IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAMELA GELLER, Plaintiff-Appellant, -v.- BILL DE BLASIO, individually and in his official capacity as Mayor, City of New York, New York; and DERMOT SHEA, individually and in his official capacity as the Police Commissioner, City of New York, New York, Defendants-Appellees.	Appeal No. 20-1592

PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND MEMORANDUM OF LAW IN SUPPORT

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INTRODUCTION

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Pamela Geller ("Plaintiff") hereby moves this Court for an injunction pending appeal that enjoins the enforcement of Defendants-Appellees' ("Defendants") restriction on her First Amendment right to freedom of speech and to peaceably assemble in public forums in the City of New York ("City"). Plaintiff's request for an injunction below was denied by the district court. (Op. & Order; R-27 at Ex. A).

LEGAL STANDARD

To obtain the requested injunction, Plaintiff "must establish [1] that [she] is likely to succeed on the merits, [2] that [she] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [her] favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Trump v. Deutsche Bank AG,* 943 F.3d 627, 640 (2d Cir. 2019) (same).

FACTS

On March 12, 2020, Defendant de Blasio issued an emergency executive order declaring a state of emergency for the City. (*See* Geller Decl., Ex. 1 [City EEO No. 98]; R-14-2 at Ex. B). On March 25, 2020, Defendant de Blasio issued Emergency Executive Order 103, which states in pertinent part:

> In order to avoid the mass congregation of people in public places and to reduce the opportunity for the spread of COVID-19 any non-essential gathering of individuals of any size for any reason shall be cancelled or postponed.

(Geller Decl. at Ex. 6 [City EEOC No. 103]; R-14-7 at Ex. B).

On May 4, 2020, Defendant de Blasio held a telephonic press conference. Participating with Defendant de Blasio were several City officials, including Defendant Shea. During the press conference, a reporter asked Defendant Shea what the City and police department's policies were with regard to a citizen's First Amendment right to peaceably assemble and publicly protest, especially when protestors and members of the media covering a protest are observing social distancing protocols. The question was predicated upon a small protest that had recently occurred in the City wherein the police officers dispersed the protest and, while doing so, threatened to issue summonses and make arrests. (Geller Decl. at ¶ 10 & Ex. 16 [Tr. of May 4 Press Conference]; R-14-17 at Ex. B).

Defendant Shea responded by explaining that the New York Police Department would not permit public protests of any kind. (*Id*. at ¶ 9). Immediately following Defendant Shea's answer, Defendant de Blasio confirmed Defendant Shea's position forbidding the gathering in public to protest. (*Id*. at ¶ 10 & Ex. 16 at 22).

Plaintiff Pamela Geller resides in the City. She is an experienced and successful champion of the First Amendment and has honed her free speech *bona*

fides over the years as president of the American Freedom Defense Initiative, a nonprofit organization that defends the right to freedom of speech, and as a published author, a conservative blogger, and a political activist. (Geller Decl. at ¶¶ 1, 11; R-14-1 at Ex. B).

Plaintiff is an experienced sponsor of non-violent and lawful public protests. She was, for example, the organizer of the successful public protest of the Ground Zero mosque construction in Lower Manhattan. She has also successfully challenged in federal court government restrictions on free speech in major cities throughout the United States, including New York, Washington D.C., Philadelphia, and Seattle, among others. (Geller Decl. ¶ 12; R-14-1 at Ex. B).

Prior to the May 4, 2020, press conference referenced above, Plaintiff was contemplating and planning lawful and safe public protests over what she considered Governor Cuomo's and Defendant de Blasio's draconian and unconstitutional executive edicts relating to COVID-19. In addition, Plaintiff was prepared to sponsor a demonstration against what she considers Defendant de Blasio's blatant bias against Jews. (Geller Decl. ¶ 13; R-14-1 at Ex. B).

In contemplation and in planning for these group public protests, Plaintiff would have provided for and maintained the requisite social distancing and proper use of face masks. The protests and demonstrations she was contemplating and planning would have taken place on open sidewalks and public courtyards in front

of and surrounding New York City Hall—public areas which are currently open to pedestrians for exercise, recreation, amusement, or to walk their pets. (Geller Decl. ¶ 15; R-14-1 at Ex. B).

In addition, the City has implemented an "Open Streets" program that closes certain streets to non-essential vehicular traffic and dedicates those "open streets" for pedestrians and cyclists who may choose to utilize them for personal and other lawful reasons. (Geller Decl. ¶ 16; R-14-1 at Ex. B). Alternate locations for Plaintiff's public protests would be on the "open streets" closest to government buildings and major media outlets in order to ensure the greatest exposure for her message. (Geller Decl. ¶ 17; R-14-1 at Ex. B).

Prior to the press conference of May 4, 2020, wherein Defendants announced that free speech gatherings and thereby public protests were "non-essential" and thus prohibited, Plaintiff, and apparently many other New Yorkers, had understood that public First Amendment activities that maintained the social distancing protocols and use of face masks when appropriate were permitted. Indeed, protests had taken place prior to the May 4 press conference. (Geller Supplemental Decl. ¶ 1; R-23-1 at Ex. C). It was only *after* the May 4 press conference that Plaintiff understood that Defendant de Blasio considered First Amendment group protests, even those adhering to social distancing protocols, illegal. (Geller Supplemental Decl. ¶ 3; R-23-1 at Ex. C).

To understand this matter in chronological context, Defendant de Blasio made his public statement singling out the Jews of New York as bad actors on April 28, 2020, and this was widely reported on April 29, 2020. Plaintiff immediately began planning her protests. However, just five days later, in the midst of her planning, Defendants announced at the May 4 press conference that any and all public protests were to be considered "non-essential" and illegal by virtue of Defendant de Blasio's order. (Geller Supplemental Decl. ¶ 2; R-23-1 at Ex. C).

When Plaintiff read the press reports of the May 4 press conference and then investigated further by reading the transcript of the press conference, she was shocked. Plaintiff immediately ceased planning the protest and contemplated alternatives. She quickly realized that no blog, podcast, or radio interview would gain any media traction in today's environment. The only viable means of exercising her First Amendment right to free speech and assembly would be a public protest. (Geller Supplemental Decl. ¶ 3; R-23-1 at Ex. C). Plaintiff filed her complaint in the district court three days later and filed her motion for temporary restraining order and preliminary injunction three court days after filing suit.

In planning for her protest, Plaintiff had in mind a protest at New York City Hall Park, which remains open today. The protest Plaintiff was planning was to

be a silent protest while wearing face masks. The protestors would be carrying signs as the primary means for expressing their message. It is not practical and nearly impossible to shout or chant while wearing a face mask. (Geller Supplemental Decl. ¶ 4; R-23-1 at Ex. C).

Every protest Plaintiff has ever sponsored has been lawful, peaceful, and respectful of those non-protestors in the area. Plaintiff has always carefully coordinated with police for any of her public group events. (Geller Supplemental Decl. ¶ 7; R-23-1 at Ex. C).

But for Defendant de Blasio's executive orders and Defendants' announced policies forbidding all group protests, thereby declaring the First Amendment right to peaceably assemble and publicly protest as non-essential group activities, Plaintiff would have organized and participated in public protests of Defendant de Blasio's policies in front of City Hall on public sidewalks and courtyards and on "open streets." As a result, Plaintiff has suffered and continues to suffer irreparable harm. (Geller Dec. ¶¶ 18, 19; R-14-1 at Ex. B).

ARGUMENT

While *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and this current pandemic may provide a "lens" through which this Court reviews the matter (Op. & Order at 8-9; R-27 at Ex. A), neither deprives this Court from

declaring the challenged First Amendment restriction unlawful and enjoining its enforcement.

In *Jacobson*, amid a smallpox outbreak, a city (acting pursuant to a state statute) mandated the vaccination of all its citizens. The Court upheld the statute against a Fourteenth Amendment challenge, clarifying that the State's action was a lawful exercise of its police powers and noting that, "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27. While the Court in *Jacobson* urges deferential review in times of emergency, it clearly demands that the courts enforce the Constitution. *See id.* at 28. Indeed, the Court explicitly contemplates an important and essential backstop role for the judiciary in circumstances such as this: "[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, *or* is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, *it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*" *Id.* at 31 (emphasis added).

Under *Jacobson*, therefore, a Mayor's emergency response can still be unlawful if it impinges on a fundamental right in a "plain, palpable" way or has "no real or substantial relation" to the public safety concerns at issue. *Jacobson*,

197 U.S. at 31; *see also Robinson v. AG*, Case No. 20-11401-B, 2020 U.S. App. LEXIS 1309, *16-28 (11th Cir. April 23, 2020) (upholding TRO citing *Jacobson* after testing factual claims by the state of the deleterious effect of abortions during pandemic); *Roberts v. Neace*, No. 20-5465, 2020 U.S. App. LEXIS 14933, *10-13 (6th Cir. May 9, 2020) (granting plaintiffs' motion for injunction pending appeal and citing *Jacobson*); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (citing *Jacobson* for the proposition that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims").

Accordingly, per *Jacobson*, requiring a vaccination for a disease that is the source of the public emergency is directly related to the government's public safety concerns. The same is not true of the challenged First Amendment restriction. Here, Defendant de Blasio seeks a "plenary override of individual liberty claims" through the enforcement of the challenged restriction. The Court should forbid it.

I. Plaintiff Is Likely to Succeed on the Merits of Her First Amendment Challenge.

Plaintiff's First Amendment claim is reviewed in three steps. First, the Court must determine whether the speech in question—Plaintiff's political protest—is protected speech. Second, the Court must conduct a forum analysis as to the forums in question to determine the proper constitutional standard to apply. And third, the Court must then determine whether the challenged restriction

comports with the applicable standard. *See, e.g., AFDI v. MTA I*, 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) (analyzing a free speech claim in "three parts").

Moreover, the challenged restriction "[is] an exercise of a prior restraint." *N.Y. Magazine*, 136 F.3d at 131; (*see also* Op. & Order at 9 [acknowledging that the challenged restriction operates as a "prior restraint"]; R-27 at Ex. A). "The essence of prior restraints are that they give public officials the power to deny use of a forum in advance of actual expression." *Beal v. Stern*, 184 F.3d 117, 124 (2d Cir. 1999) (citation omitted). Prior restraints are "the most serious and least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "*Any system of prior restraints of expression* comes to this Court bearing a heavy presumption *against its constitutional validity*." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases) (emphasis added).

Here, Defendants deny Plaintiff the use of any public forum within the City for her core political speech *in advance of the expression*. Defendants have made no provisions to permit expressive activity even if the protestors exercise appropriate social distancing and other safety measures such as wearing masks. Instead, Defendants have banned all group public protests in all public forums in the City. And Defendants have offered no factual, policy, or medical basis to make a distinction between permitting 50 *individuals* to engage in recreational activity—

or even protest activity if independent of one another—in one location but prohibiting the same 50 individuals from protesting as a *group* in the very same location. The First Amendment does not permit such restrictions.

A. Plaintiff's Proposed Speech is Protected by the First Amendment.

The first question is easily answered. Plaintiff's proposed political protest comes within the ambit of speech fully protected by the First Amendment. As stated by the Supreme Court, "speech on public issues," such as Plaintiff's planned protest of Defendant de Blasio's policies, "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Indeed, Plaintiff's speech is "core political speech," which "is afforded the highest level of protection under the First Amendment." *AFDI v. MTA I*, 880 F. Supp. 2d at 466 ("As a threshold matter, the Court notes that the AFDI Ad is not only protected speech—it is core political speech. . . . As such, the AFDI Ad is afforded the highest level of protection under the First Amendment."); *Schneider v. State*, 308 U.S. 147, 161 (1939) (observing that the exercise of First Amendment rights "lies at the foundation of free government by free men").

B. The Challenged Restriction Bans Speech in Traditional Public Forums.

"The [Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for [expressive] purposes." *Cornelius v. NAACP, 473 U.S. 788,* 800 (1985). Forum analysis has traditionally divided government property into three categories: traditional public forums, designated public forums, and nonpublic forums. *Id.* at 800; *N.Y. Magazine*, 136 F.3d at 128. Once the forum is identified, the Court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

Without question, Defendants' First Amendment restriction bans speech and assembly in traditional public forums. *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora.") (internal citation omitted); *see also Hous. Works v. Kerik*, 283 F.3d 471, 478 (2d Cir. 2002) ("City Hall Plaza is a public forum as defined by the Supreme Court."). Traditional public forums, such as streets, sidewalks, and parks, are places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

C. The Challenged Restriction Cannot Survive Constitutional Scrutiny.

Speech restrictions in public forums may be subject to reasonable time, place, and manner restrictions that further a significant government interest. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984); *Housing Works, Inc. v. Kerik*, 283 F.3d 471, 479 (2d Cir. 2002). "Content-neutral time, place, and manner restrictions are permitted so long as they are 'narrowly tailored to serve a significant government interest, leave open ample alternatives for communication,' and do 'not delegate overly broad licensing discretion' to government officials." *Beal v. Stern*, 184 F.3d 117, 124 (2d Cir. 1999) (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)); *see also Ward*, 491 U.S. at 791. Defendants have the burden of establishing that the challenged restriction is a legitimate time, place, and manner regulation. *See Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334, 346 (S.D.N.Y. 1998), *modified in part by* 155 F.3d 124 (2d Cir 1998); *see also Thomas v. Chi. Park Dist*, 534 U.S. 316 (2002). This standard is not a pushover. *See Olivieri v. Ward*, 801 F.2d 602, 606 (2d Cir. 1986) (explaining and underscoring the court's role in closely scrutinizing and examining the government's rationale for imposing time-place-manner restrictions).

Accordingly, this Court must play an active and probing role in testing any underlying factual assertions serving as Defendants' basis for imposing the ban on

the First Amendment right to free speech and to peaceably assemble in the City. Indeed, it is Defendants' burden to justify their restriction on First Amendment rights—it is not Plaintiff's burden to justify her liberty.

As stated by this Court:

> The Supreme Court has held that the government must present substantial supporting evidence in order for a regulation that threatens speech to be upheld. Specifically, the Court has stated that speculation or surmise is insufficient:
>
> > When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease to be cured. It must demonstrate that the recited harms are real, not merely conjectural, *and that the regulation will in fact alleviate these harms in a direct and material way*.

Eclipse Enters. v. Gulotta, 134 F.3d 63, 67 (2d Cir. 1997) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994)) (emphasis added).

Trying to mitigate the harm of the current COVID-19 pandemic is a substantial government interest. In fact, it is a compelling government interest. But that does not end the inquiry; it only begins it. The total ban on public protests in every public forum in the City is not a narrowly drawn restriction. For example, Defendant de Blasio has implemented the Open Streets initiative whereby certain City streets are open to an unlimited number of pedestrians and *individual* protestors protesting independently of one another as long as social distancing protocols are maintained. However, these same City streets remain closed for coordinated *group* protest activity even if the protestors maintain proper social

distancing. Again, and this point bears repeating, the only difference between legally conducted *individual* protests abiding by social distancing protocols and illegal coordinated *group* protests following social distancing protocols is the coordination of a particular message in protest.

Defendants acknowledged below that "[t]he Open Streets Initiative was enacted so as to provide *more spaces for people to socially distance* and to relieve the overcrowding in city parks. . . . By relieving sidewalk congestion and providing alternative non-vehicular spaces *for recreational use*, the Open Streets Initiative better ensures that New Yorkers can socially distance when they choose to go outside." (Defs.' Mem. at 21 [emphasis added]; R-19 at Ex. D). Defendants further asserted that "if Plaintiff would like to stand on one of the streets designated in the Open Streets Initiative (provided she practices socially (sic) distancing and wears a face covering) and protests, she is free to do so." (Defs.' Mem. at 22; R-19 at Ex. D). And Defendants do not dispute Plaintiff's assertion that "City sidewalks are currently open to 'pedestrians for exercise, recreation, amusement or to walk their pets.'" (Defs.' Mem. at 22 n.5; R-19 at Ex. F). Moreover, Defendants do <u>*not*</u> limit the number of people who can simultaneously walk their pets, cycle, jog, or engage in an individual protest on sidewalks within the City. As noted above, this means that Plaintiff Geller and 50 other protestors might appear in front of City Hall and protest independently of one another without

risk of arrest as long as they maintain the proper social distancing. But to do so in a coordinated and purposeful way to conduct an effective protest will invite police intervention, issuance of citations, and even arrest.

To place this in spatial context, the public sidewalk surrounding City Hall Plaza is approximately ½ mile in length, which is approximately 2,640 feet. (*See* Geller Supplemental Decl. ¶¶ 4-6; R-23-1 at Ex. D). If each person needs approximately 8 feet (2 feet for themselves and 6 feet to social distance with the person to his or her front), approximately 330 people can simultaneously walk, jog, or protest individually along this public sidewalk while maintaining proper social distancing. *None* of these individuals would be violating any executive order. However, if a fraction of this number of people—for instance, 50 protestors—join Plaintiff to publicly protest Defendant de Blasio's policies, each individual could remain 50 feet apart and yet they would be committing a crime.

Defendants respond by claiming that "it would be a near impossibility to ensure that each person at the protest . . . complied with the requirement to stand six feet apart with a properly affixed face covering." (Defs.' Mem. at 21; R-19 at Ex. D). To begin, this is mere conjecture and a statement without any factual or empirical basis. More to the point, *Defendants are mistaken* because it is contrary to common experience. It's no more an "impossibility" than it would be to police the 330 joggers, cyclists, or individual protestors described above. "Precision of

regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Taking a sledgehammer to the First Amendment is impermissible regardless of the government interest involved or the level of scrutiny applied. *See generally Hill v. Col*, 530 U.S. 703, 749 (2000) (Scalia, J., dissenting) (noting that the "narrow tailoring" here "must refer not to the standards of Versace, but to those of Omar the tentmaker").

And as noted above, upon the close judicial scrutiny required, Defendants' assertion that organized public protests are more harmful than other permitted activity (*i.e.*, if the same number of people are incidentally on the public streets and sidewalks at the same time cycling, walking their dogs, or even protesting as individuals) is not based on any hard facts or science. Rather, it is based on speculation. (*See* Dr. Daskalakis Decl. ¶¶ 14-16; R-17 at Ex. F). For example, Defendants speculate that protestors will be "chanting and yelling," which will then cause a greater spread of respiratory droplets. But Plaintiff never claimed she was planning a "chanting and yelling" protest. Even if a group protest called for chanting and the like, are individual protestors acting independently of one another less likely to chant and yell? Do Defendants demand silence from all those who go out in public? Anyone involved in sponsoring protests or policing them knows that an organized protest is more likely to maintain the requisite etiquette than a large number of independent protestors. And moving beyond protestors, do joggers and

others exercising strenuously in public not present a similar likelihood of heavy breathing and expectorating? In stark contrast to Defendants' naked claims of the risk posed by group protests, Plaintiff's protest will involve the use of signs, particularly since the protestors will be wearing masks, which makes it impractical, if not impossible, to chant or yell. (Geller Supplemental Decl. ¶ 4; R-23-1 at Ex. C).

As recently stated by the Sixth Circuit:

> [W]e agree that no one, whether a person of faith or not, has a right "to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). But restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom. *Assuming all of the same precautions are taken*, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers.

Roberts, 2020 U.S. App. LEXIS 14933, at *10 (emphasis added). Assuming all of the same precautions are taken, why can 50 people simultaneously ride their bicycles on a public sidewalk or protest as individuals but 50 people cannot walk together holding protest signs conveying a unified message condemning Defendant de Blasio's policies? And why can't Defendants and their army of police officers not equally enforce the social distancing requirements for both? Defendants have "no good answers." *See also City of Ladue v. Gilleo,* 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may

be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

In the final analysis, the ban on public protests in traditional public forums throughout the City "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." The restriction fails intermediate scrutiny. *See, e.g., Saieg v. City of Dearborn*, 641 F.3d 727, 740-41 (6th Cir. 2011) (striking down a content-neutral sidewalk leafleting restriction under intermediate scrutiny because it permitted vendors and pedestrians to occupy the same sidewalks).

Moreover, it is no defense to this constitutional challenge that Plaintiff might have alternative ways of communicating her message. *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) ("[L]aws regulating public fora cannot be held constitutional simply because they leave potential speakers alternative fora for communicating their views."); *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 607 ("[B]ecause we have already found that the Ordinance is not narrowly tailored, whether the City of Dearborn has provided ample alternatives of communication is now irrelevant in this case. . . ."); *see also Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) ("[A]lternative mode[s] of communication may be constitutionally inadequate if

the speaker's 'ability to communicate effectively is threatened' [and a]n alternative is not ample if the speaker is not permitted to reach the 'intended audience.'").

"In this Circuit, an alternative channel is adequate and therefore ample if it is within 'close proximity' to the intended audience." *Marcavage v. City of N.Y.*, 689 F.3d 98, 107 (2d Cir. 2012). Consequently, an "alternative channel" is *not* adequate if it is *not* "within 'close proximity' to the intended audience." *See id*. Here, by prohibiting group protests outside City Hall—the targeted location of Plaintiff's protest message—the alternatives are constitutionally inadequate because Plaintiff's ability to effectively communicate her protest message opposing Defendant de Blasio's policies is threatened, and she is unable to reach her intended audience—Defendant de Blasio and those who advise him. (*See also* Op. & Order at 12 ["Of course, it is true, as the plaintiff argues, that a single person protesting in public is not a perfect substitute for public group protests."]; R-27 at Ex. A).

As emphasized above, there is no dispute that the challenged restriction "does not prohibit an individual from protesting on City streets alone." (Op. & Order at 12; R-27 at Ex. A). And because Defendants do not limit the number of individuals who may simultaneously use a public sidewalk while maintaining social distancing, there could be 50 *individual* protesters maintaining social distancing on the same public sidewalk at the same time, and that would be

permissible. However, as Plaintiff argued during the hearing on her motion for a TRO, to determine whether this was simply coincidental protests of 50 individuals, which is permitted, or an organized group protest of 50 individuals, which is a crime, Defendants would necessarily have to view the content of the messages expressed by the protestors. (Tr. at 7-8; R-31 at Ex. E). In this respect, the restriction *does* operate as a content-based restriction. *See Ward*, 491 U.S. at 791 ("Government regulation of expressive activity is *content neutral* so long as it is *justified* *without* reference to the content of the regulated speech.") (internal quotations and citation omitted) (emphasis added); *Eclipse Enters.*, 134 F.3d at 67 ("A content-based restriction on speech is presumptively invalid. [To survive strict scrutiny,] the County must show that the Law is *necessary* to serve a compelling state interest and that it is narrowly drawn to achieve that end.") (internal quotations and citation omitted) (emphasis added). For the reasons the restriction fails intermediate scrutiny review as noted above, it fails strict scrutiny as well.

Defendants cannot meet their burden under this most demanding test as a matter of law based on the fact that Defendant de Blasio has implemented the Open Streets initiative, thereby permitting pedestrians and others to use the City streets for activity that is not constitutionally protected, and based on the fact that there is no restriction on the number of *individual* protestors who may simultaneously use a public sidewalk while practicing social distancing—it is only

organized public protests that are prohibited. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (internal quotations and citation omitted). Defendants' restriction on the right to freedom of speech and to peaceably assemble fails constitutional scrutiny under intermediate and strict scrutiny review.

II. Plaintiff Will Suffer Irreparable Harm in the Absence of the Injunction.

The proof of irreparable harm suffered by Plaintiff is clear and convincing. It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *N.Y. Magazine*, 136 F.3d at 127 ("As the district court correctly found that the facts presented constitute a violation of New York Magazine's First Amendment freedoms, New York Magazine established a fortiori both irreparable injury and a substantial likelihood of success on the merits."). This factor favors granting the requested injunction.

III. The Balance of Equities Tips Sharply in Favor of Granting the Injunction.

The likelihood of harm to Plaintiff without the injunction is substantial because the deprivation of First Amendment rights, even for minimal periods, constitutes irreparable injury. (*See supra* § II). Additionally, Defendants' public

health interests can be advanced by ensuring social distancing during the public protests, similar to how Defendants permit *individuals* to jog or protest on public streets while maintaining social distancing, and wearing face masks. In sum, the balance of equities favors the granting of the requested injunction.

IV. Granting the Injunction Is in the Public Interest.

The impact of the injunction on the public interest turns in large part on whether Defendants violated Plaintiff's rights protected by the First Amendment. *See Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 889 F. Supp. 2d 606, 615 (S.D.N.Y. 2012) (noting that "the public as a whole has a significant interest in . . . protection of First Amendment liberties") (internal quotations and citation omitted); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest.").

The challenged restriction criminalizes Plaintiff's core political speech in a traditional public forum, thereby depriving Plaintiff of her fundamental rights protected by the First Amendment. It is in the public interest to issue the injunction.

CONCLUSION

Plaintiff hereby requests that the Court grant her motion.

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