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

Columbus Ale House, Inc.
d/b/a "The Graham,"
Plaintiff

v.

Andrew M. Cuomo, *in his official capacity as Governor of the State of New York*,
Defendant

Case No. 20-CV-4291 (BMC)

REPLY TO OPPOSITION TO
TIME-SENSITIVE MOTION FOR PRELIMINARY INJUNCTION

(Challenge to Executive Order Taken Effect Sept. 30th, 2020)

(Expedited Hearing Requested)

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I. Introduction

Defendant Andrew M. Cuomo continues to argue that there is rationality behind what there clearly is not: a rule that says eating at 11:30 PM is safe, but at 12:30 AM is not. A rule that says eating in Queens with a 25% maximum capacity is more risky than eating in Nassau County with a 50% capacity. Because Defendants have done nothing to demonstrate that the challenged rule is based on science, rather than on politics or the capricious whims of the Governor, the Court should issue a preliminary injunction.

II. Hearing Request – Testimony of Dr. Dufort

During the scheduling conference held on September 22nd, 2020, the Court asked the parties to indicate whether any live testimony would be necessary.

In their opposition to this motion, the Governor relied heavily on a declaration of Dr. Elizabeth M. Dufort, who attached 34 exhibits totaling 248 pages to this declaration. It is entirely unclear as to which facts Dr. Dufort has personal knowledge versus which facts she is simply citing from news and other sources, and it is entirely unclear as to the nature of her expertise as to many non-medical related matters (*e.g.*, how people behave in nightlife settings, how she determined where and when people are likely to "congregate and mingle," *etc.*).

Plaintiff wishes to explore the foundation of this evidence and expresses to the Court that it would be helpful to the evaluation of the instant motion to have Dr. Dufort provide testimony. Live and in-person would be preferable, but videoconference would also be satisfactory.

III. Argument

A. *We Are Not Here About Bars. We Are Not Here About Alcohol. The Ban is On Food Service.*

The memorandum in opposition to this motion uses the word "bar" thirty-five times. It uses the word "alcohol" ten times. The Dufort Declaration uses the word "bar" twenty times and the word "alcohol" five times.

The challenged rule is a restriction on **food service**.

If the Governor wants to set a curfew on alcohol service, he is more than capable of doing so. That is not what has happened, and that is not what is being challenged. The Governor's argument that Plaintiff is asking the Court to sanction late night alcohol service, and that Plaintiff does not have standing to challenge a ban on food service because Plaintiff also sells alcohol, is, frankly, frivolous. Plaintiff's complaint makes clear that its drink service is "[i]n addition to selling food," ¶ 54, and only mentions the drink service in the complaint to note that it faces stiff penalties if it violates the challenged rule: to wit, a business-ending liquor license suspension, ¶¶ 55 – 57. To be crystal clear: if Plaintiff was required to stop alcohol service at midnight but could continue food service thereafter, Plaintiff would do so, and is only refraining from doing so now because the challenged order specifically prohibits it from selling food after midnight.

Beyond this misrepresentation of the facts and the law, every single time that the Governor and his Medical Director argue that the later it gets, the more people get intoxicated and become careless with social distancing and mask-wearing, that argument is *irrelevant*. Opp. to Mot. for

P.I.[1], pp. 14, 16, 24; Dufort Decl., ¶¶ 69, 70, 71, 74. Plaintiff does *not* seek a preliminary injunction that would prevent New York from limiting late-night alcohol service. The Court should award no points towards a finding of rational basis, real or substantial relationship, or a determination that the rule is not arbitrary or capricious, for any argument that relies on intoxication.

B. *The State Seeks to Benefit from* Jacobson *When it Helps, and Toss it Aside When Inconvenient; The Court Should Require Evidence*

Whether prudent or not, and whether still good law or not, the U.S. Supreme Court in *Jacobson* set out a different standard for reviewing measures taken in the interest of the public health than for laws enacted for other reasons. That standard requires a "real or substantial" relation. Mot. for P.I., p. 6, *citing Jacobson* at 31. This is different from the rational basis test, and the core difference, in practice, seems to be requiring the Government to show their evidence. *Id.*, pp. 6 – 8.

It is not hard to hypothesize a good reason for this: when the Government acts to protect the public health, we must presume they are doing so based on some scientific data rather than on a hunch or as a mere policy preference. Having a look at the data that led to the conclusion that a restriction on the rights of the people is required "for their own good" would seem to be critical to judicial review of whether the Government was acting rationally, or the restriction has a "real or substantial" relation to the public health interest, or whatever other standard a court is using. Put

[1] All page number references to ECF-stamped header numbers, not Defendant-provided footer numbers.

simply, if the Government's argument is that the rule is necessary "because science," they must show the science; otherwise, "because science" would be a blank check to do whatever they want.

New York has no qualms arguing for application of *Jacobson* when it might reduce the level of scrutiny. S*ee*, *e.g.*, New York Indep. Venue Ass'n. v. Bradley, Case No. 20-CV-6870 (S.D.N.Y.), Opp. to Mot. for TRO/PI (attempting to reduce normal strict scrutiny for free speech claims to *Jacobson* scrutiny). Where it may slightly increase their burden, the Court should not cut them a break.

Even if the Court tosses aside *Jacobson*, and whether or not the Court requires the Government to show their data, the Governor grossly misrepresents the standard as requiring "shock[ing] the conscience." Opp. to Mot. to Dismiss, p. 12. Indeed, the two Second Circuit that they cite clearly undermine their argument. The first, *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2nd Cir. 1994), literally and in no uncertain terms says that arbitrary conduct is sufficient: "Substantive due process protects individuals against government action that is arbitrary…" The second is in an entirely different context: a teacher accused of violating his student's rights by slapping the student in the face. *Smith v. Half Hollow Hills Cent. School*, 298 F.3d 168 (2nd Cir. 2002). In such a context, the question is obviously one of whether the action was excessive, not arbitrary, and the case does not contemplate foreclosing on other means of violating the substantive due process clause. (And, are we seriously contemplating that a holding that a teacher slapping a middle schooler in the face does not violate substantive due process is an example of law that is still likely good today?)

Finally, the Governor also asks the Court to hold this motion to a higher standard because "Plaintiff is seeking to alter the status quo." Opp. to Mot. for P.I., p. 18. This is silly: the status

quo since the incorporation of the city in 1653 was that restaurants could serve food whenever they please. Cuomo's emergency executive order is not "the status quo."

C. *The Governor Has Failed to Provide a Rational Explanation of "Why New York City, Why Midnight?"*

Why New York City and only New York City? We all know that there are a lot of people who live in New York City. But how is population and population density related to the likelihood of transmission of a virus *in a restaurant after midnight*?

Regardless of how many people live in the city, the "population density" inside a New York City restaurant is half that of the rest of the state: 25% of fire code limit vs. 50% of fire code limit. The Governor concedes that there is "no risk of crowding" inside of restaurants as a result of the 25% rule. Opp. to Mot. for P.I., p. 26. How is it that the number of people within city limits makes it necessary to mandate a food curfew?

The same question applies to the Governor's other arguments. Opp. to Mot. for P.I., p. 24 (virus spreads easily indoors, one cannot wear a mask while eating). These are arguments against indoor dining generally. Not arguments that support a midnight food curfew, and certainly not arguments as to why such a curfew is required in the city but not outside of the city.

Additionally, the Governor's argument that the city is (not just "was," but *is*) some kind of special breeding ground for coronavirus is undercut by his "tweets" all week discussing where there are "clusters" of new infections within the State[2]. The top 3 locations where coronavirus is

[2] *See, e.g.*, https://twitter.com/NYGovCuomo/status/1311754133607768065/

spreading in this state are *all* outside of New York City (Orange County and Rockland County twice over). Not only that, but of these top 3 hotspots, their 7-day positivity averages are each *more than double* anywhere found within city limits. But you are free to take the 20-minute drive (after midnight when there is no traffic) from midtown Manhattan to Rockland County and eat, inside, at 50% capacity, until the sun comes up. (And yes, you're also free to have alcoholic drinks until the normal 4 AM on-premise alcohol sales cutoff time.) It doesn't get more arbitrary than that.

And why midnight? Plaintiff raised the issue. Mot. for P.I., p. 12. But the 304 pages filed on behalf of the Governor in opposition to this motion do not even attempt to explain how 12:00 AM was chosen. Neither the CDC nor the WHO, who the Governor's Medical Director cites with gusto, suggested this is the time after which the risk increases unacceptably. Is it the case that the Governor, on his own, decided that midnight was "late enough" for New Yorkers?

D. Many Federal Courts Have Entertained Article 78 Challenges, and This Court Should Too

It is known that the federal district courts within this state have disagreed as to whether Article 78 petitions can be heard in federal courts as a part of their supplemental jurisdiction. The Second Circuit appears not to have ruled on the issue (apparently avoiding the question whenever possible). Plaintiff will not attempt to brief this thorny issue with the 3 days allotted to respond to the Governor's opposition because it is unclear that the application of an Article 78 standard versus a federal standard will change the resolution of this motion at all. Plaintiff will, however, note that it is clear from the text of New York law that the Chief Executive Officer of the state can be subject

to Article 78 positions. *See* N.Y. CPLR § 7802 ("includes every ... officer…"). Notwithstanding, as the Governor points out, Article 78 is just a procedural vehicle. Opp. to Mot. for P.I., p. 29. When New York courts find that it does not apply, they simply treat the action as one for a declaratory judgment or for a writ. *See*, *e.g.*, *Saratoga Cty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (N.Y. 2003).

E. To the Extent That the Governor is Arguing That the Fourteenth Amendment Does Not Cover This Claim, It Is Mistaken

It is unclear whether the Governor spends page 21 of his opposition to argue that Plaintiff has no interest protected by the Fourteenth Amendment or simply that the interest is not "fundamental" and therefore deserves lesser protection. To the extent that the Governor is arguing that the Fourteenth Amendment offers no protection to Plaintiff's interest here, the argument is without merit whatsoever, as over the last 6 months there have been dozens of substantive due process cases filed by businesses over coronavirus restrictions – plenty cited in both Plaintiff's opening brief and the Governor's opposition – and none of them have held the right to work is unprotected. To the extent that the Governor argues for a lesser standard, Plaintiff has already discussed.

IV. Conclusion

Governor Cuomo has offered no facts from which anyone could draw a conclusion that a midnight food curfew is anything less than arbitrary. The rule should be enjoined.

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Dated: Brooklyn, NY

October 2nd, 2020

Respectfully submitted,

/s/

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