at, and departure from, a dining experience at the same time." Dufort Declaration ¶¶ 64, 66. So the "risks of congregating and mingling" that are associated with performance events because such events are typically "scheduled to take place at a particular time," which "increases the chances of further mingling and transmission of the virus" are "not associated with incidental live music." *Id.* ¶¶ 67, 69.

These justifications are sufficient to show the "real and rational relationship" between the scope of the incidental music carve-out and protecting public health under *Jacobson*. Of course, again, plaintiffs are not asking me to strike down that carve-out. And under *Jacobson*, I provide appropriate respect to the determinations by the State.

B. Irreparable Harm.

"A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. *Wabtec Corp.*, 559 F.3d at 118 (quotation omitted). A harm alleged to be irreparable must be "actual and imminent, not merely possible," *Toney-Dick v. Doar*, 2013 WL 1314954, at *9 (S.D.N.Y. Mar. 18, 2013) (collecting cases), and "one that cannot be remedied if a court waits until the end of trial to resolve the harm," *Wabtec Corp.*, 559 F.3d at 118 (quotation omitted). "Where there is an adequate remedy at law, such as

an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005). If the "harm can be remedied in money damages [that] is the antithesis of irreparable harm." *Toney-Dick*, 2013 WL 1314954, at *9.

1. First Amendment Claim.

Because the speech restricted by the SLA guidance concerns currently unlawful activity, it is not protected by the First Amendment. So plaintiffs have not demonstrated "actual and imminent" irreparable harm to their First Amendment rights.

2. Plaintiffs also fail to make a showing of irreparable harm to their substantive due process rights.

Here, the founder of the New York Independent Venue Association ("NYIVA") explains that "the business of our members has been ground to a halt by the shutdown and new rules promulgated in response to the coronavirus pandemic since March 2020." Plaintiffs' TRO Motion, Exhibit A, NYIVA Aff. ¶ 5. NYIVA's members' business models "rely... on people deciding in advance to patronize their establishment—and often paying a fee for the privilege." *Id.* ¶ 9. Plaintiffs allege that the SLA guidance will cause "the total destruction of [NYIVA members] businesses" and that "it is not possible for [NYIVA's] members to modify their businesses to comply with the SLA rule... without becoming entirely new businesses. *Id.* ¶¶ 11, 12.

NYIVA members who have attempted to adapt by offering takeout and delivery have only made 10 to 20 percent of their normal revenue, which is unsustainable given their expenses *Id.* ¶¶ 10, 11. One of the venue plaintiffs alleges that if the challenged rule is not enjoined, "we would loose our branding of being a live performance and arts space." Plaintiffs' TRO Motion, Exhibit B, Jukimoo LLC Aff. ¶ 10.

Even if this were to constitute "irreparable harm," plaintiffs have not succeeded in showing that this harm is caused by the challenged SLA guidance. All the SLA guidance does is ban plaintiffs from putting on "ticketed shows." Exhibit Y. But shows—ticketed or otherwise—are already prohibited by the underlying EOs and DOH guidance. And "performance... spaces" remain closed under the same. So even if the SLA guidance were to be lifted, plaintiffs would not be permitted to host "shows." The "total destruction" of plaintiffs' businesses is caused not by the SLA guidance, but by the underlying EOs and DOH guidance that the SLA guidance clarifies. Plaintiffs' affidavits support this factual conclusion. But plaintiffs have not challenged the underlying EOs or DOH guidance so plaintiffs have failed to make a showing of irreparable harm.

Again, just a brief note that the SLA guidance provides a carve-out to permit incidental music at restaurants. So it opens an avenue rather than closing one.

C. Balance of the Equities and Public Interest.

Finally, plaintiffs must demonstrate that "the balance of the equities tips in [their] favor," and that "an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009); see also *Make the Road New York v. Cuccinelli*, 419 F. Supp. 3d 647, 665 (S.D.N.Y. 2019) (same).

In assessing these factors, courts must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," as well as "the public consequences in employing the extraordinary remedy of injunction," *Winter*, 555 U.S. at 24 (citations omitted). The Second Circuit has noted that the government's interest in "public health" is one such consideration. *Million Youth March, Inc. v. Safir*, 155 F.3d 124, 125-26 (2d Cir. 1998) (modifying injunction because district court failed to consider the government's interest in public health.)

Here, the balance of the equities and consideration of the public's interest also weigh in favor of denying plaintiffs' request for a preliminary injunction. Plaintiffs allege that the "ticketing ban" will cause "severe damage to, and/or destruction of their businesses," and that they "will be required to permanently close their doors." Complaint ¶¶ 48,

51.

Defendant alleges that the SLA guidance is a necessary "component of a broader statewide prohibition on the operation of performance venues." Defendant's opposition at 18. The DOH's medical director of the division of epidemiology has explained that "incidental live music" in restaurants is, from a public health standpoint, "not an appropriate comparator for a venue that relies on musical performances to attract customers" because there are not the same "risks of congregating and mingling." Dufort Declaration ¶¶ 64-68. When "guests all arrive and leave together at roughly the same time," this "increases the chances of... transmission of the virus." *Id.* ¶ 69.

On balance, the public interest in preventing the further spread of COVID-19 and protecting public health outweighs plaintiffs' interests in advertising or selling tickets to "shows" that are not permitted under the current EOs and DOH guidance.

IV. Conclusion.

For the reasons that I have just stated on the record, the Court denies plaintiffs' motion for a temporary restraining order and preliminary injunction. I will enter a separate order denying the application and referring to the transcript of these proceedings for the reasoning behind my decision.

Now, counsel for both sides I'd like to spend a little

bit of time talking about next steps in the case.

First, I'd like to talk about where there appears to be I'll call it a misunderstanding perhaps on plaintiffs' side of what defendants believed the SLA guidance does at the outset.

Counsel for plaintiffs, you said that you were done if the guidance does not bar legal music. The State has confirmed in its briefing and here at oral argument that advertising of incidental music is permitted. The State has also pointed out that there is nothing in the guidance that prohibits, that they have noted here the I'll call it ticketing of events that involve -- not events, I should say the ticketing of restaurants which involve incidental music, so something like a table minimum for a jazz brunch, for example. So I'd like to begin a conversation about the ways in which these ships seem to be crossing in the night regarding the scope of the limitation.

Counsel for plaintiffs, you asked for a court order to outline what the constraints are. Here, I'm basically looking to the text of the guidance to say that what it is that's prohibited and what is not. But I'd like to ask the parties to talk about whether or not there's a way for you to work together to close the understanding gap. So that's the first thing that I want to talk about.

And the second thing that I want to talk about is how

we wish to proceed with the case going forward now that I've made a determination with respect to the application for preliminary injunctive relief.

So I'm going to turn to each of the parties to ask for your respective views on those questions.

I should also say that I am perfectly happy to ask the parties to confer offline and to write me about your views with respect to each of those issues or to request a conference with respect to each of those issues after you've had the opportunity to consider the questions.

So, please keep in mind that I'm happy for you to suggest that if you'd like to begin a discussion of those topics now, however, I'm open to it.

Let me begin, if I can, please, with counsel for plaintiffs.

Counsel.

MR. CORBETT: Thank you, your Honor. Jonathan Corbett speaking again.

To address the Court's question of how this misunderstanding came about, I refer the Court to ¶ 38 of the complaint. We had several licensees call the SLA and ask for clarification on what this rule means and they were categorically told that everything that we mention in our complaint was banned: Any kind of advertising of incidental music was banned; any kind of ticketing was banned; any kind of

table minimum was banned.

That said, perhaps the people at the SLA answering the phones were misinformed. I would love to settle this case with some kind of consent decree or otherwise making clear that the government does not intend to ban advertising of illegal -- of perfectly legal incidental music and ticketing of the same.

So if opposing counsel is comfortable with that, perhaps we could speak -- we could put together some kind of joint order for the Court to review and we could maybe bring this to a conclusion.

THE COURT: Good. Thank you very much. And thank you counsel for plaintiffs for pointing to that section of the complaint. I suspected from that that the issue here might possibly have been something other than the text of the guidance but, rather, the kind of informal interpretation of the guidance that was being conveyed to your clients' members which is not what I'm opining on.

Counsel for defendant, what's your view?

MR. CONRAD: Yes, this is Matthew Conrad, representing the defendant.

Obviously, I wasn't on the phonecalls they referred to there so I can't speak directly to those.

I think we would actually -- I'd want to confer with my clients about next steps here and how we could hopefully expediently wrap this matter up. But obviously we would want

to do this in a fair way quickly so that we can get this wrapped up. But I would want to confer with my clients before doing anything further here.

And I would also ask that so that we can discuss this offline and hopefully get this wrapped up, I would ask that our time to answer the complaint be held in abeyance.

THE COURT: Thank you. Good.

So I will comment further but first let me hear from counsel for plaintiffs regarding defendant's application that I extend the deadline for defendant to answer or otherwise respond to the complaint.

Counsel for defendant, is there a concrete period of time that you would like to suggest as the amount of time that I should allocate for this extension?

MR. CONRAD: Would maybe -- I would just say maybe a 30-day extension.

THE COURT: Thank you.

What is the date that you're proposing?

MR. CONRAD: I'm not sure what the date currently is. OK. It looks like the answer is currently due on September 29. So I would suggest October 29.

THE COURT: Thank you very much.

Counsel for plaintiffs, counsel for defendant has requested that I extend the deadline for defendant to answer or otherwise respond to the complaint to October 29. What's

plaintiffs' position on that request?

MR. CORBETT: Plaintiff would oppose the length that defendant proposed. We remain committed to responding expediently to any settlement or other discussions that the other side has. And it seems that where we are now and what we need to do to resolve this amicably is pretty clear and straightforward. So I would suggest that six days currently plus another 30 is more time than is necessary.

THE COURT: Thank you. Understood.

I'm going to grant the defendant's application nonetheless and extend the deadline for the defendant to answer or otherwise respond to the complaint to October 29, 2020. I do this in large part because I do hope that the parties will take advantage of this time to focus their energies on working toward mutual understanding of the scope of the SLA guidance and how best to communicate it. I appreciate plaintiffs' desire for urgency but also appreciate that particularly governmental agencies can take some time to work through the process of reaching a resolution or engaging in meaningful conversations on an issue such as this. So I believe the application is well founded and I'm granting it.

I will permit the parties to talk offline. I appreciate that you'll have the opportunity to do that. I am going to ask for the parties to send me a status update letter. I am going to issue an order establishing a date for an initial

pretrial conference for this case. That date will be some day after the extended answer deadline that I've just established and the order establishing that initial pretrial conference will include a request for the parties to submit a joint status update to the Court.

If in the interim the parties are able to reach a resolution regarding these issues by clarifying the guidance of what is meant by incidental music or otherwise making clear what the State reads in the text of the rule already, I will encourage you to write me jointly and to let me know that if you wish or simply I'll invite the parties to submit a simple stipulation of dismissal under Rule 41(a)(1).

Good. Anything else that we need to take up now?

First counsel for plaintiffs.

MR. CORBETT: Jonathan Corbett speaking. No, your Honor. Thank you.

THE COURT: Good. Thank you.

Counsel for defendant.

MR. CONRAD: Matthew Conrad for defendant. No. Thank you very much for your time, your Honor.

THE COURT: Good. Thank you all.

(Adjourned)