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] Columbus Ale House v. Cuomo

Motion for: dismissal of appeal.

Set forth below precise, complete statement of relief sought:

Defendant-appellee moves to dismiss the appeal as moot, as set forth in the accompanying letter.

MOVING PARTY: Governor Andrew M. Cuomo **OPPOSING PARTY:** Columbus Ale House

☐ Plaintiff ☑ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Sarah L. Rosenbluth **OPPOSING ATTORNEY:** Jonathan Corbett

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: E.D.N.Y. Hon. Brian M. Cogan, U.S.D.J.

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 INJUCTIONS PENDING APPEAL:

Has this 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:

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/ Sarah L. Rosenbluth **Date:** December 16, 2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

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December 16, 2020

Catherine O'Hagan Wolfe (via ECF)
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Columbus Ale House v. Cuomo* (No. 20-3574)

Dear Ms. Wolfe:

I represent defendant-appellee Governor Andrew M. Cuomo in the above matter. In this appeal, plaintiff challenges the rule—imposed pursuant to Executive Order ("EO") 202.61 and to New York State Department of Health guidance—that allowed restaurants and bars in New York City to resume indoor service, but required them to stop serving food and alcohol at midnight ("Midnight Service Rule" or "Rule"). Plaintiff moved to enjoin enforcement of the Rule pending appeal.

I write to inform the Court of the Governor's new executive order, EO 202.81, which modifies EO 202.61 to prohibit indoor food service and dining in New York City at *any* hour of the day or night, effective December 14, 2020. Thus, the Midnight Service Rule, which plaintiff seeks to enjoin, is no longer in effect. In light of the superseding policy of EO 202.81, plaintiff is now independently prohibited from serving food in its establishment after midnight, and its ability to do so will not "be affected by any view this Court might express on the merits" of the Midnight Service Rule. *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (appeal challenging plaintiff's rejection from law school was moot where plaintiff had subsequently been admitted and any decision on the merits would not affect plaintiff's rights). The appeal is therefore moot. *See, e.g.*, *Coll. Standard Magazine v. Student Ass'n of State of Univ. of N.Y. at Albany*, 610 F.3d 33, 35 (2d Cir. 2010) (dismissing appeal as moot where

repeal of policy meant that the court could not "issue a decision that would confer any relief to the plaintiffs").

No exception to the mootness doctrine applies. While a defendant's voluntary cessation of a challenged conduct may provide a ground for a court to review a case that has been rendered moot, that exception does not pertain here. EO 202.81 does not constitute "a unilateral action taken for the deliberate purpose of evading a possible adverse decision by this [C]ourt." *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006). To the contrary, Governor Cuomo signed EO 202.81 in response to the ongoing surge of new COVID-19 cases and related hospitalizations. *See* Michael Gold, N.Y. Times, *Indoor Dining Will Shut Down in New York City Again* (Dec. 11, 2020), *available at* https://www.nytimes.com/2020/12/11/nyregion/indoor-dining-nyc.html. EO 202.81 did not supersede the Midnight Service Rule to avoid a decision in this or any other litigation.

Neither does the exception for conduct "capable of repetition, yet evading review" apply here. That exception permits review of otherwise moot cases where "there is a reasonable expectation that the same complaining party will be subjected to the same action again." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018). But it is entirely speculative whether plaintiff here will be subjected to restrictions on its opening hours in the future and, if so, whether those restrictions will approximate the Midnight Service Rule that is at issue in this lawsuit. Moreover, even if a similar decision is made in the future to restrict bars' and restaurants' hours as part of another reopening plan, the rationale for any such decision might well differ from the rationale for the Midnight Service Rule, affecting both plaintiff's challenge and the State's defense. Accordingly, any recurrence of the Midnight Service Rule in anything like its current form is speculative at best. The Court should therefore dismiss the appeal as moot. *See Spell v. Edwards*, 962 F.3d 175, 180 (5th Cir. 2020) (dismissing as moot appeal challenging Louisiana's stay-at-home order where it was speculative whether governor would impose same restrictions again).

Respectfully submitted,

/s/ Sarah L. Rosenbluth
SARAH L. ROSENBLUTH
Assistant Solicitor General

cc: JONATHAN CORBETT (via ECF)
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