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

New York Independent Venue Association *et al*. *Plaintiffs* v. Vincent G. Bradley, *Defendant*	Case No. 20-CV-6870 (GHW)(KNF) **MOTION FOR TEMPORARY RESTRAING ORDER AND PRELIMIARY INJUNCTION**

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 New York's State Liquor Authority ("SLA") that simply does not make sense. The rule in question was issued by modifying its "Frequently Asked Questions" on its Web site to state:

> "Additionally, please note that only incidental music is permissible at this time. This means that advertised and/or ticketed shows are not permissible. Music should be incidental to the dining experience and not the draw itself."

The rule applies to all on-premise licensees, including restaurants, bars, event spaces, *etc*.[1], in all parts of the state regardless of "phase," and the SLA has clarified to licensees that it means they may not in any way advertise anything about music or other entertainment options (*e.g.*, they

[1] In New York, these titles are purely marketing, not legal, distinctions. Even pre-pandemic, all bars were required to have at least *some* minimal prepared food for sale and are thus automatically "restaurants," or more technically, "food service establishments."

cannot identify the names of any performers, the title of any shows, the date and times of the happenings of events, *etc*.). Compl., ¶¶ 36, 37. They have also clarified that the prohibition on "ticketed shows" applies not just to literal paper tickets, but that any type of admission fee, table minimum, or other payment for one's attendance at a licensee is now prohibited. *Id*., ¶ 38. Licensees who fail to comply face penalties that may include the suspension or revocation of their liquor license, either of which would effectively bankrupt and destroy the licensee's business. *Id*., ¶ 32.

The advertising rule is a content-based restriction on free speech that is subject to strict scrutiny review. The ticketing restriction is subject to review under a "real or substantial relation" test under federal law and an "arbitrary or capricious" or "abuse of discretion" standard under state law. It is highly unlikely that the state can demonstrate that a blanket prohibition on the advertising of lawful services is "narrowly tailored." Likewise, it is highly unlikely that the government can demonstrate that charging admission increases the odds of transmission of coronavirus. On the flip side, Plaintiffs will almost certainly incur irreparable injury.

Accordingly, Plaintiffs request that the Court restore the status quo and immediately place a temporary hold on the SLA's order via a temporary restraining order, and thereafter consider full briefing and issue a preliminary injunction[2].

[2] This motion, for the purposes of the temporary restraining order, is made *ex parte*, as the defendant has not been formally served. *See* N.Y. CPLR § 307(2), subsection 2 (service complete by mailing to officer and personal service on state Attorney General). In order to provide maximum notice to the government as to the pendency of this motion, the undersigned attorney certifies that he has sent a copy of the summons, complaint, and this motion via USPS overnight mail, certified, to Defendant's office, as well as faxed a copy to the NY Attorney General's office at (212) 416-6030. In-person service to NY AG will be completed tomorrow. Finally, Plaintiff notes that the government has been placed on notice of this lawsuit as a result of media attention and requests for comment by journalists, for which it has been reported the government obliged.

II. Standard of Review

The legal standard governing a request for a temporary restraining order is the same as that governing a motion for a preliminary injunction. See, *e.g.*, *Geller v. de Blasio*, 20-CV-3566, 2020 WL 2520711, at *2 (S.D.N.Y., May 18th, 2020) (*citing* *Local 1814, Int'l Longshoreman's Ass'n, AFL-CIO v. N.Y. Shipping Ass'n*, 965, F.2d 1224, 1228 (2nd Cir. 1992)), *appeal docketed*, No. 20-1592 (2nd Cir., May 19th, 2020). 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).

The advertising ban must be considered using strict scrutiny. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). The Supreme Court has described this inquiry as "demanding," noting that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Gr., Inc.*, 529 U.S. 803, 818 (2000).

The ticketing ban would be considered under the "real or substantial relation" test. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905). "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). Under this standard, 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.

In general, violations of fundamental constitutional rights causing more than mere economic injury automatically constitute irreparable harm. *See New Hope* at *76. Put simply, infringements on speech cannot merely be repaid, and are thus irreparable. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); Likewise, 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).

III. Argument

A. New York Will Be Unable to Demonstrate That the Advertising Ban is Narrowly Tailored

The analysis of any restriction on speech must start with a determination that the speech is covered by the First Amendment. The U.S. Supreme Court has been unwavering for close to a century in its conclusion that commercial speech, and advertising in particular, is protected. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) (solicitation is First Amendment-protected). *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 761 (1976) (collecting cases and holding that even if speech has no purpose other than a commercial transaction, it is protected). We note that none of the traditional "exceptions" – such as fraudulent speech or that promoting

criminal transactions – apply here: Plaintiffs are seeking to overturn a rule that bars completely truthful advertising of a completely lawful subject matter.

Once the Court is satisfied that the speech prohibited by the rule is First Amendment-protected, the next question is whether the restriction is content-based, because if so, the Court must apply strict scrutiny. *Barr v. American Assn. of Political Consultants, Inc.*, No. 19-631, at *9 (S. Ct., July 6th, 2020) ("Content-based laws are subject to strict scrutiny."). There can be no doubt that a ban on advertising one specific thing is a ban on the content of that advertisement. See *id*. at *36 (even a law prohibiting *false* advertising is "content-based") (Breyer, J, *concurring*). Plaintiffs are currently allowed to advertise food and drink specials, décor and ambiance, the experience and talents of their chefs, *etc*., but if the subject of the advertisement is music, the Plaintiffs are categorically barred placing such an ad at any time, in any place, in any manner – indefinitely. Strict scrutiny must apply.

We also note that no Court of Appeals or U.S. Supreme Court has ever held that the scrutiny level that must be applied to a content-based restriction on free speech may be reduced because of an emergency. "COVID-19 is not a blank check for a State … There are certain constitutional red lines that a State may not cross even in a crisis. Those red lines include racial discrimination, religious discrimination, and content-based suppression of speech." *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, at *22 (July 24th, 2020) (Kavanaugh, J., *dissenting*) (*emphasis added*). For sure, the strict scrutiny test is easier for the government to meet during a pandemic since it will almost never have to quibble over whether there is a "compelling government interest." But its burden to demonstrate "narrow tailoring" remains unchanged.

To start the strict scrutiny analysis, Plaintiffs will stipulate that the government has a compelling interest: it can hardly be said that stopping the carnage caused by coronavirus is anything less than compelling. We need not waste time on this issue.

The only question, therefore, is whether the advertising ban is "narrowly tailored" to that interest. A restriction is narrowly tailored if it is "reasonably necessary to protect the substantial governmental interest." *Brown v. Glines*, 444 U.S. 348, 355 (1980). If there are "plausible, less restrictive alternatives," the government's more restrictive option is not reasonably necessary. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004); *Picard v. Clark*, 19-CV-3059 (DLC) (S.D.N.Y., July 29th, 2020).

It is the government's burden to prove narrow tailoring. *Reed* at 2226. But here, it will be unable to. The government has not explained precisely how it expects its rule to serve the public health interest at hand, so we are left to speculate. Perhaps they believe that a ticketed event will be a more well-attended event, and the more people that attend an event, the more likely it is that there will be community spread of coronavirus. But this reason would not win the day. First, the government has already sharply limited the number of guests who may be present at an establishment. In the parts of New York where indoor dining is allowed, establishments are required to keep to 50% of their lawful capacity, and since they are also required to keep 6 feet of space between guests of different parties, many restaurants are forced to operate at far below 50% because not enough tables will fit with that spacing requirement. In the parts of New York where outdoor dining is allowed, the "6 feet between parties" requirement still applies to outdoor tables, again sharply limiting the maximum number of guests. If the government does not want establishments to fill to 50%, or thinks more than 6 feet is necessary, or wants to put a hard

maximum on the number of people at an establishment, it need not curtail their speech to do so: it can simply adjust its existing capacity rules.

As continued speculation, perhaps the government believes that people who attend events with advertised music will somehow behave differently at these events. But this fails for two reasons. First, no matter whether there is music or not, the rules require all establishments to keep their guests seated, at tables, and order a meal. Dancing – or any other conduct likely to occur in the presence of music that requires leaving one's seat – is prohibited. A person sitting a table, eating a meal, and enjoying a live music performance is no more likely to spread coronavirus than one doing the same in silence. Second, whether there is advertising or not, music is still permitted. The advertising of the same does not change a thing about the behavior of the guests. It also would not limit third parties[3] from collecting a list of establishments that feature music and distributing it on social media. This would make the rule futile, and it would be naïve to think that this is not already happening. A futile rule is, obviously, not "reasonably necessary."

It is highly unlikely the government will be able to demonstrate that this rule is narrowly tailored. Accordingly, the Court should find that Plaintiffs have demonstrated likelihood of success on the merits as to the advertising ban.

[3] The rule does not purport to create a restriction on the general public, but even if it did, the SLA is without the power to directly regulate the conduct of non-licensees.

B. New York Will Be Unable to Demonstrate a Real or Substantial Relationship Between Charging Admission and Community Spread of Coronavirus

The standard for whether an order intended to protect public health during an emergency is constitutional is largely unchanged over the last century: there must be a "real or substantial relation" between the restriction and the public health benefit. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905).

What does this test mean in practice? In *Jacobson* itself, the challenge was to mandatory smallpox vaccination, in which the Supreme Court held that no one could "confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety" *Jacobson* at 31. Since this case is not much of a "close call," it may not help us to draw the line here.

We can compare it to the more familiar means-end scrutiny tiers: "real or substantial" clearly means more than the "rational" in "rational basis," but how much more (and does it vary based on the right?). 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)[4].

[4] 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.

We can consider some other coronavirus case approaches. 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); *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. It seems quite unlikely the state can demonstrate that charging money to sit in a food service establishment increases the risk of the community spread of coronavirus. We are left to speculate as we did *supra*, but the same two justifications as discussed (potential for a more well-attended event or potential for different behavior) would fail for the same reasons discussed *supra*. Plaintiffs actually add one additional reason that the ticketing ban is illogical: selling advance tickets allow them to *prevent* congregations of large crowds. If no advance tickets are sold for an "event" (whether the "event" is "dinner at Eleven Madison Park[5]" or "Led Zeppelin concert"), an unknown people will show up and try to gain admittance, and if more show up than the establishment can accommodate, the establishment will face the burden of trying to disperse the

[5] And, in fact, many high-end restaurants in New York City (especially those offering prixe menus) require payment to make a reservation. Although the SLA may not be about to enforce its new rule against Michelin-starred restaurants, technically these restaurants are in violation of the ticketing ban.

crowd as quickly and safely as possible. With advance tickets, establishments can sell the exact number of tickets for which seats are available and then note the event as sold out. Further, one not need to be an industry insider to understand that charging admission for an event results in the attendance of *fewer* people, not more. The government is thwarting its effort to solve the very problem that the government, perhaps, thinks it is solving.

While the ticketing ban will be reviewed at a lower level of scrutiny than the advertising ban, given that it is even more illogical to conclude that whether one forks over $5 for the right to sit down, or not, affects community spread of coronavirus, Plaintiffs have again demonstrated that they are likely to succeed on the merits, and the Court should so find in regards to the ticketing ban.

C. Plaintiffs Face Immediate Irreparable Injury

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also New Hope Family Servs. v. Poole*, No. 19-1715 at *76 (2nd Cir., July 21, 2020). As to the advertising ban, therefore, Plaintiffs need do no more to demonstrate irreparable injury.

Regarding the ticketing ban, Plaintiffs submit that it 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* and that of many of NYIVA's members. *See* Exhibit A., Affidavit of Plaintiff NYIVA; *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"). Establishments with music or other live entertainment pay their performers, audio/video technicians, licensing fees, and other expenses *with the money they collect from admission*. Without being able to pay for those who make their businesses run, they will be unable to carry on without, essentially, starting a completely new establishment with a completely new, entertainment-free business model, giving up their brand, reputation, and good will – which *itself* would be an irreparable injury (and, in the current climate, this would likely prove unsuccessful anyway). *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2nd Cir. 2004) ("loss of reputation, good will, and business opportunities" was sufficient for district court to find irreparable injury).

The SLA has made clear to establishments that there are no minor "tweaks" that may make to comply. Compl., ¶ 38. The SLA has shot down requiring minimum table spends, which would allow establishments to raise their food and beverage prices to make up for lost admission revenue. The SLA has shot down cash-at-the-door admission fees, which would avoid any potential of additional crowd draw that the SLA may speculate would occur with advance ticketing. Having been closed for over 5 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 the Venue Plaintiffs take their last breath. *See* Exhibit B, Affidavit of Plaintiff Jukimoo, LLC, ¶ 9.

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 SLA versus other damaging-but-constitutional coronavirus restrictions, or based on other market changes. Second, New York almost certainly cannot afford to compensate all the establishments that will be injured during the pendency of this lawsuit if temporary relief does not issue[6]. There are tens of thousands of on-premise liquor licensees in the state and likely thousands of them are in the same boat as the named plaintiffs in this action. But the Governor has made clear the state's coffers are running dry. When asked whether the state would participate in an federal unemployment insurance bonus that would be matched with 3 federal dollars for every dollar chipped in by the state – a deal that in other times would be almost too good to be true – he said[7]:

> "It's an impossibility for the state of New York to contribute any money to unemployment insurance," Cuomo said. "You can not get water out of a stone. That is a fact and we have a $14 billion deficit, and we can't pay for it.

Even if the rule only causes damage to the industry in the amount of 5% of its annual revenue, the state would be on the line for over $2,500,000,000 that it simply will not be able to repay any time soon[8].

[6] Plaintiffs currently do not seek monetary relief, but assuming the Court eventually finds the challenged rule to be unconstitutional, Plaintiffs and all others similarly situated either: 1) could successfully seek monetary relief for the loss or destruction of business caused by the order in the interim, which the state cannot afford to pay, or 2) may be barred from seeking monetary relief, perhaps due to issues of federalism, immunities, or otherwise. Either way, Plaintiffs would never be made whole for their injury and thus the injury is irreparable.

[7] Rochester First. "Gov. Cuomo calls unemployment payment plan 'impossible' as many scramble for answers." https://www.rochesterfirst.com/economy/gov-cuomo-questions-unemployment-payment-plan-leaving-many-scrambling-for-answers/ (Retrieved August 27th, 2020).

[8] Based on estimate of $51.6 billion in annual revenue for the industry in New York by the National Restaurant Association. *See* https://restaurant.org/downloads/pdfs/state-statistics/newyork.pdf

Accordingly, the Court should find that the advertising ban causes *per se* irreparable harm, and the ticketing ban would cause irreparable harm due to the likelihood of major disruption or complete destruction of Plaintiffs' businesses that cannot be redressed with money damages.

IV. Conclusion

The SLA 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. Until that time, the SLA 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 advertising ban and ticketing ban should not be temporarily restrained and hold a hearing as soon as practical on the matter, 2) issue a temporary restraining order preventing Defendant and his agents from enforcing the advertising and ticketing bans, 3) order full briefing on the request for a preliminary injunction, and 4) preliminarily enjoin Defendant and his agents from enforcing the advertising and ticketing bans.

Dated: New York, NY
August 31st, 2020

Respectfully submitted,

/s/

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