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October 4, 2020

Via ECF

The Honorable Judge Brian M. Cogan
United States District Court for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Columbus Ale House, Inc. v. Cuomo, No. 20-cv-04291 (E.D.N.Y.)

Dear Judge Cogan:

This Office represents Defendant Andrew M. Cuomo in his official capacity as the Governor of the State of New York ("Governor Cuomo") in the above-referenced action. Governor Cuomo respectfully submits this letter to request reconsideration of the Court's October 3, 2020 order granting the request by Plaintiff Columbus Ale House, Inc. d/b/a "The Graham" ("Plaintiff") to cross-examine Dr. Elizabeth M. Dufort at the upcoming hearing/argument on Plaintiff's motion for a preliminary injunction. *See* ECF No. 15 at 3. The Court's October 3, 2020 order requires the government to produce its declarant, Dr. Dufort, for limited cross-examination on her expertise regarding the non-medical matters discussed in her declaration and the basis for her personal knowledge.

Governor Cuomo also writes to inform the Court that the government will be unable to produce Dr. Dufort for cross-examination on October 6, 2020, because she is out of town for the next week and is unreachable. Dr. Dufort will return the week of October 12, 2020.

In short, Governor Cuomo seeks reconsideration not only because Dr. Dufort will be unable to appear for cross-examination on October 6, 2020, but because it would serve no purpose for Plaintiff to cross-examine the declarant given that the rational basis test applies to Plaintiff's relevant claim and does not require the government to affirmatively justify its executive action.

Procedural History and Background

Plaintiff challenges an Executive Order issued by Governor Cuomo that permits New York City restaurants to reopen for indoor dining at 25% capacity, but only until midnight. Plaintiff alleges that there is "no discernable public health benefit" to limiting the hours of indoor dining during the COVID-19 pandemic (ECF No. 1, Compl. ¶ 60), and seeks preliminary relief against the rule. ECF No. 10, Time-Sensitive Motion for Preliminary Injunction ("Pl. Br.").

On September 29, 2020, Governor Cuomo filed his Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction and the Declaration of Dr. Dufort with exhibits. ECF No. 12 ("Opposition Brief" or "Opp. Br."); ECF No. 13 ("Dufort Declaration"). In his Opposition Brief, Governor Cuomo argued that Plaintiff cannot establish the elements necessary to obtain a preliminary injunction because, *inter alia*, it has no chance of success on the merits of its substantive due process claim. Opp. Br. at 12-13. Plaintiff's substantive due process claim, which is governed by the rational basis test, requires that the Court uphold the Executive Order unless Plaintiff is able to negate not only the *stated* reasons for the rule but "every conceivable basis which might support it." *Id*. at 14. Because Plaintiff cannot meet this burden, its claim cannot succeed and its motion must be denied. *See id*. at 12-19.[1]

Plaintiff's Request To Cross-Examine Dr. Dufort's Should Be Reconsidered And Denied

On October 2, 2020, Plaintiff included in its reply brief a request that Dr. Dufort be compelled to testify at the October 6, 2020 hearing/argument. ECF No. 15 at 3. Plaintiff claims that it is unclear which facts asserted by Dr. Dufort are based on "personal knowledge versus which facts she is simply citing from news and other sources," and that it is "unclear as to the nature of her expertise as to many non-medical related matters." *Id.* However, the foundation for Dr. Dufort's knowledge or assertions has no relevance to whether Plaintiff's motion for a preliminary injunction should be granted, as the rational basis test applies to Plaintiff's claims.

Indeed, there is no need to cross-examine Dr. Dufort because probing Governor Cuomo's reasons for the midnight closure rule would serve no function under the rational basis test. *See Heller v. Doe*, 509 U.S. 312 (1993) ("A classification does not fail rational-basis review because it is not made with mathematical nicety."). Initially, there is no dispute that the rational basis test applies. Pl. Br. at 8 n.4, 13; *Wigginess Inc. v. Fruchtman*, 482 F. Supp. 681, 689 n.11 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1346 (2d Cir. 1980) ("State statutes regulating business activity need only be rationally related to a legitimate state objective."). Under this test, the Court must presume that the Executive Order is constitutional, unless Plaintiff is able to negate "every conceivable basis which might support" it. *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012).

Thus, the government is not required to justify an executive order, let alone to proffer a witness for cross-examination to defend it. In fact, "[w]here rational basis scrutiny applies, the

[1] Plaintiff also attempts to assert a claim under Civil Practice Law and Rules Article 78, and Governor Cuomo argues in the Opposition Brief that Plaintiff has no chance of success on this claim either. Opp. Br. at 19-23. However, the Dufort Declaration has no relevance to that argument, as the Article 78 claim is barred by the Eleventh Amendment, Plaintiff cannot bring it in federal court, and Article 78 proceedings are not available to challenge actions of an executive official that are legislative in nature. *See id*.

Government 'has no obligation to produce evidence,' or 'empirical data' to 'sustain the rationality of a statutory classification.'" *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (quoting *Heller*, 509 U.S. at 320). Unlike exacting forms of scrutiny, "the Governor was not required to explain that choice at all, let alone exhaustively." *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020) (citing *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993)).

The Second Circuit elaborated on this standard in *Beatie v. City of New York*, 123 F.3d 707 (2d Cir. 1997), explaining that a plaintiff must discredit any conceivable basis to support a rule, "*regardless* of whether that basis has a foundation in the record," and *regardless* of whether that basis "actually motivated" the rule. *Id*. at 713 (emphasis added). Further, *Beatie* held that lawmakers have the "freedom to engage in 'rational speculation unsupported by evidence,'" and due process does not require the State "to await concrete proof of reasonable but unproven assumptions before acting to safeguard the health of its citizens." *Id*.

Further, to the extent Plaintiff wishes to cross-examine Dr. Dufort to challenge the logic of her conclusions, "[a]s the Supreme Court has stated on multiple occasions, rational basis review is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 284 (2d Cir. 2015); *see also Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994) (substantive due process does not protect "against government action that is incorrect or ill-advised"). As a result, cross-examining Dr. Dufort would be pointless.

In addition, much of the Dufort Declaration attaches and summarizes relevant exhibits, all of which are publically available and consist of guidance from public health organizations, President Trump's National Emergency Declaration, Governor Cuomo's Executive Orders, and published studies, reports, and articles relating to the pandemic. As "[t]he Court may take judicial notice of 'relevant matters of public record,'" there is no need to cross-examine Dr. Dufort on these matters. *See Geller v. Cuomo*, 2020 WL 4463207, at *1 n.1, n.2 (S.D.N.Y. Aug. 3, 2020) (quoting *Giraldo v. Kessler*, 694 F.3d 161, 163 (2d Cir. 2012)) (taking judicial notice of guidance and reports from public health organizations and Johns Hopkins University).

Thus, we respectfully request that the Court reconsider its October 3, 2020 order granting Plaintiff's request to cross-examine Dr. Dufort. Thank you for your consideration.

Respectfully submitted,

/s/
Erin R. McAlister
Assistant Attorney General
Attorney for Governor Cuomo

cc: All counsel of record (via ECF)