UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Columbus Ale House, Inc. d/b/a "The Graham,"

Plaintiff,

-against-

Andrew M. Cuomo, *in his official capacity as Governor of the State of New York,*

Defendant.

No. 20-cv-04291-BMC

GOVERNOR ANDREW M. CUOMO'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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Defendant Andrew M. Cuomo, sued in his official capacity as Governor of the State of New York ("Governor Cuomo" or "Governor"), respectfully submits this memorandum of law, together with the accompanying Declaration of Dr. Elizabeth M. Dufort, Director of the Division of Epidemiology at the New York State Department of Health ("Dufort Decl."), in opposition to the motion for a preliminary injunction, ECF No. 10, filed by Plaintiff Columbus Ale House, Inc. d/b/a "The Graham" ("Plaintiff" or "The Graham").

PRELIMINARY STATEMENT

The State of New York continues to confront the greatest public health crisis in living memory along with the rest of the world. The COVID-19 pandemic has caused over 16,000 deaths in New York City alone, an enormous number that could have been far higher had the State not taken urgent action to halt the spread of the virus by mandating temporary restrictions on businesses and social gatherings. Thanks to these measures, New York was able to flatten the curve for new infections and fatalities and is now working toward lifting restrictions in a measured way, balancing the lives, health, and safety of its citizens with the need to protect their livelihoods. But the danger of a resurgence in cases remains clear and present. The State's response continues to be carefully calibrated so as to ensure that activities with the highest risk of widespread contagion do not imperil New York's progress.

By this lawsuit, Plaintiff seeks to undermine these efforts and enjoin portions of Governor Cuomo's Executive Order designed to mitigate the significant risks of COVID-19 transmission posed by indoor dining in New York City. Indoor dining at bars and restaurants is a particularly high risk activity because COVID-19 spreads more easily indoors, diners and drinkers cannot wear masks while dining and drinking, and drinking at a bar or restaurant can encourage congregating and mingling, particularly late at night, which furthers the risk of spread. Because of its large population and high population density, these risks are particularly acute in

New York City, and, consequently, its bars and restaurants have not been permitted to offer indoor dining since March 2020. Following the success of the State's mitigating actions, on September 9, 2020, Governor Cuomo issued Executive Order 202.61, which will permit establishments to offer indoor dining at 25% capacity until midnight each night, starting on September 30, 2020.

Plaintiff operates a bar and restaurant in Kings County, the most populous and second most densely populated county in the State, and seeks a preliminary injunction against the midnight closure rule. However, Plaintiff's motion is fatally flawed because it cannot meet the high burden of establishing the elements required for a mandatory injunction.

First, there is no clear or substantial likelihood of success on the merits. *See* Point I, *infra*. Plaintiff's federal substantive due process claim fails because the midnight closure rule is rationally related to the government's interest in avoiding spikes in COVID-19 cases and the concomitant threat to public health. Plaintiff's State law claim, asserted under Civil Practice Law and Rules ("CPLR") Article 78, fails because it is barred by the Eleventh Amendment. Moreover, Article 78 claims are only available in State court to challenge administrative actions, and simply cannot be brought in federal court to challenge the actions of an executive official that are legislative in nature.

Second, the balance of equities and the public interest tip overwhelmingly in favor of New York's mission to protect its citizens from the imminent dangers presented by COVID-19. *See* Point II, *infra*.

Finally, Plaintiff cannot establish any irreparable harm given that the rule goes into effect on September 30, 2020; that any restrictions on indoor dining will be reevaluated by November 1, 2020, based on data regarding new infections and positivity rates for the month of October;

and that outdoor dining will also be permitted in the interim. *See* Point III, *infra*.

Accordingly, Plaintiff's motion for a preliminary injunction should be denied.

FACTUAL BACKGROUND

The ongoing COVID-19 pandemic has caused over 25,000 deaths in New York State, over 16,000 of which were in New York City, and hundreds of thousands of deaths worldwide.[1] New York was, for much of this spring, the global epicenter of the crisis.[2] Thanks to the lifesaving efforts of medical professionals, essential workers, state and local governments, and ordinary New Yorkers who have heeded calls to shelter-in-place and practice social distancing, New York's daily death toll has been reduced from a peak of approximately 800 per day to an average of less than 10 per day.[3] The threat is not over, however, as hundreds of New Yorkers remain hospitalized.[4] Continued vigilance is necessary to prevent a deadly second wave of the pandemic from afflicting the State and requiring additional extensive shutdowns of schools and businesses. *See generally* Dufort Decl. ¶¶ 45-50.

A. The COVID-19 Pandemic And The State's Early Response

COVID-19 is a highly infectious and potentially deadly respiratory disease caused by a newly discovered coronavirus that spreads easily from person-to-person. Dufort Decl. ¶ 7, Ex. B. Because there is no pre-existing immunity against this new virus, it has spread worldwide in an exceptionally short period of time. On January 31, 2020, the World Health Organization ("WHO") declared a "public health emergency of international concern." Dufort Decl. ¶ 9, Ex. C. Less than two months later, on March 11, 2020, WHO characterized the COVID-19 outbreak

[1] Fatalities, New York State Department of Health ("DOH"), https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?:embed=yes&:toolbar=no&:tabs=n.

[2] New York Times, *New York City Region Is Now an Epicenter of the Coronavirus Pandemic*, https://nyti.ms/3kUJgbs.

[3] *See* New York, Covid Tracking Project, https://covidtracking.com/data/state/new-york#historical.

[4] *See id*.

as a pandemic. Dufort Decl. ¶ 10, Ex. D.

On March 7, 2020, pursuant to N.Y. Exec. Law § 29, Governor Cuomo issued Executive Order 202, implementing the State Comprehensive Emergency Management Plan and declaring a statewide disaster emergency. Dufort Decl. Ex. I. By Executive Order 202, the Governor suspended all State and local laws, rules, and regulations to the extent necessary to cope with the COVID-19 emergency. *Id*. Following the issuance of Executive Order 202, Governor Cuomo issued multiple supplemental Executive Orders, continuing the temporary suspension and modification of certain laws relating to the state of emergency. *See, e.g.*, Dufort Decl. ¶¶ 27-36.

On March 16, 2020, by Executive Order 202.3, on-premises service of food and beverages in all bars and restaurants was indefinitely suspended. Dufort Decl. Ex. J. Executive Order 202.3 stated that "[a]ny restaurant or bar in the state of New York shall cease serving patrons food or beverage on-premises effective at 8 pm on March 16, 2020, and until further notice shall only serve food or beverage for off-premises consumption." *Id.* On March 20, 2020, Governor Cuomo announced the "New York State on PAUSE" initiative, which required, among other things, the closure of all non-essential businesses and prohibited non-essential gatherings of individuals of any size for any reason. Dufort Decl. ¶¶ 29-31. Executive Order 202.6 listed what businesses and services in New York State were deemed "essential" and directed the Empire State Development Corporation ("ESD"), a New York State public benefit corporation, to issue guidance to further clarify which businesses would be considered "essential" or "non-essential." Dufort Decl. ¶ 55, Ex. S. Shortly afterward, ESD issued guidance that defined "Restaurants/bars (but only for take-out/delivery)" as essential businesses. Dufort Decl. Ex. T.

B. New York's Phased Reopening

Over the course of May and June, as the State's infection and death rates began to stabilize and then decline, New York transitioned from the "New York on PAUSE" initiative to

the "New York Forward" initiative, a phased plan to guide the reopening of non-essential businesses. Dufort Decl. ¶¶ 37-38. The New York Forward initiative was intended to begin reopening New York's economy in a slow, measured way that would prevent any new spikes in COVID-19 cases. *See id.* ¶¶ 38-41. Through this measured reopening, which has been data-driven and guided by public health experts, the State was able to keep the daily number of new infections and new deaths relatively flat at a time when cases were spiking throughout the rest of the country. *See id.* ¶¶ 42-46.

Outside of New York City, restaurants were permitted to open for indoor dining at 50% capacity, with other restrictions, when a region entered "Phase 3." *See* Dufort Decl. Ex. DD. However, indoor dining was not permitted in New York City during the phases of New York Forward given the significant risks of COVID-19 transmission presented by indoor dining in New York City.[5]

C. The Risk Of COVID-19 Transmission Posed By New York City's Bars And Restaurants

COVID-19 primarily spreads through person-to-person contact via respiratory droplets, and it may be spread not only by those who have symptoms, but also by those who are asymptomatic. *See* Dufort Decl. ¶¶ 7, 88, Ex. HH at 2. When it comes to the risk of COVID-19 transmission, indoor spaces are riskier than outdoor spaces. Dufort Decl. ¶¶ 12, 85, Ex. F at 2, 4, Ex. FF at 2-3. As noted by the Centers for Disease Control and Prevention ("CDC"), it is harder to keep people apart indoors versus outdoors, "and there's less ventilation," and, therefore, the CDC recommends that individuals "[c]hoose outdoor activities and places where it's easy to stay

[5] https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-city-enters-phase-iii-reopening-without-indoor-dining-and; *see also* Dufort Decl. ¶¶ 64-75, 85.

6 feet apart, like parks and open-air facilities."[6] Notably, a "study of the more than 300 outbreak clusters of COVID-19 in China reveals that the majority of the outbreaks were fueled by indoor transmission of the disease, while outdoor transmission was scarce."[7] Another study, designed to analyze the issue, similarly concluded that "[t]he virus is harder to transmit outdoors because the droplets that spread it are more easily disturbed or dispersed outside in the elements than in a closed, confined, indoor setting."[8] Another research team "found that superspreading events tended to happen in indoor spaces, with people in close proximity," and that superspreading events included "weddings, temples, bars and karaoke." Dufort Decl. ¶ 85, Ex. FF.

Although the risk of COVID-19 transmission can be mitigated by wearing masks, it is not possible for individuals to eat or drink while wearing a mask. Therefore, bars and restaurants are necessarily high risk. Further, individuals in bars and restaurants that serve alcohol tend to congregate and mingle, which increases the risk of spread. *Id*. ¶ 77. In a recent study conducted by the CDC, individuals who tested positive for COVID-19 were found twice as likely to have been in a bar or restaurant recently than individuals who have not tested positive.[9] Additionally, DOH tracks clusters throughout the State and found that the second highest level of clusters, in areas where indoor dining is permitted, came from restaurants/bars. Dufort Decl. ¶ 86.

There is a higher risk of COVID-19 transmission in New York City than in the rest of the State because it is both more populated and more densely populated than the rest of the State.[10] Indeed, the five counties making up New York City are the most densely populated counties in the State. *Id*. Kings County, where Plaintiff's bar and restaurant are located, is the most populous

[6] CDC, *Deciding to Go Out*, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html.
[7] The Hill, *New study finds few cases of outdoor transmission of coronavirus in China*, https://bit.ly/2S8ino6.
[8] The Hill, *Evidence mounts that outside is safer when it comes to COVID-19*, https://bit.ly/3mVjsh4.
[9] CDC Report, available at https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm?s_cid=mm6936a5_x.
[10] Table 2: Population, Land Area, and Population Density by County, New York State 2017, New York State Department of Health, available at https://www.health.ny.gov/statistics/vital_statistics/2017/table02.htm.

county of all, with 2,648,771 people, and the second highest population density, with 37,401.45 people per square mile. *Id*. Kings County is almost eight times as densely populated as Nassau County, which Plaintiff uses as a comparator, as Nassau only has 4,810.04 people per square mile. *Id*. Richmond County – which Plaintiff also looks to as a comparator – is both the least populous and least densely populated county in New York City, yet still almost twice as densely populated (1.7 times more dense) as Nassau County. *Id*.

D. The Rules Governing New York City's Bars And Restaurants

As explained above, New York bars and restaurants have been permitted to stay open for takeout and delivery throughout the entirety of the pandemic. *See* Dufort Decl. Ex. J. Executive Order 202.3 also allowed bars and restaurants to sell alcoholic beverages for takeout and delivery, a new privilege ordinarily reserved for liquor stores and grocery stores, although such sales had to be accompanied with the purchase of food. *See id*. Notably, New York State laws governing liquor licenses do not make a distinction between bars and restaurants, and require premises selling alcohol to have food available. *See, e.g.*, N.Y. Alco. Bev. Cont. Law §§ 64, 64-a, 100, 106 (McKinney).

On June 6, 2020, Governor Cuomo issued Executive Order 202.38, which allowed restaurants to serve patrons on-premises, but "only in outdoor space, provided such restaurant or bar is in compliance with Department of Health guidance promulgated for such activity."[11] Governor Cuomo subsequently issued Executive Order 202.52, which clarified that the purpose in allowing outdoor dining was to allow patrons to dine, with accompanying drinking, while restricting the congregating and mingling that arise in a bar service/drinking only environment.[12]

[11] https://www.governor.ny.gov/news/no-20238-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.

[12] https://www.governor.ny.gov/news/no-20252-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.

To avoid these dangerous conditions, the sale of alcohol would have to be accompanied by the purchase of food. *See id.*; Dufort Decl. ¶ 64. It was announced on September 25, 2020, that New York City's outdoor dining program will become permanent, rather than expiring on October 31, and that heat lamps will be permitted to keep diners warm during the cooler months.[13]

On September 9, 2020, Governor Cuomo announced that indoor dining could resume in New York City starting on September 30, 2020, with a 25 percent occupancy limit. Dufort Decl. Ex. X (Executive Order 202.61). All restaurants that choose to reopen indoor dining will be subject to strict safety protocols, including temperature checks, contact information for tracing, and face coverings when not seated. *Id*. In addition, bar service will not be permitted, and restaurants will close at midnight. *Id*. The announcement also stated that the guidelines will be reassessed based on the data by November 1, 2020. *Id*.

The Governor's Executive Orders regarding restaurant and tavern service have sought to balance industry needs with a safe reopening that avoids unnecessary congregating and mingling. Dufort Decl. ¶ 64. The more people an individual interacts with at a gathering and the longer that interaction lasts, the higher the potential risk of their becoming infected with COVID-19 and spreading the disease. *Id.* ¶¶ 69, 83. A lengthy period of time occupying the same space is an important factor in increased risk of transmitting the COVID-19 virus, and late-night service can further encourage individuals to gather and mingle, heightening the risk of COVID-19 transmission. *Id*. ¶ 77. This risk is particularly acute at establishments that serve alcohol, because as individuals drink they are more likely to neglect social distancing standards, and the chances of further mingling and transmission of the virus increase the later a bar or restaurant remains open. *Id*. ¶¶ 70, 77. The midnight closure rule will mitigate these risks. *Id.* ¶¶ 64-77.

[13] https://nypost.com/2020/09/25/de-blasio-nyc-outdoor-dining-plan-permanent-year-round.

THE PRESENT LAWSUIT AND PRELIMINARY INJUNCTION MOTION

Plaintiff operates a bar and restaurant in Brooklyn. Compl. ¶ 4 (Plaintiff "is a food service establishment in Brooklyn"), ¶ 54 ("The Graham sells alcoholic beverages and has an active license issued by the state to do so."). Plaintiff commenced this proceeding by filing a complaint on or about September 14, 2020. ECF No. 1 ("Complaint" or "Compl."). The Complaint alleges two claims against Governor Cuomo. First, Plaintiff alleges that Governor Cuomo's Executive Order requiring restaurants to close at midnight violates its substantive due process right because there is "no discernable public health benefit to forcing all restaurants to close at midnight." Compl. ¶ 60. Second, Plaintiff alleges that the rule is "arbitrary and capricious" and, therefore, should be annulled under CPLR 7806. *Id.* ¶¶ 64-67.

Plaintiff filed its motion for a preliminary injunction on September 17, 2020, requesting that the Court "preliminarily enjoin Defendant and his agents from enforcing the food curfew and from issuing or enforcing any substantially similar rules." ECF No. 10, September 17, 2020 Time-Sensitive Motion for Preliminary Injunction ("Pl. Br.") at 19. In an affidavit filed in support of the motion, the owner of The Graham asserts that "we will face bankruptcy if we are forced to operate effectively indoor-only, 25% capacity, closing at midnight, for any substantial amount of time." Affidavit of Tov Lutzker dated September 16, 2020, ECF No. 10-1, ¶ 11.

STANDARD OF REVIEW

A. Preliminary Injunction Standard of Review

A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiff bears the burden of establishing each of the following elements: (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Id*. at 20. The final

two factors – the balance of the equities and the public interest – "'merge when the Government is the opposing party.'" *L&M Bus Corp. v. Bd. of Educ.*, 18 Civ. 1902, 2018 WL 2390125, at *13 (E.D.N.Y. May 25, 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

In addition, the Second Circuit has "held the movant to a heightened standard" where, as here: (i) an injunction is "mandatory" (i.e., altering the status quo rather than maintaining it), or (ii) the injunction "will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *People ex. rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015). In such cases, "the movant must show a 'clear' or 'substantial' likelihood of success on the merits and make a 'strong showing' of irreparable harm, in addition to showing that the preliminary injunction is in the public interest." *Id.* (quoting *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999); *Doe v. N.Y.U.*, 666 F.2d 761, 773 (2d Cir. 1981)).

Despite Plaintiff's assertion otherwise, Plaintiff is seeking to alter the status quo. Pl. Br. at 5. Currently, all restaurants in New York City are prohibited from offering indoor dining and are only permitted to offer indoor dining until midnight starting September 30, 2020. Plaintiff seeks to alter this status quo so that it can offer indoor dining at its bar and restaurant at any hour it wishes. Thus, Plaintiff's motion is subject to the heightened standard for a mandatory injunction. Plaintiff cannot meet this heightened standard.

B. The *Jacobson* Standard

This is the latest in a series of actions brought in New York and across the country that have challenged state and local government restrictions on in-person gatherings enacted to reduce the death toll of COVID-19. Such actions contradict a long line of precedent, dating back to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in which the Supreme Court declared that "a community has the right to protect itself against an epidemic of disease which threatens its

members," and that in such times judicial scrutiny is reserved for a measure that "has no real or substantial relation to" the object of protecting the public or is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 27, 31; *see also Geller v. Cuomo*, 20 Civ. 4653, 2020 WL 4463207, at *10 (S.D.N.Y. Aug. 3, 2020) (relying on *Jacobson* to uphold prohibition of non-essential gatherings of over 50 people).

As Chief Justice Roberts recently observed: "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring).[14] Justice Roberts cautioned that a court should be especially reluctant to impose its own judgment in order to set aside acts of those better trained and charged with responsibility to respond to matters "fraught with medical and scientific uncertainties," and in the face of those uncertainties, the latitude given those officials "must be especially broad." *Id.* (denying injunctive relief against California order aimed at limiting spread of COVID-19); *see also Ass'n of Jewish Camp Operators v. Cuomo*, 20 Civ. 687, 2020 WL 3766496, at *8 (N.D.N.Y. July 6, 2020) ("the Court joins the many courts throughout the country that rely on *Jacobson* when determining if a governor's executive order has improperly curtailed an individual's constitutional right during the COVID-19 pandemic"); *Luke's Catering Service, LLC v. Cuomo*, 20 Civ. 1086, 2020 WL 5425008, at *14-15 (W.D.N.Y. Sept. 10, 2020) (applying *Jacobson* to deny preliminary injunction and grant cross-motion to dismiss, in a

[14] Plaintiff attempts to cite to the Ninth Circuit's decision *South Bay* in support of its argument for a preliminary injunction. Pl. Br. at 6. However, the portion of *South Bay* cited by Plaintiff is the *dissent*. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting). In fact, the Ninth Circuit denied the plaintiff's motion for an injunction in that case because the plaintiff had no likelihood of success on its First Amendment challenge and because "[w]e're dealing here with a highly contagious and often fatal disease for which there presently is no known cure." *Id*. at 939. The Supreme Court also subsequently denied the injunction.

challenge to New York's 50-person limit on event and banquet venues).[15]

For these reasons, Plaintiff's motion for a preliminary injunction should be denied.

ARGUMENT

I. PLAINTIFF CANNOT ESTABLISH A "CLEAR" OR "SUBSTANTIAL" LIKELIHOOD OF SUCCESS ON THE MERITS

A. Plaintiff's Federal Constitutional Claim Will Not Succeed

1. Standards Applicable to Plaintiff's Substantive Due Process Claim

Substantive due process does not protect "against government action that is incorrect or ill-advised." *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994) (internal quotations omitted). Instead, it protects only against "egregious conduct which . . . can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience." *Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 173 (2d Cir. 2002) (internal quotations omitted). To state a substantive due process claim, the plaintiff must allege: (1) a "valid property interest" or "fundamental

[15] This principle of deference to states' determinations as to how to protect their citizens from the COVID-19 pandemic has resulted in a chorus of decisions upholding state laws and directives. *See, e.g.*, *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125 (6th Cir. 2020) (MI order closing indoor gyms); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (IL order limiting size of religious services); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020) (TX temporary ban on unnecessary procedures, including abortion); *Corbett v. Cuomo*, 20 Civ. 4864, Dkt. No. 13 (S.D.N.Y. July 2, 2020) (NY order requiring travel quarantine); *Ill. Republican Party v. Pritzker*, 2020 WL 3604106 (N.D. Ill. July 2, 2020) (IL gatherings restriction); *Elmsford Apt. Associates, LLC v. Cuomo*, 2020 WL 3498456 (S.D.N.Y. June 29, 2020) (NY eviction moratorium); *McCarthy v. Cuomo*, 20 Civ. 2124, 2020 WL 3286530 (E.D.N.Y. June 18, 2020) (NY gathering restriction); *Slidewaters LLC v. Wash. Dep't of Labor & Indus.*, 2020 WL 3130295 (E.D. Wash. June 12, 2020) (WA order closing certain business); *Calvary Chapel Lone Mtn. v. Sisolak*, 2020 WL 3108716 (D. Nev. June 11, 2020) (NV order limiting size of religious services); *Prof'l Beauty Fed. of Cal. v. Newsom*, 2020 WL 3056126 (C.D. Cal. June 8, 2020) (CA order closing non-essential business); *Talleywhacker, Inc. v. Cooper*, 2020 WL 3051207 (E.D.N.C. June 8, 2020) (NC order closing non-essential business); *Best Supplement Guide, LLC v. Newsom*, 2020 WL 2615022 (E.D. Cal. May 22, 2020) (CA order closing non-essential business); *Antietam Battlefield KOA v. Hogan*, 2020 WL 2556496 (D. Md. May 20, 2020) (MD gathering restriction); *Open Our Oregon v. Brown*, 2020 WL 2542861 (D. Or. May 19, 2020) (OR order closing non-essential business); *Geller v. De Blasio*, 20 Civ. 3566, 2020 WL 2520711 (S.D.N.Y. May 18, 2020) (NY gathering restriction); *Henry v. DeSantis*, 2020 WL 2479447 (S.D. Fla. May 14, 2020) (FL order closing businesses and restricting movement); *Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913 (D. Me. May 9, 2020) (ME gatherings restriction); *McGhee v. City of Flagstaff*, 2020 WL 2308479 (D. Az. May 8, 2020) (AZ stay-at-home order and order closing business); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758 (E.D. Cal. 2020) (CA gathering restriction); *Cassell v. Snyders*, 2020 WL 2112374 (N.D. Ill. May 3, 2020) (IL stay-at-home order); *Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416 (E.D. Va. May 1, 2020) (VA gathering restriction); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) (CA stay-at-home order); *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 (D.N.M. Apr. 17, 2020) (NM gathering restriction).

right"; and (2) that the defendant infringed on that right by conduct that "shocks the conscience" or suggests a "gross abuse of governmental authority." *Leder v. Am. Traffic Solutions, Inc.*, 81 F. Supp. 3d 211, 223 (E.D.N.Y.), *aff'd*, 630 F. App'x 61 (2d Cir. 2015). Plaintiff's allegations do not rise to the level of stating a viable substantive due process claim for several reasons.

Here, Plaintiff does not allege a "fundamental right" protected by the United States Constitution. The scope of rights afforded by the substantive component of the due process clause is extremely limited, and its protection extends only to those interests that are "implicit in the concept of ordered liberty," rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Walker v. City of Waterbury*, 361 F. App'x 163, 165 (2d Cir. 2010) (internal quotations and citations omitted). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 271-72 (1994). The general right to do business has not been recognized as a constitutionally protected property right. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999); *see also 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) (finding no "fundamental right to work in the common occupations of the community" and "[a]ny such fundamental right that may have been recognized earlier was derived solely from substantive due process cases which have been either discredited or overruled" (quotation marks omitted)). Also, unlike in the case of procedural due process, it is not enough to have a property right under state law. *Local 342, Long Island Pub. Serv. Employees v. Town Bd.*, 31 F.3d 1191, 1196 (2d Cir. 1994). Since Plaintiff is complaining of interests relating to its ability to remain in business, it has not demonstrated an infringement of a fundamental right.

Consequently, the rational basis test applies to Plaintiff's constitutional claims – a point it appears to admit. Pl. Br. at 8 n.4, 13.[16] This standard is a deferential one: "As 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) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). Utilizing that legal framework, the Court must presume that the Executive Order is constitutional, making it incumbent upon Plaintiff to negate "every conceivable basis which might support" it. *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012).

Plaintiff nevertheless asserts, without any basis whatsoever, that the State is "required to provide *and show evidence of* a good reason to enact the restriction," and that "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." Pl. Br. at 7 (emphasis in original). Plaintiff is wrong. The law is clear that it is the *plaintiff's* burden to "discredit any conceivable basis which could be advanced to support the challenged" rule, "regardless of whether that basis has a foundation in the record," and regardless of whether that basis "actually motivated" the rule at issue. *Beatie v. City of N.Y.*, 123 F.3d 707, 713 (2d Cir. 1997) (citing *Heller*, 509 U.S. at 320-21; *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). In fact, "to succeed on a substantive due process challenge, a plaintiff must do more than show that the legislature's *stated* assumptions are irrational." *Id*. (emphasis in original).

[16] Although Plaintiff admits that the rational basis test applies, it also cites various recent cases from other Circuits, mostly concerning restrictions on abortion, trying to imply that some stricter standard may also apply during a pandemic. *See, e.g.*, Pl. Br. at 6-7 (citing *In re Rutledge*, No. 20-1791, 956 F.3d 1018 (8th Cir. 2020); *Abbott*, 954 F.3d 772; *Robinson v. Attorney Gen.*, No. 20-11401-B, 957 F.3d 1171 (11th Cir. 2020)). However, as discussed below, Plaintiff's attempt to merge the rational basis standard with higher standards of review has no basis in law.

As *Beatie* further held, 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.* at 713 (finding it rational "for the New York City Council to conclude that cigar smoke might be harmful"). In fact, "unlike exacting forms of scrutiny applied in other contexts, the Governor was not required to explain that choice at all, let alone exhaustively." *Whitmer*, 814 F. App'x at 128 (citing *Beach Commc'ns*, 508 U.S. at 313-14); *see also Windsor v. United States*, 699 F.3d 169, 196 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (in a rational basis review "courts look to any 'conceivable basis' for the challenged law, not limited to those articulated by or even consistent with the rationales offered by the legislature").

Plaintiff is also wholly incorrect in claiming that there is no "substantial difference" between the standard for whether governmental action violates the United States Constitution and whether an administrative action can be deemed arbitrary and capricious under State law. *See* Pl. Br. at 8 n.4. Instead, "[s]ubstantive due process is an outer limit on the legitimacy of governmental action." *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999). As such, it does *not* forbid actions even if they could "fairly be deemed arbitrary or capricious and for that reason correctable in a state court lawsuit seeking review of administrative action." *Id.* Rather, substantive due process rights "are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." *Id.*

2. There Is A Rational Basis For The Midnight Closure Rule

Plaintiff errs in claiming that its substantive due process rights have been violated because there is purportedly "no discernable public health benefit" to an Executive Order restricting its hours of operation. Compl. ¶ 60. To the contrary, limiting the hours of bars and restaurants within a city that is still in the midst of a pandemic is quite rational, and reasonably

related to a legitimate government interest of avoiding an increase in COVID-19 cases. *See Wigginess Inc.*, 482 F. Supp. at 689 n.11 ("State statutes regulating business activity need only be rationally related to a legitimate state objective."); *McCarthy*, 2020 WL 3286530, at *6 ("Given the seriousness of the COVID-19 pandemic, I find it exceedingly unlikely that plaintiffs will be able to demonstrate that the COVID-19 Executive Orders do not have a rational basis."). As explained above, bars and restaurants are particularly high risk because (1) COVID-19 spreads more easily indoors, (2) individuals in bars and restaurants cannot wear masks while eating or drinking, and (3) congregating and mingling increases the risk of spread, and drinking at a bar or restaurant can encourage such activity. Dufort Decl. ¶¶ 64-77. These risks increase later at night because the longer the establishment remains open, the more alcohol is likely to be consumed by patrons and the less likely it is that social distancing and other guidelines for preventing the risk of spread will be followed. *Id.* ¶¶ 70-71. Further, the longer individuals occupy the same space, the higher the risk of transmitting the COVID-19 virus increases. *Id.* ¶ 77. This explanation is easily sufficient under rational basis review. *See Ass'n of Jewish Camp Operators*, 2020 WL 3766496, at *16 ("preventing the spread of COVID-19 is a legitimate interest, and that interest is rationally related to the prohibition on overnight camps").[17]

Moreover, limiting the hours that a bar and restaurant can serve food and alcohol is not "egregious conduct which . . . can fairly be viewed as so brutal and offensive to human dignity as to shock the conscience" such that it violates substantive due process. *See Smith*, 298 F.3d at 173. Indeed, district courts have found, in decisions upheld by the Second Circuit, that restrictions on the sale of alcohol, including limits on the hours of sale, do not violate substantive

[17] Plaintiff cites to *DiMartile v. Cuomo*, 120 Civ. 859, 2020 WL 4558711 (N.D.N.Y. Aug. 7, 2020), in support of its motion, but ignores that the Second Circuit issued an order staying the injunction issued by the district court in *DiMartile* pending appeal. *DiMartile v. Cuomo*, No. 20-2683, 2020 WL 5406781, at *1 (2d Cir. Sept. 8, 2020).

due process. *See Obsession Sports Bar & Grill, Inc. v. City of Rochester*, 235 F. Supp. 3d 461, 470 (W.D.N.Y.), *aff'd*, 706 F. App'x 53 (2d Cir. 2017) (municipality's actions in restricting plaintiff's hours of operation below those permitted by the ABC Law were not "arbitrary, conscience-shocking, or oppressive in the constitutional sense"); *Perrotti v. Town of Middlebury*, 3:06 Civ. 1930, 2009 WL 3682535, at *9 (D. Conn. Nov. 2, 2009), *aff'd*, 391 F. App'x 900 (2d Cir. 2010) (defendants' attempt to limit plaintiff to serving wine and beer, but not liquor, was not "conduct that could be considered conscience shocking" or arbitrary in the constitutional sense, and a liquor license is not a property interest protected by the Constitution).

Plaintiff also incorrectly claims that there is no rational basis for the Executive Order to treat restaurants in New York City differently than restaurants outside of the City.[18] There are straightforward reasons to treat New York City differently than the rest of the State: it is the most densely populated region in the State, and it was the hardest hit by the pandemic. Because courts are "required to uphold the classification 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,'" these reasons are more than sufficient. *See Sensational Smiles*, 793 F.3d at 284 (quoting *Heller*, 509 U.S. at 320). Further, as explained above, "[w]here rational basis scrutiny applies, the 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). Thus, Plaintiff cannot succeed on its challenge to a rule treating restaurants in New York City differently than those outside of New York City.

[18] Although neither the Complaint nor the preliminary injunction motion references the Equal Protection clause, Plaintiff asserts that the midnight closure rule is biased and discriminates against New York City. Regardless of whether Plaintiff is asserting substantive due process or equal protection claims, they are subject to rational basis review because the classifications made by Governor Cuomo "neither involv[e] fundamental rights nor proceed[] along suspect lines." *Sensational Smiles*, 793 F.3d at 284. Accordingly, to prevail, Plaintiff again must "negative every conceivable basis which might support" the classification. *Id.*

Plaintiff also claims that there is no rational basis to force McDonald's or a 24/7 diner to close for indoor dining at midnight. Pl. Br. at 13. But Plaintiff is not McDonald's or a diner, nor is it comparable to either of them. Instead, Plaintiff is a restaurant serving alcohol (Compl. ¶ 54) that holds itself out as a bar.[19] Thus, the rationale of the midnight closure rule is directly relevant to Plaintiff's establishment and to this motion for a preliminary injunction, and Plaintiff lacks standing to raise constitutional arguments on behalf of McDonald's or 24/7 diners. *Great Atl. & Pac. Tea Co. v. Town of E. Hampton*, 997 F. Supp. 340, 349 (E.D.N.Y. 1998) ("a party must assert his or her own legal rights and interests, and cannot rest the claim to relief on the legal rights or interests of third parties") (citing *Warth v. Seldin*, 422 U.S. 490 (1975)).

Plaintiff's remaining arguments are also insufficient to negate "every conceivable basis which might support" the midnight closure rule. *Armour*, 566 U.S. at 681. Plaintiff claims that the midnight closure rule will effectively make restaurants more crowded because those who would eat after midnight must eat earlier. Compl. ¶ 43. This argument fails because indoor dining is currently restricted to 25% capacity, and, therefore, there is no risk of crowding. Plaintiff also claims there is no basis to continue with strict precautions against the spread of COVID-19 in New York City because it has a low per capita infection rate. Pl. Br. at 9. But the reason for the low infection rate is because New York City has followed such precautions. Stated differently, the low infection rate is not evidence that the precautions are unnecessary, but that they are *effective*.

Plaintiff also claims that measures to prevent the spread of COVID-19 are unnecessary because of a purported herd immunity. Pl. Br. at 10. However, Plaintiff does not cite any scientific evidence supporting this argument. It only cites a *New York Times* article that states

[19] *See* https://www.thegrahambrooklyn.com ("At night we're the same bar you know and love!").

that some researchers "have expressed *hope*" that herd immunity may only require around 50% of a community to have immunity, while others have suggested a higher threshold of 70%.[20] Further, there have already been spikes in cases in New York City communities with reportedly high rates of testing positive for antibodies, which strongly refutes any claims that New York can rely on herd immunity.[21] Also, it is unknown how long immunity lasts, as there are already reported cases of individuals contracting COVID-19 a second time.[22] Regardless, there is no evidence that anywhere near 50% to 70% of New Yorkers have immunity, and Plaintiff admits that only around 2.4% of New Yorkers have "tested positive for coronavirus as of the date of the docketing of this lawsuit." Compl. ¶ 20.

In sum, the Executive Order clearly meets the requirements of rational basis review. This is particularly the case when it is viewed through the lens of *Jacobson*'s requirement that a government measure enacted to combat an epidemic must be upheld unless it "'has no real or substantial relation to'" the object of protecting 'the public health, the public morals, or the public safety' or 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Geller*, 2020 WL 2520711 at *3 (quoting *Jacobson*, 197 U.S. at 31). Thus, Plaintiff has no chance of success on its federal claim.

B. Plaintiff's State Law Claim Will Not Succeed

1. Plaintiff's State Law Claim Is Barred By The Eleventh Amendment

Plaintiff's second cause of action – which seeks relief under CPLR Article 78 by alleging

[20] New York Times, *1.5 Million Antibody Tests Show What Parts of N.Y.C. Were Hit Hardest*, https://www.nytimes.com/2020/08/19/nyregion/new-york-city-antibody-test.html (emphasis added).

[21] The article cited by Plaintiff, dated August 19, 2020, claims that more than 46.8% of people in the Borough Park neighborhood tested for antibodies were positive. *See id.* However, there was an "uptick" in cases in Borough Park reported that same day, and another "surge" in cases in this neighborhood was reported on September 22, 2020. *See* https://cbsloc.al/2S5VwJF; https://bit.ly/339DSuZ.

[22] https://www.sciencemag.org/news/2020/08/some-people-can-get-pandemic-virus-twice-study-suggests-no-reason-panic.

that the Executive Order is "arbitrary and capricious or an abuse of discretion" – is barred from consideration in this Court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103-06 (1984) (Eleventh Amendment prevents suit requiring state official to follow state law). The Eleventh Amendment prohibits lawsuits against a state without the State's unambiguous consent or an act of Congress. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54-55 (1996). This immunity "includes suits against state officials in their official capacities," such as Governor Cuomo. *Li v. Lorenzo*, 712 F. App'x 21, 22 (2d Cir. 2017) (summary order) (citing *Davis v. New York*, 316 F.3d 93, 101-02 (2d Cir. 2002)). A narrow exception to Eleventh Amendment immunity exists under the *Ex parte Young* doctrine, which permits "suits against state officers acting in their official capacities that seek prospective injunctive relief to prevent a continuing violation of federal law," but "*Young* does not allow a federal court to issue an injunction for a violation of state law." *Kelly v. N.Y. Civil Serv. Comm'n*, 632 F. App'x 17, 18 (2d Cir. 2016) (summary order); *accord Treistman v. McGinty*, 804 F. App'x 98, 99 (2d Cir. 2020) (summary order) ("A claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment.").[23] Accordingly, Plaintiff's State law claim necessarily fails.

2. CPLR Article 78 Challenges Can Only Be Heard In State Court

Even if the Eleventh Amendment did not bar Plaintiff's CPLR Article 78 claims here, it still would be unable to proceed because CPLR Article 78 claims can only be brought in State court. CPLR Article 78 explicitly requires that "[a] proceeding under this article shall be brought in the [State] supreme court," except for certain exceptions specified in CPLR 506 when the proceeding must be brought in the State appellate division. CPLR 7804; CPLR 506. As a result,

[23] The fact that Plaintiff has also alleged federal causes of action is of no moment, because "[t]his constitutional bar applies to pendent claims as well." *Pennhurst*, 465 U.S. at 120.

federal courts consistently find that they "do not have the discretion to exercise supplemental jurisdiction over an Article 78 claim." *Cartagena v. City of N.Y.*, 257 F. Supp. 2d 708, 710 (S.D.N.Y. 2003) ("'[T]he [State] Supreme Court has *exclusive* jurisdiction over Article 78 proceedings,' with the exception of the Article 78 proceedings that must be brought in the Appellate Division.") (quoting *Vanderbilt Museum v. American Assoc. of Museums*, 113 Misc.2d 502 (1982)); *Beckwith v. Erie Cnty. Water Auth.*, 413 F. Supp. 2d 214, 226 (W.D.N.Y. 2006) ("This court has no original or supplemental subject matter jurisdiction over [plaintiff's] Article 78 proceeding as neither federal nor New York state law empower the federal courts to consider such claims, and, under New York law, authority to grant relief pursuant to an Article 78 proceeding is exclusively vested in New York Supreme Court."); *Clear Wireless L.L.C. v. Bldg. Dep't of Lynbrook*, 10 Civ. 5055, 2012 WL 826749, at *9 (E.D.N.Y. Mar. 8, 2012) ("The overwhelming majority of district courts confronted with the question of whether to exercise supplemental jurisdiction over Article 78 claims have found that they are without power to do so or have declined to do so.").

Moreover, "Article 78 is not in and of itself a cause of action, but a procedure best suited for state courts." *DeJesus v. City of N.Y.*, 10 Civ. 9400, 2012 WL 569176, at *4 (S.D.N.Y. Feb. 21, 2012). "Recognizing state courts' exclusive jurisdiction over Article 78, courts within this circuit have consistently declined to exercise supplemental jurisdiction over Article 78 claims." *Id.* As explained in *Lucchese v. Carboni*, 22 F. Supp. 2d 256 (S.D.N.Y. 1998):

> An Article 78 proceeding is a novel and special creation of state law, and differs markedly from the typical civil action brought in this Court in a number of ways. It is a 'special proceeding . . . designed to facilitate a summary disposition of the issues presented, . . . and has been described as a fast and cheap way to implement a right that is as plenary as an action, culminating in a judgment, but is brought on with the ease, speed and inexpensiveness of a mere motion.' Article 78 proceedings were designed for the state courts, and are best suited to adjudication there.

Id. at 258 (quoting *Davidson v. Capuano*, 792 F.2d 275, 280 (2d Cir. 1986)). Thus, Plaintiff's attempt to assert an Article 78 claim should not be considered by this Court.

3. CPLR Article 78 Proceedings And Standards Are Not Available To Challenge Executive Orders

Even if the Court could hear Plaintiff's CPLR Article 78 challenge (which it cannot), such a claim would still fail because Article 78 proceedings are not available against executive officials, nor are they available to review a legislative act. The State Court of Appeals has repeatedly held "that article 78 may not be used against executive officials." *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 815 (2003) (citing *Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143 (1983); *Matter of Dondi v. Jones*, 40 N.Y.2d 8 (1976)) (plaintiff could not use article 78 to challenge the Governor's signing of a compact). New York's highest court has also found that a "legislative act [is] not generally reviewable in a proceeding under article 78." *See Voelckers v. Guelli*, 58 N.Y.2d 170, 176 (1983); *cf. Triolo v. Johnson*, 65 Misc. 2d 424, 426 (Sup. Ct. Albany Cnty. 1970), *aff'd*, 40 A.D.2d 953 (3d Dep't 1972) ("Article 78 review is not generally available to review the propriety or wisdom of a legislative act, except where the local legislative body is exceeding its constitutional power."). Plaintiff acknowledges that Article 78 proceedings are meant to challenge an "'*administrative* action.'" Pl. Br. at 8 (quoting, *inter alia*, *Pell v. Board of Education*, 34 N.Y.2d 222 (1974)) (emphasis added).

Here, Governor Cuomo is certainly an executive official, and the Executive Order is legislative in nature because it is generally applicable, in that it applies equally and prospectively to every restaurant across the entirety of New York City. *See O'Bradovich v. Village of Tuckahoe*, 325 F. Supp. 2d 413, 429-30 (S.D.N.Y. 2004) ("Official action is adjudicative when it is 'designed to adjudicate disputed facts in particular cases.' It is legislative when it has 'general application and look[s] to the future.'") (quoting *United States v. Fla. E. Coast Ry.*, 410 U.S.

224, 245 (1973); *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 142 (2d Cir. 1994)). Therefore, Governor Cuomo's Executive Order cannot be challenged under State law on the basis that it is allegedly "arbitrary and capricious" or "an abuse of discretion." Accordingly, Plaintiff has no chance of success on its State claim.

II. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF NEW YORK'S MISSION TO PROTECT ITS CITIZENS FROM A GLOBAL PANDEMIC

The balance of equities and considerations of the public interest decidedly weigh in favor of denying Plaintiff's request for emergency relief. "As the Supreme Court reaffirmed in *Winter*[, 555 U.S. 7], a plaintiff seeking a preliminary injunction must demonstrate not just that they have some likelihood of success on the merits and will suffer irreparable harm absent an injunction, but also that the 'balance of the equities tips in his favor and an injunction is in the public interest.'" *Otoe-Missouria Tribe v. N.Y.S. Dep't of Fin. Svcs.*, 769 F.3d 105, 112 n.4. (2d Cir. 2014). "These factors merge when the Government is the opposing party." *Make the Rd. N.Y. v. Cuccinelli*, 419 F. Supp. 3d 647, 665 (S.D.N.Y. 2019) (citing *Nken*, 556 U.S. at 435).

Further, the court must ensure that the "public interest would not be disserved" by the issuance of a preliminary injunction. *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010). In exercising their discretion in whether to enter an injunction, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *N.Y.S. Rifle & Pistol Ass'n v. City of N.Y.*, 86 F. Supp. 3d 249, 258 (S.D.N.Y. 2015), *aff'd*, 883 F.3d 45 (2d Cir. 2018) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). This consideration includes the government's interest in public health. *Million Youth March, Inc. v. Safir*, 155 F.3d 124, 125-26 (2d Cir. 1998) (modifying injunction because District Court failed to consider government's interest in, *inter alia*, public health against First Amendment rights).

The government's interest in preventing a spike in COVID-19 cases is vitally important.

Ensuring that restaurants and bars reopen for indoor dining at a slow and measured pace certainly furthers that interest. This slow and measured reopening also provides sufficient time for the State to analyze the subsequent data to ensure that the reopening is not leading to an increase in cases before proceeding with more a more expansive reopening plan. *See Ass'n of Jewish Camp Operators*, 2020 WL 3766496, at *21 (injunction was not in the public interest due to "the unprecedented nature of the COVID-19 pandemic, the deadly nature of the virus itself, the lack of a vaccine at the time of this writing, and lack of scientific agreement about its transmission"). Plaintiff's interest in operating its business without a midnight closing time hardly outweighs the critical need to ensure that the reopening of indoor dining for bars and restaurants does not endanger the public as a whole.

Accordingly, the public interest and equitable considerations require the denial of Plaintiff's motion. *See Winter*, 55 U.S. at 23-24 (holding "proper consideration" of public interest and equitable factor "alone require[d] denial of the requested injunctive relief").

III. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF IRREPARABLE HARM

Plaintiff has failed to present sufficient evidence that the temporary measures implemented to combat the COVID-19 pandemic will cause it irreparable harm. *Vis Vires Grp., Inc. v. Endonovo Therapeutics, Inc.*, 149 F. Supp. 3d 376, 390 (E.D.N.Y. 2016) ("To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.") (quoting *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)). The Executive Order at issue in the case permits restaurants to increase service by having indoor dining at 25% capacity until midnight starting September 30, 2020. Governor Cuomo has announced that these restrictions will be reevaluated by November 1, 2020. Further, outdoor dining will be permitted

in New York City with the use of heat lamps. Plaintiff has failed to sufficiently demonstrate that that one-month period of being restricted to 25% indoor capacity with a midnight closure, coupled with the continuation of outdoor dining, will lead to its imminent closure rather than simply financial loss of revenue for one month. *See Do Corp. v. Town of Stoughton*, 2013 WL 6383035, at *9 (D. Mass. Dec. 6, 2013) (holding that "modification of [nightclub's] liquor license to service before 11 p.m." was mere financial loss and not irreparable harm).

On the other hand, the State suffers irreparable harm any time that it is enjoined by the court from enforcing one of its policies. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). In the present case, such harm is manifest because the policy Plaintiff seeks to enjoin is intended to prevent the spread of COVID-19, and the resulting severe illnesses and loss of lives. Plaintiff's business is among the riskiest industries to reopen, and food service after midnight is more similar to a bar experience, where individuals congregate and mingle, than a restaurant, where patrons leave after finishing their meals. Dufort Decl. ¶¶ 69, 74, 77. Enjoining the Executive Order would impair the State's ability to safely manage the reopening process for all of these establishments during the pandemic, and would endanger the public health.

CONCLUSION

For the reasons set forth above, Governor Cuomo respectfully requests that the Court deny Plaintiff's motion for a preliminary injunction and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 29, 2020

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