UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-2561 Caption [use short title] Pamela Geller v. Andrew Cuomo, et al.

Motion for: Injunction Pending Appeal

Set forth below precise, complete statement of relief sought:

Plaintiff, through this emergency motion, seeks an injunction prohibiting Defendants from enforcing emergency executive orders in such a way as to prohibit Plaintiff from engaging in public group protests in public forums in New York City when such group protests follow the current social distancing and face mask requirements.

MOVING PARTY: Plaintiff-Appellant Pamela Geller **OPPOSING PARTY:** Defendants-Appellees Cuomo, de Blasio and Shea

☑ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: David Yerushalmi **OPPOSING ATTORNEY:** Andrew Amer and Aimee Lulich

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Court- Judge/ Agency appealed from: Honorable Edgardo Ramos, U.S. Dist. Ct., S.D.N.Y.

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

The parties have conferred and have agreed that Defendants-Appellees will respond by August 24, 2020, and Plaintiff-Appellant will reply by August 31, 2020.

Emergency: Irreparable hartm to First Amendment rights.

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

But only if by telephone or video conference given logistics of travel.

Signature of Moving Attorney:

/s/David Yerushalmi **Date:** 8/10/2020 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PAMELA GELLER, Plaintiff-Appellant, -v.- ANDREW CUOMO, in his official capacity as Governor of the State of New York; 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. 20-2561

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"). The district court denied Plaintiff's request for a preliminary injunction as well as Plaintiff's request for injunctive relief pending appeal. (D. Ct. Op. & Order ["Op."] at 26, R-32 at Ex. 1).

FACTS

On March 23, 2020, Defendant Cuomo issued Executive Order No. 202.10 which, in relevant part, banned state-wide "non-essential" gatherings of individuals of any size for any reason as long as the "gatherings" were organized. Unorganized or fortuitous "gatherings" of pedestrians, dog-walkers, or individual protestors, however, were permitted. (Op. at 2). In other words, if the individual protestors were not protesting and conveying the same or organized message, the individual protestors were permitted to gather in any number as long as they maintained the social distancing required. *Geller v. De Blasio*, No. 20-cv-3566 (DLC), 2020 U.S. Dist. LEXIS 87405, at *11-12 (S.D.N.Y. May 18, 2020) ("*Geller I*"). That restriction remained in place until May 21, 2020. On May 22, Defendant Cuomo increased the limit on non-essential public gatherings to 10 individuals. On June 15,

the limit was increased to 25 individuals for regions in Phase Three of Defendant Cuomo's "reopening plan" and to 50 individuals for regions in Phase Four. (Op. at 2-4 [referencing and citing to https://forward.ny.gov/ny-forward]; Geller Decl. at ¶¶ 11-22, R-17 at Ex. 2).

Defendant de Blasio issued his own emergency executive orders in response to the pandemic. His orders incorporate by reference Defendant Cuomo's limitations on non-essential public gatherings—as originally mandated and as amended—and redundantly include separate orders mirroring the governor's evolving limitations. (Op. at 3-4; Geller Decl. at ¶¶ 23-34). Defendant Shea, as the New York City Police Commissioner, enforces the executive orders at issue here with orders of crowd dispersal, citations, and arrests. (Geller Decl. at ¶¶ 9-10).

Prior to May 4, 2020, Defendants had never issued any official or unofficial clarification that the restriction on "non-essential gatherings" would prohibit otherwise lawful free speech activity. During a press conference held on May 4, 2020, Defendants de Blasio and Shea publicly and officially announced that the "shut down" imposed by the executive orders included the suspension of the right to publicly protest in the City. In other words, free speech activity was considered a "non-essential gathering" and thus prohibited. (Geller Decl. at ¶¶ 29-30).

The May 4, 2020, press conference announcement was prompted by a question relating to a small group of protestors who were instructed by New York City police to disband and who were threatened by the police with summonses and

arrest if they failed to do so. The reporting of this event was the first public report of Defendants de Blasio and Shea enforcing the executive orders against individuals peaceably assembling for the purpose of public protest. (Geller Decl. at ¶¶ 29-31; Op. at 5-6).

The purpose and effect of the restrictions on "non-essential gatherings"—the challenged First Amendment restrictions—were, and continue to be, to shut down most of the City and the State of New York for certain protest activity. Defendants' stated rationale for the "shut down" and thus the challenged restrictions has been, and continues to be, to stop the spread of COVID-19 and to "flatten the curve" of infection, hospitalization, and mortality rates related to COVID-19. Defendants Cuomo and de Blasio intend to issue additional executive orders over the coming weeks and months that will continue the "shut down" and thus continue the challenged First Amendment restrictions. Further, Defendants Cuomo and de Blasio intend to lessen or increase the "shut down" and thus First Amendment restrictions in the future depending upon their respective views of the severity of the COVID-19 infection, hospitalization, and mortality rates in New York. (Geller Decl. at ¶¶ 35-37).

Prior to the May 4 announcement by Defendants de Blasio and Shea that Defendants' executive orders prohibit lawful, free speech activity throughout the City as non-essential gatherings, Plaintiff was planning public protests of Defendant de Blasio's draconian restrictions imposed during this current pandemic. Plaintiff

was planning to protest throughout the summer months and as long as the restrictions continued in public fora throughout the City. She was planning protests of approximately 25 to 100 people to take place primarily at City Hall Plaza, the seat of City government. At the time of the filing of this litigation, the First Amendment restrictions limited public protests to 25 individuals in New York City. Today, the limitation is 50 individuals. As a result of the challenged First Amendment restrictions, Plaintiff had to cease and cancel her planned protests, thus causing her irreparable harm. (Geller Decl. at ¶ 39; Op. at 5-6).

Apparently sparked by the death of George Floyd while in police custody in Minneapolis, Minnesota, beginning on May 28, 2020, and continuing regularly to this day, hundreds and thousands of protestors have taken to the streets of New York City protesting what they allege to be police brutality against Blacks and what is referred to as systemic racism, and calling for various reforms—what has become widely known as the "Black Lives Matter" or "BLM" movement and message. (Geller Decl. at ¶ 41; Op. at 7-10).

Notwithstanding the First Amendment restrictions in place at the time and their enforcement by Defendants against other New Yorkers engaged in public group activity, including activity protected by the First Amendment's right to freedom of speech and to peaceably assemble, Defendants have embraced the content and viewpoint of the BLM protestors' message and have encouraged the protests. For example, on June 1, 2020, just four days after the start of the government-approved

protests, Defendants Cuomo and de Blasio issued a press release with the following quoted statements:

> "I support and protect peaceful protest in this city. The demonstrations we've seen have been generally peaceful. **We can't let violence undermine the message of this moment. It is too important and the message must be heard**. Tonight, to protect against violence and property damage, the Governor and I have decided to implement a citywide curfew," said Mayor Bill de Blasio. "The Police Commissioner and I have spoken at length about the incidents we've all seen in recent days where officers didn't uphold the values of this city or the NYPD. We agree on the need for swift action. He will speak later today on how officers will be held accountable."
>
> "**I stand behind the protestors and their message**, but unfortunately there are people who are looking to take advantage of and discredit this moment for their own personal gain," said Governor Cuomo. "The violence and the looting that has gone on in New York City has been bad for the city, the state and this entire national movement, undermining the [sic] and distracting from this righteous cause. **While we encourage people to protest peacefully and make their voices heard**, safety of the general public is paramount and cannot be compromised. At the same time, we are in the midst of a global pandemic which spreads through crowds and threatens public health. Tonight the Mayor and are implementing a citywide curfew starting at 11 PM and doubling the NYPD presence across the city."

(Geller Decl. at ¶¶ 42-43; Op. at 8; Yerushalmi Decl. at ¶¶ 12-13, R-28-1 through R-28-8 at Ex. 3).

Beyond the verbal praise of the protestors who were openly and massively violating the challenged First Amendment restrictions, it was widely reported that high ranking New York City police officers, including Chief Terrance Monahan, the City's highest ranking uniformed police officer, actually participated in the protests by kneeling and holding hands with BLM protestors while not wearing any face

coverings or gloves. Social distancing was also disregarded. (Geller Decl. at ¶¶ 44-45).

Notwithstanding the blatant violations of the executive orders and, in particular, the challenged First Amendment restrictions, Defendant de Blasio enthusiastically endorsed Chief Monahan's conduct:

> Terry Monahan made the point out in Washington Square Park, anyone who hasn't seen that video of Terry Monahan in Washington Square Park needs to see it, it is a profound moment. **Don't just see the part where he kneels down, see what he says. And he's saying, pure passion from the heart, and he points to the officers around us, and he says none of us believe what happened in Minnesota was right. And it was a very important moment, it was a watershed moment to me**, and I think we need this going forward, that police leaders, police officers, I'd like to see police unions even say, when something is done wrong in policing, we are all going to own it. We all want to fix it together.

(Geller Decl. at ¶ 46). And yet again five days later:

> Chief Monahan, I spoke to him throughout this. I constantly was in touch with Commissioner Shea, Chief Monahan, Chief Pichardo. We constantly compared notes. And I want to say again, Chief Monaghan in Washington Square Park did something that I hope will be respected. The highest ranking uniformed officer in the largest, most important police force in America – he spoke to the protesters. He said, none of us condoned and can accept what happened, that those officers did in Minnesota, and we are all in this together and we have to bring our city forward together. **And then they said, show us some respect, take a knee with us, and he did. It was a powerful, meaningful moment. And for all the things that need to be better, we also have to remember the things that were right, and that was something right**.

(Geller Decl. at ¶ 46; *see also* Op. at 9-10).

Moreover, as recently as July 9, 2020, Defendant de Blasio himself took to

the streets to paint a BLM street mural on Fifth Avenue in front of Trump Tower, joined by a number of other protestors, whose numbers far exceeded the 25-person limitation in effect at the time. (Yerushalmi Decl. at ¶ 15; Op. at 9-10). Defendant Cuomo has further reinforced his earlier support for the BLM protestors and has issued public statements supporting the BLM message and protests—as long as they are not violent. (Yerushalmi Decl. at ¶¶ 14-16). Moreover, Defendant Cuomo has never publicly refuted the City Defendants' conduct in embracing and participating in demonstrations that clearly violated Defendant Cuomo's First Amendment restrictions, notwithstanding the fact that the City Defendants are the enforcement arm in New York City of Defendant Cuomo's executive orders. (Yerushalmi Decl. at ¶¶ 4-11).

Even more noteworthy is that notwithstanding Defendants' public embrace of the BLM protests, Defendants have taken the public and formal position in this and other litigation that the executive orders are extant and lawful prohibitions on otherwise constitutionally protected free speech activity in the form of public protests, when those protests exceed the evolving participant limitations. (Geller Decl. at ¶¶ 39-40; Yerushalmi Decl. at ¶¶ 4-11; 14). In striking contrast to their public statements and conduct in support of the BLM protestors and message, Defendants have never disclaimed their stated position that they will enforce the First Amendment restrictions against Plaintiff and other non-BLM protestors or that they have somehow decided to relax the First Amendment restrictions and to grant

all public protests the same government approval they have granted to the BLM protestors.

ARGUMENT

I. Standard for Issuing a Preliminary Injunction.[1]

"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").

[1] Because this motion is filed directly in this Court and is not an appeal of the district court's earlier respective denials of the motions for preliminary injunction and for injunction pending appeal, this Court's motion panel reviews the current motion *de novo*. *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 917 (6th Cir. 2018) ("Because we are not reviewing any district court decision or order, our review is *de novo*.")

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.")

II. Plaintiff Has Made a Clear Showing that She Is Entitled to Relief on Her First Amendment Claim.

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 restrictions comport 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 restrictions are "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 the 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 have exerted their power to deny Plaintiff and her co-protestors the use of any public forum within the City for her core political speech in advance of the expression unless they are prepared to limit their protest to a relatively scant fifty protestors. Defendants have made no provisions to permit Plaintiff's planned expressive activity even if the protestors exercise appropriate social distancing measures—*unless* the protest is conveying a message regarding racial inequality following the death of George Floyd—and in that case, any number of peaceful protestors is permitted and social distancing is only of passing concern.

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 Mayor de Blasio's and Governor Cuomo'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.; *Papineau v. Parmley,* 465 F.3d 46, 56 (2d Cir. 2006) (same); *see also De Jonge v. Or.*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

B. The Challenged Restrictions Ban 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 challenged restrictions ban 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.").

C. The Challenged Restrictions Cannot Survive Constitutional Scrutiny.

1. The Challenged Restrictions Are Unlawful Content- and Viewpoint-Based Restrictions on Speech.

"[T]he guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (internal quotations and citation omitted). Per the Supreme Court, "Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994).[2]

"The principle that has emerged from [Supreme Court] cases is that the First

[2] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) does not change this analysis nor does it jettison decades of constitutional jurisprudence by providing an oblique, ever-expanding standard of judicial deference that has no boundaries when the executive branch of state government confronts a pandemic. Dealing with a substantive due process claim, the Court made clear that the analysis is a disjunctive one requiring a court to apply the "real or substantial relation to" test when dealing with "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety" unless ("or") the statute (or executive order as in this case) "is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." In the latter instance, "it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id*. at 31.

Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

A regulation "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen*, 573 U.S. at 479 (internal quotations and citation omitted); *see also Glendale Assocs. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir. 2003) ("A rule is defined as a content-based restriction on speech when the regulating party must examine the speech to determine if it is acceptable."). "[T]he 'principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Turner Broad. Sys.*, 512 U.S. at 642 (quoting *Ward v. Rock Against*

Racism, 491 U.S. 781, 791 (1989)).

Here, Defendants approve, permit, and thus agree with the BLM protestors. Defendants have publicly approved these recent protests, stating, *inter alia*, that the protests are "too important and the message must be heard," that they "stand behind the protestors and their message," and that they "encourage people to protest peacefully and make their voices heard." (Geller Decl. at ¶ 43). Yet, Defendants prohibit other protest activity, specifically including Plaintiff's proposed protest. This is not only a content-based restriction in a public forum—it is a restriction based on viewpoint. Accordingly, it is presumptively unconstitutional and it must survive strict scrutiny, which it cannot.

"A content-based restriction on speech is presumptively invalid. [To survive strict scrutiny, Defendants] must show that the [challenged restriction] is *necessary* to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (internal quotations and citation omitted) (emphasis added); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws . . . are presumptively unconstitutional."). Strict scrutiny 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 Defendants permit, without social distancing or other protective measures, such as the wearing of masks, the government-approved

BLM protests but prohibit all other public protests. Additionally, Defendant de Blasio has implemented the Open Streets initiative, thereby permitting pedestrians and others in numbers far greater than the current 50-person limitation to use the City streets for activity that is not constitutionally protected. (Geller Decl. at ¶ 38). These exceptions are fatal to the challenged restrictions. *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 and in other public forums under the same conditions as the government-approved BLM protests or under the conditions that permit individuals to use the City streets and other public forums for recreational activity.

2. The Challenged Restrictions Are Not Reasonable Time, Place, and Manner Restrictions on Speech.

Even if we were to ignore the government-approved BLM protests—stretching credulity well beyond its breaking point—and assume *arguendo* that the challenged restrictions on free speech activity are content neutral, they must be reasonable time, place, and manner restrictions that further a significant government interest. *See Ward*, 491 U.S. at 791; *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." This standard is not a pushover. *See McCullen*, 573 U.S. at 495 ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier."); *Olivieri v. Ward*, 801 F.2d 602, 606 (2d Cir. 1986) ("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.) 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 First Amendment rights (for some messages and not for others) 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. But that does not end the inquiry, it only begins it. *See generally Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (stating that the Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise

of rights protected by the First Amendment"). The restriction on Plaintiff's free speech activity (but not on BLM 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 whereby certain City streets are open to pedestrians, cyclists, and separate groups of 50-person protests, even though collectively they number in the thousands. (Geller Decl. at ¶ 38). However, these same City streets remain closed for First Amendment protest activity if the same number of individuals are protesting in an organized fashion notwithstanding their observance of the proper social distancing protocols. But more to the point, Defendants endorse and promote the government-approved BLM protests far in excess of the 50-person limitation, but prohibit Plaintiff's protests. The First Amendment does not permit such disparate treatment.

Additionally, any assertion that organized groups are less likely to social distance than unorganized groups of 50 or more individuals is speculative at best and logically absurd at worst. And, apparently, the current magic number that will abide by social distancing protocols is 50 people. But, of course, just weeks ago the magic number was 25, and before that 10, and before that one person. And with the government-approved BLM protests, there is no magic number.

And 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. v. City of Dearborn*, 418 F.3d 600, 607 (6th Cir. 2005) ("[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 large public protests outside City Hall—the seat of local government and 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.

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). Thus, irreparable harm is established as a matter of law. 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)).

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 (interests which they have abandoned with the government-approved BLM 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 Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 U.S. Dist. LEXIS 86921, at *45

(S.D.N.Y. May 23, 2018) ("The public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.") (citing *Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984)); *Coronel v. Decker*, No. 20-cv-2472 (AJN), 2020 U.S. Dist. LEXIS 53954, at *23 (S.D.N.Y. Mar. 27, 2020) ("First, as this Court has previously stated, the 'public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.'"); *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.").

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 27(d)(1), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5146 words, excluding those accompanying documents identified in Fed. R. App. P. 27(a)(2)(B).

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/ *David Yerushalmi*
David Yerushalmi, Esq.

INDEX OF EXHIBITS

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAMELA GELLER,

Plaintiff,

– against –

ANDREW CUOMO, *in his official capacity as Governor of the State of New York*, BILL DE BLASIO, *individual 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.

OPINION AND ORDER

20 Civ. 4653 (ER)

Ramos, D.J.:

Facing an unprecedented global pandemic and a dangerously surging number of COVID-19[1] cases, Andrew Cuomo, Governor of the State of New York, issued Executive Order No. 202.10 on March 23, 2020, that, in relevant part, banned all non-essential gatherings of individuals of any size for any reason. That original Executive Order was subsequently amended on two occasions, so that as of the date of this order, non-essential gatherings of up to 50 people are permitted in all regions of New York State. On June 17, 2020, Pamela Geller brought this action under the First and Fourteenth Amendments against the Governor, New York City Mayor Bill de Blasio, and New York Police Department Commissioner Dermot Shea (with Mayor de Blasio, the "City"), challenging the restrictions on non-essential gatherings as a violation of her

[1] The Court may take judicial notice of "relevant matters of public record." *See Giraldo v. Kessler*, 694 F.3d 161, 163 (2d Cir. 2012). According to the Centers for Disease Control and Prevention ("CDC"), COVID-19 is a highly infectious and potentially deadly respiratory disease caused by a newly discovered coronavirus that spreads easily from person-to-person. *See* Doc. 27, Ex. B. There is no pre-existing immunity against this new virus, which has spread worldwide in an exceptionally short period of time, posing a serious public health risk. *Id*. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. *Id.* Ex. D.

constitutional right to engage in public protest. Now before the Court is Geller's motion for a preliminary injunction enjoining Defendants from enforcing the restrictions on non-essential gatherings so that she can organize a protest of between 25 to 100 people. For the reasons set forth below, Geller's motion is DENIED.

I. Background

A. The COVID-19 Executive Orders

On March 1, 2020, New York State recorded its first case of COVID-19 in New York City. On March 7, 2020, the Governor declared a State of Emergency. At the time, 60 people had tested positive in New York. By March 20, 2020, that number approached 10,000, with over 150 deaths.[2] On March 20, the Governor announced the New York State on PAUSE initiative, which very generally speaking, closed all non-essential private businesses and governmental activities. This initiative included, as relevant to this case, Executive Orders aimed at restricting non-essential outdoor gatherings.

On March 23, the Governor issued Executive Order No. 202.10 which, in relevant part, banned non-essential gatherings of individuals of any size for any reason. That restriction remained in place until May 21.

On May 21, the Governor issued Executive Order No. 202.32, which modified Executive Order 202.10 to permit non-essential outdoor gatherings of ten or fewer individuals for any religious service or ceremony, or for the purposes of any Memorial Day service or commemoration. The following day, on May 22, the Governor issued Executive Order No. 202.33, which extended the loosening of the gathering restrictions to any non-essential outdoor

[2] *See* Doc. 27, Ex. H (Image from Johns Hopkins University's Coronavirus Resource Center, available at https://coronavirus,jhu.edu/us-map, last visited June 1, 2020).

gathering of ten or fewer individuals for any reason, provided the participants follow appropriate social distancing, cleaning and disinfection protocols.

On June 15, the Governor issued Executive Order No. 202.42, which extended Executive Order No. 202.33 until July 15, and further modified it to permit non-essential outdoor gatherings of up to 25 individuals for any reason, provided that the gathering was in a region that had reached Phase Three of the New York State's reopening plan as described below, and the participants follow appropriate social distancing protocols.

Also on June 15, the Governor issued Executive Order No. 202.45, which permits non-essential gatherings of up to 50 individuals for any reason, provided the gathering was in a region that had reached Phase Four of the re-opening plan, and the participants follow appropriate social distancing protocols.

Since the outbreak of the pandemic, New York City has followed the State's lead in imposing restrictions. *See* Doc. 25. On March 25, Mayor de Blasio issued an Executive Order No. 103 that provided:

> 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.

On May 22, a New York City Police Department General Administration Information memorandum that was issued to all police commanders (the "Enforcement Guidance"), in relevant part, provided:

> As of Today, gatherings involving a maximum of 10 people are permissible so long as participants maintain a distance of 6 feet from each other. Examples of the types of 10-person gatherings that are now permissible are religious services, social gatherings, weddings and protests…If a [member of service] ("MOS") observes a gathering of more than 10 people, MOS should remind the participants that large gatherings are not permitted and order the group to disperse. If the large gathering is

> egregious and poses a danger to public health, MOS should call for a supervisor to respond to the scene. Enforcement should only be taken as a last resort if the group refuses to comply with an order to disperse from a large dangerous gathering.

See Doc. 28, Ex. E. The City's Executive Order No. 129, issued on July 2, 2020, specifically incorporates "all relevant provisions of Governor Executive Order No. 202 and subsequent orders issued by the Governor."[3] Doc. 25 ¶ 6.

The regulations put in place by the City and State have proven to be largely successful. Since April 9, 2020, the number of positive tests per day in New York has declined steadily. On June 29, for example, 46,428 people were tested and only 319 tested positive—a positivity rate below 0.7 percent. *See* Doc. 27, Ex. W. Due to the success New York State has had in flattening the curve,[4] the Governor transitioned from the New York State on PAUSE initiative to a re-opening plan that established four "phases" to guide non-essential businesses and offices on how to reopen, with Phase One having the most restrictions on the size of outdoor gatherings and indoor occupancy rates, and Phase Four having the least. *See* https//forward.ny.gov/ny-forward.

B. The Prior Case

This is Geller's second lawsuit in this Court challenging the COVID-19 restrictions on non-essential gatherings. Geller, a self-described "Champion of the First Amendment," is the president of a non-profit organization named American Freedom Defense Initiative, a published author, a conservative blogger, and a political activist who has successfully organized several political protests in New York City in the past. Compl., Doc. 1, ¶ 10. She has 1,289,034

[3] At the preliminary injunction hearing, the City represented that they intend on continuing to follow the State's COVID-19 restrictions.

[4] Public health efforts aimed at stopping the pandemic from overwhelming a state's healthcare system are referred to as "flattening the curve."

followers on Facebook,[5] over 200,000 followers on Twitter,[6] 108,000 followers on Instagram,[7] and 28,900 followers on YouTube.[8] [9]

On May 7, 2020, Geller filed her first lawsuit against the City, arguing that the City's Executive Order No. 103 banning all non-essential gatherings of any size for any reason violated her First Amendment right to freedom of speech. *Geller v. de Blasio* ("*Geller I*"), ---F. Supp. 3d ---, 2020 WL 2520711 (S.D.N.Y. May 18, 2020).

Prior to May 4, 2020, Geller allegedly had planned for and begun to organize a public protest of the City's gathering restrictions. Compl., Doc. 1 ¶ 56. The protest was to include between 25 and 100 people standing silently on the public streets of New York City, including the public sidewalks around City Hall plaza, with face coverings, observing social distancing protocols, and holding signs conveying their protest message. *Id.* However, Geller purportedly canceled her planned protest after a press conference held on May 4 by City Officials ("the May 4 Press Conference") where Mayor de Blasio provided a status report on the impact of the pandemic on the City. *Geller I*, 2020 WL 2520711 at *1. After reporting that substantial challenges remained despite progress in combatting the virus, Mayor de Blasio explained that summonses would be issued to people in any substantial gathering. *Id.* In response to a reporter's question[10] as to whether the City had a "policy as to how to approach…protests with maintaining freedom of speech, but at the same time maintaining the social distancing,"

[5] *See* https://www.facebook.com/pamelageller.

[6] *See* https://bit.y/2YSC3QK.

[7] *See* https://www.youtube.com/user/atlasshrugs2000.

[8] *See* https://www.youtube.com/user/atlasshrugs2000.

[9] The Court takes judicial notice of these facts pursuant to Federal Rules of Evidence 201. *See* Fed. R. Evid. 201; *see also Braun v. United Recovery Sys.*, 14 F. Supp. 3d 159, 164 (S.D.N.Y. 2014).

[10] The reporter prefaced his question by referencing a protest the day before where police officers threatened to issue summonses and make arrests if the protestors and the media did not disperse. Compl., Doc. 1 ¶ 39.

Commissioner Shea explained that protests should not be "taking place in the middle of a pandemic by gathering outside and putting people at risk." *Id.* Mayor de Blasio followed by stating that "people who want to make their voices heard, there's plenty of ways to do it without gathering in person" and that they should "use all the other tools [they] have to get [their] point across but avoid anything that might put other people in harm's way." *Id.*

On May 12, Geller filed a motion for a temporary restraining order in *Geller I*, which Judge Cote denied on the basis that Geller was not likely to succeed on the merits of her First Amendment claim. *Id.*, at *2. Recognizing the "special protection" accorded to "speech on matters of public concern," and that the Government's authority to regulate expressive conduct is usually "sharply circumscribed" in traditional public forums, Judge Cote nevertheless held that this protection is not absolute, noting:

> Over a century ago, the U.S. Supreme Court taught that a community has the right to protect itself against an epidemic of disease which threatens its members. In such times, judicial scrutiny is reserved for a measure that has no real or substantial relation to the object of protecting the public health, the public morals, or the public safety, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law. As explained by the Supreme Court, a court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. Given the COVID-19 pandemic, and the City's place as an epicenter of that pandemic in this country, it is necessary to review the restriction expressed in the March 25 Executive Order through that lens.

Id., at * 3. Guided by those principles, Judge Cote found that intermediate scrutiny applied because the Executive Order at issue was content-neutral, and that the order was reasonably and narrowly tailored to advance the City's interest in curbing COVID-19. *Id.*, at *4. Specifically, Judge Cote found:

> Given the severity of the public health crisis, the City has taken measures that are reasonable and narrowly tailored in temporarily prohibiting public

> gatherings. While a measure restricting all public group activity may not likely be found narrowly in ordinary times, these times are extraordinary. The City has demonstrated that the scientific and medical communities believe that preventing in-person gatherings is crucial to any strategy of containment. As the City has argued, the declining rates of infection and death among New Yorkers is evidence not that the gatherings ban is overly broad, but rather that it is effective. As there is no evidence to suggest that the City has misunderstood the dangers of person-to-person spread of COVID-19, the Court declines to second guess the City's measure that clearly seeks to mitigate this risk.

Id.

After denying Geller's motion for a temporary restraining order, Judge Cote entered judgment for the City at the parties' request. That same day, Geller filed a notice of appeal, and filed an emergency motion for an injunction pending appeal two days later.

On May 25, 2020, prior to Geller's appeal being heard by the Second Circuit Court of Appeals, George Floyd died while being physically restrained by three police officers in Minneapolis, Minnesota. His horrific death at the hands of the police, which was recorded by several bystanders, sparked street protests around the country and indeed, the world. Beginning on May 28, protests took place in the streets of New York City as well. The protestors appeared to embrace the Black Lives Matter ("BLM") movement.[11] Many of the protests included hundreds and even thousands of participants. According to Geller, the Governor and Mayor de Blasio "embraced" and affirmatively encouraged the BLM protests in a joint press release posted online on June 1, to respond to the violence that some of the protestors engaged in. Compl., Doc.1 ¶ 51. Specifically, Geller cites the following statements by Mayor de Blasio:

[11] As described on its website, the BLM movement began in 2013 after the acquittal of George Zimmerman, who fatally shot Trayvon Martin in Florida, with the mission to "eradicate white supremacy" and to "intervene in violence inflicted on Black communities." *See* https://blacklivesmatter.com/about/ (last accessed July 27, 2020). Nothing in the record suggests that the Black Lives Matter organization directed the demonstrations in New York City.

> I support and protect peaceful protest in this city. The demonstrations we've seen have been generally peaceful. We can't let violence undermine the message of this moment. It is too important and the message must be heard. Tonight, to protect against violence and property damage, the Governor and I have decided to implement a citywide curfew, the Police Commissioner and I have spoken at length about the incidents we've all seen in recent days where officers didn't uphold the values of this city or the NYPD. We agree on the need for swift action.

Id. Geller further cites the following statements by the Governor:

> I stand behind the protestors and their message, but unfortunately there are people who are looking to take advantage of and discredit this moment for their own personal gain, the violence and the looting that has gone on in New York City has been bad for the city, the state and this entire national movement, undermining [] and distracting from this righteous cause. While we encourage people to protest peacefully and make their voices heard, safety of the general public is paramount and cannot be compromised. At the same time, we are in the midst of a global pandemic which spreads through crowds and threatens public health. Tonight the Mayor and [I] are implementing a citywide curfew starting at 11 PM and doubling the NYPD presence across the city.

Id. During a press conference also on June 1, 2020, when asked if he would suggest people not go out and protest, Governor Cuomo answered:

> No, I think you can protest, but do it smartly and intelligently…There were protests all across the country. Protest. Just be smart about it. With this virus, you can do many things now as long as you're smart about it, right? You can reopen, you can go into a store and you can do a lot of things, just be smart.[12]

See Soos v. Cuomo, No. 20 Civ. 651 (GLS/DJS), 2020 WL 3488742, at *4 (N.D.N.Y. June 26, 2020). That same day, the following exchange took place when Governor Cuomo appeared on MSNBC's Deadline: White House with Nicolle Wallace:

> Nicolle Wallace: I spoke to our mutual friend Chris Christie over the weekend and he said that the economic despair that people are feeling in a lot of these cities is contributing to the hopelessness and the rage and the exasperation and the just despair with the state of all of it. With our inability to protect our citizens from a deadly virus. Our inability to

[12] At the time, non-essential outdoor gatherings of up to 10 people were permitted pursuant to Executive Order No. 202.33.

> protect people's economic security, their life saving's [sic], in the case of small business owners. And our inability to protect black Americans in particular from police. What do you have to say to people who are feeling hopeless?
>
> Governor Cuomo: It's right. It's right. I said on day one, I stand with the protesters. I believe this is a moment in history, Nicolle, where we can actually galvanize and make change. There are forces coming together here, let's be honest. It's not a coincidence that this is in the middle of the COVID crisis. The poor paid the highest price for this Covid situation. They were essential workers, their communities had a higher infection rate. They're living in public housing. You can't socially distance on an elevator in public housing. They were living paycheck to paycheck and now they're destitute. They paid the highest price. They always pay the highest price. It has just exploded the blatant injustice and racism in this nation. I said today, my father did the Tale of Two Cities speech in 1984 at the Democratic convention. It was true then, it's true now. Let's make this a moment of progressive reform and focus on a real agenda going forward.
>
> Nicolle Wallace: The divisions are there, the divisions are being exploited by this President, by the White House, the divisions a lot of people feel are exploited in some corners of the media. Most people don't want to feel divided. What can people do? What are you urging citizens of New York to do today, tonight?
>
> Governor Cuomo: Tonight, I'm saying be smart. We talk about New York tough. Part of being New York tough is being smart. We have to be smart. You want protest, don't lose in the protest. Don't be exploited. Don't make it a mask for criminal activity or for extremist organizations. If you're going out, wear a mask. Socially distance. Don't put your life at risk. That's short term.[13]

That same day, the Chief of Department of the New York City Police, Terence Monahan, was photographed as he kneeled with a BLM protester at Washington Square Park. Compl. ¶ 52. At a press conference two days later, Mayor de Blasio made the following statement:

> Don't just see the part where he kneels down, see what he says. And he's saying, pure passion from the heart, and he points to the officers around

[13] *See* "Governor Cuomo is a Guest on MSNBC's Deadline: White house with Nicolle Wallace," June 1, 2020, at https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-gest-msnbcs-deadline-white-house-nicolle-wallace (last visited July 31, 2020).

> us, and he says none of us believe what happened in Minnesota was right. And it was a very important moment, it was a watershed moment to me…

Id. ¶ 54.

At oral argument in the instant motion, Defendants' attorneys confirmed that no permits were requested or issued for those protests, nor were arrests made of any protestor simply for peaceably protesting.

Because no arrests were made of peaceful protestors, Geller argued, for the first time during oral argument before the Second Circuit, a selective enforcement Equal Protection claim. On June 4, the Second Circuit denied Geller's emergency motion without prejudice to renew "in the event that Appellant amends her complaint and/or seeks appropriate relief in the district court in light of facts and arguments articulated for the first time during oral argument."[14] *Id*. ¶ 67.

Also on June 4, Governor Cuomo went on an interview on WAMC Northeast Public Radio and made the following statements:

> Here's the challenge of the time: There are multiple truths and people only want to hear their own truth, but there are multiple truths. Yes, protestors have a right to protest and they should be righteously indignant about the murder of Mr. Floyd. They should be upset and I love to see those young people out there, African Americans, whites saying we're not going to take this anymore. We want reform. That's a truth.[15]

C. The Instant Case

Geller filed the instant case on June 17, 2020. Doc. 1. On June 23, she moved for a preliminary injunction. Doc. 16. A preliminary injunction hearing was held telephonically before this Court on July 23.

[14] Geller then voluntarily dismissed her appeal, and filed the instant action. *Id*. ¶ 68.

[15] *See* "Governor Cuomo Is a Guest on WAMC Northeast Public Radio with Alan Chartock," June 4, 2020, at https://www.governor.ny.gov/news/audio-rsuh-transcript-governor-cuomo-guest-wamc-northeast-public-radio-alan-chartock-4 (last visited July 31, 2020).

At the hearing, Geller's counsel acknowledged that she has not attempted to apply for a permit for her planned protest. Geller's counsel further acknowledged that the recent BLM protests were spontaneous, and that no permits were issued by either New York State or City, which the City confirmed. [16]

In response to a question by this Court as to whether an application from Geller would be futile, the Governor's counsel responded it is not clear on this record, but that in any event Geller would have had to first do something to trigger some sort of enforcement action before she could bring an as-applied First Amendment Challenge. The City acknowledged that Mayor de Blasio has expressed his support for the BLM protests, and that they were not aware of any enforcement against peaceful protestors for violating the gathering restrictions since the demonstrations related to Floyd's death began. In addition, the City explained that while law enforcement did not enforce the gathering restrictions at the protests, given the tense and emotional circumstances that inspired the protests, it was particularly important to give law enforcement the flexibility to make real time decisions as to whether to make an arrest or not, lest they exacerbate an already volatile situation. The City further explained:

> Well, certainly when the protests began, it was in the context of there having been protests in other cities as well that had turned violent. And that was something that the city, I believe, was very cognizant of. And, you know, there was a very large group of people that spontaneously gathered to protest. And that is a situation in which there have to be decisions made on the ground tactically about the best way to handle that. I mean, it is not always feasible or appropriate to start arresting people under those circumstances for violating a gathering ban…Well, for example, if it's a very large group, it can become violent against the police or against each other. Unfortunately, we have seen that in other cities…It is a tactical decision that needs to be made by the police department and others responding on the ground as to what the statements and the best way to handle these gatherings are for the public at large as a community.

[16] According to Defendants, this is an important distinction for purposes of enforcement because enforcement against protests generally target the organizers.

At the conclusion of the preliminary injunction hearing, Geller requested that, if the Court were to deny her motion for preliminary injunction, it also deny her presumptive motion for injunctive relief pending appeal for substantially the same reasons because that motion would be exactly the same as the instant one, to which the Defendants had no objections.[17]

As of the date of this Order, all regions within New York State, including New York City, have reached Phase Four of the State's reopening plan.[18] Pursuant to Executive Order No. 202.45, non-essential outdoor gatherings of up to 50 people are allowed.

While New York has been successful (to date) in flattening the curve, the pandemic is not over yet. During the week of June 23, the United States reported the highest seven-day average of new COVID-19 cases. During the week of July 23, New York City had reported 1,418 new positive cases of COVID-19, as well as 198 hospitalizations, and 58 confirmed deaths stemming from coronavirus.[19] It is against this backdrop that the Court held the preliminary injunction hearing on July 23, 2020, and issues the instant opinion.

II. Legal Standard

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995)). "A plaintiff seeking a

[17] The Second Circuit has held that under Fed. R. Civ. P. 62(c), which regulates the power of district courts to grant such relief, "a district court may grant injunctive relief after a proper notice of appeal has been filed, but only when it is necessary to preserve the status quo pending the appeal." *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556 (2d Cir. 1991) (citing, *International Ass'n of Machinists & Aerospace Workers v. Eastern Air Lines*, 847 F.2d 1988 (2d Cir. 1988)).

[18] *See* https://forward.ny.gov.

[19] *See* COVID-19: Data, New York City Health, available at https://www1.nyc.gov/site/doh/covid/covid-19-data.page (last accessed August 3, 2020). In comparison, during the week of April 9, New York City reported 34,344 positive cases of COVID-19, as well as 9730 hospitalizations, and 3,958 confirmed deaths.

preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Furthermore, the movant is held "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." *New York 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. *Id*. (quoting *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999), and *Doe v. N.Y.U.*, 666 F.2d 761, 773 (2d Cir. 1981)).

III. Discussion

A. Geller Has Not Shown A Clear Likelihood Of Success On The Merits

Although a showing of irreparable harm is often considered the "single most important prerequisite for the issuance of a preliminary injunction," *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted), "[c]onsideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor." *N.Y. Progress and Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013).

1. Geller's First Amendment Facial Challenge Is Collaterally Estopped

As mentioned above, Geller previously raised a First Amendment facial challenge to the City's implementation of the Governor's original ban on all non-essential outdoor gatherings of any size, Executive Order No. 202.10, and lost after briefing and a hearing. Specifically, Judge Cote determined that the Executive Order was "reasonable and narrowly tailored." *Geller I*,

2020 WL 2520711, at *4. Judge Cote's well-reasoned opinion collaterally estops Geller from raising a similar First Amendment facial challenge in the instant action.

Collateral estoppel applies where "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." *Levich v. Liberty Central School Dist.*, 361 F. Supp. 2d 151, 157 (S.D.N.Y. 2004) (quoting *Colon v. Coughlin*, 58 F.3d 865, 869 n.2 (2d Cir. 1995)); *see also Wyly v. Weiss*, 697 F.3d 131, 140 (2d Cir. 2012) (issue preclusion "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.").

Here, Geller again argues that she has a likelihood of success on the merits on a First Amendment facial challenge to the Executive Order. The only difference between her previous challenge and the instant one is that she is now challenging a *less* restrictive order. But this is not a material distinction for purposes of applying collateral estoppel. The issue necessarily decided in *Geller* I is the same issue presented in this case: whether, applying intermediate scrutiny,[20] the government's interest in protecting the public against the pandemic outweighs Geller's First Amendment right to protest. Because Judge Cote held that she was not likely to succeed on the merits of her facial challenge to the total ban, that ruling precludes re-litigation of another challenge towards a similarly facially neutral, but less restrictive Executive Order.

[20] In a forum traditionally open to the public, such as a public street or park, the government's authority to regulate speech or expressive conduct is typically "sharply circumscribed." *Geller I*, 2020 WL 2520711, at *3 (quoting *Hobbs*, 397 F.3d at 148). "A prior restraint on speech, *i.e.*, any regulation that gives public officials the power to deny use of a forum in advance of actual expression…bears a heavy presumption against its constitutional validity." *Id*. (citation omitted). When such a regulation is content-neutral, as the Court finds below, intermediate scrutiny applies. *Id*.)

Applying collateral estoppel here serves the underlying principles of the doctrine, which are to "save[] parties and the courts from the waste and burden or relitigating stale issues, and, by discouraging inconsistent result, forwards public policy favoring the establishment of certainty in legal relations." *Ferring B.V. v. Serenity Pharm., LLC*, 391 F. Supp. 3d 265 (S.D.N.Y. 2019) (quoting *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 719 (2d Cir. 1993)).

Moreover, even if the Court were to analyze her claim on the merits, it would still find that she has not established a clear likelihood of success. Contrary to Geller's assertion, the change in facts, namely Defendants' subsequent public statements expressing approval of peaceful protests and their purported lack of enforcement of the gathering restrictions with respect to the BLM protests, do not warrant a different outcome.

In order to determine the appropriate level of scrutiny, it is necessary to note the differences between a facial and an as-applied First Amendment challenge. On a facial challenge, a court "considers only the text of the [provision] itself, not its application to the particular circumstances of an individual."[21] *See Field Day, LLC v. Cnty. Of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 n.11 (1988)). The Second Circuit further clarified the point by instructing that when reading a regulation in the context of a facial First Amendment challenge, a court may do so in light of any "binding judicial or administrative construction" thereof, and must consider "the well-established practice of the authority enforcing the ordinance." *Id*. (citing *City of Lakewood*, 486 U.S. at 770 n.11 ("[W]hen a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, they are read in light of those limits."). On its face, Executive Order No.

[21] On an as-applied challenge, on the other hand, the Court is required to examine the "facts of a particular case to decide if a facially constitutional statute "deprived the individual to whom it was applied of a protected right." *Id*. at 174–75.

202.45 is content-neutral because it expressly applies to all non-essential gatherings without regard to the messages conveyed by those gatherings. *See also Geller I*, 2020 WL 2520711, at *3.

Geller's argument that the Executive Order should be read as a content-based regulation because of the City's "practice and policy" selectively suspending the First Amendment for some protests while "encouraging" the BLM protests, is unpersuasive. To begin, Geller's characterization of Defendants' public statements as evidence of viewpoint discrimination is overstated. Mr. Floyd's death sparked an immediate, spontaneous outpouring of righteous anger than reverberated around the globe. Tens of thousands engaged in street demonstrations in New York City on a near daily basis. Indeed, regular protests continue to this day, more than two months later. Certain of those demonstrations turned violent, with protestors destroying property and looting businesses. It is against that backdrop that Defendants made the public statements that Geller relies on so heavily. As is clear from the June 1 Press Release, the statements were made in response to the violence that marred certain demonstrations. (De Blasio: "I support and protect peaceful protests in this city. The demonstrations we've seen have been generally peaceful. We can't let violence undermine the message of the moment…Tonight, to protect against violence and property damage, the Governor and I have decided to implement a citywide curfew[.]"; Cuomo: "I stand behind the protestors and their message, but unfortunately there are people who are looking to take advantage of and discredit this moment for their own personal gain, the violence and the looting that has gone on in New York City, the state and this entire national movement, undermining [] and distracting from this righteous cause."). It was because of that violence that a curfew was imposed. In light of that context, Defendants' statements may

reasonably be construed as acquiescing to the inevitability of the protests, rather than actively "encouraging" protests.[22]

Furthermore, as the City suggested at oral argument, reasonably in the Court's view, public officials need to have the flexibility to determine how to enforce the gathering restrictions, to determine the circumstance under which arrest may or may not be appropriate. The Enforcement Guidance provided to each member of the New York City Police Department further supports this view. The Guidance, issued prior to Mr. Floyd's death, directs police officers in the first instance to instruct participants in gatherings to disperse and that "[e]nforcement should only be taken as a last resort if the group refuses to comply with an order to disperse from a large dangerous gathering." It is not difficult to imagine that if robust efforts were made to enforce the gathering restrictions in response to the Floyd demonstrations, an already fraught and combustible situation would have been made worse. As the City noted at oral argument:

> There was a very large group of people that spontaneously gathered to protest. And that is a situation in which there have to be decisions made on the ground tactically about the best way to handle that. I mean, it is not always feasible or appropriate to start arresting people under those circumstances for violating a gathering ban…Well, for example, if it's a very large group, it can become violent against the police or against each other…It is a tactical decision that needs to be made by the police department and others responding on the ground as to…the best way to handle these gatherings are for the public at large as a community.

Under these circumstances, the Chief Justice's words in *South Bay Pentecostal Church v. Newsom*, seem particularly fitting: public officials responding to a public health crisis must be afforded especially broad latitude, such that they should not be open to "second-guessing" by an "unelected federal judiciary which lacks the background, competence, and expertise to assess

[22] At the same time, the Governor stressed the importance of remaining vigilant against the virus: "I think you can protest, but do it smartly and intelligently…With this virus, you can do many things now as long as you're smart about it [.]"

public health and is not accountable to the people." 140 S.Ct. 1613, 1613–14 (2020) (Roberts, C.J. concurring). The Court therefore declines Geller's invitation to "play an active and probing role in testing any underlying factual assertions serving as Defendants' basis" for imposing the gathering restrictions, in the context of her facial First Amendment challenge. *See* Mem. of Law in Supp. re Mot. for Prelim. Inj., Doc. 18, at 21. To that end, the Court agrees with Judge Cote's reasoning in *Geller I* that any constitutional analysis must be undertaken through the lens of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) (upholding a vaccination statute enacted by Massachusetts to protect against smallpox), in light of the ongoing pandemic. *Geller I*, 2020 WL 2520711, at *3.

In *Jacobson*, 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 review is reserved for a measure that "has no real or substantial relation" to the object of public health or is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." 197 U.S. at 31. More recently, courts across the country have relied on *Jacobson* in refusing to enjoin state and local restrictions aimed at protecting the public against the spread of COVID-19.[23] *See Geller I*, 2020 WL 2520711; *see also Ass'n of Jewish Camp Operators v. Cuomo*, ---F.Supp.3d---, 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" and conducting traditional First Amendment analysis only in the alternative); *Six v. Newsom*, ---F.Supp.3d---, 2020 WL 2896543, at *3 (C.D. Cal. May 22, 2020) (discussing *Jacobson* as "the well-established test that governs when courts are asked to analyze the

[23] *See* Mem. of Law in Opp'n.re Mot. for Prelim. Inj., Doc. 26, at 18 n.7 (collecting cases where courts have rejected challenges to state and local government restrictions enacted over the past few months).

constitutionality of state powers to protect the public health"). They have uniformly found that the restrictions were adopted for the undeniable public interest in fighting COVID-19 which, as discussed below, has only become more apparent since the cases were decided.[24] In contrast, Geller's conclusory assertions that Defendants adopted these gathering restrictions to "silence opposition to" these very restrictions, are unsupported by the record.

Accordingly, because the Executive Order prohibits non-essential outdoor gatherings of over 50 people regardless of the messages expressed, the Court has no difficulty in concluding, as Judge Cote did, that the restriction was enacted to protect the public health and bears a real and substantial relation to the public safety concerns at issue. *See Jacobson*, 197 U.S. at 31. The Court further concludes that it is narrowly tailored because it promotes a substantial government interest that Geller does not dispute, namely, to mitigate the harm and spread of the pandemic, which would be "achieved less effectively" absent the gathering restrictions. *Hobbs*, 397 F.3d at 149 ("The narrow tailoring requirement is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," and the regulation "need not be the least restrictive or least intrusive means of doing so."); *see also McCarthy v. Cuomo*, No. 20 Civ. 2124 (ARR), 2020 WL 3286530, at *4 (E.D.N.Y. June 18, 2020) ("I agree with Judge Cote's analysis that prohibitions on large public gatherings and other similar restrictions are narrowly tailored to the interest of protecting the public from COVID-19."). Those conclusions have only been bolstered in recent weeks as conditions continue to improve in New York State while other states that imposed less restrictive measures have seen

[24] Geller's citation to the recent decision in *Soos v. Cuomo*, No. 20 Civ. 651, 2020 WL 3488742 (N.D.N.Y. June 26, 2020), granting a preliminary injunction enjoining the enforcement of New York's gathering bans solely as to the plaintiffs in that case based on a Free Exercise Clause challenge, misses the mark. Here, Geller does not raise a Free Exercise Clause claim and the Court in *Soos* expressly declined to address the plaintiffs' First Amendment and Equal Protection claims. *See Soos*, 2020 WL 3488742, at *4 n.4 ("Because each of the prongs is met with respect to plaintiffs' Free Exercise Clause claim, the court need not, and does not, analyze the remainders.").

an alarming surge in infection rates and deaths, showing that any progress attained may be fragile. *See* Doc. 27, ¶¶ 43–47; *see also Geller I*, 2020 WL 2520711, at *4 (noting that "the declining rates of infection and death among New Yorkers is evidence not that the gatherings ban is overly broad, but rather that it is effective.").

Moreover, because there are "ample alternative channels for the communication of [Geller's] information," her contention that the COVID-19 Executive Order leaves her with no reasonable or effective alternatives to express her views is unpersuasive. *See id*. (noting Geller is "free to express her discontent online, through media, and by protesting in public on her own."). In the first place, she could organize a protest of up to 50 participants today if she were so inclined. Moreover, as the Governor correctly points out, Geller's substantial online presence and following undercuts her contention that a protest of between 25 to 100 people is the most effective way for her to express her point of view.

2. Geller Lacks Standing To Bring An As-Applied First Amendment Challenge

The parties dispute whether Geller is precluded from bringing her as-applied First Amendment challenge before she has been charged with any violation of the gathering restrictions.

In support of their contention, Defendants cite *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Departments, Appellate Div. of the Supreme Court of New York*, a case where a law firm challenged the constitutionality of the restriction on investments in law firms by non-lawyers under the New York Code of Professional Conduct and certain New York statutes. 852 F.3d 178, 182 (2d Cir. 2017). The district court below dismissed the case for failure to state a claim, and the law firm appealed, contending that the New York provisions violated its First Amendment right to petition and to association. *Id*. at 184. The

Second Circuit held that "'[b]ecause plaintiffs pursue this pre-enforcement appeal before they have been charged with any violation of law, it constitutes a facial, rather than as-applied challenge.'" *Id*. (quoting *N.Y.S. Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) (internal quotation marks omitted)).

In response, Geller contends, relying principally on the Supreme Court's decision in *Steffel v. Thompson*, 415 U.S. 452, 459–62 (1974), that she need not subject herself to arrest to advance an as-applied challenge. In *Steffel*, police officers twice threatened to arrest the plaintiff and his partner for distributing handbills on an exterior sidewalk of a shopping center in protest of American involvement in the Vietnam War. *Id*. at 455. The plaintiff left to avoid arrest, but his partner continued distributing handbills and was subsequently arrested and charged with violating a Georgia criminal trespass statute. *Id*. at 455–56. Notably, the parties stipulated in *Steffel* that if the plaintiff "returned and refused upon request to stop handbilling, a warrant would be sworn out and he might be arrested and charged with a violation of the Georgia statute." *Id*. The Supreme Court held that under those circumstances, "it is not necessary that [he] subject himself to actual arrest or prosecution" to seek a declaratory judgment that the trespass statute was unconstitutional as applied to him.

Geller also cites to the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). In *Holder*, the Court considered an as-applied First Amendment challenge to a law that criminalized "'knowingly provid[ing] material support or resources to a foreign terrorist organization.'" *Id*. at 8. The plaintiffs there claimed that they had provided support to groups designated as terrorist organizations prior to the law's enactment and intended to continue to provide similar support in the future. Moreover, the record showed that the Government had already charged 150 persons with violating the challenged law, and it expressly declined to

disclaim prosecution if the plaintiffs recommenced their support of those organizations. The Supreme Court held that the plaintiffs faced a "credible threat of prosecution" and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Id*., at 15 (internal quotation marks omitted).

Although there appears to be some tension between *Jacoby* and *Steffel* and *Holder*, all of which are binding on this Court, the Court need not resolve that tension here because the facts of both *Steffel* and *Holder* are readily distinguishable from the instant case, and neither supports Geller's standing to bring an as-applied challenge. Geller acknowledges that she never even attempted to apply for a permit for her planned protest. Instead, she abandoned them before any interaction with the police, so that no threats of enforcement of the gathering restrictions have ever been made against her.

Geller cites to four arrests, as alleged in the complaints filed in two actions similarly challenging Defendants' gathering restrictions, *see Bouferguen v. Cuomo et al.*("*Bouferguen*), No. 20 Civ. 3975 (S.D.N.Y. May 22, 2020); *see also Butler et al. v. City of N.Y. et al.*("*Butler*"), No. 20 Civ. 4067 (S.D.N.Y. May 27, 2020), as evidence that she will be subject to arrest if she proceeds with her planned protest. Reply Mem. of Law in Supp. Re Mot. For Prelim. Inj., Doc. 28 at 4 n.4. ("citing prior arrests of protestors…making clear that Plaintiff's proposed protest…subject[] her to arrest"). As an initial matter, the Court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation but rather to establish the fact of such litigation and related filings. *See Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006).

Even were the Court to accept the contents of those complaints as true, they do not establish a genuine threat of enforcement against Geller. All four arrests were made on May 8

and 9 respectively, before the Floyd-related demonstrations began. Out of the four arrests, three were made only after the arrestees failed to disperse despite being told to do so.[25] *See Bouferguen*, No. 20 Civ. 3975, Compl., Doc. 1 ¶¶ 18–29; *see also Butler*, No. 20 Civ. 4067, Compl., Doc. 1 ¶¶ 59–66. Furthermore, the plaintiff in the *Bouferguen* action participated in a protest on May 2, 2020 against, *inter alia*, the gathering restrictions, with hundreds of protestors marching from the New York State Capitol and no arrest was made. *See Bouferguen*, No. 20 Civ. 3975, Compl., Doc. 1 ¶¶ 16–17. Another protest of 50 people was organized in Foley Square, New York City to protest the NYPD's enforcement of the COVID-19 Executive Orders. *See id*. ¶ 12. According to the *Bouferguen* plaintiff, there were also no arrests despite presence of a "significant number of police officers." *Id*. In his opposition brief, the Governor points to four more news accounts of protests against New York's COVID-19, that took place from mid-April to mid-May, where no arrests were reported. *See* Mem. of Law in Opp'n.re Mot. for Prelim. Inj., Doc. 26, at 24. To the extent that there were any doubts before, the City has represented that no enforcement or prosecution has been made of individuals solely for protesting peacefully as violations of the gathering restrictions since the Floyd-related demonstrations began, and that to the extent any arrests were made, they were for actions in addition to simply protesting, such as destruction of property. The Enforcement Guidance memorandum's clear instruction that enforcement should only be used as a last resort further undercuts any threat of enforcement or prosecution against Geller, especially in light of her representation that her planned protest would be peaceful and in compliance with social distancing protocols. *See Steffel*, 415 U.S. at 475; *see also Holder*, 561 U.S. at 15.

[25] As alleged in *Butler*, even the fourth arrest was made five minutes after an order of dispersal was given. But according to the arrestee, he was dispersing when he was arrested. *See Butler*, No. 20 Civ. 4067, Compl., Doc. 1 ¶¶ 59–70. New York Penal Code Law § 240.20 provides, in relevant part, that "a person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."

In any event, even were the Court to consider her as-applied challenge, it finds that Geller has not shown a clear likelihood of success on the merits thereof. As noted above, on her as-applied challenge, the Court looks into Geller's particular circumstances. *Field Day, LLC*, 463 F.3d at 185. (internal citations omitted). To be sure, Geller's planned protest involves political speech, which is at the core of the First Amendment protection and deserving of special protection. However, even political speech may be subject to reasonable time, place, and manner regulations that are content-neutral, serve a significant government interest, and that leave open ample alternative channels for communication of the information. *See Geller I*, 2020 WL 2520711.; *see also Frumer v. Cheltenham Township*, 545 F.Supp. 1292, 1293–94 (E.D. Penn. 1982) (quoting *American Future Systems, Inc. v. The Pennsylvania State Univ.*, 688 F.2d 907, 915 (3d Cir. 1982) ("even speech entitled to the highest First Amendment protection may be subject to reasonable time, place, and manner regulations that are content-neutral, serve a significant government interest, and that leave open ample alternative channels for communication of the information.")). Peaceful protests of up to fifty people are clearly permitted now. Moreover, as discussed above, Geller's individual circumstances, namely her substantial online presence and following, mitigate any burden imposed on her by the 50-person cap, as she can continue to speak out to her more than one million followers through her social media platform, articles, and regular television appearances.[26]

[26] Geller has in fact regularly used these channels to protest New York's policies, including a post about this lawsuit, *see* https://www.facebook.com/pamelageller/posts/10159555602397439, another post about the requirement of wearing masks, *see* https://www.facebook.com/pamelageller/posts/10159470575842439, and one objecting to the Executive Orders as an attempt to seize complete dictatorial control, *see* https://www.facebook.com/pamelageller/posts/10159398494187439. According to her website, she has also published multiple books, written op-eds in publications all over the world, and regularly appears on television. *See* https://gellerreport.com/about/.

3. Geller Has Failed To State A Selective Enforcement Equal Protection Claim

To the extent Geller bases her as-applied challenge on a claim that the gathering restrictions are applied to her in a discriminatory fashion against her First Amendment protected views, that challenge "coalesce[s]" with her selective enforcement Equal Protection claim, s*ee Cobb v. Pozzi*, 363 F.3d 110 (2d Cir. 2004), and she has not shown a clear or substantial likelihood of success on the merits thereof.

In order to state a selective enforcement Equal Protection claim, a plaintiff must plausibly allege: (1) that she, compared with others similarly situated, was "selectively treated"; and (2) that such "selective treatment" was based on "impermissible considerations" including, among other things, "intent to inhibit or punish the exercise of constitutional rights." *Bar-Levey v. Gerow*, No. 18 Civ. 9454 (NSR), 2020 WL 814925, at *5 (S.D.N.Y. Feb. 19, 2020) (citing *Tyk v. Surat*, 675 F. App'x 40, 42 (2d Cir. 2017)). To satisfy the first prong, a plaintiff must identify a "similarly situated comparator," and show that she was treated differently compared with that comparator. *See id*. Geller has not done so here. As she acknowledged at the preliminary injunction hearing, the BLM protests were spontaneous rather than organized, as her planned protest would be. Additionally, there has been no interaction between Geller and any government officials or the police. Finally, contrary to Geller's assertion and as discussed above, nothing in Defendants' public statements remotely suggest an attempt to suppress viewpoints against gathering restrictions, or that Defendants permit only protests expressing messages that they favor.

Accordingly, because Geller has not shown a clear or substantial likelihood of success on the merits of either her First Amendment or Equal Protection claims, the Court need not consider the other factors. *See Geller I*, 2020 WL 2520711, at *5 (citing *Hsu v. Roslyn Union Free*

School Dist. No 3, 85 F.3d 839, 853 (2d Cir. 1996) (noting that in the First Amendment context a finding of irreparable harm is contingent on a plaintiff's likelihood of success on the merits)).

IV. Conclusion

Because Geller has failed to show a clear or substantial likelihood of success, her motion for a preliminary injunction is DENIED. As requested by Geller at the preliminary injunction hearing, her motion for injunctive relief pending appeal is also DENIED. The Clerk of Court is respectfully directed to terminate motion, Doc. 16.

It is SO ORDERED.

Dated: August 3, 2020
New York, New York

Edgardo Ramos, U.S.D.J.

EXHIBIT 2

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

PAMELA GELLER, Plaintiff, -v.- ANDREW CUOMO, in his official capacity as Governor of the State of New York; 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. 1:20-cv-4653 Honorable Edgardo Ramos

DECLARATION OF PAMELA GELLER

I, Pamela Geller, make this declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge and upon information and belief where noted.

1. I am an adult citizen of the United States and a resident of the City of New York (hereinafter "New York," "New York City," or "City").

2. I have long championed the cause of the First Amendment. I am the president of the American Freedom Defense Initiative, a nonprofit organization that defends the right to freedom of speech. I am a published author, a conservative blogger, and a political activist.

3. I organized successful public protests of the Ground Zero mosque construction in Lower Manhattan. I have also successfully challenged government restrictions on free speech in New York. *See, e.g.*, *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012), Washington, D.C., *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit. Auth.*, 898 F. Supp. 2d 73 (D.D.C. 2012), Philadelphia, *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), and

Seattle, *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126 (9th Cir. 2018), among others.

4. But for Defendants' suspension of First Amendment activity within the City as set forth in the accompanying motion for preliminary injunction, I would have organized and participated in public protests of Defendant de Blasio's and Defendant Cuomo's draconian restrictions on liberty they have imposed during this current COVID-19 pandemic.

5. Defendant Andrew Cuomo is the Governor of the State of New York. Upon information and belief, as the Governor, Defendant Cuomo is responsible for adopting, creating, and enforcing the executive and emergency policies and practices of the State of New York, including the challenged policy and practice of suspending the First Amendment for some protestors within the State as set forth in the accompanying motion for preliminary injunction.

6. Upon information and belief, at all relevant times herein, Defendant Cuomo was a government official acting under the color of State law. Defendant Cuomo is sued in his official capacity as the Governor of the State of New York.

7. Defendant Bill de Blasio is the Mayor of New York City. Upon information and belief, as the City Mayor, Defendant de Blasio is responsible for adopting, creating, and enforcing the executive and emergency policies and practices of the City, including the challenged policy and practice of suspending the First Amendment for some protestors within the City as set forth in the accompanying motion for preliminary injunction.

8. Upon information and belief, at all relevant times herein, Defendant de Blasio was a government official acting under the color of State law. Defendant de Blasio is sued individually and in his official capacity as the New York City Mayor.

9. Defendant Dermot Shea is the New York City Police Commissioner. Upon information and belief, as the City Police Commissioner, Defendant Shea is responsible for

enforcing the policies and practices of the City and the State, including the challenged policies and practices of suspending the First Amendment for some protestors within the City and the State of New York as set forth in the accompanying motion for preliminary injunction.

10. Upon information and belief, at all relevant times herein, Defendant Shea was a government official acting under the color of State law. Defendant Shea is sued individually and in his official capacity as the City Police Commissioner.

Defendant Cuomo Issues Orders Restricting First Amendment Rights

11. Upon information and belief, pursuant to his authority as Governor, Defendant Cuomo is empowered to issue executive orders. A violation of an executive order can result in a civil or criminal penalty.

12. On or about March 23, 2020, Defendant Cuomo issued Executive Order ("EO") No. 202.10, which took effect immediately and remained in effect pursuant to Section 29-a of Article 2-B of the Executive Law of the State of New York for 30 days unless it was terminated or modified at an earlier date.[1]

13. EO No. 202.10 ordered, in relevant part, that "[n]on-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time."

14. On April 7, 2020, Defendant Cuomo issued EO No. 202.14, which extended the restriction on "non-essential gatherings" through April 29, 2020.

15. On April 16, 2020, Defendant Cuomo issued EO No. 202.18, which extended the restriction on "non-essential gatherings" through May 15, 2020.

[1] All EOs referenced herein are maintained on Defendant Cuomo's official government website at https://www.governor.ny.gov/executiveorders (last accessed June 23, 2020).

16. On May 8, 2020, Defendant Cuomo issued EO No. 202.29, which extended the restriction on "non-essential gatherings" through June 7, 2020.

17. On May 21, 2020, Defendant Cuomo issued EO No. 202.32, which modified EO 202.10 "to permit a gathering of ten or fewer individuals for any religious service or ceremony, or for the purposes of any Memorial Day service or commemoration."

18. On May 22, 2020, Defendant Cuomo issued EO No. 202.33, which modified EO 202.32 "to permit any non-essential gathering of ten or fewer individuals, for any lawful purpose or reason."

19. On May 29, 2020, Defendant Cuomo issued EO No. 202.35, which extended the modified restriction on "non-essential gatherings" until June 28, 2020.

20. On June 13, 2020, Defendant Governor Cuomo issued EO No. 202.41, which extended the modified restriction on "non-essential gatherings" until July 13, 2020.

21. On June 15 2020, Defendant Cuomo issued EO No. 202.42, which modified EO 202.41 by extending its effective date until July 15, 2020, and by "allow[ing] twenty-five (25) or fewer individuals, for any lawful purpose or reason, provided that the location of the gathering is in a region that has reached Phase 3 of the State's reopening."

22. Upon information and belief, the City of New York is in Phase 1 of the State's reopening plan and remains subject to EO 202.41's prohibition restricting non-essential group activities, including protests in public fora, to "ten or fewer individuals."

Defendant de Blasio Issues Orders Restricting First Amendment Rights

23. Upon information and belief, pursuant to his authority as Mayor, Defendant de Blasio is empowered to issue emergency executive orders. A violation of an emergency executive order can result in a civil or criminal penalty.

24. Upon information and belief, pursuant to his authority as Police Commissioner, Defendant Shea is empowered and required to enforce Defendant de Blasio's emergency executive orders and Defendant Cuomo's executive orders via the City's police force.

25. On or about March 25, 2020, Defendant de Blasio issued Emergency Executive Order ("EEO") No. 103, which took effect immediately and remained in effect for five (5) days unless terminated or modified at an earlier date.[2]

26. EEO No. 103 ordered that "any non-essential gatherings of individuals of any size for any reason shall be cancelled or postponed."

27. Through a series of executive orders issued beginning on March 30, 2020 and continuing every five days throughout the month of April, Defendant de Blasio extended the restriction on "non-essential gatherings" for an additional five days.

28. On May 4, 2020, Defendant de Blasio issued EEO No. 111, which again extended the restriction on "non-essential gatherings" for an additional five days.

29. Upon information and belief, prior to May 4, 2020, Defendants had never made any public statement or issued any official or unofficial clarification that the restriction on "non-essential gatherings" would apply to prohibit otherwise lawful free speech activity.

30. During a press conference held on May 4, 2020, Defendants de Blasio and Shea publicly and officially announced that the "shut down" imposed by the executive orders included the suspension of the right to publicly protest in the City. In other words, free speech activity was considered a "non-essential gathering" and thus prohibited.

31. Upon information and belief, the May 4, 2020, press conference announcement by

[2] All EEOs referenced herein are maintained on Defendant de Blasio's official government website at https://www1.nyc.gov/office-of-the-mayor/news.page (last accessed June 23, 2020).

Defendants de Blasio and Shea was prompted by a question relating to a small group of protestors who were instructed by New York City police to disband and who were threatened by the police with summonses and arrest if they failed to disband. Upon information and belief, the reporting of this event on May 4, 2020, was the first public report of Defendants de Blasio and Shea enforcing the executive orders against individuals peaceably assembling for the purpose of public protest.

32. Through a series of executive orders issued beginning on May 9, 2020 and continuing every five days through May 24, Defendant de Blasio extended the restriction on "non-essential gatherings" for an additional five days.

33. On May 29, 2020, Defendant de Blasio issued EEO No. 115, which extended the restriction on "non-essential gatherings" for an additional five days and modified it in relevant part as follows: "[A]ny non-essential gathering of individuals of any size for any reason shall be cancelled or postponed, provided however that gatherings of ten (10) or fewer individuals where such individuals adhere to applicable social distancing protocols and cleaning and disinfection protocols are permitted."

34. Through a series of executive orders issued beginning on June 3, 2020 and continuing approximately every five days through June 17, Defendant de Blasio extended the modified restriction on "non-essential gatherings" for an additional five days.

35. The purpose and effect of the restrictions on "non-essential gatherings"—the challenged First Amendment restrictions—were, and continue to be, to shut down most of the City and the State of New York for certain protest activity. Upon information and belief, Defendants' rationale for the "shut down" and thus the challenged restrictions has been, and continues to be, to stop the spread of COVID-19 and to "flatten the curve" of infection, hospitalization, and mortality

rates related to COVID-19.

36. Upon information and belief, Defendants Cuomo and de Blasio intend to issue additional executive orders over the coming weeks and months that will continue the "shut down" and thus continue the challenged First Amendment restrictions.

37. Upon information and belief, Defendants Cuomo and de Blasio intend to lessen or increase the "shut down" and thus First Amendment restrictions in the future depending upon their respective views of the severity of the COVID-19 infection, hospitalization, and mortality rates in New York.

38. Despite suspending First Amendment activity within the City pursuant to the challenged First Amendment restrictions, Defendant de Blasio has implemented an Open Streets initiative whereby certain City streets are open to pedestrians and cyclists. However, these same City streets remain closed for Plaintiff's First Amendment protest activity of more than 10 people even if the protestors maintain proper social distancing.

39. Prior to the May 4, 2020 announcement by Defendants de Blasio and Shea that Defendant de Blasio's executive orders prohibit lawful, free speech activity throughout the City, I was planning public protests of Defendant de Blasio's draconian restrictions imposed during this current pandemic. I was planning to protest throughout the months of May and July, and as long as the restrictions continued, in public fora throughout the City, but principally at City Hall Plaza. I was planning protests of approximately 25 to 100 people. As a result of the challenged First Amendment restrictions, I had to cease and cancel my planned protests, thus causing me irreparable harm.

40. Upon information and belief, Defendant Cuomo has now also taken the formal position in litigation that his executive orders also prohibit lawful, free speech activity throughout

the State.

Defendants Encourage New York City Protests Violating the First Amendment Restrictions Based Upon the Content and Viewpoint of the Message

41. Apparently sparked by the death of George Floyd while in police custody in Minneapolis, Minnesota, beginning on May 28, 2020, and continuing daily through the current month of June 2020, hundreds and thousands of protestors have taken to the streets of New York City protesting what they allege to be police brutality against Blacks and what is referred to as systemic racism, and calling for various reforms.

42. Notwithstanding the First Amendment restrictions in place at the time and their enforcement by Defendants against other New Yorkers engaged in public group activity, including activity protected by the First Amendment's right to freedom of speech and to peaceably assemble, Defendants have embraced the content and viewpoint of these protestors' message and have encouraged the demonstrations and protests (hereinafter referred to as "government-approved protests").

43. For example, on June 1, 2020, just four days after the start of the government-approved protests, Defendants Cuomo and de Blasio issued a press release with the following quoted statements:

> "I support and protect peaceful protest in this city. The demonstrations we've seen have been generally peaceful. **We can't let violence undermine the message of this moment. It is too important and the message must be heard**. Tonight, to protect against violence and property damage, the Governor and I have decided to implement a citywide curfew," said Mayor Bill de Blasio. "The Police Commissioner and I have spoken at length about the incidents we've all seen in recent days where officers didn't uphold the values of this city or the NYPD. We agree on the need for swift action. He will speak later today on how officers will be held accountable."
>
> "**I stand behind the protestors and their message**, but unfortunately there are people who are looking to take advantage of and discredit this moment for their own personal gain," said Governor Cuomo. "The violence and the looting that has

> gone on in New York City has been bad for the city, the state and this entire national movement, undermining the and distracting from this righteous cause. **While we encourage people to protest peacefully and make their voices heard**, safety of the general public is paramount and cannot be compromised. At the same time, we are in the midst of a global pandemic which spreads through crowds and threatens public health. Tonight the Mayor and are implementing a citywide curfew starting at 11 PM and doubling the NYPD presence across the city."

Press Release, Mayor Bill de Blasio and Governor Andrew M. Cuomo, Mayor de Blasio and Governor Cuomo Announce Citywide Curfew in New York City Beginning at 11 PM Tonight (June 1, 2020) (emphasis added) *available at* https://www1.nyc.gov/office-of-the-mayor/news/394-20/mayor-de-blasio-governor-cuomo-citywide-curfew-new-york-city-beginning-11-pm (last visited on June 23, 2020).

44. Beyond the verbal praise of the protestors who were openly and massively violating the challenged First Amendment restrictions, it was widely reported that high ranking New York City police officers actually participated in the protests by kneeling with protestors and holding hands with other protestors while not wearing any face coverings or gloves. Social distancing was also disregarded. The below photograph is but one of many examples:

This picture is captioned as follows:

> Chief of Department of the New York City Police, Terence Monahan, takes a knee with activists as protesters paused while walking in New York, Monday, June 1, 2020. Demonstrators took to the streets of New York to protest the death of George Floyd, who died May 25 after he was pinned at the neck by a Minneapolis police officer. (AP Photo/Craig Ruttle).

"See it: One of NYPD's top cops kneels, hugs protester," Pix 11 (June 1, 2020) *available at* https://www.pix11.com/news/local-news/see-it-one-of-nypds-top-cops-kneels-hugs-protester (last visited on June 23, 2020).

45. Chief Monahan's conduct pictured above violates Defendant de Blasio's and Defendant Cuomo's executive orders prohibiting "non-essential gatherings" consisting of more than 10 people and the executive orders requiring social distancing in public, and it violates Defendant Cuomo's Executive Order 202.17 requiring face coverings in public settings when social distancing cannot be observed.

46. Notwithstanding the blatant violations of the executive orders and, in particular, the

challenged First Amendment restrictions, Defendant de Blasio enthusiastically endorsed Chief Monahan's conduct:

> Terry Monahan made the point out in Washington Square Park, anyone who hasn't seen that video of Terry Monahan in Washington Square Park needs to see it, it is a profound moment. **Don't just see the part where he kneels down, see what he says. And he's saying, pure passion from the heart, and he points to the officers around us, and he says none of us believe what happened in Minnesota was right. And it was a very important moment, it was a watershed moment to me**, and I think we need this going forward, that police leaders, police officers, I'd like to see police unions even say, when something is done wrong in policing, we are all going to own it. We all want to fix it together.

Official Transcript of Press Conference (June 3, 2020) available at https://www1.nyc.gov/office-of-the-mayor/news/402-20/transcript-mayor-de-blasio-holds-media-availability (last visited on June 23, 2020) (emphasis added). And yet again five days later:

> Chief Monahan, I spoke to him throughout this. I constantly was in touch with Commissioner Shea, Chief Monahan, Chief Pichardo. We constantly compared notes. And I want to say again, Chief Monaghan in Washington Square Park did something that I hope will be respected. The highest ranking uniformed officer in the largest, most important police force in America – he spoke to the protesters. He said, none of us condoned and can accept what happened, that those officers did in Minnesota, and we are all in this together and we have to bring our city forward together. **And then they said, show us some respect, take a knee with us, and he did. It was a powerful, meaningful moment. And for all the things that need to be better, we also have to remember the things that were right, and that was something right**.

Official Transcript of Press Conference (June 8, 2020) *available at* https://www1.nyc.gov/office-of-the-mayor/news/419-20/transcript-mayor-de-blasio-holds-media-availability (last visited on June 23, 2020) (emphasis added).

My First Amendment Activity Restricted

47. Prior to the May 4, 2020, press conference, I had understood that First Amendment activity, specifically including peaceful public protests in public fora within the City, was not forbidden by either Defendant Cuomo's executive orders or Defendant de Blasio's emergency

executive orders insofar as I assumed such activity was considered "essential" to a free society and thus not within the scope of the restrictions.

48. Prior to the May 4, 2020, press conference, I had planned for and begun to organize participation in upcoming public protests of Defendants de Blasio's policies, including the draconian restrictions he had imposed upon businesses, religious worship, and other fundamental liberties during the COVID-19 pandemic. I had planned for these protests to take place throughout the City in traditional public fora, but principally at City Hall Plaza, and to continue as long as the restrictions remained in place. The protest was to include between 25 and 100 people standing silently with face coverings, observing social distancing protocols, and holding signs conveying their protest message.

49. Upon learning of Defendant de Blasio's and Shea's position that public protests were considered non-essential activity and thus forbidden under the executive orders, I cancelled my planned protests.

50. But for the challenged First Amendment restrictions, I would have organized and participated in several public protests, with each protest including between 25 and 100 people.

51. But for the challenged First Amendment restrictions, I would have participated in public protests, maintaining proper social distancing, on the City streets that have been opened pursuant to Defendant de Blasio's Open Streets initiative and in public fora, including the public sidewalks surrounding City Hall plaza.

Plaintiff's Original First Amendment Lawsuit

52. Three days after the May 4, 2020, press conference, I filed my original First Amendment lawsuit in this Court against Defendants de Blasio and Shea alleging, *inter alia*, that Defendant de Blasio's executive orders violated my right to peaceably assemble and my right of

free speech in violation of the First Amendment and sought preliminary and permanent injunctive relief and nominal damages.

53. On May 12, 2020, I filed a motion in this Court seeking a temporary restraining order (TRO) and preliminary injunction against Defendants de Blasio and Shea.

54. On May 18, 2020, the Court issued an opinion and order denying the motion for TRO and, pursuant to agreement by the parties, issued a final judgment in favor of Defendants de Blasio and Shea. I filed my notice of appeal later that same day.

55. On May 20, 2020, I filed an emergency motion for an injunction pending appeal in the U.S. Court of Appeals for the Second Circuit seeking to immediately prevent Defendants de Blasio and Shea from enforcing the restrictions on my First Amendment activity.

56. As set forth above, on May 22, 2020, Defendant Cuomo modified his restriction on "non-essential group activity" (*i.e.*, permitting up to 10-person public group activity, including protests). Also as set forth above, Defendant de Blasio followed suit and modified his restriction on May 29, 2020.

57. My emergency motion was briefed within 9 days, and on June 2, 2020, the parties argued the motion before a motions panel of the Second Circuit.

58. During oral argument, the circuit judges extensively questioned Defendants' counsel as to how the City's recent embrace of the government-approved protests fit with their enforcement of the restrictions against my protest activity especially in light of Defendants approving of and allowing protest activity when they agree with the content and viewpoint of the protestors while disallowing protest activity when they do not agree with the content and viewpoint of the protestors. In response, Defendants' counsel took the position that, because the government-approved protests only began after the filing of the Notice of Appeal and the briefing of the

emergency motion before the Court of Appeals, the appellate court should not consider the issues arising from the government-approved protests.

59. On June 4, 2020, the Second Circuit denied my emergency motion but made clear that I was free to renew my motion before the Court of Appeals after establishing a proper record below. The Second Circuit's decision in full follows:

> Appellant moves for an emergency injunction pending appeal. Upon due consideration, it is hereby ORDERED that the Appellant's motion for an injunction pending appeal is DENIED because the Appellant has failed to meet the requisite standard. *See LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994). This denial is without prejudice to renewal in the event that Appellant amends her complaint and/or seeks appropriate relief in the district court in light of facts and arguments articulated for the first time during oral argument.

60. The parties agreed to stipulate to the dismissal of the pending appeal before the Second Circuit so that I could file this lawsuit alleging the facts relating to the government-approved protests.

61. The Second Circuit dismissed the pending appeal on June 8, 2020.

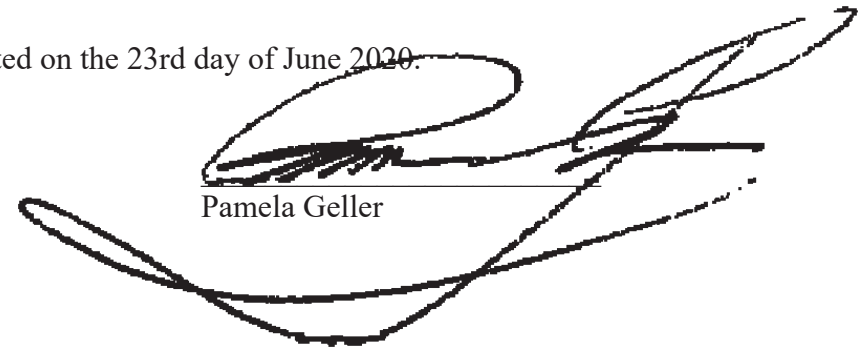
62. Public protests are an effective way to change public policy, particularly during this current COVID-19 pandemic. For example, shortly following a large public protest outside of the State Capitol in Lansing, Michigan, the Michigan Governor eased many of the restrictions that fueled the protest, realizing that her political power and future were in jeopardy as a result of her exceedingly unpopular decisions. Other similar protests have sprung up in major cities across the country. Through the challenged First Amendment restrictions, Defendants de Blasio and Cuomo seek to silence such opposition to their respective policies so that they can retain their political power. Consequently, the challenged First Amendment restrictions operate to suppress those viewpoints that oppose efforts by government officials to control people's lives and restrict their liberty during the COVID-19 pandemic—a viewpoint I share enthusiastically.

63. However, as set forth above, during this pandemic, Defendants permit protests that express views that Defendants' favor, such as the views expressed by protestors during the government-approved protests.

64. A large public protest is the most effective way for me and others who oppose Defendants' policies to express and show our opposition. Such protests also generate a great deal of media attention, particularly in New York City. There are no reasonable or effective alternatives for me and others to express our opposition to Defendants' policies.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on the 23rd day of June 2020.



Pamela Geller

EXHIBIT 3

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

PAMELA GELLER, Plaintiff, -v.- ANDREW CUOMO, in his official capacity as Governor of the State of New York; 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. 1:20-cv-4653 Honorable Edgardo Ramos

DECLARATION OF DAVID YERUSHALMI, ESQ.

I, David Yerushalmi, make this declaration pursuant to 28 U.S.C. § 1746 and based on my personal knowledge and upon information and belief where noted.

1. I am an adult citizen of the United States and lead counsel in the matter captioned above.

2. Prior to the BLM protests beginning in New York City on May 28, 2020, Defendants de Blasio and Shea had stated publicly that they would arrest violators of Defendant Cuomo's executive orders prohibiting public protests. (*See* Geller Decl. ¶¶ 30-31, 41 [Doc. No. 17]).

3. Specifically, during the May 4, 2020, press conference, Defendant Shea responded to a reporter's question about New York City police threatening protestors with arrest the day before by responding that the New York City police department would enforce the "executive orders" prohibiting public protests. Notably, Defendant Shea did not mention the "Emergency Executive Orders," which is the term formally given Defendant de Blasio's orders relating to

COVID-19. Governor Cuomo's orders relating to COVID-19 are formally referred to as just "Executive Orders."

4. In federal litigation challenging various aspects of the restrictions against public protests, Defendants have all maintained that Defendant de Blasio's and Cuomo's orders are lawful and lawfully apply to the plaintiffs challenging them.

5. For example, Linda Bouferguen was arrested on May 8, 2020, for violating Defendant Cuomo's and de Blasio's orders forbidding public gatherings. (Compl. at ¶ 22 [Dkt. #1] filed in *Bouferguen v. Cuomo et al*., 1:20-cv-03975 [S.D.N.Y. May 22, 2020], attached hereto as Ex. A; *see also* Bouferguen Decl. at ¶¶ 6-8 [Dkt. #4] filed in *Bouferguen v. Cuomo et al.* in support of motion for temporary restraining order, attached hereto as Ex. B).

6. On May 9, 2020, the plaintiff in Bouferguen was arrested again along with nine other protestors for protesting her arrest of the day before. (Bouferguen Compl. at ¶¶ 25-27; Bouferguen Decl. at ¶¶ 8-11).

7. In the Bouferguen litigation, Defendant Cuomo opposed plaintiff's motion for a temporary restraining order, arguing that his executive orders constitutionally prohibited plaintiff from protesting and asking the court to deny the motion. Moreover, Defendant Cuomo did not take the position that it was his expectation that Defendants de Blasio and Shea would refuse to enforce his public gathering restriction. In fact, his argument in his opposition papers was that his orders were absolutely necessary to prevent the spread of COVID-19 and to save lives. (Defendant Cuomo's Opp'n Br. [Dkt. #7] filed in *Bouferguen v. Cuomo et al*., attached hereto as Ex. C).

8. On May 9, 2020, Eric Butler and Jacob J. Katzburg were arrested, along with seven others, for violating Defendant de Blasio's orders prohibiting public gatherings. (Verified Compl. at ¶¶ 44-72 [Dkt. #1] filed in *Butler et al. v. City of N.Y. et al*., 1:20-cv-04067 [S.D.N.Y. May 27,

2020], attached hereto as Ex. D).

9. Plaintiffs in the Butler litigation filed a motion for temporary restraining order. As part of the City of New York and Defendants de Blasio's and Shea's opposition to the motion, the defendants filed a New York City Police Department "General Administration Information" memorandum issued to all police commands and dated May 22, 2020. This command memorandum instructs all commands to enforce the prohibition against public gatherings in excess of 10 people and to arrest those individuals who do not comply with an order to disperse. (NYPD Command Mem. [dated May 22, 2020], filed in *Butler et al. v. City of N.Y. et al*. as Ex. 8 to Shonfeld Decl. [Dkt. #11-7], attached hereto as Ex. E).

10. In the Butler litigation, in addition to arguing that Defendants de Blasio's and Cuomo's restrictions on public gathers were constitutional and lawfully prohibited the Butler plaintiffs from protesting in groups larger than 10 people, the City defendants all took the position that Defendant Cuomo, who was not a named defendant, was a necessary party because Defendant de Blasio's order restricting public gatherings was expressly based upon and dependent upon Defendant Cuomo's orders restricting public gatherings. (Defs.' Opp'n Br. [Dkt. #12] at 90-10, filed in *Butler et al. v. City of N.Y. et al*., attached hereto as Ex. F).

11. Moreover, in the Butler litigation, at oral argument the City Defendants' counsel elaborated on this position by stating expressly that even if the court were to strike down Defendant de Blasio's order restricting public protests, the City Defendants, and notably Defendant Shea and the New York City Police Department, would still enforce Defendant Cuomo's order restricting public gatherings precisely because Defendant de Blasio's orders "derive from and are based on [Defendant Cuomo's] orders." (Tr. of *Butler* oral argument re: mot. for TRO at 19-21, filed in *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 U.S. Dist. LEXIS 111808, at *10 (N.D.N.Y.

June 26, 2020), as Ex. 4 to Parodi Decl. [Dkt. #19-4], attached hereto as Ex. G.).

12. On June 1, 2020, following several days of protests arising because of the death of George Floyd, Defendants de Blasio and Cuomo issued a joint formal public statement and each posted the statement on their official websites at the same location where their respective executive orders relating to the COVID-19 pandemic are posted for the public. Defendant de Blasio posted the joint statement at https://www1.nyc.gov/office-of-the-mayor/news/394-20/mayor-de-blasio-governor-cuomo-citywide-curfew-new-york-city-beginning-11-pm (last visited July 14, 2020), and Defendant Cuomo posted the joint statement at https://www.governor.ny.gov/news/governor-cuomo-and-mayor-de-blasio-announce-citywide-curfew-new-york-city-will-take-effect (last visited July 14, 2020).

13. The formal joint statement includes quoted statements of support for the George Floyd/Black Lives Matter protestors as follows:

> "I stand behind the protestors and their message, but unfortunately there are people who are looking to distract and discredit this moment," **Governor Cuomo** said. "The violence and the looting has been bad for the city, the state and this entire national movement, undermining and distracting from this righteous cause. While we encourage people to protest peacefully and make their voices heard, the safety of the general public is paramount and cannot be compromised. Tonight the Mayor and I are implementing a citywide curfew starting at 11 PM and doubling the NYPD presence across the city."
>
> "I support and protect peaceful protest in this city. The demonstrations we've seen have been generally peaceful. We can't let violence undermine the message of this moment. It is too important and the message must be heard. Tonight, to protect against violence and property damage, the Governor and I have decided to implement a citywide curfew," **said Mayor Bill de Blasio.** "The Police Commissioner and I have spoken at length about the incidents we've all seen in recent days where officers didn't uphold the values of this city or the NYPD. We agree on the need for swift action. He will speak later today on how officers will be held accountable."

(Emphasis in the original).

14. In *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 U.S. Dist. LEXIS 111808, at

*1 (N.D.N.Y. June 26, 2020), the court found the following undisputed facts:

> During a press conference held on June 1, 2020, when asked if he would "suggest people not go out and protest," Governor Cuomo answered:
>
> > No, I think you can protest, but do it smartly and intelligently. . . . There were protests all across the country. Protest. Just be smart about it. With this virus, you can do many things now as long as you're smart about it, right? You can reopen, you can go into a store and you can do a lot of things, just be smart.

Soos v. Cuomo, No. 1:20-cv-651 (GLS/DJS), 2020 U.S. Dist. LEXIS 111808, at *10 (N.D.N.Y. June 26, 2020). And,

> During this same press briefing [referring to a subsequent press briefing on June 4, 2020], Governor Cuomo also stated, "I want to thank the protestors. . . . I stand with the protestors on the point that we need meaningful reform."

Id. at *12.

> On April 28, Mayor de Blasio appeared in Williamsburg at a Jewish funeral gathering, which was dispersed by the New York Police Department (NYPD). Via Twitter, Mayor de Blasio wrote: "Something absolutely unacceptable happened in Williamsburg tonite [sic]: a large funeral gathering in the middle of this pandemic. When I heard, I went there myself to ensure the crowd was dispersed. And what I saw WILL NOT be tolerated so long as we are fighting the Coronavirus." This was followed by another tweet: "My message to the Jewish community, and all communities, is this simple: the time for warnings has passed. I have instructed the NYPD to proceed immediately to summons or even arrest those who gather in large groups. This is about stopping this disease and saving lives. Period."
>
> During a June 2, 2020 media conference, when asked: "What about the retail store owner facing imminent financial ruin or the religious person who cannot [attend a] house of worship? What about their pain and anger?" Mayor de Blasio replied, in part: "When you see a nation, an entire nation simultaneously grappling with an extraordinary crisis seeded in 400 years of American racism[,] I'm sorry[,] [t]hat is not the same question[] as the understandably aggrieved store owner, or the devout religious person who wants to go back to services."
> On June 4, 2020, Mayor de Blasio, without a mask, attended and addressed a political gathering, held in memory of George Floyd. Neither the ten-person limit on outdoor gatherings, nor the social distancing protocols, were adhered to.

Id. at *12-14.

15. Beyond the undisputed facts determined by the *Soos* court, and as widely reported

in the New York and national media, on July 9, 2020, Defendant de Blasio attended a public gathering to assist in painting Black Lives Matter on Fifth Avenue in front of the Trump Tower. The gathering in which Defendant de Blasio participated included well in excess of 25 people in violation of his own emergency executive order prohibiting such gatherings and Defendant Cuomo's identical executive order.

Volunteers, including Mayor de Blasio, Charlene McCray and Rev. Al Sharpton, paint "Black Lives Matter" in front of Trump Tower on Fifth Avenue Thursday, July 9. (Barry Williams/for New York Daily News)

"Showdown outside Trump Tower: Black Lives Matter painters, using Fifth Ave. as their canvas, deliver message on the president's home turf," *New York Daily News* (July 9, 2020), at https://www.nydailynews.com/new-york/ny-black-lives-matter-trump-towers-20200709-vkti6ncujrh5flwunkvn2ipzv4-story.html (last visited July 14, 2020).

16. Not to be outdone by Defendant de Blasio in the exploitation of the George Floyd

protests, Defendant Cuomo has added his imprimatur on these particular protests and on their particular message on several other occasions. Thus, each of these public statements by Defendant Cuomo have been posted to his official website, once again, at the same location where the public may access his executive orders restricting public protests.

> Here's the challenge of the time: There are multiple truths and people only want to hear their own truth, but there are multiple truths. Yes, protestors have a right to protest and they should be righteously indignant about the murder of Mr. Floyd. They should be upset and I love to see those young people out there, African-Americans, whites saying we're not going to take this anymore. We want reform. That's a truth.

"Governor Cuomo Is a Guest on WAMC Northeast Public Radio with Alan Chartock," June 4, 2020, at https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-wamc-northeast-public-radio-alan-chartock-4 (last visited July 14, 2020).

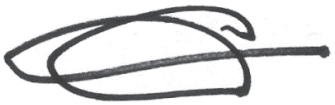
> **Nicolle Wallace:** Governor, I spoke to our mutual friend Chris Christie over the weekend and he said that the economic despair that people are feeling in a lot of these cities is contributing to the hopelessness and the rage and the exasperation and the just despair with the state of all of it. With our inability to protect our citizens from a deadly virus. Our inability to protect people's economic security, their life saving's [sic], in the case of small business owners. And our inability to protect black Americans in particular from police. What do you have to say to people who are feeling hopeless?
>
> **Governor Cuomo:** It's right. It's right. I said on day one, I stand with the protesters. I believe this is a moment in history, Nicolle, where we can actually galvanize and make change. There are forces coming together here, let's be honest. It's not a coincidence that this is in the middle of the Covid crisis. The poor paid the highest price for this Covid situation. They were essential workers, their communities had a higher infection rate. They're living in public housing. You can't socially distance on an elevator in public housing.
>
> They were living paycheck to paycheck and now they're destitute. They paid the highest price. They always pay the highest price. It has just exploded the blatant injustice and racism in this nation. I said today, my father did the Tale of Two Cities speech in 1984 at the Democratic convention. It was true then, it's true now. Let's make this a moment of progressive reform and focus on a real agenda going forward.

> **Nicolle Wallace:** The divisions are there, the divisions are being exploited by this President, by the White House, the divisions a lot of people feel are exploited in some corners of the media. Most people don't want to feel divided. What can people do? What are you urging citizens of New York to do today, tonight?
>
> **Governor Cuomo:** Tonight, I'm saying be smart. We talk about New York tough. Part of being New York tough is being smart. We have to be smart. You want protest, don't lose in the protest. Don't be exploited. Don't make it a mask for criminal activity or for extremist organizations. If you're going out, wear a mask. Socially distance. Don't put your life at risk. That's short term.

"Governor Cuomo is a Guest on MSNBC's Deadline: White House with Nicolle Wallace," June 1, 2020, at https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-msnbcs-deadline-white-house-nicolle-wallace (last visited July 14, 2020).

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on the 14th day of July 2020.



David Yerushalmi

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINDA BOUFERGUEN, Plaintiff, v. ANDREW CUOMO, as the Governor of New York; and the CITY OF NEW YORK, Defendants.	20-cv-3975 **COMPLAINT**

PRELIMINARY STATEMENT

1. This civil-rights action seeks to vindicate the constitutional rights of New Yorkers who wish to engage in protest activity but are barred from doing so by an executive order issued by New York Governor Andrew Cuomo and adopted by the City of New York intended to protect the public from the threat of COVID-19. Under a series of executive orders dating back to March 23, 2020, "non-essential gatherings of any size for any purpose" have been banned in New York, a ban that has applied to all First Amendment activity. On Tuesday, May 19, the governor announced he would permit gatherings of up to ten people who engage in social distancing if the gathering was for the purpose of commemorating Memorial Day. The following day, on May 20, Governor Cuomo announced a further expansion of the exception to include "religious" gatherings of up to ten people who engage in social distancing. The governor memorialized these exceptions in a new executive order he issued the evening of May 21.

2. Plaintiff Linda Bouferguen is a New York City resident who has organized two small demonstrations near City Hall in New York City protesting the shutdown of economic activity across New York State. At each protest – one of which involved seven people and the

other fewer than twenty – all participants were at least six feet apart and nearly all wore masks. Ms. Bouferguen was arrested at both events and issued summonses, as were some other participants. She now wishes to organize another similar demonstration on May 23, 2020, at City Hall, and through the New York Civil Liberties Union she requested approval from New York City on Monday, May 18. Following the governor's announcements on May 19 and May 20, the NYCLU requested of the governor's office and New York City that protest events like the one Ms. Bouferguen planned – gatherings of up to ten people observing social distancing – be allowed to take place just like the ones the governor had newly authorized. As of the filing of this complaint, however, neither the governor nor New York City has modified their executive orders or otherwise agreed that Ms. Bouferguen's demonstration may take place without violating the executive order's ban on public gatherings and without risk of arrest.

3. The governor's executive order allowing gatherings commemorating veterans and allowing religious gatherings while barring protests that likewise would involve ten or fewer people observing social distancing violates the First Amendment, as would New York City's enforcement of the order. The plaintiff therefore seeks injunctive relief enjoining the executive order and a temporary restraining order requiring the defendants to allow Ms. Bouferguen's protest to take place on Saturday, May 23 without threat of enforcement or disruption.

PARTIES

4. Plaintiff Linda Bouferguen is a resident of Brooklyn, New York.

5. Defendant Andrew Cuomo is the governor of New York. He is sued in his official capacity.

6. Defendant the City of New York is a municipal corporation within the State of New York.

FACTS

The Public-Gathering Bans and New York City's Enforcement Practices

7. On March 7, 2020, defendant Governor Andrew Cuomo issued an executive order declaring a state of emergency in response to the threat of COVID-19. Since then, he has issued a series of related executive orders restricting or barring a wide range of activity in New York State. New York City Mayor Bill de Blasio in turn has issued related executive orders adopting and incorporating provisions of the governor's executive orders.

8. On March 23, 2020 Governor Cuomo issued Executive Order 202.10, which contains numerous restrictions related to COVID-19. Included in that executive order was one barring a wide range of public gatherings: "Non-essential gatherings of individuals of any size for any reason (e.g., parties, celebrations or other social events) are canceled or postponed at this time." Mayor de Blasio subsequently issued an executive order adopting this provision (along with all other provisions of the governor's COVID-related executive orders).

9. In Executive Order 202.18 and Executive Order 202.29, Governor Cuomo continued the ban on "non-essential gatherings."

10. The New York City Police Department has played a significant role in enforcing the public-gatherings ban. As the ban applies to protest activities, the NYPD has enforced the ban against some protesters but not others.

11. The LGBTQ advocacy group Reclaim Pride Coalition held two press conferences to raise concerns about a conservative group's erection of a temporary medical site in Central Park. On April 14 near the Central Park site, about fifteen individuals participated, with masks and observing social distancing; a representative of the Mayor de Blasio's office was present as was a representative of NYPD Commissioner Dermot Shea; no enforcement action was taken

against the group. On May 3, the group planned a second small press conference near Beth Israel Hospital, with masks and social distancing, but police officers this time ordered the group to disperse and issued a summons to the lead organizer.

12. On Monday, May 11, New York City Public Advocate Jumaane Williams organized a demonstration in Foley Square to protest the NYPD's racially-biased enforcement of social-distancing guidelines. According to press reports, at least 50 people participated while wearing masks and observing social distancing. After holding a rally, the group marched to nearby police headquarters at One Police Plaza. A significant number of police officers were present throughout the event but made no effort to enforce the state or city public-gatherings bans. Upon information and belief, high-level NYPD officials were aware of the protest and made the decision not to enforce the public-gathering bans.

13. On Sunday, May 17, a group of seven people held a protest in midtown Manhattan in front of the headquarters of the New York State Democratic Party about its decision to cancel the presidential primary in New York; the protesters wore masks and observed social distancing. In advance of the protest, its organizer contacted the community affairs office of the local NYPD precinct, informed it of the planned protest, and was told it was fine to conduct it. At the event itself, police officers were present and made no effort to enforce the state or city public-gathering bans.

Plaintiff Linda Bouferguen and Her Protest Activity

14. Plaintiff Linda Bouferguen intends to participate in a small, peaceful demonstration in the vicinity of City Hall in Manhattan on Saturday, May 23.

15. Ever since Governor Cuomo declared a state of emergency, Ms. Bouferguen has been deeply concerned about the state's and the city's response to COVID-19. In particular, she

has harbored concerns about how defendants' efforts to curb the virus has affected her life and the lives of other New Yorkers.

16. On three occasions, all during May 2020, she has participated in peaceful, public demonstrations as a means of voicing these concerns. During each of these three public demonstrations, Ms. Bouferguen has observed proper social distancing by maintaining at least six feet between herself and other protestors (with the exception of her mother, who is in Ms. Bougerguen's household), and has protested peaceably.

17. During the first of these protests, which took place on May 2, 2020, Ms. Bouferguen joined hundreds of other protestors in Albany to march from the New York State Capitol to the Governor's Mansion. The police were present at the protest and appeared to have cordoned off the street to allow the protestors to march. On information and belief there was no violence at the May 2 protest and no one was arrested. At all times during the demonstration, Ms. Bouferguen protested peacefully and observed proper social distancing.

18. Six days later, on Friday, May 8, Ms. Bouferguen participated in another peaceful protest with around seven other people, including her mother, outside City Hall. The protest occurred from approximate 1:00 p.m. to 4:00 p.m. next to a locked gate such that none of the protestors was obstructing access to City Hall or the sidewalk. On information and belief, all of the protestors observed proper social distancing and none behaved violently.

19. Ms. Bouferguen's May 8 protest violated the defendants' public-gatherings ban.

20. Within minutes of the protest beginning police officers arrived on the scene and began telling Ms. Bouferguen and other protestors that they were assembled illegally.

21. By 4:00 p.m., approximately 50 police officers had arrived, and the police began playing a prerecorded message on a loudspeaker to the effect that the protestors were gathered

illegally and would be subject to arrest if they did not disperse.

22. Although all other protestors dispersed, leaving Ms. Bouferguen as the lone protestor, approximately 24 NYPD officers proceeded to surround Ms Bouferguen and arrest her.

23. At no point during her encounter with the NYPD on May 8 did Ms. Bouferguen resist arrest. To the contrary, when police officers approached Ms. Bouferguen to arrest her, she turned around with her hands behind her back, signaling that the officers could handcuff her.

24. After Ms. Bouferguen's arrest, the police took her to a van and detained her for approximately two hours, after which Ms. Bouferguen was released with a criminal summons. On information and belief, the summons was for violation of the dedendants' public-gatherings ban.

25. The following day, on Saturday, May 9, Ms. Bouferguen and her mother again participated in a peaceful demonstration in the vicinity of City Hall that began at around 1 p.m. Ms. Bouferguen's specific purpose for participating in this protest was to speak out concerning her arrest the previous day. On information and belief, fewer than twenty protestors were present, all of whom observed proper social distancing. None of the protestors behaved violently.

26. The May 9 demonstration violated the defendants' public-gatherings ban.

27. Within approximately 20 minutes of the May 9 protest beginning, the police arrested nine people, including Ms. Bouferguen, who were participating in or located in the immediate vicinity of the protest.

28. After their arrest, Ms. Bouferguen and the other protestors were detained in a cramped van for approximately 40 minutes without any ability to observe social distancing, and transported to a police precinct, where they remained for approximately two hours thereafter.

29. As a result of her May 9 arrest, Ms. Bouferguen was issued two summonses: one for "failure to disperse" and the other for "violating Mayor's Executive Order."

30. Ms. Bouferguen has organized another peaceful protest to occur at noon on Saturday, May 23, outside City Hall in Manhattan. Ms Bouferguen plans for the protest to occur in such a place and manner as not to obstruct the sidewalk or access to City Hall.

31. The purpose of the May 23 protest is to speak out about the defendants' response to COVID-19. The protest is not a religious service or ceremony or Memorial Day service or commemoration.

32. Like the other three demonstrations in which Ms. Bouferguen has participated related to COVID-19, Ms. Bouferguen intends to observe proper social distancing and anticipates no violence whatsoever. Ms. Bouferguen is prepared for the protest to have no more than ten people protesting at a time, all engaging in social distancing.

33. Because of her two recent arrests for participating in public demonstrations in violation of the defendants' public-gatherings ban, Ms. Bouferguen believes she will be arrested for participating in the May 23 protest.

34. Ms. Bouferguen is concerned not only about the humiliation of being arrested, but also that others will be too fearful of arrest to join her in criticizing the government publicly during the protest.

35. On Friday, May 15, the NYCLU contacted the New York City Law Department on behalf of Ms. Bouferguen to inform it of her planned event and to request that New York City confirm that the protest could take place without threat of enforcement on the basis of the state or city bans on public gatherings. In making this request, the NYCLU pointed to the fact that the NYPD had on at least two occasions allowed other protests to take place, most notably the May

11 rally and march led by Public Advocate Jumaane Williams.

36. On Monday, May 18, the NYCLU informed the New York City Law Department of the protest the NYPD had allowed to take place the prior day in midtown Manhattan at the Democratic Party headquarters.

37. On Tuesday, May 19, the New York City Law Department informed the NYCLU that New York City would not grant permission for Ms. Bouferguen's protest to take place in light of the state executive order barring non-essential public gatherings and that it could not make any representations that the NYPD would not take enforcement action if Ms. Bouferguen went forward with her planned protest.

38. Later on May 19, Governor Cuomo announced he would permit gatherings to take place over the Memorial Day weekend involving up to ten people observing social distancing if the gatherings were for the purpose of commemorating veterans. Upon learning of this, the NYCLU contacted the New York State Attorney General's Office to object to granting this exception while continuing the bar on other gathering protected by the First Amendment, including protests like Ms. Bouferguen's. The NYCLU also contacted the New York City Law Department to express the same objection and to request that New York City formally consent to Ms. Bouferguen being allowed to conduct her protest.

39. On May 20, Governor Cuomo announced a second exception to the public-gatherings ban, this time for "religious" gatherings of up to ten people observing social distancing. The NYCLU again promptly contacted the Attorney General's Office and the Law Department, further objected to the exceptions being made for certain First Amendment events but not others. With respect to New York City, the NYCLU again requested formal recognition that Ms. Bouferguen be allowed to hold her protest without threat of arrest of other enforcement.

40. Late on May 20, the NYCLU communicated to a senior member of Governor's Cuomo's office the NYCLU's concerns about the excepting of events commemorating Memorial Day and of religious events. The NYCLU urged the office to amend the ban on gatherings to allow all First Amendment events of ten or fewer people observing social distancing.

41. On the evening of May 21, Governor Cuomo issued Executive Order 202.32. In relevant part it states, "Executive Order 202.10 (as later extended by Executive Order 202.18 and Executive Order 202.29), which prohibited all non-essential gatherings of any size for any reason, is hereby modified to permit a gathering of ten or fewer individuals for any religious service or ceremony, or for the purposes of any Memorial Day service or commemoration, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to . . . ."

42. As of the filing of this complaint, New York City has refused to consent to Ms. Bouferguen holding her protest without threat of arrest or other enforcement.

CAUSE OF ACTION

43. The defendants' actions violate the plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

JURISDICTION AND VENUE

44. This Court has subject-matter jurisdiction over the plaintiffs' claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)–(4).

45. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) in that the plaintiffs' claims arise in the Southern District of New York.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs request that this Court:

(a) Assume jurisdiction over this matter;

(b) Declare the defendants' actions violate the First Amendment to the United States Constitution;

(c) Temporarily restrain the defendants from enforcing their public-gatherings bans against the plaintiff's event scheduled for May 23, 2020;

(d) Permanently enjoin the defendants from enforcing their public-gatherings bans against protest events with ten or fewer people who engage in social distancing for as long as the defendants permit other events that likewise involve ten or fewer people who observe social distancing;

(e) Award the plaintiff attorneys' fees and costs; and

(f) Grant any other relief the Court deems appropriate.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, by

s/*Christopher Dunn*_____

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Dated: May 22, 2020
New York, N.Y.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINDA BOUFERGUEN,

Plaintiff,

v.

ANDREW CUOMO, as the Governor of New York, and the CITY OF NEW YORK,

Defendants.

DECLARATION OF LINDA BOUFERGUEN

I, Linda Bouferguen, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am 32 years old and reside in Brooklyn, New York, with my mother.

2. I am deeply concerned by how the government's response to the COVID-19 pandemic is affecting my life and the lives of other New Yorkers. I'm troubled by the slew of recent media reports of law enforcement targeting minority communities. And I'm particularly worried about the government taking steps to criminalize people for exercising their constitutional rights, like what happened to me earlier this month, when I was arrested twice for engaging in peaceful, socially distanced protest. I also believe Governor Cuomo's "New York State on PAUSE" Executive Order is damaging our economy by forcing businesses around New York to close down. For me personally, as a nursing student, the Executive Order means I have to take classes online rather than gaining the clinical experience I think is important to my education.

3. On three occasions this month, I have sought to express these concerns publicly by exercising my First Amendment right to speak up and speak out against what I view as government misconduct. In each of these instances, I have observed proper social distancing, maintaining at least six feet between myself and others (other than my mother, who is in my household), and have protested peacefully.

4. The first of those occasions passed without incident. On May 2, 2020, I traveled to Albany to participate in a peaceful protest regarding the effect of Governor Cuomo's Executive Order on local businesses. From around 11 a.m. to 3 p.m. that day, I, along with hundreds of other people, marched from the New York State Capitol to the Governor's Mansion. The police were present at the protest and appeared to have cordoned off the street to allow the protestors to march. As far as I know, there was no violence during the protest and no one was arrested. At all times during the protest, I observed proper social distancing by maintaining at least six feet from protestors other than my mother.

5. Six days later, on May 8, 2020, I participated in another peaceful protest with about seven or eight other people, including my mother, outside City Hall in Manhattan. The protest occurred next to a locked gate such that none of the protestors was obstructing access to City Hall or the sidewalk. As far as I know, all of the protestors observed proper social distancing. None of the protestors behaved violently.

6. The protest began at around 1 p.m. and lasted until about 4:30 p.m., when I was arrested. Within minutes of the protest beginning, police officers arrived on the scene and began telling me and the other protestors that we were assembled illegally.

7. By 4 p.m. that day, approximately 50 police officers were present, and the police began playing a prerecorded message on a loudspeaker to the effect that we were gathered

illegally and would be subject to arrest if we didn't disperse. While the other protestors left the scene, I remained where I was and was surrounded by 24 officers and arrested. One of the officers handcuffed me using a ziptie. At no point did I resist arrest. To the contrary, when the police officers approached to arrest me, I turned around with my hands behind my back to signal that they could cuff me.

8. After arresting me, the police took me to a van and detained me for approximately two hours. I received a criminal summons as a result of my arrest on May 8, but lost my copy of the summons.

9. The following day, on May 9, 2020, my mother and I participated in another peaceful protest in City Hall Park in Manhattan that began at around 1 p.m. My specific purpose for participating in this protest was to speak out against the fact that I was arrested the previous day. I do not remember exactly how many people were present, but I believe it was fewer than twenty. As far as I know, all of the protestors observed proper social distancing. None of the protestors behaved violently.

10. This time, the police began arresting me and others within approximately 20 minutes of the beginning of the protest. Altogether, I'm aware of nine people having been arrested. The other arrestees and me were all taken to a cramped police van, where we were detained for around forty minutes without any ability to observe social distancing, and transported to a police precinct, where we remained for around another two hours.

11. I received two criminal summonses as a result of my arrest on May 9, copies of which are attached as Exhibit A. One of the summonses is for "failure to disperse" and the other is for "violating [the] Mayor's Executive Order."

12. I have organized another peaceful protest to occur at noon tomorrow, May 23, outside of City Hall in Manhattan in such a manner as not to obstruct the sidewalk or access to City Hall. The purpose of the protest is to speak out about the government's response to the coronavirus. The protest is not a religious service or ceremony or Memorial Day service or commemoration. Like the other protests in which I've participated, I intend to observe proper social distancing and anticipate no violence whatsoever. I am prepared for the protest to have no more than ten people protesting at a time, all engaging in social distancing.

13. Because of my experience being arrested twice in the last two weeks for engaging in peaceful protest, I am very concerned about being arrested tomorrow during the protest outside City Hall. I'm also concerned that others may be too fearful of being arrested to join me at the protest.

14. I'm aware that on May 11, 2020, just two days after my second arrest, more than 50 people participated in a public protest led by Jumaane Williams, New York City's Public Advocate, while the NYPD looked on. I think it's unfair that I shouldn't be permitted to engage in a small, socially distanced public protest of my own without the NYPD subjecting me to the humiliation of arrest.

15. I don't want to break the law and have the utmost respect for the police — I have friends in the NYPD — but I intend to exercise my rights under the First Amendment, even if it means being arrested.

Dated: May 22, 2020
Brooklyn, New York

Linda Bouferguen

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LINDA BOUFERGUEN,

Plaintiff,

v.

ANDREW CUOMO, as the Governor of New York, and the CITY OF NEW YORK,

Defendants.

No. 20 Civ. 3975 (JGK)

GOVERNOR CUOMO'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

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Defendant Andrew Cuomo, sued in his official capacity as Governor of the State of New York ("Governor"), respectfully submits this memorandum of law in opposition to the motion for a temporary restraining order ("TRO") filed by plaintiff Linda Bouferguen ("Bouferguen" or "Plaintiff").

PRELIMINARY STATEMENT

Through an executive order issued on March 23, 2020, the Governor banned all "[n]on-essential gatherings of individuals of any size for any reason" in order to prevent the spread of COVID-19 and protect the health of the general public in the midst of the pandemic. Until recently, that ban has remained in place without modification. On May 21, 2020, the Governor issued an executive order that modifies this ban in a very limited way to permit gatherings involving up to ten people observing social distancing for religious observance and commemoration of veterans during the Memorial Day weekend.

Plaintiff seeks to stage a protest tomorrow that does not fit within the exception for religious observance or commemoration of veterans and is therefore subject to the original non-essential gathering ban. Plaintiff's issue is not with the original ban, but with the recent modification. She maintains that having carved out limited exceptions to the ban for small gatherings of religious observance and commemoration of veterans, the Governor must now open the floodgates to permit similar small gatherings by anyone for any reason because otherwise the ban acts as a content-based restriction that violates her First Amendment rights. Plaintiffs seek a temporary restraining order to permit her to proceed with her planned protest notwithstanding the non-essential gathering ban.

Notably, Plaintiff is not seeking to invalidate the recent executive order, as that would leave in place the original ban against all non-essential small gatherings as that would prevent her from proceeding with her planned protest. Rather, the relief Plaintiff seeks is, in effect, an order requiring the Governor to expand the recent executive order modifying the ban to include all small gatherings

for any purpose. Accordingly, she seeks a mandatory injunction to command the Governor to take a positive action that alters the status quo and therefore must meet the heightened standard on this application of showing a clear or substantial likelihood of success on the merits. Plaintiff fails to meet that high bar because under the applicable intermediate scrutiny standard that applies to the content-neutral executive orders at issue here, the non-essential small gathering ban as modified clearly serves the important governmental interest in protecting the general public from the COVID-19 pandemic.

STATEMENT OF FACTS

The COVID-19 Pandemic

The world is currently threatened by a global pandemic, and New York City is at its epicenter: the hardest-hit region in the hardest-hit nation. *See World Map,* Johns Hopkins Coronavirus Resource Center, available at https://coronavirus.jhu.edu/map.html. As of May 20, 2020, 23,083 New Yorkers have been killed by the novel coronavirus, a number more than seven times greater than the losses suffered on September 11, 2001. *See Fatalities*, New York State Department of Health, available at https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n.

The virus killed 107 New Yorkers yesterday, 133 the day before that, and 114 the day before that. *See New York*, Covid Tracking Project, available at https://covidtracking.com/data/state/new-york#historical. While alarming, these numbers reflect a marked improvement over the peak daily death toll in New York of approximately 800 through the heroic efforts of medical professionals, state and local governments, and ordinary New Yorkers staying at home and observing social distancing. *See id.* This result has only been possible due to a series of emergency executive orders (N.Y. State Executive Orders 202-202.32, the "COVID-19 Executive Orders") issued by Governor Cuomo in order to prevent the spread of the virus by minimizing in-person contact, including requiring social distancing, and shuttering non-essential businesses, and banning "[n]on-essential

gatherings of individuals of any size for any reason." N.Y. Executive Order 202.10. The COVID-19 Executive Orders are temporary emergency measures that are tailored to respond to the virus and will remain in effect only for as long as the threat from the pandemic does. New York has already begun relaxing COVID-19 related restrictions in regions where data-driven criteria show that it is safe to do so. *See* Press Release, Governor Andrew Cuomo, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Seventh Region Hits Benchmark to Begin Ropening Tomorrow*, available at https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-announces-29. New York City has not yet met the requirements for reopening because key criteria, such as the hospital and ICU occupancy, indicate that it is not yet safe to relax the protections imposed by the COVID-19 Executive Orders. See Regional Monitoring Dashboard, New York Forward, available at https://forward.ny.gov/regional-monitoring-dashboard. The threat of COVID-19 is still very real.

Plaintiff's Lawsuit and TRO Application

The Plaintiff contends that it would be unconstitutional for her to be prohibited from staging her protest while allowing others to have small gatherings pursuant to the recently-enacted Executive Order 202.32, which modified the ban on non-essential gatherings in New York State "to permit a gathering of ten or fewer individuals for any religious service or ceremony, or for the purposes of any Memorial Day service or commemoration, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to." *See* Compl. ¶¶ 1-3.

Plaintiff seeks a temporary restraining order ("TRO") that permits her to proceed with her planned demonstration tomorrow on the basis that Executive Order 202.32 allowing for two narrow exceptions to the non-essential gathering ban violates her First Amendment rights. More specifically, Plaintiff seeks an order "enjoining the defendants from interfering, on the basis of an

alleged violation of Executive Order 202.32 (May 21, 2020), with the plaintiff's protest on May 23, 2020 in the vicinity of City Hall so long as the protest involves no more than ten participants at a time and so long as participants remain at least six feet apart or are wearing face coverings." *See* Plaintiff's Notice of Motion (ECF No. 3).

STANDARD OF REVIEW

The standard for determining whether to grant a motion for a temporary restraining order is identical to the standard for a preliminary injunction, *Local 1814, Int'l Longshoreman's Ass'n, AFL-CIO v. N.Y. Shipping Ass'n*, 965 F.2d 1224, 1228 (2d Cir. 1992), which is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). The plaintiff bears the burden of establishing 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*, 555 U.S. at 20.

In addition, the Second Circuit has "held the movant to a heightened standard" where: (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 PLLC*, 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) and *Doe v. N.Y.U.*, 666 F.2d 761, 773 (2d Cir. 1981)).

Here, Plaintiffs seeks a mandatory injunction because she seeks to "alter the status quo by commanding some positive act," and therefore the higher standard applies. *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). Although framed as a challenge to Executive Order 202.32, Plaintiff is not seeking to invalidate that order, as that would simply leave in place the

prior executive orders banning all non-essential gatherings, including hers. Rather, what Plaintiff seeks is an order mandating that the Governor expand Executive Order 202.32 to include all small gatherings by anyone for any purpose that observe the social distancing requirements, as that is the only way Plaintiff would be permitted to proceed with her protest. Such a court order requiring an expansion of Executive Order 202.32 would certainly alter the status quo by "commanding some positive act" on the part of the Governor. *Id.*

The Plaintiff cannot meet this heightened standard. There is no "clear" or "substantial" likelihood of success on the merits, as Executive Order 202.32 serves the important governmental interest of combatting a pandemic that has already claimed the lives of over 23,000 New Yorkers. Additionally, the balance of equities and the public interest tip overwhelmingly in favor of New York's mission to protect its citizens from harm, rather than the Plaintiff's desire to hold a gathering in-person rather than online.

ARGUMENT

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

This case is the latest in a series of actions across the country that have challenged restrictions on in-person gatherings imposed by state and local governments in order to lessen the death toll of Covid-19. These cases fly in the face of a long line of precedent, dating back to the Supreme Court's ruling in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in which the 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 health, the public morals, or the public safety," or is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 27, 31; *see Geller v. De Blasio*, No. 20 Civ. 3566, 2020 WL 2520711, at *3 (S.D.N.Y. May 18, 2020) (denying TRO and declaring that "it is necessary to review the restriction expressed in

[New York City's executive order banning gatherings] through that lens" of *Jacobson*).

Accordingly, courts across the country have overwhelmingly upheld state and local restrictions on public gatherings over the last month, citing *Jacobson*. *See, e.g., Open Our Oregon v. Brown*, 2020 WL 2542861, at *2 ("At this stage, this Court is inclined to side with the chorus of other federal courts in pointing to *Jacobson* and rejecting similar constitutional claims brought by Plaintiffs challenging similar Covid-19 restrictions in other states."); *Geller*, 2020 WL 2520711; *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2517093 (7th Cir. May 16, 2020); *Spell v. Edwards*, 2020 WL 2509078 (M.D. La. May 15, 2020); *In re Abbott*, 954 F.3d 772 (5th Cir. Apr. 7, 2020); *Henry v. DeSantis*, 2020 WL 2479447 (S.D. Fla. May 14, 2020); *Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913 (D.Me. May 9, 2020); *Cassell v. Snyders*, 2020 WL 2112374 (N.D. Ill. May 3, 2020); *Legacy Church, Inc. v. Kunkel*, 2020 WL 1905586 (D.N.M. Apr. 17, 2020); *Cross Culture Christian Ctr. v. Newsom*, 2020 WL 2121111 (E.D. Cal. May 5, 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); *McGhee v. City of Flagstaff*, 2020 WL 2308479 (D. Az. May 8, 2020). This includes Judge Cote's decision in *Geller*, announced Monday of this week, which upheld New York City's restriction on public gatherings as "reasonable and narrowly tailored" because "preventing in-person gatherings is crucial to any strategy of containment." *Geller*, 2020 WL 2520711, at *4. The threat of COVID-19 has not changed since Monday, or since the cases cited above from across the nation have been decided, and there is nothing in Plaintiff's contentions to alter the conclusion that restrictions on public gatherings during a pandemic are necessary and constitutional. The motion for a temporary restraining order should be denied.

A. Intermediate Scrutiny Applies to New York's COVID-19 Executive Orders, Which are Subject to the Deferential *Jacobson* Test for Epidemic Emergency Measures

The framework for the Court's analysis is the same as the one applied by Judge Cote in her opinion issued earlier this week denying the temporary restraining order in *Geller*, and should lead to the same result. Contrary to Plaintiff's contention that strict scrutiny applies, the COVID-19

Executive Orders, including Executive Order 202.32, are subject to the "less stringent test" of intermediate scrutiny because they are "content neutral." *Geller*, 2020 WL 2520711k at *3 (citing *Hobbs v. County of Westchester*, 397 F.3d 133, 148-50 (2d Cir. 2005)). A regulation is content neutral if it "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." *Id.* (citing *Hobbs*, 397 F.3d at 150). "Thus, a regulation that targets only potentially harmful secondary effects of speech" – such as the transmission of a contagion from in-person gatherings – "rather than the contents of the speech itself or the listener's agreement or disagreement with those contents, is deemed content neutral." *Id.* "A restriction designed to serve a governmental need to protect the security of the audience targets the speech's secondary, rather than its primary effect." *Id.*

The modification of the non-essential gathering ban implemented by Executive Order 202.32 does not establish a "content-based" restriction between what is permitted and what is not permitted. In permitting a small, socially distanced gathering for a religious service or ceremony, Executive Order 202.32 permits the free exercise of religious activity by Catholics, Atheists, Hindus, Satanists, Protestants, Unitarians, Buddhists, Muslims, Mormons, or any other faith or religious perspective – there is no restriction the content of the planned religious observance. Similarly, in permitting a small, socially distanced gathering "for the purposes of any Memorial Day service or commemoration," Executive Order 202.32 permits any form of commemoration of veterans regardless of content, including anti-war demonstrations or any other perspective relating to the Memorial Day holiday – there is no restriction as to content. Because Executive Order 202.32 does not discriminate between types of small gatherings based on content, it is subject to intermediate scrutiny.

B. Because the COVID-19 Executive Orders Serve an Important Government Interest,, They Pass Intermediate Scrutiny

The restrictions on in-person gatherings in the COVID-19 Executive Orders pass constitutional muster under intermediate scrutiny. Under the intermediate scrutiny standard "the

government may 'limit the time, place, or manner of expression – whether oral, written, or symbolized by conduct – even in a public forum,' so long as the measure is 'reasonable,' 'narrowly tailored to serve a significant governmental interest, and leave[]s open ample alternative channels for communication of the information.'" *Geller*, 2020 WL 2520711 at *4 (quoting *Hobbs*, 397 F.3d at 149).

Here, the restrictions on in-person gatherings are manifestly reasonable. As Judge Cote pointed out in Geller, "the scientific and medical communities believe that preventing in-person gatherings is crucial to any strategy of confinement." *Id.*; *cf. Lighthouse Fellowship Church v. Northam*, 2020 WL 2110416, at *12 (E.D. Va. May 1, 2020) ("The scope of the Governor's Orders [banning gatherings] is no greater than that which is essential to further the interests of slowing the spread of a deadly pandemic and preserving human life.") As to the question of whether the Covid-19 Executive Orders are narrowly tailored to a government interest, the standard is a relatively deferential one. "The narrow tailoring requirement is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Geller*, 2020 WL 2520711 at *4 (quoting *Hobbs*, 397 F.3d at 149). Thus, a restriction "need not be the least restrictive or least intrusive means of doing so." *Id.* Here, there can be no question, given the scale and public health danger of the COVID-19 pandemic, that the government interest in lessening the death toll is substantial one, and no question, given the improvement in mortality statistics since the COVID-19 Executive Orders went into effect, that the interest in preventing the spread of COVID-19 would be harmed absent such restrictions. *See Geller*, 2020 WL 2520711, at *4 ("the declining rates of infection and death among New Yorkers is evidence not that the gatherings ban is overly broad, but rather that it is effective."); *cf. Calvary Chapel of Bangor*, 2020 WL 2310913 at *7 (Maine's Gathering Orders are likely to survive this test too. The orders are in place to protect Maine residents from the spread of a virus that can cause serious illness and death. Given what we know about how COVID-19 spreads, the nature of the orders . . . demonstrates substantial relation to the interest of protecting public health.");

Cross Culture Christian Center, 2020 WL at *7 ("The [California] orders are not unconstitutional. Rather they are permissible exercises of emergency police powers especially given the extraordinary public health emergency facing the State."). As to the third prong, whether there are "ample alternative channels for the communication of the [Plaintiff's] information," *Geller*, 2020 WL 2520711, at *4, the Plaintiff is fully able to communicate her message in any manner other than via an in-person gathering.

The COVID-19 Executive Orders manifestly meet the requirements of intermediate scrutiny, particularly when 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*, 202 WL 2520711, at *3 (quoting *Jacobson*, 197 U.S. at 31).

C. Even If Strict Scrutiny Were To Apply, The COVID-19 Executive Orders Should Still Be Upheld

Even if the Court were to apply a strict scrutiny analysis to the COVID-19 Executive Orders – which it should not, for the reasons discussed above – New York's ban on in-person social gatherings would still pass muster. Federal courts have repeatedly refused to apply the heightened standard to COVID-related gathering restrictions, but they have also repeatedly held that these critical public health provisions would meet either standard. *See, e.g., Legacy Church*, 2020 WL 1905586, at *38 ("The [New Mexico] Order is reasonably related to the demands of the public health crisis, coronavirus. Moreover, if the [New Mexico] Order was subject to a strict scrutiny analysis, the Court would conclude that it meets strict scrutiny and uphold the [New Mexico] Order."); *Calvary Chapel of Bangor*, 2020 WL 2310913, at *9 n.17 ("Even if the [Maine] orders were subject to heightened scrutiny, the Governor would likely be able to show that they serve a compelling government interest (preventing the spread of COVID-19) and that they are narrowly tailored to achieve that interest, particularly because they do not restrict [socially distanced forms of communication] and because, as

discussed above, they do not impermissibly single out religious groups."). The same outcome is appropriate here: the restrictions on gathering are narrowly tailored to the overwhelming governmental interest in preventing the spread of COVID-19, a public health crisis that has already taken the lives of over 23,000 New Yorkers.

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

The balance of the equities and public interest prongs of the preliminary injunction standard, which "merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. 418, 435 (2009), also require the COVID-19 Executive Orders to be upheld, based on the sheer discontinuity between the threat of the coronavirus pandemic and the minor imposition imposed on the Plaintiff by not being able to hold her City Hall protest in person. Judge Arenda Allen's opinion in the *Lighthouse Fellowship Church* case is instructive, in which she explained that:

> Contrary to Plaintiff's assertions, the Commonwealth [of Virginia] would be harmed significantly if it were prevented from enforcing the Governor's Orders against religious gatherings of more than ten people. The Commonwealth has a responsibility to safeguard the lives of its residents. The Commonwealth has a responsibility to protect frontline healthcare workers from being overwhelmed by more patients than the Virginia health system has the capacity to adequately care for. Every gathering of more than ten people endangers health and life and increases the burden on the frontline healthcare workers tasked with caring for those afflicted. An injunction against the enforcement of the Governor's Orders against religious gatherings of more than ten interferes substantially with the Commonwealth's ability to meet its responsibilities.

Lighthouse Fellowship Church, 2020 WL 2110416, at *16. These equities are even stronger when applied to New York, which has suffered harm from the COVID-19 pandemic on a scale that is unprecedented in this country. In contrast, the imposition on the Plaintiff is merely "adapt[ing] to current circumstances," by carrying out her protest via other means, such as in the media or via social networking. *Id.* "Although this may not be how Plaintiff wishes to [express her viewpoint] under ideal circumstances, these are not ideal circumstances. The

equities, in the context of a deadly pandemic, tip in Defendant's favor." *Id.*

CONCLUSION

For the reasons set forth above, the Governor respectfully requests that the Court deny the Plaintiff's application for a temporary restraining order and grant such other and further relief as it deems just and proper.

Dated: New York, New York
May 22, 2019

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EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ERIC BUTLER and JACOB J. KATZBURG, Plaintiffs, v. CITY OF NEW YORK; BILL DE BLASIO, in his personal and official capacity as the Mayor of New York City, DERMOT SHEA, his personal and official capacity as Police Commissioner of the New York City Police Department, POLICE OFFICERS JOHN" RODRIGUEZ (TAX: 952174), "JOHN" VILLANUEVA (BADGE NUMBER 27398), "JOHN" LARKENS (BADGE NUMBER 13260), NICHOLAS T. BRUCCOLERI (TAX: 960288), "JOHN" MEJIA," JOHN DOES 1-15, SERGEANTS "JOHN DOE" 1-5, and CAPTAIN "JOHN DOE," all in their personal and official capacity, Defendants,	CIVIL ACTION NO. 1:20-cv-4067 **JURY TRIAL** **DEMANDED**

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT
INJUNCTIVE RELIEF AND MONETARY DAMAGES

PRELIMINARY STATEMENT

1. Plaintiffs Eric Butler and Jacob Katzburg bring this Complaint for Declaratory, Injunctive and Monetary Damage Relief against the City of New York, New York City Mayor BILL de BLASIO, in his official and personal capacity, New York City Police Department Commissioner DERMOT SHEA, in his official and personal capacity, New York City Police Officers JOHN" RODRIGUEZ (TAX: 952174), "JOHN" VILLANUEVA

(BADGE NUMBER 27398), "JOHN" LARKENS (BADGE NUMBER 13260), NICHOLAS T. BRUCCOLERI (TAX: 960288), "JOHN" MEJIA," JOHN DOES 1-15, SERGEANTS "JOHN DOE" 1-5, and CAPTAIN "JOHN DOE," all in their personal and official capacity, for a deprivation of Plaintiffs' constitutional rights to free speech, free of assembly, free association and to petition the government for redress of grievances, all protected by First and Fourteenth Amendments to the United States Constitution.

2. On May 9, 2020, at approximately 2:00 PM, Plaintiffs and nearly twenty other people were peaceably assembled in City Hall Park, New York County, New York City, in protest against Defendant de Blasio's policies instituted in response to the present COVID-19 pandemic, including the arbitrary limitations on "non-essential gatherings" that nonetheless comply with social distancing and other health-related requirements. While at this peaceful protest, Plaintiffs were unlawfully and unconstitutionally seized, arrested, charged and summonsed with criminal offenses for allegedly violating the overbroad, over-restrictive and unconstitutional Emergency Executive Orders (EEOs) issued by Defendant de Blasio on behalf of the City of New York and construed, applied and enforced by Defendant Shea and the remaining defendants (hereinafter referred to as the "Police Defendants"). By their arrests, Plaintiffs were deprived of, *inter alia*, their constitutional rights under the First, Fourth and Fourteenth Amendments.

3. This violation is continuing and ongoing in that, as a direct result of Defendants' unconstitutional actions in issuing and enforcing the various EEOs, Plaintiffs

have been cowed, intimidated and chilled from further exercising their rights for fear of further arrest and criminal punishment.

JURISDICTION AND VENUE

4. This civil rights action raises federal questions under the United States Constitution, specifically the First, Fourth and Fourteenth Amendments, and is brought pursuant to 42 U.S.C. § 1983.

5. This Court has jurisdiction over Plaintiffs' federal claims under U.S. Const., Art. III., Sec. 2, and under 28 U.S.C. §§ 1331, 1343.

6. This Court has authority to grant the requested declaratory relief under 28 U.S.C. §§ 2201 and 2202, the requested injunctive relief and damages under 28 U.S.C. § 1343, and reasonable attorney fees and costs under 42 U.S.C. § 1988.

7. Venue is proper in this Court under 28 U.S.C. § 1391(a) and (b) because, upon information and belief, all defendants are headquartered in this District and a substantial part of the events or omissions giving rise to the claims occurred in this District.

PLAINTIFFS

8. Plaintiff Jacob J. Katzburg is thirty-two years old, is a resident of Queens County, New York and is a citizen of the United States and of the State of New York.

9. Plaintiff Eric Butler is thirty-four years old**,** is a resident of Kings County, New York and is a citizen of the United States and of the State of New York.

DEFENDANTS

10. The City of New York is a municipal corporation with the right to sue and be sued. It is responsible for the policies and procedures of the New York City Police Department and the police officers it employs.

11. At all times relevant to this Complaint, Defendant Bill de Blasio was the Mayor of the City of New York, was responsible for enacting and enforcing the various Emergency Executive Orders (EEO) at issue in this litigation, and was acting under color of law and within the scope of his employment. He is sued in his personal and official capacity.

12. At all times relevant to this Complaint, Defendant Dermott Shea was the Police Commissioner for the New York City Police Department (NYPD), was a duly sworn and licensed police officer of the NYPD, was acting under color of law and within the scope of his employment, and was tasked with interpreting and supervising the enforcement of Defendant de Blasio's EEOs at issue in this litigation and is sued in his personal and official capacity.

13. At all times relevant to this Complaint, Defendant Officer "John" Rodriguez was a duly sworn and licensed police officer of the NYPD and was acting under color of law and within the scope of his employment. Upon information and belief, Officer Rodriguez's ultimate supervisor is Defendant Shea, the Police Commissioner. Upon information and belief, at all times relevant to this case, Officer Rodriguez's direct supervisors were Sergeants "John Doe" 1 through 5 and Captain "John Doe." Officer Rodriguez is being sued in his personal and official capacity.

14. At all times relevant to this Complaint, Defendant Officer "John" Larkens (Badge Number 13260) was a duly sworn and licensed police officer of the NYPD and was acting under color of law and within the scope of his employment. Upon information and belief, Officer Larkens' ultimate supervisor is Defendant Shea, the Police Commissioner. Upon information and belief, at all times relevant to this case, Officer Larkens' direct supervisors were Sergeants "John Doe" 1 through 5 and Captain "John Doe." Officer Larkens is being sued in his personal and official capacity.

15. At all times relevant to this Complaint, Defendant Officer "John" Villanueva (Badge Number 27398) was a duly sworn and licensed police officer of the NYPD and was acting under color of law and within the scope of his employment. Upon information and belief, Officer Villanueva's ultimate supervisor is Defendant Shea, the Police Commissioner. Upon information and belief, at all times relevant to this case, Officer Villanueva's direct supervisors were Sergeants "John Doe" 1 through 5 and Captain "John Doe." Officer Villanueva is being sued in his personal and official capacity.

16. At all times relevant to this Complaint, Defendant Officer Nicholas T. Bruccoleri (TAX: 960288), was a duly sworn and licensed police officer of the NYPD and was acting under color of law and within the scope of his employment. Upon information and belief, Officer Bruccoleri's ultimate supervisor is Defendant Shea, the Police Commissioner. Upon information and belief, at all times relevant to this case, Officer Bruccoleri's direct supervisors were Sergeants "John Doe" 1 through 5 and Captain "John Doe." Officer Bruccoleri is being sued in his personal and official capacity.

17. At all times relevant to this Complaint, Defendant Officer "John" Mejia was a duly sworn and licensed police officer of the NYPD and was acting under color of law and within the scope of his employment. Upon information and belief, Officer Mejia's ultimate supervisor is Defendant Shea, the Police Commissioner. Upon information and belief, at all times relevant to this case, Officer Mejia's direct supervisors were Sergeants "John Doe" 1 through 5 and Captain "John Doe." Officer Mejia is being sued in his personal and official capacity.

18. At all times relevant to this Complaint, Defendant Officers John Does 1 through 15 were all was a duly sworn and licensed police officers of the NYPD and were acting under color of law and within the scope of their employment. Upon information and belief, Defendant Officers John Does 1 through 15's ultimate supervisor is Defendant Shea, the Police Commissioner. Upon information and belief, at all times relevant to this case, Defendant Officers John Does 1 through 15's direct supervisors were Sergeants "John Doe" 1 through 5 and Captain "John Doe." Defendant Officers John Does 1 through 15 are being sued in their personal and official capacity.

19. At all times relevant to this Complaint, Defendant Sergeants "John Doe" 1 through 5 were all duly sworn and licensed police officers of the NYPD and were acting under color of law and within the scope of their employment. Upon information and belief, Sergeants "John Doe" 1 through 5 directly authorized, approved, condoned, supervised and verified the actions of the police officers named herein as defendants. At all times relevant to this Complaint, upon information and belief, the immediate supervisor of Sergeants "John

Doe" 1 through 5 was Captain "John Doe." Defendant Sergeants "John Doe" 1 through 5 are being sued in their personal and official capacity.

20. At all times relevant to this Complaint, Defendant Captain "John Doe" was a duly sworn and licensed police officers of the NYPD and was acting under color of law and within the scope of his employment. Upon information and belief, Defendant Captain "John Doe" directly authorized, approved, condoned, supervised and verified the actions of the police officers and sergeants named herein as defendants. Defendant Captain "John Doe" is being sued in his personal and official capacity.

FACTS

The Emergency Executive Orders (EEOs)

21. The State and City of New York, as is the entire world, are suffering from the COVID-19 virus pandemic.

22. In response to this crisis, on March 12, 2020, by EEO 98, Defendant de Blasio declared that a "state of emergency . . . exist[s] within the City of New York." EEO 98 further provided that the state of emergency "shall remain in effect for a period not to exceed thirty days or until rescinded, whichever occurs first." **See EEO 98, Annexed Hereto as Plaintiff's Exhibit 1**.

23. On March 15, 2020, Defendant de Blasio issued EEO 99, which declared, in part, that "to avoid the mass congregation of people in public places and to reduce the opportunity for the spread of COVID-19, any large gathering or event for which attendance is anticipated to be in excess of five hundred people shall be cancelled or postponed." *See*

EEO 99 § 1. The EEO further provided that gatherings "of any number of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption, or similar group activities shall operate at no greater than fifty percent occupancy and no greater than fifty percent of seating capacity." *Id.* § 2. The EEO further provided that "in order to promote social distancing, places where such events are held shall not close off any portion of the area to which the occupancy or seating capacity limit applies. Any occupancy that exceeds the limits established by this Order shall be subject to the fines, levies, or other penalties that would apply if the maximum occupancy or seating capacity limit established for the relevant space and in effect prior to this Order had been violated. *Id.* Finally, the EEO provided that all "gatherings or events for which attendance is anticipated to be fewer than five hundred people shall operate at no greater than fifty percent occupancy, and no greater than fifty percent of seating capacity. Furthermore, in order to promote social distancing, places where such events are held shall not close off any portion of the area to which the occupancy or seating capacity limit applies. Any occupancy that exceeds the limits established by this Order shall be subject to the fines, levies, or other penalties that would apply if the maximum occupancy or seating capacity limit established for the relevant space and in effect prior to this Order had been violated." *Id.* § 3.

24. However, EEO 99 exempted from these directives, "a private dwelling, school, hospital, nursing home, other medical office or facility as determined by the New York State Commissioner of Health, mass transit or mass transit facility, governmental facility, law enforcement facility, or retail establishments including grocery stores, or . . . the

High Line Park and *other public parks, public spaces* and trails under the jurisdiction of the Department of Parks and Recreation, except for any enclosed area within such a park, public space or trail that otherwise falls under the provisions of section 2 of this Order and events held in such places where the attendance is anticipated to be in excess of five hundred people." *See* **EEO 99, Annexed Hereto as Plaintiff's Exhibit 2**. (emphasis added).

25. On March 16, 2020, Defendant de Blasio issued EEO 100, which provided, in pertinent part, that "all establishments- including restaurants, bars, cafes - that offer food or drink shall close until further notice, effective Monday, March 16, 2020 at 8:00 PM." § 7. However, to "ensure sufficient access to food and/or drink, establishments serving food and/or drink (including restaurants, bars, and cafes) may remain open for the sole purpose of providing take-out or delivery service, provided the establishments do not exceed fifty percent of their occupancy or seating capacity while persons are waiting for take-out and that such persons follow social distancing protocols." EEO 100 § 7. Defendant de Blasio further authorized "all agencies to continue enforcing Emergency Executive Order 99 and any additional limitations on large gatherings that may be imposed by the Governor of New York State pursuant to his powers under §29-a of the Executive Law." § 10. The order was set to last five days. *See* **EEO 100, Annexed Hereto as Plaintiff's Exhibit 3**.

26. On March 20, 2020, Defendant de Blasio issued EEO 102, which, in pertinent part, amended EEO 99's prohibition on large gatherings of five hundred people and now prohibited gatherings or events "for which attendance is anticipated to be in excess of fifty people, or in excess of any number established as the maximum number permitted by an

order of the Governor issued pursuant to his powers under section 29-a of the Executive Law, is cancelled or postponed." EEO 102 § 5. Additionally, "all places of public amusement, whether indoors or outdoors, including but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, arcades, fairs, children's play centers, funplexes, theme parks, bowling alleys, family and children's attractions shall remain closed. This shall not apply to *public parks and open recreation areas*, subject to the restrictions in Emergency Executive Order 99 as renewed by this Order." EEO 102 § 4(f). This order similarly was set to last five days. *See* **EEO 102, Annexed Hereto as Plaintiff's Exhibit 4**. (emphasis added).

27. On March 25, 2020, Defendant de Blasio issued EEO 103, which provided that businesses and not-for-profit entities not defined by Governor Andrew M. Cuomo's Executive Order 202.6 as "essential services or functions" "shall reduce its in-person workforce at any locations by 100%." *See* EEO 3 § 2(b), **EEO 103, Annexed Hereto as Plaintiff's Exhibit 5.**

28. Under Governor Cuomo's Executive Order 202.6, essential businesses are defined as "essential health care operations including research and laboratory services; essential infrastructure including utilities, telecommunication, airports and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash collection, mail, and shipping services; *news media*; banks and related financial institutions; providers of basic necessities to economically disadvantaged populations; construction;

vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public." (emphasis added). *See* Executive Order 202.6, **Annexed Hereto as Plaintiff's Exhibit 6.**

29. Defendant de Blasio's EEO 103 further provided that "[i]n 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*." *See* EEO 103 § 3(b), **Plaintiff's Exhibit 5**. (emphasis added). EEO 103 did not define the term "non-essential gathering." Nor did EEO 103 contain a carve-out for gatherings for the purpose of exercising the First Amendment rights to Free Speech, Free Assembly or to petition the government for redress of grievances, unlike, for example, Governor Cuomo's EO 202.6, which provided a carve-out for the news media and the exercise of the First Amendment's Free of the Press right in his definition of "essential" businesses. EEO 103 further provided that the it shall take effect "immediately, and shall remain in effect for five (5) days unless it is terminated or modified at an earlier date." *Id*. § 6.

30. On March 30, 2020, Defendant de Blasio issued EEO 104, extending the bar on "non-essential gatherings" for an additional five days. See EEO 104 § 1, **Annexed Hereto as Plaintiff's Exhibit 7**.

31. On April 4, 2020, Defendant de Blasio again extended the ban on non-essential gatherings for an additional five days. *See* EEO 105 § 1, **Annexed Hereto as Plaintiff's Exhibit 8**.

32. On April 9, 2020, the ban was extended for another five days. EEO 106 § 2, **Annexed Hereto as Plaintiff's Exhibit 9**. This EEO, also extended the State of Emergency for an additional thirty days. *See Id*. § 1.

33. On April 14, 2020, the ban was again extended for five days. *See* EEO 107 § 1, **Annexed Hereto as Plaintiff's Exhibit 10**.

34. On April 19, 2020, the ban was again extended for five days. *See* EEO 108 § 1, **Annexed Hereto as Plaintiff's Exhibit 11**.

35. On April 24, 2020, the ban was again extended for five days. *See* EEO 109 § 1, **Annexed Hereto as Plaintiff's Exhibit 12**.

36. On April 29, 2020, the ban was extended for five days. *See* EEO 110 § 1, **Annexed Hereto as Plaintiff's Exhibit 13**.

37. On May 4, 2020, the ban was extended for five days. *See* EEO 111 § 1, **Annexed Hereto as Plaintiff's Exhibit 14**.

38. On May 9, 2020, Defendant de Blasio again extended the State of Emergency for thirty days. *See* EEO 112 § 1, **Annexed Hereto as Plaintiff's Exhibit 15**. In addition, the ban on "non-essential" gatherings was again extended for five days. *Id*. § 2.

39. On May 14, 2020, the ban was extended for five days. *See* EEO 113 § 1, **Annexed Hereto as Plaintiff's Exhibit 16**.

40. On May 19, 2020, the ban was extended for five days. *See* EEO 114 § 1, **Annexed Hereto as Plaintiff's Exhibit 17**.

41. On May 24, 2020, in a tacit admission of guilt, Defendant de Blasio issued EEO 115, which modified the ban on "non-essential" gatherings to now permit "gatherings of ten (10) or fewer individuals where such individuals adhere to applicable social distancing protocols and cleaning and disinfection protocols are permitted." *See* EEO 115 § 2, **Annexed Hereto as Plaintiff's Exhibit 18**. This modified ban also did not contain a definition for the term "non-essential gathering" nor did it provide for allowing "non-essential" gatherings in a large area, such as a park, that could easily accommodate more than ten people while also maintaining proper social distancing protocols.

Plaintiffs' Peaceful Protest on May 9, 2020

42. Plaintiffs have each had limited to no prior experience participating in any political protests prior to May 9, 2020.

43. Plaintiffs acknowledge the gravity of the current COVID-19 pandemic and the necessity for Defendant de Blasio to take emergency measures. Yet, Plaintiffs sincerely believe that Defendant de Blasio and those reporting to him have gone too far in meeting the emergency. Specifically, Plaintiffs, along with many other New Yorkers, sincerely believe that a number of Defendants' measures, particularly the portion of the EEOs that prohibit, *inter alia*, "non-essential" gatherings without so much as defining this term or allowing for gatherings that adhere to social distancing protocols, are improvident, unwise and unnecessary to meet the present crisis.

44. For nearly a week before May 9, 2020, Plaintiffs watched from afar how members of the New York City Police Department, presumably at the direction of Defendant de Blasio and Defendant Shea, effected public and violent arrests of several individuals for allegedly violating the "social distancing" dictates of various EEOs. *See, e.g.*, *NYPD officer put on modified duty after violent social distancing violation arrest filmed*, ABC News, May 4, 2020, *available at* https://abcnews.go.com/US/nypd-officer-put-modified-duty-violent-social-distancing/story?id=70488152; *Coronavirus News: Video of NYPD arrest during social distancing enforcement sparks outcry*, ABC Eyewitness News, May 4, 2020, *available at* https://abc7ny.com/nypd-violent-arrest-east-village-caught-on-camera-legal-aid/6147631/; *Violent arrest in New York raises questions about police enforcement of social distancing orders*, The Washington Post, May 5, 2020, *available at* https://www.washingtonpost.com/nation/2020/05/05/donni-wright-nyc-arrest/; *NYPD arrested more people of color for social distancing and other charges, data shows*, ABC News, May 8, 2020, *available at* https://abcnews.go.com/US/nypd-arrested-people-color-social-distancing-charges-data/story?id=70573776

45. Given the severe and sometimes violent curtailment of civil liberties flowing from the various EEOs, Plaintiffs felt impelled let their disapproval be heard.

46. Thus, on Saturday, May 9, 2020, in furtherance of voicing their sincerely held belief in the *ultra vires* nature of the EEOs, its improvidence, its selective and unconscionably violent enforcement, and the severe social, emotional and economic harms that have flowed to the general public as a result of adhering to the dictates of the various

EEOs, Plaintiffs assembled with a likeminded group of New Yorkers in City Hall Park, near Steve Flanders Square, directly in front of City Hall, the seat of New York City government.

47. Plaintiffs both arrived at approximately 1:00 PM.

48. Plaintiff Katzburg came bearing an American flag while Plaintiff Butler arrived wearing a cap with the letters "USA" emblazoned on it.

49. Plaintiff Katzburg was also equipped with a face mask, which he wore at all times relevant to this complaint.

50. Over approximately the next half-hour, nearly twenty other like-minded American citizens arrived in the park to join Plaintiffs.

51. Many in the assembly met each other for the first time and, together, the group exchanged their opinions on the various EEOs and expressed their views as to their improvidence. Some came bearing signs expressing these beliefs and still others wore various American-flag paraphernalia. Many of these protestors also came wearing masks or other face-coverings, consistent with the face-covering protocols announced by many health officials on the federal, state and local level.

52. At all times while the assembly, which included Plaintiffs, was assembled in City Hall Park, they attempted as best as practicable, and largely succeeded, in maintaining "social distancing" of approximately six feet between themselves.

53. Also, at all times relevant to this Complaint, there were numerous other park-goers nearby, some sitting on park benches, others standing around a nearby fountain and still others walking their dogs through the park. In total, at any given time while Plaintiffs

and their group was assembled in the park, there were approximately ten unassociated members of the public nearby engaged in various forms of recreational activities.

54. At no time did the assembly interfere with other members of the public's use of the park or of any of the park's paths or other amenities.

55. Similarly, at no time did the assembly act violently, threaten anyone, damage any property, or take any action that could be construed as causing a public nuisance.

56. While Plaintiffs and their assembly did not possess a permit to conduct this assembly in a public park, upon information and belief, no such permit was required by applicable law. *See* 56 RCNY §§ 1-02; 1-03(b)(3). Similarly, upon information and belief, even if a permit was required, Defendants did not provide any procedure by which Plaintiffs and their assembly could have obtained a permit and, given the various EEOs, any such permit application would surly have been rejected and, thus, would have been futile.

57. At approximately 1:35 PM, nearly two dozen uniformed police officers, including the Police Defendants, arrived at the Park.

58. At first, the Police Defendants assembled and conversed amongst themselves outside of the park. Many of the officers belonged to the elite Strategic Response Group, who were each equipped with numerous "zip tie" restraints on their gun belts.

59. After several minutes of these officers coalescing outside the park, they entered the park, formed a line blocking off one of potential avenues of egress from the park and began playing an audio recording over a loudspeaker which stated as follows:

"This is the New York City Police Department. Non-essential gatherings of any kind have been prohibited by the Governor and the Mayor. This gathering is unlawful, and you are ordered to disperse. If you fail to disperse immediately, you are subject to arrest."

60. Upon information and belief, the use of the term "non-essential gatherings" in this audio recording directly relates to the policy, custom and order set forth in EEO 103 and its progeny.

61. After about five minutes of playing the audio recording, the group of officers approached Plaintiffs and their fellow protestors.

62. Plaintiff Katzburg was accosted by Defendant Officer Rodriguez, who ordered Plaintiff Katzburg to "leave the park."

63. Plaintiff Katzburg responded in sum and substance, "The park is open to the public today. I'm exercising my First Amendment right to freedom of assembly, what crime have I committed?"

64. Standing nearby Defendant Rodriguez was Defendant Sergeant 1 who, at that time, upon information and belief, signaled to Defendant Officer Rodriguez to place Plaintiff Katzburg under arrest.

65. At that point, Defendant Officer Rodriguez, Defendant Officer Villanueva, who was also standing nearby, along with Defendant Officer Larkens, unlawfully and unconstitutionally seized and arrested Plaintiff Katzburg and began searching him, but not

before Defendant Villanueva confiscated Plaintiff Katzburg's American flag. Plaintiff Katzburg did not resist arrest.

66. Below, are two photographs of Plaintiff Katzburg from May 9, 2020 taken at around the time he was unlawfully and unconstitutionally seized and arrested. Plaintiff Katzburg is the tall male wearing a light blue hoody underneath a dark jacket and a black face covering. *See*, *Reopen NY' protesters busted outside New York City Hall*," *available at* https://nypost.com/2020/05/09/reopen-ny-protesters-busted-outside-new-york-city-hall/.

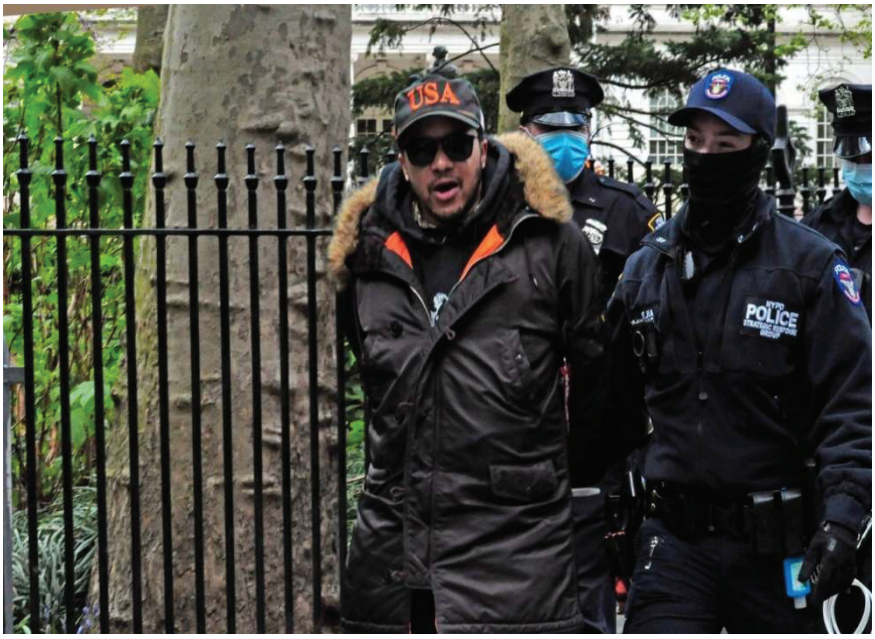
67. Meanwhile, the remaining Police Defendants continued to herd protestors out of the park and onto Park Row.

68. Along the way, several non-parties were also arrested.

69. As the Police Defendants succeeded in herding the group out of the park, Plaintiff Butler was attempting to leave the location.

70. As Plaintiff Butler walked away from the park, on Park Row on a public sidewalk, Defendant Officer Bruccoleri accosted him and, while assisted by Defendant Mejia, unconstitutionally seized and arrested Plaintiff Butler.

71. Plaintiff Butler can be seen in the photo below already in custody and being led by Defendant Mejia, moments after being unconstitutionally arrested on the public sidewalk outside City Hall Park, despite having complied with the unconstitutional order to disperse. This photo was also published in the New York Post. *See*, *Reopen NY' protesters busted outside New York City Hall*," *available at* https://nypost.com/2020/05/09/reopen-ny-protesters-busted-outside-new-york-city-hall/.



72. In all, nine protestors, including Plaintiffs, were arrested.

73. Ironically, after Plaintiffs and their fellow protestors were arrested, they were all placed together in a nearby police van, less than six feet apart from each other, at which point those without masks had masks applied to their faces by the police.

74. The arrestees, including Plaintiffs, were then taken to the nearby Seventh Precinct where they had their temperatures taken and were placed in cells.

75. At approximately 4:30 PM on May 9, 2020, Plaintiff Butler was released from the custody, after being issued by Defendant Officer Bruccoleri a criminal summons charging him with "Violat[ing] The Mayor's Order" under New York City Administrative Code § 3-108. ***See*** **Butler Summons, Annexed Hereto as Plaintiff's Exhibit 19**.

76. Similarly, at approximately 5:09 PM, Plaintiff Katzburg was released from the custody, after being issued by Defendant Officer Rodriguez two criminal summonses, charging him with "Violat[ing] The Mayor's Order" under New York City Administrative Code § 3-108 and with "Discon: Failure to Disperse," under New York State Penal Law § 240.20(6). ***See*** **Katzburg Summonses, Annexed Hereto as Plaintiff's Exhibit 20**.

77. Under New York City Administrative Code § 3-108, "Any knowing violation of a provision of any emergency measure established pursuant to this chapter shall be a class B misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment for not more than three months, or both."

78. Under New York State Penal Law § 240.20(6), "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or

recklessly creating a risk thereof . . . He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse."

EXIGENCIES REQUIRING TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIV RELIEF

79. Plaintiffs bring this suit to challenge Defendant de Blasio's EEO Nos. 103 through 115 issued on March 25, March 30, April 4, April 9, April 14, April 19, April 24, April 29, May 4, May 9, May 14, May 19 and May 24, 2020, respectively, which bars all "non-essential" gatherings, without defining that term and without providing protocols by which Plaintiffs can exercise their constitutional rights to free speech, free assembly and the right to petition the government for redress of grievances, protected by the First and Fourteenth Amendment, and as modified by EEO 115, continue to effect such a ban on "non-essential" gatherings in excess of ten people.

80. Specifically, Plaintiff's herein alleged that the EEOs are unconstitutional facially and as applied to Plaintiffs under the First and Fourteenth Amendments of the United States Constitution because:

a. The EEOs are void for vagueness under the Due Process Clause of the Fourteenth Amendments, as they do not define the term "non-essential" gatherings;

b. The EEOs act as an outright ban on the rights to free speech, free assembly and to petition the government for redress of grievances, particularly as it relates to the EEOs and, even as modified by EEO 115, impermissibly effects a ban on these rights if more than ten people attempt to exercise them together,

even in a large area that could accommodate more than ten people while also maintaining social distancing protocols such as a public park;

c. The EEOs irrationally treat constitutionally protected core political speech and peaceful protests that are opposed to the EEOs worse than other forms of gatherings that Defendant de Blasio has arbitrarily labeled "essential" and, which pose the same purported health risk as the "non-essential" gatherings such as the one Plaintiffs participated in;

d. The EEOs, as applied against Plaintiffs, are viewpoint discriminatory in that, but for Plaintiffs protesting against Defendants, the very authority that issued the EEOs and tasked with enforcing them, Plaintiffs would not have been arrested on May 9, 2020; and

e. The EEOs are not narrowly tailored and do not use the least restrictive means to meet the governments purported compelling state interest in quelling the spread of COVID-19.

81. Furthermore, the EEOs do not constitute reasonable time, place and manner restrictions as they effect an outright ban on "all non-essential gatherings" and, even as modified, do not provide for any mechanism by which Plaintiffs could have conceivably obtained a permit to conduct their peaceful protests for more than ten people.

82. Defendant de Blasio's EEOs, issued on behalf of the City of New York, have been interpreted, applied, and enforced by Defendant Shea's Police Department, including

by the Police Defendants, as providing cause to detain, arrest and summons Plaintiffs for violating the unconstitutional ban on "non-essential" gatherings.

83. This ban irreparably harms Plaintiffs and requires emergency injunctive relief for two reasons.

84. First, based on the facts alleged herein, Plaintiffs have had their First Amendment rights violated on May 9, 2020 in that they were denied the ability to exercise their right to free speech, free assembly and to petition their government for redress of grievances by being unconstitutionally detained, arrested and charged with violating Defendant de Blasio's EEOs. That deprivation of their constitutionally-protected rights alone constitutes an irreparable harm under applicable case law.

85. Second, since their arrests, Plaintiffs sincerely desire to continue publicly expressing their objection to Defendant de Blasio's policies in dealing with the COVID-19 pandemic in public gatherings with likeminded Americans. However, as a direct result of having been unconstitutionally detained, arrested and charged for exercising their rights on May 9, 2020, Plaintiffs have been cowed, intimidated and chilled from further exercising their constitutional rights for fear of further arrest and criminal punishment.

86. Even as amended by EEO 115, the EEOs continue to cause irreparable harm to Plaintiffs because they sincerely desire to exercise their First Amendment rights in gatherings with more than ten people while fully intending to adhere to proper social distancing protocols. Nonetheless, even under the present iteration of the ban, Plaintiffs remain unable to exercise their rights as such.

87. Further compounding the irreparable harm to Plaintiff is the fact that, as a direct result of being unlawfully arrested and charged in this case, they will be required to answer the summonses in New York State court on September 4, 2020. This, in turn, will require that Plaintiffs each take time off of work, retain an attorney, as, upon information and believe, neither Plaintiff is eligible for a court-appointed attorney, and, while awaiting a disposition on the summonses, be subjected to the moral and social opprobrium that inheres with being charged with a crime.

88. Accordingly, absent emergency relief from this Court, Plaintiffs will suffer immediate and irreparable injury, as described above.

COUNTS 1-6
U.S. Const., First and Fourteenth Amendment enforceable through 42 U.S.C. § 1983–
Freedom of Speech (Count 1 – Butler)
Freedom of Speech (Count 2 – Katzburg)
Freedom of Assembly (Count 3 – Butler)
Freedom of Assembly (Count 4 – Katzburg)
Right to Petition Government for Redress of Grievances (Count 5 – Butler)
Right to Petition Government for Redress of Grievances (Count 5 – Katzburg)

89. Plaintiffs hereby allege and incorporate by reference each and every allegation contained in paragraph 1 through 88 of this Complaint as though fully set forth herein.

90. The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Under the Fourteenth Amendment, every level of state and local government is prohibited from violating these right.

91. On their face or as applied, the EEOs violate Plaintiffs' rights to Free Speech, Free Assembly and to petition the government for redress of grievances under the First and Fourteenth Amendments because they:

a. Effect an outright and overbroad ban on these rights;

b. Impose a substantial burden upon Plaintiffs' rights, subjecting them to criminal sanctions for exercising these right.

c. Irrationally treat constitutionally protected political speech, assembly and peaceful protests that are opposed to the EEOs more harshly than other forms of gatherings that Defendant de Blasio has arbitrarily labeled "essential" but pose the same purported health risk as the "non-essential" assembly Plaintiffs were arrested for participating in;

d. As applied to Plaintiffs, are viewpoint discriminatory in that, but for Plaintiffs protesting against Defendants, the very authority that issued the EEOs and tasked with enforcing them, Plaintiffs would not have been arrested on May 9, 2020; and

e. Does not serve any legitimate, rational, substantial, or compelling governmental interest; and

f. Evan assuming *arguendo* that Defendants do have a compelling state interest, the EEOs are not narrowly tailored, do not use the least restrictive means to meet the governments purported compelling state interest nor are the EEOs substantially related to meeting the purported important governmental interest.

92. In the absence of declaratory and injunctive relief, the Plaintiffs' right to free speech, free assembly and to petition the government for redress of grievances will be irreparably harmed in that Plaintiffs have been, and will continue to be, cowed, intimidated and chilled from exercising these right for fear of arrest, criminal prosecution and criminal punishment, including imprisonment.

93. The violations of the First and Fourteenth Amendments alleged herein are enforceable through 42 U.S.C. § 1983.

94. The violations of the First and Fourteenth Amendments alleged herein are continuing and ongoing.

95. Plaintiffs have no adequate remedy at law.

COUNT 7-8
(U.S. Const., Fourteenth Amendment – Due Process – Void for Vagueness) (Butler and Katzburg

96. Plaintiffs hereby allege and incorporate by reference each and every allegation contained in paragraph 1 through 95 of this Complaint as though fully set forth herein.

97. The Due Process Clause of the Fourteenth Amendment provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . ." The Fourteenth Amendment is enforceable through 42 U.S.C. § 1983.

98. On their face or as applied, the EEOs are void for vagueness in that they fail to adequately define the term "non-essential" gathering, such that Plaintiffs could not possibly be on notice of the prohibited activity that now subjects them to criminal punishment.

COUNT 9
(U.S. Const., Fourth and Fourteenth Amendment – False Arrest/Unreasonable Seizure)
(Butler)

99. Plaintiffs hereby allege and incorporate by reference each and every allegation contained in paragraph 1 through 98 of this Complaint as though fully set forth herein.

100. On or about May 9, 2020, Police Officer Bruccoleri lacked reasonable suspicion to stop and frisk and lacked probable cause to arrest Plaintiff Eric Butler on charges of violating the Mayor's emergency order.

101. The acts of Police Officer Police Officer Bruccoleri violated the Plaintiff Eric Butler's right to be free from an unreasonable seizure in violation of the Fourth Amendment, enforceable through 42 U.S.C. § 1983.

COUNT 10
(U.S. Const., Fourth and Fourteenth Amendment – False Arrest/Unreasonable Seizure)
(Katzburg)

102. Plaintiffs hereby allege and incorporate by reference each and every allegation contained in paragraph 1 through 101 of this Complaint as though fully set forth herein.

103. On or about May 9, 2020, Police Officer Rodriguez lacked reasonable suspicion to stop and frisk and lacked probable cause to arrest Plaintiff Jacob J. Katzburg on charges of disorderly conduct for failure to disperse and for violating the Mayor's emergency order.

104. The acts of Police Officer Rodriguez violated the Plaintiff Jacob J. Katzburg's right to be free from an unreasonable seizure in violation of the Fourth Amendment, enforceable through 42 U.S.C. § 1983.

COUNT 11
(U.S. Const., Fourth and Fourteenth Amendment – Failure to Intervene) (Butler)

105. Plaintiffs hereby allege and incorporate by reference each and every allegation contained in paragraph 1 through 104 of this Complaint as though fully set forth herein.

106. Defendant Police Officers John Does 1 through 15, Sergeants 1 through 5, and Captain John Doe all observed Defendants Police Officers Bruccoleri and Mejia detain and arrest Plaintiff Butler without reasonable suspicion or probable cause, in violation of Plaintiff Butler's right to be free of an unreasonable seizure under the Fourth Amendment.

107. Defendants Police Officers John Does 1 through 15, Sergeants 1 through 5, and Captain John Doe all failed to intervene and prevent Defendants Police Officers Bruccoleri and Mejia from violating Plaintiff Butler's Fourth Amendment rights to be free of an unreasonable seizure, although Defendants Police Officers John Does 1 through 15, Sergeants 1 through 5, and Captain John Doe all had a reasonable opportunity to do so.

108. The acts and omissions of Defendants Police Officers John and Jane Does 1 through 15, Sergeants 1 through 5, and Captain John Doe violated Plaintiff Butler's rights under the due process clause of the Fourteenth Amendment, enforceable through 42 U.S.C. § 1983.

COUNT 12

(U.S. Const., Fourth and Fourteenth Amendment – Failure to Intervene) (Katzburg)

109. Plaintiffs hereby allege and incorporate by reference each and every allegation contained in paragraph 1 through 108 of this Complaint as though fully set forth herein.

110. Defendant Police Officers John Does 1 through 15, Sergeants 1 through 5, and Captain John Doe all observed Defendants Police Officers Rodriguez, Larkens and Villanueva detain and arrest Plaintiff Katzburg without reasonable suspicion or probable cause, in violation of Plaintiff Katzburg's right to be free of an unreasonable seizure under the Fourth Amendment.

111. Police Officers John Does 1 through 15, Sergeants 1 through 5, and Captain John Doe all failed to intervene and prevent Police Officers Rodriguez, Larkens and Villanueva from violating Plaintiff Katzburg's Fourth Amendment rights to be free of an unreasonable seizure, although Police Officers John Does 1 through 15, Sergeants 1 through 5, and Captain John Doe all had a reasonable opportunity to do so.

112. The acts and omissions of Police Officers John Does 1 through 15, Sergeants 1 through 5, and Captain John Doe violated Plaintiff Katzburg's rights under the due process clause of the Fourteenth Amendment, enforceable through 42 U.S.C. § 1983.

COUNT 13

Municipal Liability under 42 U.S.C. § 1983

113. The Plaintiff re-alleges Paragraphs 1 through 112 as if separately set forth.

114. The City of New York at all relevant times has maintained a policy, custom, or practice that has been the cause, the moving force, behind the violations of Plaintiffs

constitutional rights under the First, Fourth and Fourteenth Amendments herein alleged. Specifically, this policy, custom, or practice involves:

a. The leader of the City of New York, Defendant Mayor de Blasio, issuing a patently unconstitutional EEOs, as herein alleged; and

b. The interpretation, application, and enforcement of these unconstitutional EEOs by the New York City Police Department and its employees named herein, at the public direction of Defendant de Blasio and Defendant Shea, such that said EEOs were the reason Plaintiffs were arrested on May 9, 2020, in violation of their constitutional rights under the First, Fourth and Fourteenth Amendments to the United States Constitution.

115. The above-described policy, custom, or practice was the direct and proximate cause of Defendant Police Officers Rodriguez, Larkens, Villanueva, Bruccoleri, Mejia, Police Officer John Doe 1 through 15, Sergeant "John Doe" 1 through 5 and Captain John Doe violating Plaintiffs' First, Fourth and Fourteenth Amendment rights, enforceable through 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs respectfully request the Court to enter judgment against Defendant as follows:

1. Granting the Plaintiffs' concurrently filed motion for a temporary restraining order;

2. Declaring the EEOs unconstitutional on their face;

3. Declaring the past enforcement of the EEOs against Plaintiffs to be unlawful and/or a violation of the Plaintiffs' rights;

4. Declaring any future enforcement of the EEOs against Plaintiffs, under circumstances similar to this case, to be unlawful and/or a violation of the Plaintiffs' rights;

5. Granting an order preliminarily, and thereafter, permanently enjoining Defendant and Defendant's officers, agents, affiliates, servants, successors, employees, and any other persons who are in active concert or participation with any of the foregoing persons from enforcing the EEOs against Plaintiffs;

4. Entry of judgment for Plaintiffs and against Defendant for deprivation of rights, including an award for compensatory damages and punitive damages, in an amount to be determined by the Court;

5. Awarding Plaintiffs' costs and attorneys' fees as authorized by Fed. R. Civ. P. 54, 42 U.S.C. § 1988, and any other applicable law;

6. Awarding such further relief as the Court deems just and proper.

JURY TRIAL DEMAND

Plaintiffs demands a trial by jury on all issues so triable.

Date: May 27, 2020

Respectfully Submitted,

Jacob J. Katburg and Eric Butler
By their attorneys,
s/ Joseph Z. Amsel
Law Offices of Joseph Z. Amsel, PLLC
43 West 43rd Street, Suite 265
New York, NY 10036
888-558-7425
JZAmsel@AmselLaw.com
Counsel for Plaintiffs

VERIFICATION

I, Eric Butler, the Plaintiff in this case, hereby declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the forgoing VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT INJUNCTIVE RELIEF AND DAMAGES has been examined by me and that the factual allegations therein are true to the best of my information, knowledge and belief, except as to those factual allegations that specifically apply to my co-Plaintiff or as to matters of law.

Executed on this 26, May 2020

State of New York
County of New York

Sworn To Before Me This Day Of

MAY 26 2020

Jenice Hernandez
Notary Public, State of New York
No. 01HE6359254
Qualified in Bronx County
Certified in New York & Kings Couny
Commission Expires May 22, 2021
The UPS Store | 82 Nassau St | 212.406.9010

Plaintiff Eric Butler

VERIFICATION

I, Jacob J. Katzburg, the Plaintiff in this case, hereby declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the forgoing VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT INJUNCTIVE RELIEF AND DAMAGES has been examined by me and that the factual allegations therein are true to the best of my information, knowledge and belief, except as to those factual allegations that specifically apply to my co-Plaintiff or as to matters of law.

Executed on this 26, May 2020

Jacob J. Katzburg 5/26/20

Plaintiff Jacob J. Katzburg

JOSEPH Z AMSEL
STATE OF NEW YORK
NOTARY PUBLIC
Qualified in Kings County
02AM6397467
MY COMMISSION EXPIRES 7/7/20

EXHIBIT E

DATE: 05/22/2020
TIME: 19:37:47
SER#: 37610511

FINEST MESSAGE
General Administrative Information

TO: ALL COMMANDS

SUBJECT: LIFTING OF RESTRICTIONS ON GATHERINGS

AS OF TODAY, GATHERINGS INVOLVING A MAXIMUM OF 10 PEOPLE ARE PERMISSIBLE SO LONG AS PARTICIPANTS MAINTAIN A DISTANCE OF 6 FEET FROM EACH OTHER. EXAMPLES OF THE TYPES OF 10-PERSON GATHERINGS THAT ARE NOW PERMISSIBLE ARE RELIGIOUS SERVICES, SOCIAL GATHERINGS, WEDDINGS AND PROTESTS. HOWEVER, GATHERINGS THAT INVOLVE ACTIVITIES WHERE SOCIAL DISTANCING IS NOT POSSIBLE, SUCH AS TEAM SPORTS, ARE STILL PROHIBITED. IF AN MOS OBSERVES A GATHERING OF MORE THAN 10 PEOPLE, MOS SHOULD REMIND THE PARTICIPANTS THAT LARGE GATHERINGS ARE NOT PERMITTED AND ORDER THE GROUP TO DISPERSE. IF THE LARGE GATHERING IS EGREGIOUS AND POSES A DANGER TO PUBLIC HEALTH, MOS SHOULD CALL FOR A SUPERVISOR TO RESPOND TO THE SCENE. ENFORCEMENT SHOULD ONLY BE TAKEN AS A LAST RESORT IF THE GROUP REFUSES TO COMPLY WITH AN ORDER TO DISPERSE FROM A LARGE DANGEROUS GATHERING.

DRIVE-IN RELIGIOUS SERVICES AND VEHICLE CARAVANS ARE ALSO PERMISSIBLE WITH NO RESTRICTION ON THE NUMBER OF PARTICIPANTS SO LONG AS THERE IS NO IN-PERSON CONTACT.

NON-ESSENTIAL BUSINESSES MUST REMAIN CLOSED AT THIS TIME WITH ONE EXCEPTION. BUSINESSES THAT HAVE A SINGLE EMPLOYEE WORKING AND ARE NOT PROVIDING A PERSONAL CARE SERVICE ARE ALLOWED TO BE OPEN. AN EXAMPLE OF THIS WOULD BE A FLORIST WHO HAS ONE PERSON WORKING IN THE SHOP. BUSINESSES THAT PROVIDE PERSONAL CARE SERVICES MUST BE CLOSED WITHOUT EXCEPTION. PERSONAL CARE SERVICES ARE BUSINESSES SUCH AS BARBERSHOPS, NAIL SALONS, HAIR SALONS AND TATTOO PARLORS. IF MOS OBSERVE A NON-ESSENTIAL BUSINESS OPERATING IN VIOLATION OF THESE RULES, DIRECT THE BUSINESS TO CLOSE. IF THE BUSINESS DOES NOT COMPLY, A C SUMMONS MAY BE ISSUED TO THE OPERATOR OF THE BUSINESS FOR NYC ADMIN. CODE 3-108, VIOLATING THE MAYOR'S EXECUTIVE ORDER CLOSING NON-ESSENTIAL BUSINESSES. IF THE BUSINESS STILL REFUSES TO COMPLY AFTER BEING WARNED AND ISSUED A SUMMONS, REPORT SUCH VIOLATION TO YOUR SUPERVISOR. SUPERVISORS WILL REPORT SUCH LOCATIONS TO THEIR COMMANDING OFFICER WHO WILL THEN ALERT THEIR PATROL BOROUGH. SUCH LOCATIONS WILL BE REFERRED TO THEIR RELEVANT LICENSING AGENCY.

AUTHORITY: CHIEF OF DEPARTMENT OPR: PO GUNNIP
OPS UNIT BROADCAST MESSAGE NO. 05/22-010

ADMN - SER#: 37610511

EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC BUTLER AND JACOB KATZBURG Plaintiffs, vs. CITY OF NEW YORK; BILL DE BLASIO, in his personal and official capacity as the Mayor of New York City; DERMOT SHEA, in his personal and official capacity as Police Commissioner of the New York City Police Department; POLICE OFFICERS "JOHN" RODRIGUEZ (TAX: 952174), "JOHN" VILLANUEVA (BADGE NUMBER 27398), "JOHN" LARKINS (BADGE NUMBER 13260), NICHOLAS T. BRUCCOLERI (TAX: 960228), "JOHN" MEJIA" JOHN DOES 1-15, SERGEANTS "JOHN DOE" 1-5, AND CAPTAIN "JOHN DOE," all in their personal and official capacity, Defendants.	Civil Action No. 20-CV-4067(ER)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

JAMES E. JOHNSON
Corporation Counsel of the
City of New York
Attorney for the City of New York, Mayor Bill de Blasio and NYPD Police Commissioner Dermot Shea
100 Church Street
New York, New York 10007

Sheryl Neufeld,
Amy J. Weinblatt,
Samantha M. Schonfeld,
of Counsel.

June 3, 2020

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ERIC BUTLER AND JACOB KATZBURG,

Plaintiffs,

-against-

CITY OF NEW YORK; BILL DE BLASIO, in his personal and official capacity as the Mayor of New York City; DERMOT SHEA, in his personal and official capacity as Police Commissioner of the New York City Police Department; POLICE OFFICERS "JOHN" RODRIGUEZ (TAX: 952174), "JOHN" VILLANUEVA (BADGE NUMBER 27398), "JOHN" LARKINS (BADGE NUMBER 13260), NICHOLAS T. BRUCCOLERI (TAX: 960228), "JOHN" MEJIA" JOHN DOES 1-15, SERGEANTS "JOHN DOE" 1-5, AND CAPTAIN "JOHN DOE," all in their personal and official capacity,

20-CV-4067

Defendants.
---------- x

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

Defendants City of New York, Mayor Bill de Blasio, and Police Commissioner Dermot Shea, by their attorney James E. Johnson, Corporation Counsel of the City of New York, submit this memorandum of law in opposition to Plaintiffs' motion for a temporary restraining order ("TRO") and preliminary injunction ("PI").[1] As detailed herein, Plaintiffs' application should be denied for several reasons. While Plaintiffs allege harm by the continuation of a Mayoral Executive Order limiting the size of gatherings in the City of New York during the state of emergency caused by the COVID-19 pandemic, the impetus for this order was an identical

[1] Defendants City of New York, Mayor Bill de Blasio and Police Commissioner Shea have been served; representation and service of the other named defendants has not yet been established. In any event, it is not necessary for the purpose of this motion to include any individual defendants since the City of New York is a party.

Executive Order issued by New York State Governor Andrew Cuomo two days before the Mayor's Order. Yet Plaintiffs have failed to name the Governor or the State of New York in this case. As a result, not only is the State deprived of an opportunity to articulate its rationale and defend its order; but even if this Court were to invalidate the Mayoral order, the State's order would nonetheless remain in effect and be enforceable against Plaintiffs. Moreover, as has been recognized by another court that recently looked at this issue, limiting in-person gatherings at this time is rational and necessary.

PRELIMINARY STATEMENT AND STATEMENT OF MATERIAL FACTS

Background

On March 1, 2020, New York State announced New York City's (the "City") first known case of COVID-19. C*oronavirus in N.Y.: Manhattan Woman Is First Confirmed Case in State*, New York Times, March 1, 2020 https://www.nytimes.com/2020/03/01/nyregion/new-york-coronvirus-confirmed.html (last visited May 13, 2020). From that date, the virus spread rapidly throughout the City with 45,707 positive cases by April 1, 2020, just one month after the first known case was diagnosed in the City, and 166,883 positive cases by May 1, 2020, just two months after the first known case was diagnosed. See Declaration of Samantha Schonfeld submitted herewith (hereinafter "Schonfeld Dec."), dated June 3, 2020, Exs. A and B. The City quickly became the epicenter of the COVID-19 outbreak in the United States, and has one of the largest reported disease burdens in the world. As of May 31, 2020, there have been 203,000 confirmed positive COVID-19 cases in New York City, with over 21,500 confirmed or probable deaths. See COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at John's Hopkins University, available at https://www.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6.

(last visited June 3, 2020). The City is in the midst of an unprecedented pandemic, which at its height was killing 577 people a day and even that figure may be a vast undercounting of the lives taken by COVID-19; the pandemic has overwhelmed the health care system and funeral homes, which have been unable to keep up with the rate of deaths.[2] The City alone has more deaths due to COVID-19 than all but seven countries in the world. See id.

Similar to other states and municipalities, the City recognized that COVID-19 could rapidly spread through the City due to its densely populated nature and has been working with New York State to contain the spread of COVID-19 in the City. In response to the quickly developing COVID-19 outbreak in New York State, Governor Cuomo declared a formal State of Emergency on March 7, 2020. See New York State Executive Order (hereafter "State EO" or "Cuomo EO") No. 202, annexed to Schonfeld Dec. at Ex. C. On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic, the first ever pandemic caused by a coronavirus. On March 12, 2020, pursuant to his authority under New York State Executive Law § 24 ("Executive Law") and New York City Administrative Code ("Administrative Code") section 3-104, Mayor de Blasio issued Emergency Executive Order ("EEO") No. 98, *inter alia*, declaring a state of emergency in the City of New York. The state of emergency in the City of New York initially lasted for a period of thirty days and has subsequently been extended.

[2] See e.g., Cases, Hospitalization and Deaths, NYC Health, https://www1.nyc.gov/site/doh/covid/covid-19-data.page (last visited June 3, 2020); Missing Deaths: Tracking the True Toll of the Coronavirus Outbreak, The New York Times, Updated May 13, 2020, https://www.nytimes.com/interactive/2020/04/21/world/coronavirus-missing-deaths.html (last visited June 3, 2020); Faced with a crush of patients, besieged NYC hospitals struggle with life-or-death decisions, The Washington Post, March 31, 2020, https://www.washingtonpost.com/health/2020/03/31/new-york-city-hospitals-coronavirus/ (last visited June 3, 2020); Funeral Directors Head to New York to Help Colleagues Overwhelmed by COVID-19, USA Today, April 21, 2020, https://www.usnews.com/news/national-news/articles/2020-04-21/volunteers-to-help-new-york-funeral-homes-overwhelmed-by-coronavirus (last June 3, 2020).

On March 23, 2020, as the virus continued to spread rapidly through New York, Governor Cuomo issued Executive Order No. 202.10 which, *inter alia,* declared that all non-essential gatherings of individuals of any size for any reason be cancelled or postponed. On March 25, 2020 Mayor de Blasio incorporated this gatherings ban into EEO 103. In this regard, EEO 103 directed that "any non-essential gathering of individuals or any size for any reason shall be cancelled or postponed." EEO 103(3)(b). The purpose of this directive was "to avoid the mass congregation of people in public places and to reduce the opportunity for the spread of COVID-19." Id. In addition, EEO 103 ordered, *inter alia*, that all non-emergency businesses and nonprofit entities that do not provide "essential services or functions" as defined by New York State Governor Cuomo's Executive Order 202.6 must reduce their in-person workforce at all locations by 100%. Id.

Mayor de Blasio subsequently issued EEOs 104, 105, 107, 108, 109, 110, 111, 113, and 114, each of which extended the ban established in EEO 103 on "non-essential gathering of individuals of any size for any reason" (hereafter the "gatherings ban") by a period of five days. EEOs 106 and 112 each extended the gatherings ban for five days as well and also extended EEO 98, which was issued on March 12, 2020 and declared a local state of emergency. The local state of emergency continues to be in effect today.

On May 24, 2020, Mayor de Blasio issued EEO 115, which eased the restrictions on non-essential gatherings put in place by EEO 103(3)(b) and the subsequent five-day extensions, in line with what New York State Governor Andrew Como had done in issuing State Executive Order 202.33 on May 22, 2020. EO 202.33 remains in effect through June 21, 2020. In this regard, mirroring the language in the State's Executive Order, EEO 115 amended the gatherings bans as follows: "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, provided however that gatherings of ten (10) or fewer individuals where such individuals adhere to applicable social distancing protocols and cleaning and disinfection protocols are permitted." This prohibition was continued in EEO 116 issued on May 29, 2020 and effective until June 3, 2020.[3]

Plaintiffs' Participation in the May 9, 2020 Protest

On May 9, 2020, Plaintiffs participated in a non-essential gathering in violation of EEO 111 and 112, which were in effect at that time. Plaintiffs gathered with nearly twenty other people in City Hall Park to protest the alleged "ultra vires nature of the EEOs." Complaint at ¶ 46. Plaintiffs acknowledge that some of the participants, including plaintiff Butler, were not wearing face masks. Complaint at ¶¶ 51, 71. Plaintiffs also acknowledge that they were not successful in maintaining six feet of distance between themselves and others at all times while in the park. Id. After approximately thirty minutes of protest, NYPD officers arrived and directed the group from a distance via audio recordings played over a loudspeaker to disperse. Complaint at ¶ 59. Plaintiffs failed to comply with these directives and were arrested and released with summonses approximately three hours later. Id. at ¶¶ 75-76.

The Instant Application

Plaintiffs do not provide a specific plan or date upon which they would like to engage in another protest. Rather, they merely "sincerely desire" to publicly protest Mayor de Blasio's EEOs in groups of more than ten people, but have been "chilled" from doing so by the enforcement actions taken on May 9, 2020. Complaint at ¶¶ 85 and 86. Plaintiffs implicitly acknowledge that they could not ensure public health measures such as maintaining six feet

[3] Upon and information and belief, as the requirements of State EO 202.33 remain in effect, Mayor de Blasio will be issuing another EEO further extending the limited gatherings ban for another five days.

between each participant and the wearing of face coverings, Complaint at ¶ 86 ("while fully intending to adhere to proper social distancing protocols."). They have presented no evidence as to how they might carry out this intention. Indeed they have already demonstrated and acknowledge that their protests cannot possibly ensure such measures. See Complaint at ¶¶ 46 et seq., noting that only plaintiff Katzburg and not plaintiff Butler wore a mask; further stating that "many," but not all, of their group of nearly 20 wore masks; and noting that the group met and exchanged views while in the park, clearly close enough to one another to enable discussion and possible infection. Complaint at ¶¶ 46-52.

Plaintiffs filed the Complaint in this action on May 29, 2020. Plaintiffs challenge the gatherings ban contained in the NYC EEOs (which incorporate the requirements of the Governor's EOs, Exs. D and E to Schonfeld Dec.), facially and as-applied, alleging it violates their right to free speech, right to free assembly, and right to petition the government for relief from grievances under the First and Fourteenth Amendments of the United States Constitution. They also allege that the EEOs violate due process under the Fourteenth Amendment in that they are unconstitutionally vague. Plaintiffs further allege they were falsely arrested and that certain individual defendants failed to intervene to prevent their constitutional rights from being violated. Plaintiffs filed their Application for Temporary Restraining Order and Preliminary Injunction on June 1, 2020.

Plaintiffs' application for this extraordinary relief should be denied. The devastating COVID-19 pandemic has overwhelmed the City's health care system and funeral homes, and is responsible, to date, for the deaths of approximately 21,500 New Yorkers and over 100,000 Americans. New York City is among the places most hard-hit by the virus, with over 203,000 confirmed cases and the seventh highest number of COVID-19 deaths as compared to

any other country in the world. New York State and New York City took action early to save the lives of New Yorkers, and among those actions were the EEOs that prohibited non-essential gatherings of individuals. As noted above, EEO 115 eased the prohibition, and non-essential gatherings of up to ten people are now permitted. Easing restrictions further prematurely could endanger lives by causing an increase in COVID-19 infections and deaths.[4]

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[4] While public safety considerations surrounding recent protests in the City have led to a temporary relaxation in enforcement of the gatherings ban, the overall ban nevertheless remains in effect and should not be disturbed simply because there are temporarily other considerations that factor into decision-making surrounding enforcement. City officials are addressing the public health crisis as it overlaps with the public safety concerns to the best of their ability in a dynamic and often fraught situation, and it has been noted that health experts and other officials are concerned that the current protests in cities all over the U.S. may well lead to another spike in COVID-19 cases. See, e.g., "Protests Draw Shoulder-to Shoulder Crowds After Months of Virus Isolation," The New York Times, June 3, 2020, https://www.nytimes.com/2020/06/02/us/coronavirus-protests-george-floyd.html?action=click&module=Spotlight&pgtype=Homepage; "Will Protests Set Off a Second Viral Wave?" The New York Times, May 31, 2020 https://www.nytimes.com/2020/05/31/health/protests-coronavirus.html (last visited June 3, 2020) Governor Cuomo "voiced strong concerns that days of crowded and chaotic protests in New York City against racism and deadly police brutality could set off a second wave of coronavirus infections." "Michigan Lifts a Stay-at-Home Order, and New York Warns that Protests Could Set Off Infections," The New York Times, June 1, 2020, https://www.nytimes.com/2020/06/01/world/coronavirus-world-news.html (last visited June 3, 2020). In recognition of the current situation, the NYC Department of Health and Mental Hygiene issued the following guidelines on May 30, 2020 for safe protesting:
"Plan to protest? Here are tips to reduce the risk of spreading #COVID19:
✔ Wear a face covering
✔ Wear eye protection to prevent injury
✔ Stay hydrated
✔ Use hand sanitizer
✔ Don't yell; use signs & noise makers instead
✔ Stick to a small group
✔ Keep 6 feet from other groups— nychealthy (@nycHealthy) May 30, 2020"

ARGUMENT

POINT I

PLAINTIFFS LACK STANDING

Plaintiffs' requests for a TRO and PI must be denied because the relief they seek will fail to redress the injury they purport to have. There are two questions to be addressed related to Plaintiffs' standing: first, whether the City's EEOs as addressed to gatherings are causing Plaintiffs' alleged injury, and second, whether the ruling they seek, i.e., an injunction against enforcement of that provision of the EEOs, would eliminate the alleged injury. Plaintiffs cannot establish either of these criteria. To establish causation, there must be a "causal connection between the injury and the conduct complained of"—the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (quotation marks and alterations omitted). And to establish redressability, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561 (quotation marks omitted). Plaintiffs have failed to establish either causation or redressability because they only challenge the City's EEOs banning or limiting non-essential gatherings; they fail to challenge the identical bans set forth in State EOs, upon which the City's EEOs were based and which would survive and bind Plaintiffs even if this Court issued an injunction barring enforcement of the City's EEOs against Plaintiffs. Since separate New York State executive orders, which Plaintiffs have not challenged, independently prohibit their desire to gather in groups of more than ten, Plaintiffs fail to establish either causation or redressability.

POINT II

PLAINTIFFS FAIL TO NAME THE STATE OF NEW YORK, A NECESSARY PARTY

Plaintiffs' requests for a TRO and PI must be denied because they failed to name the State of New York, which is a necessary party in this action. "Rule 19 of the Federal Rules of Civil Procedure provides for compulsory joinder of parties who are needed for fair and just adjudication of the dispute at hand." New Line International Releasing v. Marty Toy USA, 1995 U.S. Dist. LEXIS 7781, at * 10-11 (S.D.N.Y. June 7, 1995). Rule 19 provides for a two-part test for determining whether failure to join a necessary party requires dismissal of the action. Town of Huntington v. Am. Mfrs. Mut. Ins. Co., 267 F.R.D. 449, (E.D.N.Y. 2010). First, courts must determine "whether the party is necessary under Rule 19(a); and, if so, whether the party is indispensable under Rule 19(b)." New Line International, 1995 U.S. Dist. LEXIS 771 at *10-11.

A person or entity is necessary under Rule 19 if "(a) in that [entity's] absence, the court cannot accord complete relief among existing parties; or (b) that [entity] claims an interest relating to the subject of the action and is so situated that disposing of the action in the [entity's] absence may: (i) as a practical matter impair or impede the [entity's]' ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Brooks v. Roberts, 251 F. Supp. 3d 401, 433-434 (E.D.N.Y. 2017).

Clearly, the State of New York is a necessary party to this action. Plaintiffs are seeking a temporary restraining order enjoining the City from "enforcing the ban on 'non-essential gatherings' contained in New York City Emergency Executive Order 103 and its progeny." See Plaintiffs' Order to Show Cause. The gatherings ban set forth in EEO 103 (and subsequent extensions) was based on Governor Cuomo's EO 202.10, which was issued on

March 23, 2020 and incorporated by the City into EEO 103 on March 25, 2020. On May 22, 2020, Governor Cuomo issued EO 202.33, which eased the restrictions on non-essential gatherings to permit such gatherings of up to ten people; the City's modification followed in EEO 115, issued on May 24, 2020. Because the gatherings ban (later restriction) was created by the State, the State is a necessary party to this action. Indeed, if this Court is inclined to grant Plaintiffs' TRO temporarily enjoining the City from enforcing the ban on "non-essential" gatherings set forth in EEO 115, and further, if in doing so the Court was to opine on the merits of EEO 103 without affording the State the benefit of being heard regarding the basis for the State Order upon which the City's order is based, the State's interests may be adversely affected. Deciding the TRO in the absence of the State in this action "may as a practical matter impair or impede the [State's] ability to protect the interest" in curbing cases of COVID – 19 in New York State. Brooks, 251 F. Supp. 3d at 433-434.

POINT III

PLAINTIFFS' FIRST AMENDMENT RIGHTS WERE NOT VIOLATED AND MOREOVER THEY DO NOT MEET THE CONDITIONS FOR A PI OR TRO

Should the Court reach the merits of Plaintiffs' application for a TRO and PI enjoining the City from enforcing the limit on non-essential gatherings set forth in EEO 115, it should nonetheless deny Plaintiffs' application as they fail to meet the necessary criteria for such extraordinary relief.

Standard of Review

In order to establish their entitlement to a preliminary injunction or a temporary restraining order against government action, a Plaintiff must establish (1) that they will be irreparably injured if the relief sought is not granted; (2) that they are likely to succeed on the

merits of their claims; (3) that a balance of the equities is in their favor; and (4) that an injunction would be in the public interest. See, e.g., Trump v. Deutsche Bank AG, 943 F3d 627, 640 (2d Cir. 2019 [citations omitted]. Chemical Bank v. Haseotes, 13 F.3d 569, 572-73 (2d Cir. 1994) Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 580 (2d Cir. 1989). See also Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996), cert. denied, 520 U.S. 1251 (1997). The Second Circuit has held that "[v]iolations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction," Bery, 97 F.3d at 693. As set forth herein, Plaintiffs cannot succeed on the merits, because the gatherings ban (limitation) is not an impermissible violation of their First Amendment. As set forth in the recent decision in this district, Geller v. de Blasio, et al., 2020 U.S. Dist. LEXIS 87405, at *6-7 (S.D.N.Y. May 18, 2020), likelihood of success on the merits is all but dispositive: "Although a showing of irreparable harm is often considered the 'single most important prerequisite for the issuance of a preliminary injunction,' Faiveley transp. Malmo AB v. Wabtec Corp., 559 F.3d 110, 118) (2d Cir. 2009) (citation omitted), [c]onsideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor." N.Y. Progress and Prot. PAC v. Walsh, 733 F.3d 488 (2d Cir. 2013)." Geller, 2020 U.S. Dist. LEXIS 87405, at *6.

Plaintiffs Cannot Meet the Criteria for a TRO or PI

The First Amendment claims Plaintiffs make, with the exception of the allegation that the EEOs are void for vagueness, were largely addressed in Geller v. de Blasio, 2020 U.S. Dist. LEXIS 87405 (S.D.N.Y May 18, 2020). In Geller, plaintiff challenged the gatherings ban as it prohibited her desire to protest in a group in public.[5] The Court denied plaintiff Geller's

[5] At the time Geller commenced her case, and at the time Judge Cote ruled on her TRO and PI application, the complete ban on non-essential gatherings remained in effect. The gatherings ban

application for a PI and TRO similar to that sought by Plaintiffs herein. For the reasons set forth in Geller, the application herein should also be denied. Plaintiffs are not likely to succeed on the merits of their First Amendment claim because the challenged EEOs challenged are content neutral; the ban is narrowly tailored to address a significant governmental interest; and intermediate scrutiny applies. Additionally, Plaintiffs will suffer no irreparable harm because they have alternative means to publicly communicate their message. Finally, the balance of the equities tips in the City's favor, and granting the TRO is not in the public interest. The EEOs at issue pass Constitutional muster.

> First, the Court in Geller found that the subject EEO is content neutral:
>
> The March 25 Executive Order is content-neutral. It bans "any non-essential gathering of individuals of any size for any reason." It does not target the contents of the speech itself or the listener's agreement or disagreement with those contents. Instead, it targets the harmful secondary effects of public gathering -- the spread of a novel virus for which there currently is no cure or effective treatment.

Geller at *10. Based on the finding that the EEO is content neutral, the Court concluded that intermediate scrutiny applied:

> Because the March 25 Executive Order is content-neutral, intermediate scrutiny applies. While the plaintiff acknowledges the significance of the governmental interest, it bears repeating what is at stake. Through the March 25 Executive Order, the City seeks to slow the spread of a virus that has hospitalized and killed tens of thousands of New Yorkers and infected hundreds of thousands more -- in less than three months' time.

Geller at *10. The Court found that plaintiff was not irreparably harmed because she had alternate means to communicate her message. While acknowledging plaintiff's claim that "a

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was modified to allow gatherings of 10 or fewer participants during the course of Geller's appeal, which remains pending before the Second Circuit. Argument on Geller's motion for a stay pending appeal was heard on June 2, 2020.

single person protesting in public is not a perfect substitute for public group protest," see also Pl. Mem. at fn 1, the Court nevertheless found that sufficient alternatives were available.

> Alternative channels for communication and political protest … remain open. The plaintiff is free to express her discontent online, through media, and by protesting in public on her own. For now, these are acceptable alternatives to public group protests.

Geller at 12.

While the Geller court upheld an outright ban on gatherings of any size for any non-essential reason, the current ban permits non-essential gatherings of up to ten individuals. Thus Plaintiffs herein have avenues available to them in addition to those found sufficient by the Geller Court.

In addition, Geller found that the gatherings ban is narrowly tailored to meet the government interest at stake:

> Given the severity of the public health crisis, the City has taken measures that are reasonable and narrowly tailored in temporarily prohibiting public gatherings. While [*11] a measure restricting all public group activity may not likely be found narrowly tailored in ordinary times, these times are extraordinary.

Geller at *10-11. Since the ban Plaintiffs challenge here has been eased to permit gatherings of up to ten people, it clearly still meets this standard.

The Challenged EEOs are not Unconstitutionally Vague

Plaintiffs assert that the EEOs are unconstitutionally vague both on their face and as applied. Specifically, Plaintiffs claim that the EEOs fail to define the term "non-essential gathering," thus leaving Plaintiffs "without any guidance as to what conduct is proscribed by the EEOs and thus, what conduct, would subject them to criminal sanction." Plaintiffs' Memorandum of Law in Support of their Application for Temporary Restraining Order. ("Pl. Memo") at 11. However, as set forth below, the EEOs provide sufficient notice to an individual

of normal intelligence, and guidelines for law enforcement personnel, such that they clearly pass constitutional muster. Accordingly, Plaintiffs are unlikely to succeed on the merits of this claim.

When a party challenges a law as unconstitutionally vague, she carries the heavy burden of showing that it is impermissibly vague in all of its applications. Facial challenges are generally disfavored, Dickerson v. Napolitano, 604 F.3d 732, 741 (2d Cir. 2010); National Endowment for the Arts, et al v. Finley, et al, 524 U.S. 569, 580 (1998), since Courts are reluctant to formulate constitutional law that is broader than what is presented by the particular facts of the case, United States v. Raines, 362 U.S. 17, 21 (1960); or to rely on speculation. Dickerson, 604 F.3d at 741. Only where First Amendment rights are involved are facial challenges generally permitted. Dickerson, 604 F.3d at 742, 744. Where a law is "judged on an 'as applied' basis, one whose conduct is clearly proscribed by the statute cannot successfully challenge it for vagueness." United States v. Nadi, 996 F.2d 548, 550 (2d Cir. 1993) (citations omitted), cert. denied, 510 U.S. 933 (1993); A.F. v. Kings Park Cen. Sch. Dist., 341 F. Supp. 3d 188 (E.D.N.Y. 2018).

To determine whether a law is unconstitutionally vague as applied, the Court must determine whether it "gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and then consider whether the law "provides explicit standards for those who apply [it]." United States v. Smith, 985 F. Supp. 2d 547, 587 (S.D.N.Y. 2014); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The Supreme Court has articulated a two-part test for this purpose. First, the law must provide sufficient notice of what conduct is prohibited; second, the law must be written in such a manner as to avoid arbitrary and discriminatory enforcement. Id.; see also, Kolender v. Lawson, 461 U.S. 352, 357 (1983); Papachristou v. City of

Jacksonville, 405 U.S. 156, 162 (1972); People v. Nelson, 69 N.Y.2d 302 (1987); People v. Smith, 44 N.Y.2d 613, 618 (1978).

In order to succeed on a vagueness challenge, a plaintiff must do more than show that the provision of law in question employs "an imprecise but comprehensible normative standard." United States v. Schneiderman, 968 F.2d 1564, 1567 (2d Cir. 1992), cert. denied, 507 US 921 (1993). A law is unconstitutionally vague when it fails to apprise a person of normal intelligence that the contemplated conduct is prohibited. Under a due process analysis, a law that forbids or requires the doing of an act is void for vagueness only when it specifies no guide or standard at all and people of common intelligence must necessarily speculate as to its meaning and the conduct which is prohibited. See United States v. Charles, 1981 U.S. Dist. LEXIS 15429 (SDNY 1981), citing, United States v. Powell, 423 U.S. 87, 92 (1975) and United States v. Harriss, 347 U.S. 612, 617 (1954); see also, People v. Cruz, 48 N.Y.2d 419 (1979), appeal dismissed, 446 U.S. 901 (1980). The due process clause does not require that a law be drafted with such specificity that it leaves no room for interpretation, nor is it void for vagueness merely because situations may exist in which it should not be applied. Grayned, 408 U.S. at 108-110. "Condemned to the use of words, we can never expect mathematical certainty from our language." Id. at 110. As the Supreme Court stated:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the [challenged provisions] may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973), quoting, Civil Service Commission v. National Ass'n. of Letter Carriers, 413 U.S. 548, 578-79 (1973).

The EEOs at issue herein are not unconstitutionally vague. EEO 103 § 3(b) states "[i]n 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 gatherings of individuals of any size for any reason shall be cancelled or postponed." Furthermore, EEO 103 § 4 states "[t]his Order incorporates any and all relevant provisions of the Governor Executive Order No. 202 and subsequent orders issued by the Governor of New York State to address the State of Emergency declared in that Order pursuant to his powers under section 29-a of the Executive Law." See Schonfeld Dec., Ex. D.

Notice Requirement

Plaintiffs claim that the EEOs do not give adequate notice as to "what conduct is proscribed by the EEOs" because they "fail to define the basis term 'non-essential gatherings.'" Pl.Memo. at 11. Plaintiffs' claim is without merit. "The crux of [the notice] prong of the vagueness analysis is the requirement that the law be sufficiently clear to provide notice to potential wrongdoers that the conduct in which they are engaged has the potential for civil or criminal liability." United States v. Spy Factory, Inc., 951 F.Supp. 450, 466 (S.D.N.Y. 1997). "[O]nly the actual conduct of the [persons] involved can be considered; the Court must disregard other, more innocent or questionable hypothetical conduct under the statute." Id.

The challenged provisions of the EEOs cannot be considered unduly vague as applied to the actions of Plaintiffs, because the term "non-essential gatherings" is sufficiently described in the EEOs to provide a person of "ordinary intelligence a reasonable opportunity to know what is prohibited." Grayned, 408 U.S. at 108.

Governor Cuomo's EEO No. 202.6, which was explicitly incorporated into the City's EEO No. 103 (Schonfeld Dec. Ex. F), provides more than sufficient guidance and information on the meaning of the term "non-essential gatherings" as it relates to the ban on non-

essential gatherings. Specifically, Governor Cuomo's EEO No. 202.6 defines an "essential business or entity providing essential services or functions" as follows:

> Essential health care operations including research and laboratory services; essential infrastructure including utilities, telecommunication, airports, and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash collection, mail, and shipping services, news media; banks and related financial institutions; providers of basic necessities to economically disadvantaged populations; construction; vendors of essential services necessary to maintain the safety, sanitation, and essential operations of residences or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public.

Id.

Clearly, any business or entity that is not included in the list above as an "essential business or entity providing essential services or functions" is deemed a non-essential business or entity serving non-essential functions. Thus, because entities and services involving the act of protesting are not listed as "essential," a person of ordinary intelligence exercising simple common sense could reasonably deduce that gatherings involving the act of protesting are similarly non-essential.

In addition, the New York State Department of Economic Development ("ESD") has issued, and continued to update, guidance on Executive Order 202.6 to aid in further clarifying what constitutes essential and non-essential businesses and activities during the state of emergency. See https://esd.ny.gov/guidance-executive-order-2026 (last updated on May 31, 2020 and last visited on June 3, 2020). Further, the ESD guidance webpage states the following about gatherings: "[p]ursuant to Executive Order 202.10, all non-essential gatherings of individuals of any size for any reasons (e.g. parties, celebrations, or other social events) are

canceled or postponed. However, Executive Orders 202.32 and 202.33, issued subsequently, allow ten or fewer people to gather for any lawful purpose or reason, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to." The guidance also makes clear that the 10-person limit on in-person gatherings applies to religious services, and does not modify the restrictions on businesses (meaning that non-essential businesses are not allowed to open and limit the size of the business operation to 10 or fewer). Id.

Additionally, Plaintiffs argue that "Governor Cuomo's Executive Order 202.6 reveals that it is entirely possible to create a carve-out for fundamental constitutional rights while also protecting the public." Pl. Memo. at 20. To further this point, Plaintiffs state "[EEO] 202.6, which sets out the definition of essential businesses, specifically defined the news media as an essential business, no doubt in recognition of their constitutionally-protected free press rights under the First Amendment." Pl. Memo at 20. Tellingly, Plaintiffs recognize that "news media" were specifically defined as an essential business within Governor Cuomo's EEO 202.6, and incorporated into the City's EEO 103.[6] Therefore, Plaintiffs are on notice, and should have known, that organized protests, which are not listed explicitly in EEO 202.6 as essential, were therefore non-essential. Accordingly, the notice requirement has been satisfied.

Sufficient Guidance for Enforcers of Law

Plaintiffs further claim that the EEOs are unconstitutionally vague because their "failure to specifically define the term 'non-essential gatherings' allows the police" to "engage in a 'standardless sweep' by which Plaintiffs were swept up, while others in the park who were

[6] While Plaintiffs appear to claim that this designation was provided in deference to first amendment rights of the news media, in fact, it was more likely that the news media was deemed "essential" because they needed to provide important information to the public during this public health emergency, consistent with other life sustaining activities deemed essential during this time.

there for recreational purposes, were not." Pl. Memo at 11-12. The second part of the vagueness "as applied" analysis is the requirement that a lawmaker "establish minimal guidelines to govern law enforcement." Kolendar v. Lawson, 461 U.S. 352, 358 (1983). The courts recognize, however, that "[e]ffective law enforcement often 'requires the exercise of some degree of police judgment' but this alone does not render a statute unconstitutional." United States v. Schneiderman, 968 F.2d at 1568, citing Grayned, 408 U.S. at 114). Where guidelines can provide objective criteria against which to measure possible violations of the law, the likelihood of arbitrary enforcement is minimized and the law can surmount this element. Id. Courts can "scrutinize the statute to discern whether its language 'is so imprecise that discriminatory enforcement is a real possibility.'" Spy Factory, 951 F.Supp at 467. "If a statute is so vague that a potential offender cannot tell what conduct is against the law, neither can a police officer." People v. Stuart, 100 N.Y.2d at 412, 420-21 (2003); see also, People v. Munoz, 9 N.Y.2d 51 (1961).

Here, the definition of the term "essential business or entity providing essential services or functions" as set forth in Governor Cuomo's EEO 202.6, which was incorporated into EEO 103, provides law enforcement personnel with a clear understanding of what is deemed a "non-essential gathering." Indeed, anything not listed as an "essential business or entity providing essential services or functions" is "non-essential." Nowhere on this list does it mention businesses or entities involving organized protesting in groups. From this, law enforcement can reasonably deduce that gatherings for organized protesting are non-essential. Additionally, EEO 103 states, "I hereby direct the Fire Department of the City of New York, the New York City Police Department, the Department of Buildings, the Sherriff, and other agencies as needed to immediately enforce the directives set forth in this Order in accordance with their lawful

enforcement authorities . . . ." See Schonfeld Dec. Ex. D. It is clear from EEO 103 itself that the NYPD is authorized to enforce its directives and take appropriate measures should individuals not comply. Indeed, the NYPD has issued specific instructions to its members for the enforcement of the EEO. See Schonfeld Dec. Ex. G.

As demonstrated, the challenged EEO provisions are not unconstitutionally vague, but are clear, unambiguous, and appropriate as they give a person of normal intelligence clear guidance as to what is considered a "non-essential gathering." Moreover, they provide sufficient guidance for law enforcement. Accordingly, Plaintiffs are unlikely to succeed on the merits of this claim.

As set forth above, Plaintiffs have not established a likelihood of success on the merits of their claims. Additionally, Plaintiffs will suffer no irreparable injury as there are alternate channels of communication. The balance of the equities does not tip in their favor; their strong desire to protest in groups of more than ten cannot be said to outweigh the City's interest in curtailing the spread of COVID-19. Similarly, granting the requested PI and TRO is decidedly not in the public interest where in-person gatherings may well increase the spread of COVID-19.

CONCLUSION

For the foregoing reasons, Defendants City, Mayor Bill de Blasio, and Police Commissioner Dermot Shea respectfully request that this Court deny Plaintiff's motion for a temporary restraining order and preliminary injunction, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 3, 2020

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EXHIBIT G

K64QbutO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ERIC BUTLER, et al.,

Plaintiffs,

v.

20 Civ. 4067 (ER)
APPLICATION FOR TEMPORARY RESTRAINING ORDER

CITY OF NEW YORK, et al.,

Defendants.

----------x

New York, N.Y.
June 4, 2020
2:00 p.m.

Before:

HON. EDGARDO RAMOS,

District Judge

APPEARANCES

LAW OFFICES OF JOSEPH Z. AMSEL
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BY: JOSEPH Z. AMSEL

NEW YORK CITY LAW DEPARTMENT
OFFICE OF CORPORATION COUNSEL
Assistant Corporation for Defendants
BY: AMY J. WEINBLATT
SAMANTHA M. SCHONFELD

(The Court and all parties appearing telephonically)

THE COURT: Good afternoon, everyone. This is Judge Ramos. Jazmin, please call the case.

DEPUTY CLERK: In the matter of Butler v. City of New York. Counsel, please state your name for the record starting with counsel for plaintiff.

MR. AMSEL: Good afternoon, your Honor. Joseph Amsel for Mr. Butler and Mr. Katzburg.

MS. WEINBLATT: Good afternoon, your Honor. Amy Weinblatt, Assistant Corporation Counsel for the City, Mayor DeBlasio, and Commissioner Shea.

MS. SCHONFELD: Good afternoon, your Honor. Samantha Schonfeld, attorney for defendant, City of New York, Mayor DeBlasio and Police Commissioner Shea.

THE COURT: Good afternoon to you all. This matter is on for hearing on a temporary restraining order requested by the plaintiffs. So, I just want to note for the record that this matter is being held remotely and by telephone, and we are being assisted by a court reporter, so when you speak, please speak slowly and clearly and please state your name before you speak.

I also want to note for the record that I have just received a copy of plaintiff's reply memo, and I'm finishing it up now, but I am ready to begin. So, Mr. Amsel, let me begin with you. Why should I enter this extraordinary relief that

you are seeking?

MR. AMSEL: Your Honor, because we make out all of the necessary elements for this relief, and I can go through each and every one.

First, with respect to the irreparable harm prong, this we're dealing with the loss of the First Amendment right to exercise my client's right to free speech, freedom of assembly, and to petition their government for redress of grievances, all constitutional rights protected by the First Amendment and applied against the states and local government to the Fourteenth.

The Supreme Court has held in *Allied v. Burns* and other cases that any loss of First Amendment rights for even a short period of time is an irreparable harm. In this case, my clients not only have suffered an irreparable harm in the sense that they were arrested for exercising these rights and lost those rights immediately, but have since been unable to exercise their rights and have been chilled from exercising these rights because as the complaint alleges, they want to protest, but they don't want to be arrested again. And so, therefore, for those reasons, your Honor, I think that we have made out the irreparable harm prong.

THE COURT: You mentioned three rights. You mention the right to free speech, the right to assemble, and the right to petition for grievances, redress of grievances. But only

one of those rights is really being affected by these Executive Orders, am I right about that, just the right to assemble?

MR. AMSEL: Well, no, your Honor, because in this case the right to assemble, as your Honor pointed out, is actually specifically mentioned in the order because the orders use the word "gather" which is synonymous with the word "assemble." But even the right to free speech and free expression are also implicated because at these assemblies my clients had signs. They had flags. Certainly, those are expressive rights that the Supreme Court has recognized. For example, in the *Texas v. Johnson* case --

THE COURT: But, Mr. Amsel, they're free to express those rights, just not in a group. Your clients can make a sign and go to a park or they can start a website or they can go to the park and scream at the top of their lungs so long as they're not in a crowd, right?

MR. AMSEL: Yes. Under the orders, they could do that. The problem is that that is not a sufficient replacement for the actual exercise of the First Amendment right of assembly, of actual speech in a group, and also the right to petition the government for redress of grievances, but, your Honor, this arrest took place in City Hall Park at the seat of city government, and the message that my clients were attempting to convey to the Mayor and the powers that be within city government was that they disagreed with a particular

policy. Now, whatever the particular merits or demerits of that position might be, the fact remains is that they were trying to petition their government.

And, frankly, a single person yelling at the top of their lungs or holding a sign in a park is just not a sufficient replacement. And, frankly, I would call the Court's attention to some of the protests that are going on now. I don't think there's any doubt that if these protests were required to happen in isolated incidents with one person or on a website or on a single isolated Twitter feed or on a single isolated website, there is no way that this kind of movement that is currently going on now has the kind of effect, the major public effect that it's having in just the last couple of days. So I think that alone, your Honor, illustrates just how important it is and how irreplaceable it is the fact that people be allowed to petition their government and to assemble and to speak in a group.

THE COURT: Mr. Amsel, can I ask you a question? Because I think that since the time that you brought this action that the Executive Orders have been amended such that your clients and others can assemble in groups of as many as ten.

MR. AMSEL: Yes, your Honor.

THE COURT: So does this make your action moot?

MR. AMSEL: No, your Honor, it does not. And the

reason it doesn't make it moot is because the cutoff at ten is an arbitrary number, and, frankly -- I mean, I don't have any actual support for this, but I believe that the reason for the ten, the allowance of ten related to the fact that some of these orders also affected religious gatherings, and under Jewish law you're required to have a minyan of ten. That's why I believe the arbitrary number of ten was imposed.

Frankly, if your Honor looks at the photos that were annexed to our complaint, and just from having been, I'm sure, in City Hall Park, I mean, this is a large park. I mean, it's not Central Park, but it's an open area. My client, Mr. Katzburg, was wearing a mask. Many others in that group were wearing masks. They were maintaining social distancing, as practical in human terms, and the only reason we can't allege with certainty that they were six feet apart at all times is because it's not possible that anybody can make that allegation truthfully.

But the fact of the matter is the cutoff at ten is completely arbitrary. It has no -- frankly, I don't know what the health related for that reason for ten is. And when you're dealing with a large area such as City Hall Park, there is no reason that, for example, 20, which is approximately what this group was, or even 30 or 40 with proper social distancing could be allowed.

THE COURT: Mr. Amsel, you keep referring to this

number ten as completely arbitrary. Do you know where it comes from? Does it come from the CDC, or the White House task force on Coronavirus, or whether it comes from some other healthcare or health organization?

MR. AMSEL: No, your Honor. I don't know where the number ten comes from. And this is what I mentioned before. I don't know why ten has to be the number. Why, for example, could 20 not be in the park while maintaining social distancing, as was the case here, your Honor. I don't know why the ten is the cutoff. And, frankly, that is why it's not moot by the amendment of EEO 115 because the ten is just -- as I said, I don't see the -- and nor has the City provided, I believe, a factual basis for why is that ten is appropriate. So, that is why I believe that it's not moot, your Honor.

THE COURT: But your argument that it's because ten is what makes a minyan, that's just speculation on your part; that doesn't come from any fact-based source that you have.

MR. AMSEL: Yes, your Honor. And I believe I couched my statements before in that regard, yes.

THE COURT: OK. Go ahead.

MR. AMSEL: And turning to, your Honor, some of the likelihood of success arguments, I would also direct the Court's attention to the fact that the orders in this case have been in or should I say unequally applied. And unequally applied as compared to, for example, the Floyd protestors. And

as a result of that, your Honor, I think that these orders should be presumed unconstitutional because they constitute inappropriate viewpoints, and they are not content neutral restrictions.

And I think by point of reference, I quoted Mayor DeBlasio's statements in my reply letter indicating -- I mean, the Mayor has been out in the last couple of days supporting the protestors, and while in the last day or two, he has cautioned people to, you know, I think he said something to the effect of, "All right. We've heard you. It's now time to go home." The police are not arresting anybody, as far as I know, for violating these orders. The arrests that have been made are for burglary, looting, obstruction of governmental administration, obstruction of the sidewalk and so forth, but the police have not been arresting anybody for the gathering.

I mean, just Sunday you had the highest uniformed officer within the New York City Police Department, Chief Terrence Monahan, taking a knee in Queens alongside hundreds of protestors. Nobody was arrested. He was hugging protestors. And I think that illustrates, and we argue this, that the enforcement of the order was viewpoint discriminatory based on the fact that initially there were other people in the park in this case who were not arrested while my clients were, but that argument is even being further buttressed by the unequal enforcement over the last week by the New York City Police

Department and stated directly by the Mayor of New York City indicating that, as I said before -- I mean, they're essentially encouraging the protestors, albeit peacefully.

Now, if we're going to permit peaceful protests, your Honor, my clients assembly here was the epitome of a peaceful protest. There was no looting. There was no violence. There was no theft. There was no assault on police officers, none of that. And, yet, my clients were arrested because I believe that the message that they conveyed was one that the City government did not agree with, and, for instance, the message that's being conveyed by the Floyd protestors is one that the City has validly agreed to. And as a result of that, they look the other way.

And, you know, counsel has even recognized this in footnote four to their papers. They have even said that there are other considerations that sort of are the reason for why there's been relaxed enforcement of these orders. Those other the considerations -- what are these other considerations? Why should my clients also not be allowed to exercise their rights on the same footing as some of the other protestors who have now taken to the streets throughout New York City and indeed throughout the country.

THE COURT: As I sit here, Mr. Amsel, I can think of 15 or 20 different considerations why that would be the case. But, in any event, even if the Executive were to exercise its

discretion in terms of enforcement of a particular order, the Executive is entitled to do that, are they not?

MR. AMSEL: Yes, absolutely. The Executive has prosecutorial discretion. I agree with that 100 percent. The problem, however, your Honor, is that when there is -- when you're speaking of speech and when you're talking about a content discrimination or viewpoint discrimination, which the Supreme Court has held should be presumed to be unconstitutional, I don't know how the City can overcome that presumption given the overwhelming disparity -- we're not just talking about, your Honor, prosecutorial discretion in terms of which particular protestors the cops are going to seize or which particular pretests the cops are going to quell on a particular day. Here we're talking about just an outright non-enforcement with respect to a large number of people, far larger than the group my clients were involved in, on the one hand, because the City agrees with their message, but an absolute vigorous enforcement with respect to another group of protestors far smaller, far more peaceful in many respects, and yet it was enforced against my clients.

THE COURT: Mr. Amsel, I mean, I don't know precisely, perhaps counsel for the City will know, but my understanding is that individuals in the Floyd protests have in fact been arrested for failure to disburse even if they weren't looting. And if that's the case, what does that do to your argument?

MR. AMSEL: Your Honor, that has no effect because failure to disburse is something that's a violation under the New York State Penal Law, under Penal Law 240.20(6). And the failure to disburse is not enforcing any of these Executive Orders. The statute by which the Executive Orders are being enforced is under 3-108 of the New York City Administrative Code, which makes it a class B misdemeanor, a crime for which you can do up to 90 days in jail and a $500 fine if you violate any emergency orders or Executive Orders issued by the Mayor.

So, to my knowledge -- and, again, perhaps counsel for City can further elaborate on this -- but none of these protestors -- the ordinary disorderly conduct charges, yes, absolutely, I would expect there would be charges for that. But for the violation of the Executive Orders, which are at issue here in this case, I don't know that that's being enforced. And based on the statements of the Mayor, I have every reason to believe that they are not being enforced.

THE COURT: What was the basis for your clients' arrest?

MR. AMSEL: The basis for my clients' arrest was the police showed up with an audio recording and said, in sum and substance, this is a nonessential gathering. And both of my clients were charged with violating 3-108 of the New York Administrative Code. Mr. Katzburg was additionally charged with failing to disburse, but, again, for all the reasons, the

disorderly conduct charge, one of the elements is that it has to be a lawful order to disburse, and because the conduct here was not -- was protected by the First Amendment, therefore, the government cannot issue a lawful order to disburse or not to exercise your constitutional rights. So, Mr. Katzburg was indeed charged with failure to disburse, but the crime for which he was charged, and the charge for which he is potentially facing up to 90 days in jail on is one which is an actual criminal offense, and that is for violating the Executive Orders.

THE COURT: Why is an Executive Order not content neutral? It applies to everyone. It applies to any speech anyone might want to make.

MR. AMSEL: It's not content neutral because, your Honor, if you look at some of the cases that deal with the content neutral reasonable time, place and manner restrictions, the key is that those cases deal with a restriction, not an outright ban. And I call the Court's attention to the *Loper v. City of New York* case, which basically the Second Circuit in 1993 struck down the New York State statute that prohibited begging in a public area. Not only did the Court say that begging in a public area was considered to be an expressive conduct that is protected by the First Amendment, which is perhaps an innovation in and of itself, but should I say the Second Circuit also said -- and in citing the *Perry* case and in

citing other Supreme Court cases, you can't have an outright ban. When you have something that is an outright ban, that is not something that's content neutral, particularly, your Honor, when the outright ban is in the area that is quintessentially and had traditionally been held open to the public such as parks and sidewalks.

THE COURT: So what is the outright ban in this case? Your client can go out today, can go to the steps of the courthouse right outside my window now and say whatever he wants to say about the Executive Orders, and there's no ban on that whatsoever.

MR. AMSEL: The ban is on a gathering of people to do that, and the government in being able to determine that doing so is considered nonessential under the law. So, yes, your Honor, the argument that there is alternative methods of speech available only really applies if the court is going to be applying intermediate scrutiny. When the court applies intermediate scrutiny when there is a content neutral restriction -- not a ban, a restriction -- then sure, if the restriction is narrowly tailored to meet the important governmental interests and there are alternative means that are open, then yes.

But as for the reasons that I stated before, I don't believe that there are alternative means available to my client, number one. And, number two, the outright ban here is

that when you have -- even as the Executive Order was originally issued, if you had two people in the park talking together or conversing, that also can be considered to be nonessential. Three people, four people. So, basically you are confined to gather by yourself, and that has never been the way we've conceived of the right to assemble or the right to free speech or the right to petition the government. We have strength in numbers, and the notion that we should be required to sort of individually and separately exercise these rights, I mean, I don't see any foundation in any of the cases that support that idea.

THE COURT: Well, that gives me the opportunity to help place this in context. You know, you talk about there's never been any sort of ban along these lines, any restrictions along these lines. Talk to me about the pandemic that we are currently in that has taken 21,000 plus lives of New Yorkers.

MR. AMSEL: Sure, your Honor. Now, let me just begin on a personal note. I had COVID-19, all right, and I have asthma, so I don't take this at all lightly, OK? And nor do my clients. So, I understand the importance and I understand the horrible, horrible toll that this has taken on the City. And, frankly, even if this Court were to apply strict scrutiny, I'm not even saying that the government doesn't have a compelling state interest here.

But the question is, your Honor, how do we go about

dealing with this? Do we deal with this across the board with just an outright ban or do we deal with this in the manner in which the Supreme Court has prescribed in a narrowly tailored way?

THE COURT: Right, but how do we define what is narrowly tailored? Do we define what is narrowly tailored by reference to case law that has been developed over the course of decades without reference to the science and the facts and the guidance that we have received that we have all received and that we're getting tired of hearing from Washington and from the CDC and from Governor Cuomo that the way to defeat this pandemic is to stay home, you know, stay apart from each other and to flatten the curve in that fashion. And, by the way, it seems to be working.

MR. AMSEL: Yes. So, your Honor, here is the problem: When you look at the Executive Orders and some of the conduct that has been exempted and some of the conduct that has been prohibited, on its face the scheme is irrational because you have, for example, you know, you're permitted to go to the grocery store. You're permitted to go on the subway. You're permitted to go on the buses. There's been no regulations, to my knowledge, limiting number of people on buses, limiting the number of people on subways, go to any large supermarket. While they may limit your ability to come in, there are gatherings outside these stores, out the door and around the

block. I was at Home Depot on Sunday, which is deemed an essential store. I mean, there was a line that stretched across the entire parking lot almost.

So, these places, there are gatherings all over the place, and yet, for the government to go and to across the board ban certain gatherings that they deem to be nonessential while also permitting on the other hand gatherings at other locations that they do deem essential without creating a carveout for the exercise of constitutional rights, albeit while maintaining social distancing, while perhaps wearing masks, while perhaps limiting the number of total protestors, based on a formula related to the size of the area where the protest is taking place, those would be, your Honor, narrowly tailored, OK?

In fact, if you look at some of the Executive Orders related to on the reduction of occupancy with respect to certain buildings, at first what the government was doing was they were reducing the size or, should I say, they were reducing the total occupancy based on the size of the building. So, for example, if you had an occupancy of a hundred, you had to reduce by 50 percent, you had to reduce by 75 percent. And, in fact, it was that kind of reduction that actually the Supreme Court upheld just last Friday night in a case arising out of California with a very similar procedural posture to this one. That was a case brought by a religious institution.

But the Supreme Court at least inferentially said that when you've got a gathering that is limited and that is pegged to the size of the overall area where the gathering is taking place, then that is narrowly tailored, considering, as your Honor pointed out, the consequences and what we're talking about here in terms of the size of this pandemic.

THE COURT: Doesn't that Supreme Court decision essentially rule directly against you?

MR. AMSEL: No, your Honor. No, your Honor. And I think the strong distinction between our case and that case is that, again, the California ruling -- first off, that applies to religious institutions and those were indoor gatherings. So, that's one distinction. But the other distinction was the Supreme Court said, yes, if you're going to peg the total occupancy to the size of the area where the occupancy is taking place, then that is narrowly tailored.

But in this case there is no such formula that's in place. It's just an across-the-board ban. You can't gather. And you can't gather in a gathering that we, the government, deem to be nonessential, and that is the essence of an outright ban, and that is the essence of the type of ban that the Supreme Court applies strict scrutiny to.

THE COURT: Let me ask you this: Part of the City's response is, look, yes, we've restricted nonessential gatherings, but we took the definition of nonessential

gatherings from the state Executive Order and because getting rid of this, getting rid of the New York City Executive Order will do nothing to the state Executive Order, you have no standing because you're not going to be able to get redress from any ruling that I make in that regard, and that the state is a necessary party.

MR. AMSEL: So, with respect to the defendant's Rule 19 argument, your Honor, first off, in the *Geller* case, which they heavily rely on, they didn't make this argument, interestingly enough, and it was the exact same defendants. But, moreover, I would point out that the mechanism by which the state Executive Orders are enforced -- and that's the key here -- is the mechanism by which it's enforced is through the New York City legislature. And also I would call -- should I say through the New York City Police Department. And I would call the Court's attention back to that *Loper* case, which dealt with the constitutionality of a state criminal statute and the party -- the only party in that case was the City of New York and the police department. The Second Department had no issue dealing with that -- sorry -- the Second Circuit had no issue dealing with that case because the statute was being enforced merely by the New York City Police Department.

Here, the orders are being enforced by the New York City Police Department. They incorporate by reference, yes, the state orders, but the mechanism of enforcement is through

the City. Therefore, if this Court enjoins the enforcement of these orders, that would prohibit the City from being able to arrest my clients for these orders. And I would also point out that if you look at the exhibits for the actual charges, Exhibit 19 and 20, the actual tickets that my clients received, it says right on the ticket, "violating the Mayor's orders." So, this is, you know, not a state order that was violated here. It's a City order, and it's being enforced through City law by City employees by City police officers, and, therefore, enjoining the City from enforcing it would provide my clients full relief.

THE COURT: Thank you, Mr. Amsel.

Ms. Weinblatt or Ms. Schonfeld

MS. WEINBLATT: Yes, your Honor. Thank you very much. This is Amy Weinblatt.

First, your Honor already raised the standing and necessary party argument, but I just want to refer to those briefly, and to, I hope, correct what plaintiff's counsel just said.

It is true that his clients were arrested for violating the City's EEOs, as he referenced, via the administrative code. However, as your Honor just pointed out, were the Court to decide to take an extreme measure and simply ban outright the current EEOs; that is, Emergency Executive Orders issued by Mayor DeBlasio as they relate to this case, it

would not in fact have any prospective relief for the plaintiffs. It perhaps might void the summonses that were issued and provide relief in that context, but given the fact that the state Executive Orders are enforceable by local law enforcement personnel, striking down the relevant emergency Executive Orders issued by Mayor DeBlasio would not in fact redress the alleged injury that plaintiffs claim they are suffering.

THE COURT: Can I just ask you a question so that I understand what you're saying? I think what you're saying is even if I were to deem the Emergency Executive Orders of the City as unconstitutional for whatever reason, the New York City police would still be able to enforce the Governor's Executive Order.

MS. WEINBLATT: That's exactly right, your Honor.

THE COURT: OK.

MS. WEINBLATT: And also, as your Honor alluded to, the state is a necessary party because the concerns that plaintiff is raising here specifically refer to and incorporate the state's emergency orders. Governor Cuomo has issued those emergency orders upon which Mayor DeBlasio has issued the subsequent Emergency Executive Orders that the plaintiffs seem to be complaining about, but, in fact, the City's Emergency Executive Orders essentially derive from and are based on the state's orders. So, to the extent the plaintiffs are

complaining about the effect of the City's orders, they are, in substance, really complaining about the state's orders, and they have an interest here, if your Honor is considering granting any version of the relief they're requesting, the state should have the ability to appear and address those concerns. Even specifically as to the number of ten, the City again adopted or incorporated what the most recent Executive Order issued by Governor Cuomo was in that regard, and that's where it came from.

So, in order to address these constitutional issues, in substance, since they came from and derived from the state's Executive Orders, we fully believe that the state must be made a party to this case if the Court wishes to engage in the substance of the contents of the Executive Orders. In addition to which we -- the plaintiff has simply not met their burden here.

A preliminary injunction and temporary restraining order are, as your Honor pointed out at the beginning, are extraordinary measures, and, moreover, we are living in an extraordinary time, and those extraordinary measures, those -- the extraordinary relief of a PI or TRO should be particularly issued with reservation and in an extraordinary situation that we are in now.

The ban itself, whether we call it a ban, as it existed when the plaintiffs were arrested, or simply a

limitation now, as your Honor pointed out, it is now permissible to gather in groups of ten or fewer, is facially content neutral. It doesn't even say you can't protest on any basis for any reason. It says you can't gather. So, protests are not allowed, but neither are birthday parties of ten or more. Picnics aren't allowed in groups of ten or more. So, it is absolutely content neutral on its face. In addition to which, it's content neutral as was applied certainly on May 9 when plaintiffs were arrested, plaintiff's counsel has alluded during argument and sets forth in his papers that a number of other people in the park were not arrested.

Well, of course, he doesn't say that there were other gatherings in the park, and that those people weren't arrested, which would be a different situation. Rather, his clients were gathering in a group of, he says, slightly more than -- slightly fewer than 20, and there were others in the park nearby. They could have been -- each of them could have been protesting and could have been protesting the same concerns that plaintiffs were protesting on that date, but they weren't gathering. They were either sitting or standing or walking or running doing whatever they were doing individually or perhaps in pairs, sitting six feet or more apart on a bench, but they were not gathering. So that contrast has no weight at all.

The ban is narrowly tailored to meet the significant -- and we would even say compelling -- government

interest in curbing this pandemic. As Judge Cote found in the *Geller* matter, the City's measures are reasonable and narrowly tailored given the severity of the public health crisis. All the guidance that we have seen from agencies and others in position to know say that the way to curb the pandemic is to, as your Honor said, stay at home, don't interact with people, minimize that to the extent possible. Of course, going to the grocery store is necessary. People can't survive if they can't eat. Other things are deemed necessary. Healthcare workers must be able to travel to and from their place of work so that they can carry out the very necessary work of treating, and hopefully saving, people who are ill.

Plaintiffs have avenues of expression that are available to them. Are they the same as gathering in groups of 20 or 40 or a thousand? They're different, admittedly, but they can say whatever they want individually. The two of them can get together in a pair. They can get together in groups of ten. They can say whatever they want as loud as they want in a park or on a sidewalk, as long it's ten or fewer. They can start a website. They can issue things on social media. They can write letters to the editor. They can call into radio shows. They can absolutely make their position heard without gathering in larger groups because it has been found and shown that such restrictions have a direct impact in reducing the spread of the Coronavirus. And that is the goal of the

government here

THE COURT: In that regard, Ms. Weinblatt, Mr. Amsel, I think, makes a point that has some logical force in terms of the apparent discriminatory enforcement of the emergency Executive Order vis-a-vis the Floyd protests. So, would you speak to that.

MS. WEINBLATT: Yes. Of course, your Honor. I was going to get to that, but I'll do that now.

The situation that is facing the country and the City right now is extraordinary. It's unique. It's unprecedented. The pandemic is a public health emergency that officials have been doing the best they can to manage and reduce the spread for three months. And then on top of that, in the past week we've had a public safety emergency. And it is very difficult to address. Passions are high. There are absolutely no 100 percent ideal solutions, but public health officials and other public officials are addressing both to the best of their ability in a very rapidly changing environment.

The New York City Police Department is not sort of encouraging or permitting the Floyd protests because they no longer are concerned about it or because the Mayor and others are no longer concerned about COVID-19; they were encouraging peaceful large gatherings. The large gatherings were clearly going to happen. The statements in favor were encouraging peaceful gatherings, peaceful protests, and there's no

allegation -- and I would hope the Court would agree -- that there is no evidence that were large gatherings like the ones that are happening surrounding Mr. Floyd, were they advocating or protesting or demonstrating about something else that in that context that the gatherings' ban would be enforced. There's no comparison that really works here.

The situation is extraordinarily difficult. As Mayor DeBlasio said yesterday, there remain serious concerns about whether and how much the current situation and all the protesting and gatherings in very large groups will renew the and increase and lead to a spike in the spread of the virus as we reference in our footnote 4 that plaintiff's counsel mentioned. There are several recent publications addressing this very fact, that, yes, these protests are happening, but in two weeks, we may well see a spike, and there is a very serious concern about that. The Floyd protests don't mean that the bans or the gatherings' limitation are no longer valid and no longer grounded in science. The Mayor's and the defendants' response to those and comments about them are recognition that public safety is a major concern, as is public health. And Mayor DeBlasio has renewed as of yesterday his remarks in urging everybody to stay at home and perhaps lay low on the protests in order to further the public health goals.

Did that answer your Honor's question?

THE COURT: It does.

Can you answer this question: Where does the number ten come from?

MS. WEINBLATT: I anticipated this question, your Honor, and the number ten came from the states, from Governor Cuomo's recent Executive Order, and your Honor would have to direct that question to the state. That's one of the reasons we believe that the state is a necessary party. I don't have any independent information about that.

THE COURT: Has anyone been arrested in connection with the Floyd protests simply for violation of the Emergency Executive Order?

MS. WEINBLATT: I do not have that information. I can't say with certainty yes or no. I can certainly look into that and get back to your Honor later, probably later today.

THE COURT: Anything else, Ms. Weinblatt?

MS. WEINBLATT: I think we have mostly covered it. I believe I've addressed the First Amendment argument. I would just add that the void-for-vagueness argument, we believe that aspect of it also fails. The Executive Order issued by the Governor and the Emergency Executive Order issued by Mayor DeBlasio do list businesses and entities that are essential, and anything that's nonessential is what's not included in a list of what is essential. We think that is sufficiently clear, and we think that it provides sufficient guidance to law enforcement, and we also included a directive to members of the

service that was issued by the police department in that regard.

In terms of balance of the equities and public interest, we don't mean to minimize the plaintiff's interest in having a peaceful protest. That said, their First Amendment violations were not -- their First Amendment rights were not violated on May 9, are not going to be violated going forward, and the balance of equities between their rights to protest specifically and only in the manner in which they desire to in a group of larger than ten, when they have plenty of avenues available to them otherwise, certainly balancing that legitimate right cannot be weighed against the City's interest in, and the state's interest -- although I don't speak for the state, obviously -- but the City's interest in curbing the pandemic and doing what they need to do because of the number of deaths, the number of hospitalizations, the overwhelming burden on the City's hospitals, and public interest has to favor the ban because public interest is much -- the public interest in remaining safe and healthy is more significant than plaintiffs' interests in make their positions known in groups of eleven or more. Thank you, your Honor.

THE COURT: Thank you.

Mr. Amsel, I'll give you a couple minutes to respond.

MR. AMSEL: Yes. Thank you, your Honor.

Just very briefly, picking up where counsel left off

as to the vagueness argument, I would point out that the exhibit that they annex to their response, the internal message on the Finest System to the police officers or MOS's under their service, that order I believe is dated end of May after my clients were already arrested, so they had not provided any sort of equivalent internal guidance as to what the officers were told as to what is considered a nonessential ban, and therein lies the issue of respective voids of vagueness. Because not only on the one hand it has to be clear so that an ordinary person can understand the law, and that standard is more exacting when you're dealing with a law that violates or that infringes upon the First Amendment and a law that also has criminal consequences, as the Supreme Court has said numerous times. Not only is that issue here, but you also have, your Honor, that there is no -- I mean, what was the internal information to the police department? How were these officers' discretion cabined such that they where are not engaging in a standardless sweep, as the Supreme Court puts it. The only internal memo that they provide is after they limited the ban to ten, and all that internal memo basically says, hey, any nonessential ban for more than ten people, and it goes on to give a couple examples. But at the end of the day, there is no equivalent internal guidance that they provided with respect to what was considered a nonessential ban at the time that plaintiffs were arrested.

Also, your Honor, I would point out that the -- as I said before, the voids for vagueness require an exacting standard because there are criminal consequences here, so it's not enough to say, well, an ordinary person would be able to figure out what the statute or what the order means by, for example, as defendants have pointed out, by going to a state website. I mean, that certainly doesn't meet the exacting standards. Nor is it sufficient to tell the plaintiffs that you can know what's permitted and what's not permitted by inferring from the state's orders that define essential businesses that that is also the definition of what is an essential gathering. A business and a gathering are not synonymous with each other. So, the conflation of those two terms and then the onus being placed on plaintiffs here to be able to make that conclusion here, there's no foundation in that, and, frankly --

THE COURT: Mr. Amsel, the point is that the state provided definition of what is essential, whether essential business or otherwise. Anything else is not essential. What's so difficult to understand about that?

MR. AMSEL: Well, again, it defined what is an essential business. It did not define what is an essential gathering. And I would point out, your Honor, that when the state gatherings or, should I say, the state orders at some point when it, for example, limited a gathering and it went on

to define for social events or for worship and so forth, but the City equivalent, which is, again, what is being enforced here against my clients, did no such thing. It provided no "for example, this is sort of essential gathering. EEO 103 simply said, "all gatherings are hereby banned," in sum and substance.

And why should an ordinary person not think that the exercise of a core constitutional right is not essential? I mean, why -- when it comes to vagueness, the tie goes to the runner. You know, the tie goes to the defendant, who's being arrested pursuant to the statute. And if there's a vagueness here, which there certainly is, in not defining that essential core term to the order under which my clients are being prosecuted, then it should militate in favor of my clients.

So, with respect to the void to vagueness, it's unconstitutional under the due process clause just for that alone, on top of the other First Amendment concerns that I've already addressed.

And I would just quickly point out, your Honor, that, I mean, I understand the City is in a very difficult logical position in terms of how they dealt with the protests of my clients on the one hand and how they dealt with the protests of the Floyd protestors, but I don't know what the justification is. There is one thing if they say -- if the Mayor says, we want you to be peaceful, yes, that's true. But that wasn't

what the Mayor only said. It wasn't just, yes, be peaceful protests. He actually encouraged the message that was being conveyed. So, it wasn't just simply a plea to the public, hey guys, keep it together. It was a plea to the public that keep it together while you express a message that I agree with. And that's the core of our viewpoint discrimination claim, and that is the core which I think is borne out by the statements and comments of the defendants over the last week or so.

THE COURT: Thank you. Mr. Amsel.

MR. AMSEL: Thank you, your Honor.

THE COURT: OK. The application for a temporary restraining order is denied. In order to establish their entitlement to a temporary restraining order against a government action, a plaintiff must establish that they will be irreparably injured if the relief sought is not granted, they are likely to succeed on the merits of their claims that the balance of equities is in their favor, and that an injunction would be in the public interest. I find that the plaintiffs have not met the standard in any regard.

First of all, I do find that the Executive Orders are content neutral, apply across the board to any type of message. Accordingly, intermediate scrutiny applies. Having found that intermediate scrutiny applies, I find that the Executive Orders, again, for purposes of temporary restraining order are reasonable and narrowly tailored. I must, as I make this

determination, consider the context in which the Executive Orders were issued in the midst of an historic pandemic which was running rampant throughout the City, which was killing in excess of 500 people a day at its height, which was overwhelming the City's hospitals, the City's morgues, the City's funeral parlors, and which was putting an incredible burden on the hospital system across the board.

Given that, the guidance that was provided by healthcare agencies, governmental and otherwise, suggested that they did so find to the extent possible in every conceivable fashion would help to stem the tide of those deaths. The Executive Orders were issued in that context and were narrowly tailored to address the harm that society faced.

With respect to the void for vagueness argument, I do find that a person of reasonable intelligence would know that anything that the government did not identify as essential was nonessential, and that went across to activities of all kinds: Not just protests, but other kinds of human gatherings, including religious gatherings, family gatherings and other sorts of associational gatherings.

The Executive was entitled to define what those essential items or what those essential businesses and tasks were. They did. And, moreover, I find that the amendment of the Executive Order which expands the number of people that can gather to no more than ten further at this point lends to their

reasonableness. The plaintiffs were never prevented from protesting, were never prevented from publicizing their speech, were never prevented from conveying to others, including the Executive, including the government, what they thought about the Executive Orders. There were straightforward regulations that were put in place. They knowingly violated those regulations. Accordingly, I find that they do not at this point establish likelihood of success on the merits, so the application for the TRO is denied.

What do we need to do next, Mr. Amsel, in terms of your preliminary injunction motion?

DEPUTY CLERK: I'm sorry. I had placed Mr. Amsel on mute because there was background noise. I have now unmuted him.

MR. AMSEL: I'm sorry. Well, your Honor, in light of the Court's ruling, one of the applications I had requested or one of the reliefs I had requested was for expedited discovery. I don't think that's necessary under the circumstances. I would ask the Court put this over for further discovery.

THE COURT: OK. Why don't I do this: Why don't I instruct the parties to meet and confer concerning a discovery schedule and to submit that discovery schedule on consent by no later than end of business Tuesday.

MS. WEINBLATT: Yes, your Honor. We will do that.

MR. AMSEL: Yes, your Honor.

THE COURT: And unless there is anything else, we are adjourned.

MR. AMSEL: Thank you, your Honor.

MS. WEINBLATT: Nothing from the defendants. Thank you, your Honor.

THE COURT: Very well. Everyone stay well.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC BUTLER and JACOB J. KATZBURG,

Plaintiffs,

-against-

CITY OF NEW YORK, et al.,

Defendants.

ORDER
20 Civ. 4067 (ER)

EDGARDO RAMOS, United States District Judge:

For the reasons stated on the record at the hearing on June 4, 2020, Plaintiffs' motion for a temporary restraining order is DENIED. The parties are directed to meet and confer regarding a discovery schedule, to be submitted on consent no later than 5:00 PM Tuesday, June 9, 2020.

It is SO ORDERED.

Dated: June 5, 2020
New York, New York

EDGARDO RAMOS
United States District Judge