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

PAMELA GELLER, Plaintiff, -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.	Case No. 20-3566 Hon. Denise L. Cote

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

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INTRODUCTION

"***Liberty once lost is lost forever***." – John Adams

This case seeks to protect and vindicate fundamental liberties that citizens of the United States enjoy free from government interference. These liberties are not conferred or granted by government to then be rescinded at the will and whim of government officials. These liberties, endowed by our Creator, are possessed by the people, and they are guaranteed against government interference by the United States Constitution, which is the supreme law of the land. First among these liberties is the right to peacefully protest government officials through the freedom of speech and the right to peaceably assemble with others of like mind, both of which are guaranteed by the First Amendment.

The right to freedom of speech is not a right to catharsis. It is a right to meaningfully protest and assemble in public in order to change public policy. The most effective way to exercise this right is to organize and participate in a *public* protest as a group—there is no adequate alternative to this method of expressing opposition to the government, its officials, and their policies. Our nation's history and experience with the civil rights movement bears this out. Defendants, through the adoption and enforcement of executive edicts, have suspended these fundamental liberties in the City of New York (hereinafter "First Amendment Restriction").

Through this lawsuit, Plaintiff Geller challenges Defendants' suspension of the First Amendment. There is no justification, pandemic or otherwise, for a government official to revoke this fundamental right of the people.

Paraphrasing from the Supreme Court's opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971):

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion [or fear of a pandemic], this basic law [the First Amendment] and the

> values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts.

Id. at 455. Plaintiff satisfies the standard for issuing a Temporary Restraining Order / preliminary injunction.

STATEMENT OF FACTS

On March 7, 2020, the governor of the State of New York, Andrew Cuomo, issued Executive Order 202 declaring a state disaster emergency as a result of the COVID-19 pandemic. (*See* Governor's Executive Order No. 202 [dated March 7, 2020] at https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york [last visited May 11, 2020]). Governor Cuomo has since issued additional executive orders, including orders forbidding "nonessential business operations" across the state. (*See, e.g*., "What You Need to Know" publication [dated May 10, 2020 at 3:25 PM] at https://coronavirus.health.ny.gov/home [last visited May 11, 2020]; *see also* Governor's Executive Order No. 202.6 [dated March 18, 2020 and effective March 20, 2020] at https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency [last visited May 11, 2020]). In addition, on April 15, 2020, Governor Cuomo issued Executive Order No. 202.17, requiring "any individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance." (Governor's Executive Order No. 202.17 [dated April 15, 2020 and effective April 17, 2020] at https://www.governor.ny.gov/news/no-20217-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency [last visited May 11, 2020]).

Following Governor Cuomo's lead, Defendant Mayor Bill de Blasio issued his own emergency executive order on March 12, 2020, declaring a state of emergency for the City of New

York. (*See* Exhibit 1 to Declaration of Pamela Geller ["Geller Dec."], attached hereto as Exhibit I). Subsequently, Defendant de Blasio has issued no less than 14 additional emergency executive orders supplementing, amending, and replacing earlier such orders. (*See* Exs. 2-15 to Geller Dec.). Specifically, 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.

(Mayoral Emergency Exec. Order No. 103 [dated March 25, 2020], attached as Ex. 6 to Geller Dec.).

On May 4, 2020, Defendant de Blasio held a telephonic press conference. Participating with Defendant de Blasio were several city officials, including Defendant Police Commissioner Dermot Shea. During the press conference, a reporter from AM New York, Todd Maisel, 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 the protestors and the members of the media covering the protest were 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. The specific question posed was as follows:

> **Question:** Good morning, Mr. Mayor. I have a question actually for Commissioner Shea and it pertains to gatherings in regards to freedom of expression, freedom of speech. of people who have protests. Yesterday there was a protest over by Mount Sinai on First Avenue and most, there was about a dozen protestors that were there and they were gathered. They're very spread out, very spread out. Most and the media was definitely more than six feet away from the speakers and the people. And yet a lot of the cops that came over to us and came over to us were initially threatening to give summonses and arrests even though we were far enough away. Do you have a policy as to how to approach these protests with maintaining freedom of speech, but at the same time maintaining the social distancing?

(Official Transcript: "Mayor de Blasio Holds Media Availability" [dated May 4, 2020], attached as Ex. 16 to Geller Dec. and available at https://www1.nyc.gov/office-of-the-mayor/news/317-20/transcript-mayor-de-blasio-holds-media-availability [last visited May 11, 2020] at 21 [pagination added]).

Defendant Shea responded by explaining that the New York Police Department would not permit public protests of any kind:

> **Commissioner Shea:** Yeah. Thank you for the question. It's – I think it's a powerful, and I think it's a great question. You know you're talking about some of the values that we hold in the highest regard in this country and certainly this city, the right to people to gather and the right of free speech and the right of protest. But now and now comes the bad news. We're in a pandemic and there's been executive orders issued and these are not policies of the Police Department. These are now laws that have been passed down executive – through executive order to maintain people and keep people alive. So while we greatly, greatly respect the right of people to protest, there should not be protests taking place in the middle of a pandemic by gathering outside and putting people at risk. And that's the short answer.

(*Id*.). Immediately following Defendant Shea's answer, Defendant de Blasio added:

> **Mayor:** Yeah. And look, Todd, people who want to make their voices heard, there's plenty of ways to do it without gathering in person. And just the question is always whoever has whatever, because they want speak to, are they interested in protecting people's lives? If they are, use all the other tools you have to get your point across but avoid anything that might put other people in harm's way.

(*Id*. at 22 [pagination added]).

Plaintiff Pamela Geller is an adult citizen of the United States and a resident of the City of New York. 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 Dec. at ¶¶ 1, 11).

Plaintiff Geller 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 through the United States, including New York, Washington D.C., Philadelphia, and Seattle, among others. *See, e.g., Am. Freedom Def. Initiative v. Metro. Transp. Auth*., 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012); *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit. Auth.*, 898 F. Supp. 2d 73 (D.D.C. 2012); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, No. 2:14-cv-5335, 2015 U.S. Dist. LEXIS 29571, (E.D. Pa. Mar. 11, 2015); *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126 (9th Cir. 2018). (Geller Dec. ¶ 12).

Prior to the May 4, 2020, press conference referenced above, Plaintiff Geller 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 Geller was prepared to sponsor a demonstration against what she considers Defendant de Blasio's blatant bias against Jews. (*See, e.g.*, "WATCH: 'No Regret': Jew-hater De Blasio defends threatening Jews with arrest for attending a rabbi's funeral," *Geller Report*, published April 29, 2020, at https://gellerreport.com/2020/04/watch-no-regret-jew-hater-de-blasio-defends-threatening-jews-with-arrest-for-attending-a-rabbis-funeral.html/ [last visited May 11, 2020]). (Geller Dec. ¶ 13).

In contemplation and in planning for these group public protests, Plaintiff Geller 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, which are

currently open to pedestrians for exercise, recreation, amusement, or to walk their pets. (Geller Dec. ¶ 15).

In addition, New York 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 Dec. ¶ 16). Alternate locations for Plaintiff Geller'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 Dec. ¶ 17).

But for Defendant de Blasio's executive orders and Defendants' announced policies forbidding all public protests, thereby declaring the First Amendment right to peaceably assemble and publicly protest as non-essential group activities, Plaintiff Geller 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." (Geller Dec. ¶ 18).

As a direct and proximate result of Defendants' executive orders and announced policies forbidding constitutionally protected public protests, Plaintiff Geller is unable to conduct her planned protests, thereby suffering irreparable harm. (Geller Dec. ¶ 19).

ARGUMENT

Neither *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), nor this current pandemic 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 of 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 backstop role for the judiciary: "[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 30 (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. 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.

The Supreme Court echoed this point in *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992), in which the Court cited *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." Here, Defendant de Blasio seeks a "plenary override of individual liberty claims" through the enforcement of the First Amendment Restriction. The Court should forbid it.

I. Standard for Issuing a Temporary Restraining Order / Preliminary Injunction.

"It is well established that the standard for an entry of a temporary restraining order is the same as for a preliminary injunction." *AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010).

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his 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 Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir. 2010) ("In order to justify a preliminary injunction, a movant must demonstrate 1) irreparable harm absent injunctive relief; 2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor."); *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 465 (S.D.N.Y. 2012) ("*AFDI v. MTA I*") (noting that a mandatory preliminary injunction requires a "clear showing that the moving party is entitled to the relief requested").

Additionally, because the requested injunction seeks to protect Plaintiff's First Amendment rights to freedom of speech and to peaceably assemble, the crucial and often dispositive factor is whether Plaintiff is likely to prevail on the merits. *See N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 127 (2d Cir. 1998); *see also Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012) ("In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis."); *see generally AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994) ("As a practical matter, if a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always

will be the case that the public interest will favor the plaintiff."); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.").

II. 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. *AFDI v. MTA I*, 880 F. Supp. 2d at 466 (analyzing a free speech claim in "three parts").

Moreover, the challenged First Amendment Restriction "[is] an exercise of a prior restraint." *N.Y. Magazine*, 136 F.3d at 131. "The essence of prior restraints is 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) (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)) (emphasis added). 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); *see also Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (stating that the transit authority "carries a heavy burden of showing justification for the imposition of [a prior] restraint") (internal quotation marks and citation omitted).

Here, Defendants have exerted their power to 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 measures. Instead, Defendants have banned all free speech activity in all public forums in the City.

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); *Carey v. Brown*, 447 U.S. 455, 467 (1980)). 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.").

As the Supreme Court has long observed:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. *It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men*. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

Schneider v. State, 308 U.S. 147, 161 (1939) (emphasis added).

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 Legal Def. & Educ. Fund*, 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. *Cornelius,* 473 U.S. at 800; *N.Y. Magazine*, 136 F.3d at 128 ("The Supreme Court has created three categories of government property, and announced standards for reviewing government restriction of speech according to those categories."). Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

Without question, the 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).

As stated by the Supreme Court, "[T]he streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163; *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d

600, 605 (6th Cir. 2005) (striking down a city ordinance and stating, "Constitutional concerns are heightened further where, as here, the [challenged ordinance] restricts the public's use of streets and sidewalks for political speech"); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 55 (1983) ("In a public forum . . . all parties have a constitutional right of access . . . .").

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. Chic. Park Dist*, 534 U.S. 316 (2002). This standard is not a pushover.

The Second Circuit has explained and underscored the trial court's role in examining the government's rationale for imposing time-place-manner restrictions:

> A court's power to review government restrictions imposed on the exercise of a First Amendment right occupies middle ground between extremes. It does not kowtow without question to agency expertise, nor does it dispense justice according to notions of individual expediency "like a kadi under a tree."[1] *Terminiello v.*

[1] The quote from Justice Frankfurter's opinion in *Terminiello*, oft quoted by lower courts, references an Islamic judge. The context of the quote is the fact that Islamic law does not permit

> *Chicago*, 337 U.S. 1, 114 (1949) (Frankfurter, J., dissenting). "Because the excuses offered for refusing to permit the fullest scope of free speech are often disguised, a court must carefully sort through the reasons offered to see if they are genuine." *Olivieri v. Ward*, 766 F.2d 690, 691 (2d Cir. 1985). The district court performed that sorting process by means of the full trial that it conducted and the thorough opinion it handed down.
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> When First Amendment concerns are involved a court "'may not simply assume that [a decision by local officials] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.'" *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (quoting with approval *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22 (1984)). When reviewing the reasonableness of time, place and manner restrictions on First Amendment rights, a court must independently determine the rationality of the government interest implicated and whether the restrictions imposed are narrowly drawn to further that interest. In the instant case, we agree with the district court that the restrictions imposed were not drawn solely to further the government's conceded interest in public safety.

Olivieri v. Ward, 801 F.2d 602, 606 (2d Cir. 1986). Accordingly, this Court must play an active and probing role in testing any underlying factual assertions serving as Defendants' basis for imposing the complete ban on First Amendment rights in the City. Indeed, it is Defendants' burden to justify the restriction on First Amendment rights—it is not Plaintiff's burden to justify her liberty.

Trying to mitigate the harm of the current COVID-19 pandemic is a substantial government interest. Indeed, it is a compelling government interest. But that does not end the inquiry, it only begins it. The total ban on free speech activity in every public forum in the City is not a narrowly drawn restriction. For example, Defendant de Blasio has implemented the Open Streets initiative

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precedent to bind a judge. Each ruling, even by the same judge, is independent of all previous rulings. *See, e.g., Nat'l Grp. for Communs. & Computers Ltd. v. Lucent Techs. Int'l Inc.*, 331 F. Supp. 2d 290, 295 (D.N.J. 2004) ("When a Saudi Arabian judge, known as a 'qadi,' attempts to resolve disputes, his decision must be in accordance with the Shari'a. Therefore, he will turn to the aforementioned Qur'an, the Sunnah, and fiqh to guide his legal determination. Saudi Arabian judges are not bound by judicial precedent (in fact, Saudi Arabian judicial opinions are not published) and the concept of *stare decisis* does not exist.") (parenthetical in the original) (citations omitted).

whereby certain City streets are open to pedestrians and cyclists. However, these same City streets remain closed for First Amendment protest activity even if the protestors maintain proper social distancing.

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.'"). By prohibiting public 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.

Nonetheless, a total ban on First Amendment activity in traditional public forums within the City is not a time, place, and manner restriction in the first instance. Consequently, a total ban such as this must satisfy strict scrutiny. *Cornelius*, 473 U.S. at 800 ("[S]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575 (1987) ("We think it obvious that [an absolute ban

on activity protected by the First Amendment] cannot be justified even [in] a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech."); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (acknowledging that in a traditional public fora, "the government may not prohibit all communicative activity"). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

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 cyclist and others to use the City streets for activity that is not constitutionally protected. *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). Indeed, a "narrowly drawn" restriction would permit, at a minimum, protest activity on the City streets under the same conditions.

In the final analysis, the First Amendment Restriction fails constitutional scrutiny under intermediate and strict scrutiny review.

III. Plaintiff Will Suffer Irreparable Harm in the Absence of Injunctive Relief.

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 v. Burns*, 427 U.S. 347, 373 (1976); *Swartzwelder v. McNeilly*, 297 F.3d 228, 241 (3d Cir. 2002) (same); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal

infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). As explained by the Second Circuit:

> As for irreparable harm, the district court noted that if New York Magazine were correct as a matter of law that MTA's action unlawfully abridged its freedom of speech as guaranteed by the First Amendment, New York Magazine established irreparable harm. The "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). 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.

N.Y. Magazine, 136 F.3d at 127. This factor favors granting the requested injunction.

IV. 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* § III). Additionally, Defendants' public health interest can be advanced by ensuring social distancing during the public protests, similar to how Defendants permit individuals to jog or cycle on public streets while maintaining social distancing. In sum, the balance of equities favors the granting of the requested injunction.

V. 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) (entering a permanent injunction immediately following *AFDI v. MTA I* and 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."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*,

23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

As noted previously, the challenged First Amendment Restriction criminalizes Plaintiff's core political speech in a traditional public forum, thereby punishing and thus depriving Plaintiff of her fundamental rights protected by the First Amendment. It is in the public interest to issue the injunction.

CONCLUSION

For the foregoing reasons, this Court should grant the motion and issue the requested injunction.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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*Subject to admission *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

AMERICAN FREEDOM LAW CENTER

/s/ David Yerushalmi
David Yerushalmi, Esq.