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)

TIME-SENSITIVE MOTION FOR PRELIMINARY INJUNCTION

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

(Expedited Hearing Requested)

Table of Contents

Table of Authorities

Cases

Rules

I. Introduction

There is no doubt we are in the middle of a serious pandemic requiring a serious governmental response to protect the lives of the people. It is for this reason that courts have largely allowed, and the people of New York largely tolerated, substantial curtailments on their freedoms by the State of New York and its municipalities.

This case asks the Court to consider a pandemic-related rule promulgated by Governor Cuomo that simply does not make sense. The rule in question was announced on September 9th, 2020, during a press conference in which Cuomo announced that New York City could resume indoor dining, at 25% of normal capacity, and, *inter alia*, with no service allowed after midnight. The rule applies to all restaurants, whether or not they serve alcohol.

While the government did not explain the rationale behind this "midnight food curfew" when the rule was announced, nor did they at any point before this litigation was filed, in response to media inquiries regarding this case, a spokesperson for the Governor responded to several media outlets[1] with the following explanation:

> "Bars are closed in 10 other states and many — including Rhode Island, North Carolina, and Washington — have similar restrictions in place because they recognize that late-night service can encourage individuals to gather and mingle, increasing the risk of COVID transmission."

Stating the obvious, the New York rule does not affect "bars" – which are still prohibited from opening at all – but "restaurants," for which there is little or no precedent of doing the same anywhere in the country, *including the remainder of New York State*. The rule is arbitrary and

[1] A substantially similar statement was individually reported by the New York Post, New York Daily News, and Staten Island Advance. *See, e.g.*, https://www.nydailynews.com/new-york/ny-brooklyn-bar-midnight-curfew-lawsuit-20200915-hgoulgfvlzgdxljs4b4ugxnk4y-story.html

unsupported by anything except speculation and the Governor's bias against the people of New York City, and accordingly, Plaintiff requests that the Court protect the status quo and immediately place a hold on the order by issuing a preliminary injunction before the order takes effect on September 30th, 2020[2].

II. Standard of Review

A plaintiff who "seeks a preliminary injunction to stay government action taken in the public interest pursuant to a statutory (and regulatory) scheme… must establish both a likelihood of success on the merits and irreparable harm in the absence of an injunction." *New Hope Family Servs. v. Poole*, No. 19-1715 at *76 (2nd Cir., July 21, 2020). A government defendant and the public can have no interest in an unconstitutional rule, but to the extent that the Court wishes to consider them, these interests merge. *New York v. U.S. Dep't of Homeland Sec.*, No. 19-3591 at *25, *26 (2nd Cir., Aug. 4th, 2020).

While the standard for reviewing preliminary injunctions is well-defined, the standard for looking at the merits of Plaintiff's case is far from certain. Plaintiff brings its claim under both federal and state law, and if it would be successful on either at trial, it would obtain substantially the same relief it would receive were it to succeed on both; therefore, the "likelihood of success" factor should tip in favor of Plaintiff if it demonstrates a likelihood of success under *either* federal *or* state law.

[2] Counsel for Defendant Cuomo within the New York Attorney General's Office has made themselves known to Plaintiff via e-mail. Because of the time-sensitive nature of this motion, in order to give fair notice to the opposing party, counsel for Plaintiff affirms that the motion will be sent by e-mail to this attorney at the same time as the filing of this motion, in addition to traditional mail service.

Under federal law, discussion of the standard of review for an emergency public health regulation is destined to begin with *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). Applying *Jacobson* requires the Court to consider a "real or substantial relation" test between the rule and the public health problem the rule seeks to address. "When the government acts in the face of such an epidemic, 'judicial scrutiny is reserved for a measure that `has no real or substantial relation to` the object of protecting `the public health...` or is `beyond all question, a plain, palpable invasion of rights secured by the fundamental law.`' *Geller v. de Blasio*, Case No. 20-CV-3566 (DLC), 2020 WL 2520711, at *3 (S.D.N.Y., May 18th, 2020) (quoting *Jacobson* 197 U.S. at 31)." *McCarthy v. Cuomo*, 20-CV-2124 at *6 (E.D.N.Y., June 18th, 2020).

The contours of the "real or substantial relation" test are entirely unclear, having been largely unlitigated in the 115 years between *Jacobson* and COVID-19. Several recent cases take up the challenge. In *S. Bay United Pentecostal Church v. Newsom*, No. 20-55533 (9th Cir., May 22nd, 2020), the California governor had argued that his coronavirus orders were lawful as long as they were in "good faith" and had "some factual basis." The Ninth Circuit rejected that view. *Id.* at *9 ("The State's motion cites no authority that can justify its extraordinary claim that the current emergency gives the Governor the power to restrict any and all constitutional rights, as long as he has acted in 'good faith' and has 'some factual basis' for his edicts," analyzing First Amendment question under normal First Amendment scrutiny)[3]. Elsewhere, two circuits have upheld temporary restrictions on abortion on the theory that they may take resources (PPE, hospital beds, doctors, *etc*.) away from the coronavirus fight – *after* taking in substantial evidence from the state demonstrating a basis for the restrictions. *In re Rutledge*, No. 20-1791 (8th Cir., Apr. 22nd, 2020);

[3] The U.S. Supreme Court briefly addressed this case a week later, 2020 WL 2813056, but did not shed more light on the correct application of *Jacobson*; it merely refused to issue injunctive relief on the grounds that it was unclear if the challenged order was unconstitutional.

In re Abbott, No. 20-50296 (5th Cir., Apr. 20th, 2020). At least one circuit came to the opposite conclusion, again after considering a record of evidence supplied by the state in support of the alleged real or substantial relation. *Robinson v. Attorney Gen.*, No. 20-11401-B (11th Cir., Apr. 23rd, 2020).

Taking *Jacobson* in light of the 5th, 8th, 9th, and 11th Circuit cases discussed *supra*, what is clear is that although the courts may give some deference to the judgment of the state, the state is still required to provide *and show evidence of* a good reason to enact the restriction that it did. That is, the burden is *on the government* to demonstrate that there exists an actual – not hypothetical or invented for judicial review – reason that the means are likely to redress the public health problem the government seeks to mitigate.

That said, not all judges have agreed that *Jacobson* is the correct standard to use for similar challenges. In *Cnty. of Butler v. Wolf*, 20-CV-677 (W.D. Pa., Sept. 14th, 2020), the court invalidated a large range of state-issued coronavirus restrictions, including Pennsylvania's stay-at-home order and many restrictions on business activity. The court refused to apply *Jacobson* for reasons that fell into two categories. First, noting the 115-year age of the case, the Court found that it is unlikely that the standard set therein reflects the law today. *Id*. At *13, *14. The court noted that the traditional tiers of scrutiny had developed since the date of that case, and that those traditional tiers were flexible enough to accommodate pandemic response (*i.e.*, that when responding to a pandemic, the government will have an easier time showing need and that narrower tailoring is not possible). Second, the court held that this particular emergency was not what *Jacobson* was designed for, placing emphasis on the long duration of restrictions already, the indefinite duration of the remaining restrictions, and the lack of precedent for long, broad closures of society "even [during] more serious pandemics, such as the Spanish Flu." *Id*. at *48, *54 ("A

total shutdown of a business with no end-date and with the specter of additional, future shutdowns can cause critical damage to a business's ability to survive, to an employee's ability to support him/herself, and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life."). The *Butler* court applied a rational basis standard and invalidated Pennsylvania's version of "non-essential business" closures on the basis that they were arbitrary. *Id*. at *56.

Plaintiff's state law claim requires the Court to consider whether the challenged rule is "arbitrary and capricious or an abuse of discretion." N.Y. CPLR § 7803(3). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (N.Y. 1974), *quoting* 1 N.Y. Jur., Administrative Law, § 184, p. 609; *see also Shabsels v. Schroeder*, 2020 N.Y. Slip Op. 32936 (N.Y. Sup. Ct. 2020) (continuing to cite *Pell*'s interpretation 46 years later)[4].

The Court's review regarding irreparable harm is significantly more straight-forward. The threat of complete destruction of a business and the owners' livelihood is generally considered irreparable. *Baker's Aid v. Hussmann Foodservice Co*., 830 F.2d 13, 16, n. 3 (2nd Cir. 1987).

[4] In this case, is there a substantial difference between *Jacobson*, rational basis, or the arbitrary/capricious/abuse test? The government may squabble about the amount of deference they are due under one test versus another, but in the end, the Court is essentially asked to determine whether the challenged rule is too *arbitrary* to stand, no matter which test the Court uses. The term "arbitrary" itself implies some deference to rules that the Court may find to be less prudent *but still* evidencing some indicia of justification. The government must still come forward with real justifications, based on their real lawful interest, that at least arguably make sense.

III. Argument

A. The Governor's Rule is Arbitrary at Best, and Discriminatory at Worst

Some context may help the Court to appreciate the arbitrary nature of the Governor's order.

In this country, New York, and New York City in particular, was hit first and hardest by coronavirus. Complaint, ¶¶ 14 – 17. It also recovered the quickest, and the state as a whole has had the "flattest" curve of any state in the union since its coronavirus peak 5 months ago. *Cf*. New York with California, Florida, Texas, *etc*.; *see also* Fig. 3, *infra*, showing New York City alone:

Fig. 1: Coronavirus New Cases Charts (clockwise from top left: New York, California, Texas, Florida). Source: Google. Retrieved Sept. 17th, 2020. https://www.google.com/search?q=[statename]+coronavirus+statistics

Since that time, New York City's per capita infection rate has been on roughly the same level as most southern New York counties and actually lower than Rockland, Orange, Nassau, and

other counties. *See* Fig. 2. Studies have demonstrated that if anywhere in the state has a population with antibodies to provide some benefits of herd immunity, New York City is it – perhaps explaining the continued flat curve[5]. Put another way, there is no reason to think that at this time, New York City is in any way more vulnerable than other parts of the state.

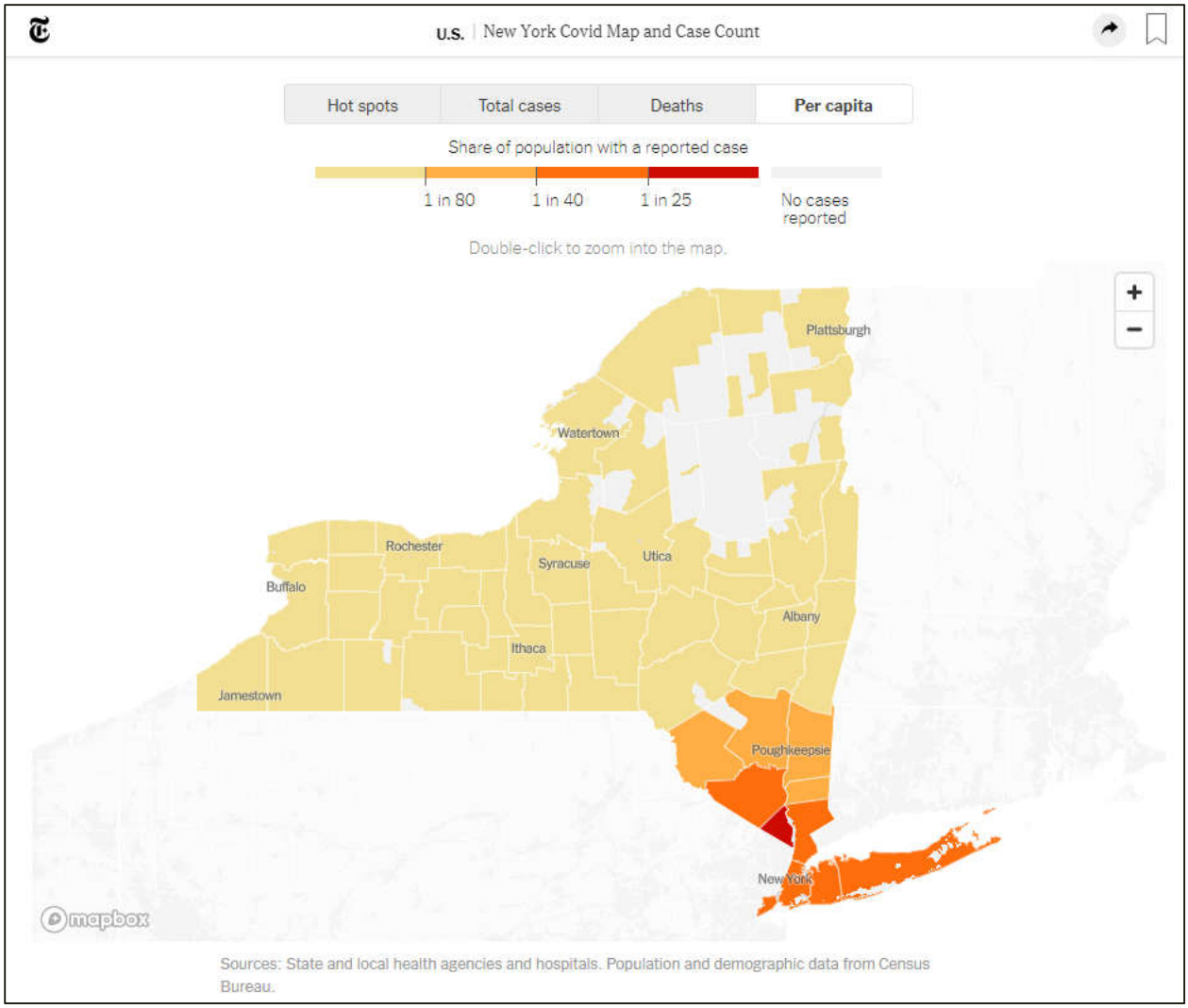

Fig. 2: New York Times. "New York COVID Map and Case Count." Retrieved Sept. 17th, 2020. https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html
(showing New York City as same or lower per capita rate as all of its surrounding counties)

[5] New York Times. "1.5 Million Antibody Tests Show What Parts of N.Y.C. Were Hit Hardest." Aug. 19th, 2020, https://www.nytimes.com/2020/08/19/nyregion/new-york-city-antibody-test.html

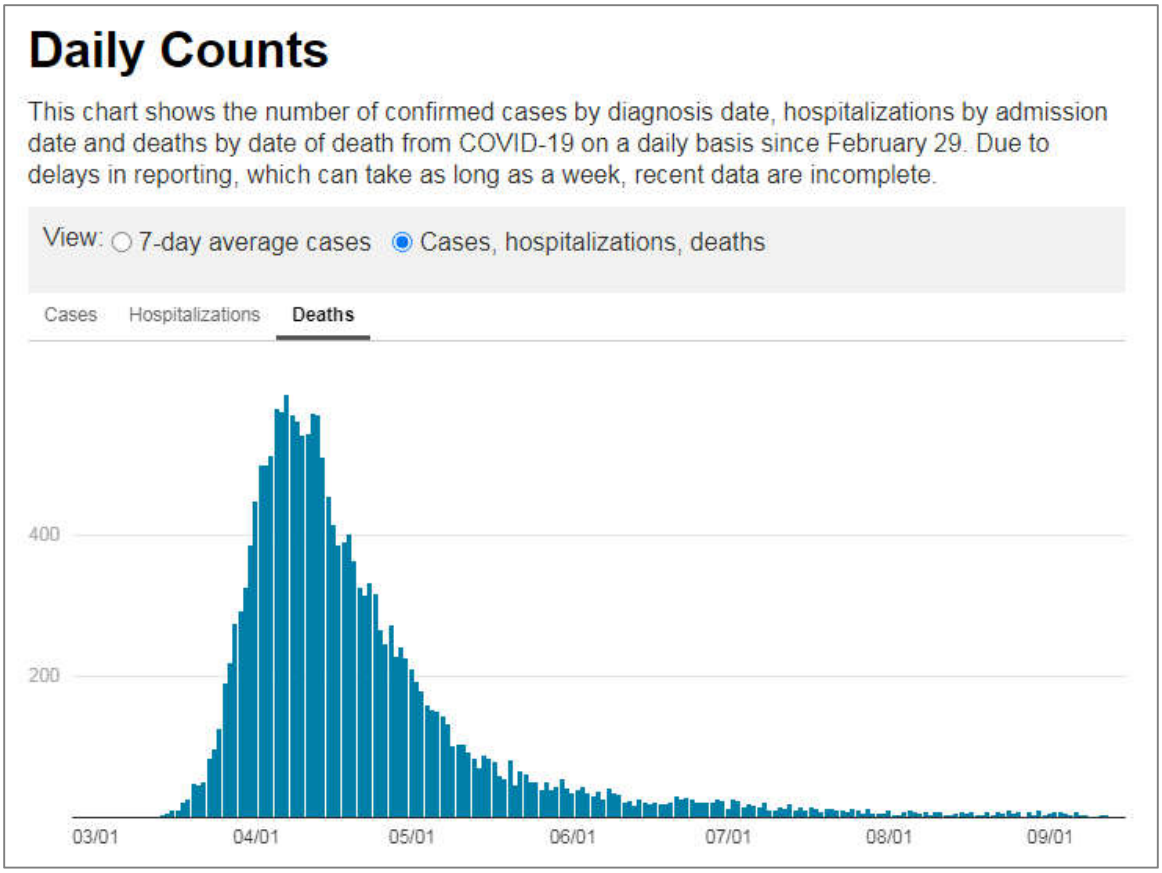

Fig 3: NYC Health. "COVID-19: Data, Main Data Page." Retrieved July 16th, 2020.
https://www1.nyc.gov/site/doh/covid/covid-19-data.page
(showing daily COVID-19 deaths in NYC flat for months)

Notwithstanding, the Governor has always treated New York City differently in regards to its coronavirus mitigation approach. The City was always the last subdivision of the state to move from phase-to-phase, and was often delayed even when it met the numerical criteria that the Governor said would trigger moving to the next phase. When the City reached Phase III, which was supposed to include indoor dining, the Governor announced that there would be no indoor dining in the City anyway[6]. Indoor dining is now allowed in every county in the state *except* New

[6] "Governor Cuomo Announces Phase Three Indoor Dining Postponed in New York City." Published July 1st, 2020. https://www.governor.ny.gov/news/governor-cuomo-announces-phase-three-indoor-dining-postponed-new-york-city

York City, at 50% capacity, and without any midnight curfew. The City is now the last in the state, and possibly last in the country, to resume indoor dining at only 25%, with a curfew, starting September 30th, 2020. Complaint, ¶¶ 24, 25.

When Cuomo announced the Sept. 30th date for indoor dining to resume during a press conference on September 9th, 2020, he announced a myriad of additional rules that New York City would have to follow – that have never, and still will not, apply to the rest of the state – including the challenged midnight food curfew[7]. Absent from his press conference was any justification whatsoever for the midnight food curfew. Reasonable people would want to know, yet are only left to speculate:

1. Why is early night dining safe, but late night dining is unsafe?
2. Assuming odds of transmission increase as the moon rises, why was midnight selected as the cutoff time?
3. If it is unsafe in New York City to eat after midnight, is it not also unsafe in Long Island, Westchester, state coronavirus infection leader Rockland County, or the Governor's Mansion in Albany?

One would think that when issuing an order that will foreseeably cause serious financial hardship, or worse, to thousands of small businesses across the state, it would be prudent to explain to those business owners, and the public as a whole, why such an order is necessary. Instead,

[7] "Governor Cuomo Announces Indoor Dining in New York City Allowed to Resume Beginning September 30 with 25 Percent Occupancy Limit." Published August 9th, 2020. https://www.governor.ny.gov/news/governor-cuomo-announces-indoor-dining-new-york-city-allowed-resume-beginning-september-30-25

Plaintiff, facing imminent and ruinous injury if the rule remains, was forced to sue to find out why his business was once again subject to a destructive order.

Thankfully, the media picked up this case and was able to use their position to get an answer, re-printed above on page 2 but deserving of a second look:

> "Bars are closed in 10 other states and many — including Rhode Island, North Carolina, and Washington — have similar restrictions in place because they recognize that late-night service can encourage individuals to gather and mingle, increasing the risk of COVID transmission."

This answer from the Governor's office is entirely lacking in rational foundation. First, as noted *supra*, while other states have indeed reduced the hours during which their bars may operate, New York does not, nor does it plan to, open bars at all, anywhere in the state. The challenged rule applies to restaurants, whether or not they serve alcohol. Point 1: There is no precedent for such a rule outside of New York (or elsewhere within New York state) for restaurants.

The explanation proposes that after midnight, diners will be "encouraged" to "gather and mingle." But the only indoor dining to be allowed requires seated table service at all times – no bar service, no lounge areas, no getting up except to enter, leave, or use the bathroom, and most definitely no "mingling." Point 2: Mingling is already prohibited inside of restaurants.

The Governor's rule applies to a 24/7 diner, a McDonald's, an upscale eatery, and everything in between. Point 3: Unlike bars, restaurants are not places known for mingling, even before coronavirus restrictions, and there is no reason to think that they have become "mingling spots" post-COVID.

Restaurants are required to enforce social distancing, mask, and other public health guidelines for all inside of their establishments, and have done a tremendous job in New York City

during outdoor dining (and for the rest of the state both in and outdoors). Point 4: There is no reason to think that these restaurants, when the clock strikes midnight, will become more lax on their obligations to ensure protocols are being followed.

But most significantly, restaurants upstate and in Long Island have been offering indoor dining for ~3 months, not subject to any midnight closure order. Point 5: If it is so dangerous to offer food after midnight, why are upstate and Long Island restaurants still allowed to serve at all hours? And Point 6: Why are New York City residents being treated differently than residents of all other parts of the state, and in particular, how does this rule accommodate those alleged differences?

Plaintiff would be thrilled to have the government address these points in its opposition brief, which, to recap, are:

- Point 1: There is no precedent for such a rule outside of New York (or elsewhere within New York state) for restaurants.
- Point 2: Mingling is already prohibited inside of restaurants.
- Point 3: Unlike bars, restaurants are not places known for mingling, even before coronavirus restrictions, and there is no reason to think that they have become "mingling spots" post-COVID.
- Point 4: There is no reason to think that these restaurants, when the clock strikes midnight, will become more lax on their obligations to ensure protocols are being followed.
- Point 5: If it is so dangerous to offer food after midnight, why are upstate and Long Island restaurants still allowed to serve at all hours?

- Point 6: Why are New York City residents being treated differently than residents of all other parts of the state, and in particular, how does this rule accommodate those alleged differences?

It is truly hard to fathom the Governor's logic here. Surely the government will argue something regarding population density, but first, what does that have to do with a midnight rule, and second, Richmond and Nassau Counties, for example, have very similar population densities and coronavirus rates and are not 10 miles apart. Why is the former forced to close at midnight and the latter allowed to play by completely different rules? The government's allegation of need is "not consistent with Defendants' allowance of exemptions" for these other locations. *DiMartile v. Cuomo*, 20-CV-0859 (N.D.N.Y., Aug. 7th, 2020), *appeal filed, 2nd Cir. Case No. 20-2683.*

Plaintiffs would far rather assume that the Governor's rule was promulgated in good faith. But with all due respect, it escapes Plaintiff how the Governor could have any justification for the disparate treatment other than thinking that New York City residents cannot behave themselves, or that he otherwise looks down upon them as less important, deserving, or obedient citizens. But that is simply not the case and is not borne out by data. Anyone who has lived through the last 6 months in New York City has seen there has been tremendous compliance with mask and social distancing restrictions – not "perfect" compliance, to be sure, but far better than can regularly be seen on the news elsewhere in the country, and no worse than elsewhere in the state.

Nor should any speculation or implication that New Yorkers do nothing after midnight but "mingle," drink alcohol, or otherwise engage in risky behavior, be credited unless the state can produce serious evidence of the same. The Governor seems to forget that "the city that never sleeps" stays awake due to employees in all sorts of businesses working all shifts of the day and

night, and those employees deserve to be able to have a meal even if their shift ends in the wee hours of the morning.

B. Plaintiff Faces Immediate Irreparable Injury

Plaintiff submits that the rule stands not to cause just "some" economic injury, but that is certain to cause *major* disruption to their business and quite likely to *completely destroy their businesses*. See Exhibit A., Verification & Affidavit, ¶¶ 9 – 11; see also *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1186 (2nd Cir. 1995) ("Major disruption of a business," even without complete destruction of a business, is irreparable injury); *C.D.S. v. Bradley Zetler* et al., 16-2346 at *3 (2nd Cir., May 31st, 2017) (district court did not commit clear error in finding irreparable harm when plaintiff "risks being forced out of business"); *Baker's Aid at* 16, n. 3 (*dicta* agreeing with district court that "threat" of going out of business "would clearly constitute irreparable harm").

This is exactly the harm that The Graham will suffer if this rule is allowed to stand during the pendency of this litigation. Exhibit A, Verification & Affidavit, ¶¶ 9 – 11. This is despite having spent tens of thousands of dollars on trying in good faith to operate within the state's framework, renovating its kitchen, purchasing outdoor tables and chairs, designing a new menu, re-training staff, *etc*., so that it could attempt to stay alive with delivery and takeout service plus outdoor dining. *Id*, ¶ 5. These attempts have not produced a profit, but have delayed bankruptcy in the hopes that normalcy would soon return. But for establishments that traditionally make a substantial amount of income after midnight, like The Graham, the rule will make survival highly unlikely. Having been closed or limited for over 6 months already with aid options expiring, bills

mounting, eviction moratoriums lifting, and frankly, no money or options remaining, there is little time left for this rule to be lifted before Plaintiff serves its last meal.

Even if the damage were purely economic and less than a "major disruption," the injury would still be irreparable for two more reasons. First, the injury would be extraordinarily difficult to quantify. *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1140 (10th Cir. 2017); *Gerard v. Almouli*, 746 F.2d 936 (2nd Cir. 1984). Imagine trying to prove how much injury was caused by this illegal order of the Governor versus other damaging-but-constitutional coronavirus restrictions, or based on other market changes. Second, any lost profits probably cannot be recovered due to issues of federalism or immunity that would close the doors to the courts on an action for money damages[8]. *See* U.S. CONST., Amend. XI; *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (placing stringent restrictions on lawsuits against high-ranking officials). Thus, even if Plaintiff could come up with a sum certain, and obtain a binding opinion holding that the challenged rule was unconstitutional, the damages are probably still "irreparable" because there is no means by which to force the state to pay (or even to stand trial).

Accordingly, the Court should find that the likelihood of major disruption or complete destruction of Plaintiffs' businesses that cannot be redressed with money damages.

[8] Which the state would be free to waive in its opposition brief if it would like to demonstrate that Plaintiff would have a chance at monetary damages upon a favorable outcome.

C. *The Public Interest Is Not in Arbitrary, Unconstitutional Rules that Destroy Small Business Without Public Health Benefit*

While the public does have an interest in being protected from coronavirus, if the challenged rule does not actually accomplish that, the public's interest is not served.

Likewise, the public does not have an interest in seeing The Graham and thousands of other small businesses flounder and fail, or in seeing the continuation of unconstitutionally arbitrary executive orders.

As with the merits analysis, the public interest comes down to whether Plaintiff is correct that the rule is arbitrary and the government cannot demonstrate its need, or the government persuades the Court that absent this rule, the virus will spread further.

IV. Conclusion

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915). The Court should not allow the government to infringe on that right without good cause. The Governor is free to come before the Court at any time with evidence to show that the challenged order is actually necessary to protect the public health. After all, the state should already be in possession of such evidence before issuing an order as drastic as the one challenged. If and when such evidence is provided, the Court may immediately lift the temporary relief and dismiss this case. Until that time, Cuomo should be ordered to "PAUSE" these unconstitutional restrictions.

In order to accomplish this, Plaintiff requests the Court: 1) order Defendant to show cause as to why the challenged rule should not be preliminarily enjoined and hold a hearing as soon as practical on the matter, and 2) preliminarily enjoin Defendant and his agents from enforcing the food curfew and from issuing or enforcing any substantially similar rules.

Dated: New York, NY

September 17th, 2020

Respectfully submitted,

/s/

Jonathan Corbett, Esq.
Attorney for Plaintiffs (*pro hac vice* granted)
CA Bar #325608
958 N. Western Ave. #765
Hollywood, CA 90029
E-mail: jon@corbettrights.com
Phone: (310) 684-3870
FAX: (310) 675-7080