UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3574

Caption [use short title]

Motion for: Injuncton Pending Appeal

Columbus Ale House, Inc.
v.
Andrew M. Cuomo

Set forth below precise, complete statement of relief sought:

injunction barring enforcement of state coronavirus-related restriction

MOVING PARTY: Columbus Ale House

☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Andrew M. Cuomo

MOVING ATTORNEY: Jonathan Corbett

OPPOSING ATTORNEY: Sarah Rosenbluth

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Court-Judge/Agency appealed from: E.D.N.Y - Cogan

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☑ No

Has this relief been previously sought in this Court? ☐ Yes ☑ No

Requested return date and explanation of emergency: Time-Sensitive, expedited review requested

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: /s/Jonathan Corbett **Date:** 10/21/2020

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

20-3574

United States Court Of Appeals
for the Second Circuit

COLUMBUS ALE HOUSE INC. D/B/A "THE GRAHAM,"
Plaintiff-Appellant

v.

ANDREW M. CUOMO,
Defendant-Appellee

On Appeal from the United States District Court for the
Eastern District of New York (Hon. Brian M. Cogan)

TIME-SENSITIVE MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

The Court is assuredly familiar with the coronavirus pandemic and the general response of the State of New York, led by Defendant-Appellee Governor Andrew M. Cuomo in implementing restrictions on both commercial and private conduct. While many of these restrictions are common-sense, effective, and necessary, Plaintiff-Appellant Columbus Ale House Inc., d/b/a "The Graham," a Brooklyn tavern, brought a substantive due process challenge to one that is clearly not: a requirement that restaurants in New York City stop food service at midnight (hereafter, the "midnight food curfew"). *See* Exhibit A, Dist. Ct. Complaint.

The state conceded that it acted not on the recommendation of a public health organization, not on a peer-reviewed study, and not even on raw data it collected, but based on a hunch that the people of New York City would not really eat after midnight, and instead would be drinking, mingling, and spreading the virus (even though the challenged rule applies to seated *food* service, even in establishments that do not serve alcohol). *See* Exhibit B, Hearing Transcript, p. 12 (asked if WHO or CDC suggested food curfew, "No, I have not seen that."), p. 13 (never read guidance from any source suggesting food curfew), p. 14 (rule origin was "a discussion among" N.Y. Governor's coronavirus response team), p. 10 ("…response team … independently concluded…"). Appearing to adopt broader reasoning than this core argument of the state, United States District Judge Brian

M. Cogan found that it is "common sense" that "if a restaurant is open 24 hours, it has a greater chance of exposing people to contagion [than] if it is offered open for 16 hours." Hearing Transcript, p. 41. Judge Cogan stated that he would apply the "real or substantial relation" test of *Jacobson v. Massachusetts*, 197 US 11 (1905), and denied a motion for preliminary injunction – the order herein appealed – with a finding that the midnight food curfew does bear a real or substantial relation to coronavirus response. *Id*.

Using the "common sense" approach of the district court, literally *any* restriction subject to *Jacobson* would automatically pass. For example, "Only allow people out of their homes for 12 hours a day? It's common sense that having people be able to leave their homes for 24 hours would give them more chance to spread the virus than 12 hours." But the plain words of Jacobson require a <u>real</u> or <u>substantial</u> relationship between the restriction and the public health interest – not the *speculative* relationship proposed by the state, nor the *insubstantial* relationship adopted by the court below.

Plaintiff-Appellant hopes that the Court uses this case to solidify the standard required by the 115-year-old *Jacobson* case (or to detail a different standard). In the meantime, Plaintiff-Appellant's business is dying, and we ask the Court to find that wherever the line is ultimately drawn, it is likely that Governor

Cuomo's rule is on the wrong side of it, and therefore the midnight food curfew should be enjoined pending this appeal.

JURISDICTIONAL STATEMENT & RULE 8 PREREQUISITE

This case was brought to the district court as a challenge under the United States Constitution[1], and thus jurisdiction was proper under 28 U.S.C. § 1331. The Court has "jurisdiction of appeals from [i]nterlocutory orders of the district courts of the United States … refusing … injunctions" under 28 U.S.C. § 1292(a). This is an appeal of a denial of a motion for preliminary injunction made on the record during a hearing on October 6th, 2020[2]. *See* Hearing Transcript.

This motion is brought under Fed. R. App. P. 8(a)(2), and asks for the same relief – an injunction against enforcing the midnight food curfew – that the district court already denied. This satisfies Fed. R. App. P. 8(a)(1) because asking the district court for the same relief while the appeal is pending that was denied for the pendency of the district court case would obviously be futile.

[1] Plaintiff-Appellant also brought a near-identical claim under state law, over which the district court declined to exercise jurisdiction. The state-law claim will not be a part of this appeal.

[2] The Court reduced its orally issued order on October 6th, 2020 to a writing filed on October 16th, 2020 (Appellate D.E. #4; hereafter, "Written Order"). The appeal is timely using either date. The oral and written orders do not appear to contradict each other; however, each provides insight into the district court's reasoning that the other does not. Plaintiff-Appellant will therefore speak of both within this brief.

STANDARD OF REVIEW

Rule 8 motions are typically judged based on four-factor criteria substantially similar to that used for preliminary injunctions in the district court: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *United States v. Grote*, No. 18-181(L), at *41 (2nd Cir., June 2, 2020), *citing In re: World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2nd Cir. 2007). As would be done in the district court, this Court should merge the third and fourth criteria because the government is the party against whom the injunction is sought. *New York v. U.S. Dep't of Homeland Sec.*, No. 19-3591 at *25, *26 (2nd Cir., Aug. 4th, 2020).

ARGUMENT

I. Plaintiff-Appellant is Likely to Succeed on the Merits

The court below erred by allowing the state to substitute speculation for evidence, and by applying "common sense" that does not accurately reflect the situation at hand.

A. *Absent True Emergency Circumstances or Obviousness, the "Real or Substantial Relation" Test Requires Evidence*

During the hearing on the appealed order, the government conceded that it did not act based on recommendations of the CDC, WHO, or other public health organization. Hearing Transcript, p. 12. The government was asked point-blank by the Court about its lack of data to support the closing time, and responded merely that it wasn't required to provide data and that it acted based on "common knowledge that most people going out after midnight are going out to mingle and drink and hang out in social gatherings rather than going out for a meal." *Id*., pp. 31 – 33. It is no surprise that the court below thus found that the rationale for the midnight food curfew "is not data based." *Id*., p. 42.

To what extent does *Jacobson* require the government to put forth hard evidence as to the need for a public health-related restriction? The state has tried to portray the test from *Jacobson* as at least as deferential to the government as rational basis review, if not more. Hearing Transcript, p. 31. The court below did not explicitly address whether its application of *Jacobson* increased or decreased the government's burden from rational basis, but merely noted that both tests would result in the same conclusion. Hearing Transcript, p. 38.

It is surprising that words such as "real" and "substantial" conjure up the same sentiment as "rational." Outside of the legal context, most English speakers would conclude that something can be rational, yet insubstantial or not actually reflective of reality. In other legal contexts, the word "substantial" has been analogized to words as strong as "certainly." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) ("…to the extent that the "substantial risk" standard is relevant and is distinct from the 'certainly impending' requirement…"). The Court should find that "substantial" under *Jacobson* means more than mere rationality.

That said, it is not disputed that *Jacobson* requires less than "narrow tailoring" and does require some level of deference to the government. However, it is possible to afford deference to the Governor while still applying more scrutiny than *mere rationality*. And, it is not difficult to reason as to why the U.S. Supreme Court may have set a higher standard for reviewing public health restrictions than garden-variety legislative enactments. 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" would seem to be critical to judicial review of whether the Government's rationale passes muster. Put simply, if the Government's argument is that a rule is necessary "because science," they must show the science; otherwise, "because science"

would be a blank check to do whatever they want. Nor is it difficult to see why this modern scenario – under which the Governor is exercising nearly unlimited emergency powers for an indefinite period of time – should invoke judicial skepticism greater than rational basis review. *Cnty. of Butler v. Wolf, Civil Action* No. 2:20-cv-677, at *17 (W.D. Pa., Sep. 14, 2020), *appeal filed*, 20-2936 (CA3) (in challenge to Pennsylvania coronavirus restrictions, "the ongoing and indefinite nature of Defendants' actions weigh strongly against application of a more deferential level of review.").

While courts have been hesitant to come out and say "evidence is a must under *Jacobson*," nearly every court to consider a challenge to coronavirus-related restrictions has taken in a substantial quantity of evidence and relied upon it in making their decisions. Illustrative are cases in three circuits challenging abortion restrictions where the state argued that abortions may divert scarce resources (PPE, hospital beds, doctors, *etc*.) needed for the coronavirus fight; two upheld the restriction, one struck it down, but all made their decision based on a mountain of evidence about their state's limited resources and whether the rule would have a real or substantial benefit to their coronavirus fight. *In re: Rutledge*, No. 20-1791 (8th Cir., Apr. 22nd, 2020); *In re: Abbott*, No. 20-50296 (5th Cir., Apr. 20th, 2020); *Robinson v. Attorney Gen.*, No. 20-11401-B (11th Cir., Apr. 23rd, 2020).

The court below dismissed the lack of data to support the challenged rule because "[t]he absence of data doesn't bother me in something like this because there just isn't time to compile data." Had this lawsuit been filed in March, when scientific understanding of the virus was little more than hypotheses and conjecture, it would make more sense to give the government a pass on hard data for a short while (as it would if the connection between means and end were so obvious or likely as to not actually be in doubt). But it is now October, a year after the first foreign outbreaks and 7 months after the virus ravaged New York. Coronavirus has had the full attention of medical, scientific, and government communities during this time, and although we have yet to find an effective cure or vaccine, we do know much about how the virus spreads by now. *See*, *e.g.*, World Health Organization, "Global literature on coronavirus disease," https://search .bvsalud.org/global-literature-on-novel-coronavirus-2019-ncov/ (89,346 articles in the database as of October 20th, 2020, including 980 on "infection control"). The New York State Department of Health is also in possession of a substantial amount of its own data, *including regarding indoor dining that has been legal in New York (outside of the city) since July*. *See also* Hearing Transcript, pp. 4, 5 (describing New York as a leader in the field of coronavirus mitigation). Defendant-Appellee brags, "We have data so specific that we can't show it because it could violate privacy conditions. We know exactly where the new cases are coming from." *See*

ABC News, "NY shuts down 10,000 person wedding as Cuomo reveals new COVID-19 plan," https://abcnews.go.com/US/ny-shuts-10000-person-wedding-cuomo-reveals-covid/story?id=73671721 (Published Oct. 17th, 2020). The Court should believe him, and be troubled that despite having all that data, they presented none in the district court.

Further, the government's failure to point to *any* supporting data is made more significant due to its inability to explain why it allows 50-person private parties in the city all night long, but not 18-person[3], socially-distanced restaurant meals past midnight. Hearing Transcript, p. 16. The same goes for its inability to explain why indoor dining after midnight is particularly dangerous in New York City, and, apparently, not in the rest of the state where the rule doesn't apply, other than to point towards New York City's higher population without explaining how late night viral transmission correlates to population. And the same goes for why they continue to insist the problem is drinking yet did not confine their restriction to alcohol. These factors should raise judicial eyebrows as to whether the Governor has acted arbitrarily and capriciously, and Defendant-Appellant should be required to rebut with real data.

[3] In New York City, public places without a "public assembly permit" are limited by fire code to 74 persons, unless their Certificate of Occupancy specifies a lower number. With the Governor's 25% capacity limitation on indoor dining, that means that the "default" capacity for most small restaurants is 18.

B. The "Common Sense" Arguments by the Governor are Specious

The court below accepted as "common sense" two propositions by the government that are undeserving of such a designation and were squarely challenged in district court proceedings.

The first is regarding the effect of limiting opening hours. The court below found, "I think it is patently obvious that if a restaurant is open 24 hours, it has a greater chance of exposing people to contagion [than] if it is offered open for 16 hours. It just seems like common sense to me." Hearing Transcript, p. 41. However, this logic operates on a presumption that fewer operating hours equals fewer customers. If it turns out that fewer operating hours just means that enough customers shift their schedules to accommodate the times that they may eat, the effect would be that more customers are present at any given time. That is, if customers average one hour to consume a meal and a restaurant averages 100 customers per day, if the restaurant is open for 24 hours, there will be an average of 4.2 customers at any given time (100 divided by 24). If the same number of customers eat during an 18-hour period, there will be an average of 5.6 customers at any given time (100 divided by 18). What *is* common sense at this point is that the more people in a given space at a time, the more likely it is that the virus will be spread.

This is exactly the type of data that the government could have easily collected and exhibited evidence of, but declined to do so. The matter was raised by Plaintiff-Appellant during the hearing. Hearing Transcript, pp. 27, 28. The court below should not have resolved a fact reasonably in dispute as "common sense" in lieu of requiring evidence of the same.

The second "common sense" position adopted by the court below is that drinking and mingling, rather than eating, is what happens after midnight. But anyone who has ever been to a 24-hour diner knows this not to be true: customers do not wander around introducing themselves to different tables, and many 24-hour diners serve no alcohol at all[4]. "The city that never sleeps" is full of shift workers who would like to eat after work, but now cannot.

II. The Remaining Factors Favor Preliminary Relief

The remaining factors are irreparable harm and injury to the opposing party/public (which should be considered as one for a government opponent, *New York v. U.S. Dep't of Homeland Sec*).

[4] The court below and opposing counsel took some exception to Plaintiff-Appellant's use of this example because Plaintiff-Appellant is not an alcohol-free establishment. But the fact remains that the challenged restriction prohibits *food* service, not alcohol service, and the example is relevant to counter Defendant-Appellee's assertion that people categorically do not merely eat without drinking and mingling after midnight.

Regarding irreparable harm, as Plaintiff-Appellant discussed and submitted evidence to support, Plaintiff-Appellant's business stands a substantial likelihood of being forced to permanently close if the challenged rule is allowed to continue for anything longer than a brief interval, and at the very least will certainly face "major disruption" of its business operations. See Dist. Ct. Mot. for Prelim. Inj., pp. 16, 17, and Affidavit; *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 v. Hussmann Foodservice Co*., 830 F.2d 13, 16, n. 3 (2nd Cir. 1987) (*dicta* agreeing with district court that "threat" of going out of business "would clearly constitute irreparable harm").

The court below noted Plaintiff-Appellant's showing in this regard. Hearing Transcript, p. 38. In the written version of its order, the court below appears to agree that "loss of plaintiff's business is likely an irreparable harm." Written Order, p. 9. Somewhat puzzlingly, the written opinion also apparently found that the "plaintiff cannot show that it has been prevented from operating its business completely because the midnight close rule does not prohibit plaintiff's operations, it just restricts them." *Id*. It appears the court below failed to grasp that if the

effect of a "restriction" is to be forced out of business, then one is prevented from operating its business completely. But that matters not: even a "threat" of going out of business, or "substantial disruption" of business, is sufficient. *Baker's Aid*; *Petereit*. There is no question that the state has substantially disrupted Plaintiff-Appellant's business here. Dist. Ct. Compl., ¶¶ 5, 49, 50.

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. This is the whole basis for the instant lawsuit, and thus "public interest" is actually intertwined with the "merits" analysis: if the restriction has a real or substantial relation to protecting the public, there is a public interest; likewise, if the restriction has speculative or insubstantial benefits, the public can have little interest in it – but *does* have an interest in not bankrupting local small businesses, not putting Plaintiff-Appellant's employees out of work, and not being told when it may or may not eat a meal. Since it appears that the government does not have a shred of data to support the need for the restriction, we exist on the latter half of that balance, and the public interest falls towards enjoining the rule.

CONCLUSION

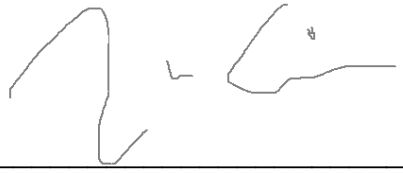
The Governor is in the unenviable position of trying to keep the citizens of New York safe while balancing their need to go about their lives and honoring their civil liberties. While his difficult decisions are afforded deference, he must nevertheless show that some science is on his side before he may devastate businesses like Plaintiff-Appellant. Because the Governor has not only failed to provide *any* scientific data relevant to this particular restriction, but has candidly admitted the rule is founded on speculation, it is likely unconstitutional and the Court should "PAUSE" this restriction while the case is considered.

Plaintiff-Appellant respectfully moves the Court to enjoin Defendant and his agents from enforcing the food curfew and from issuing or enforcing any substantially similar rules.

Dated: New York, New York

October 20th, 2020

Respectfully submitted,



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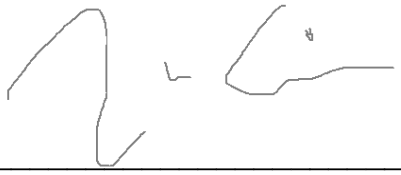
RULE 27(d)(2) CERTIFICATE

This brief complies with Fed. R. App. P. Rule 27(d)(2) because it contains approximately 3,500 words.

Dated: New York, New York

October 20th, 2020

Respectfully submitted,



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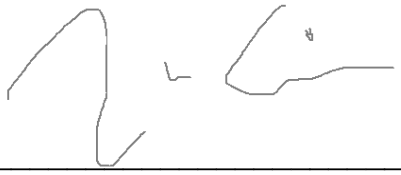
CERTIFICATE OF SERVICE

I certify that this document was served on Defendant-Appellant Andrew M. Cuomo via the CM/ECF system on October 20th, 2020.

Dated: New York, New York

October 20th, 2020

Respectfully submitted,



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