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. 20-cv-4653 (ER) Honorable Edgardo Ramos

PLAINTIFF'S MEMORANDUM OF LAW

IN OPPOSITION TO

DEFENDANTS' MOTIONS TO DISMISS

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Plaintiff Pamela Geller hereby respectfully submits this memorandum of law in opposition to Defendants' respective motions to dismiss (Doc. Nos. 47-52) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. PRELIMINARY STATEMENT AND FACTUAL CORRECTIONS.

Defendants' respective motions to dismiss vainly attempt to ignore the elephant in the room and do so with such an obvious disdain for the facts and the law that it suggests they believe they can successfully invite the Court to join them *Through the Looking Glass*.[1] Specifically, we know Defendant Cuomo and his counsel informed the Second Circuit that the State of New York has taken the position that it will not enforce the executive orders at issue in this litigation because "enforcement decisions are left to municipal officials." We also know that the City Defendants[2] informed the appellate court that they would not enforce the current executive orders, or any subsequent orders, against Plaintiff as long as her First Amendment demonstrations were conducted on public fora within the City of New York, not exceeding 100 persons, and otherwise following the COVID-19 social distancing and mask protocols.[3]

In other words, as long as 99 demonstrators join Plaintiff to protest in one of New York City's traditional public fora, the current 50-person limit is meaningless. But, as applied against

[1] Lewis Carrol, *Through the Looking Glass* (1909).

[2] Defendants New York City Mayor Bill de Blasio and New York Police Commissioner Dermot Shea are referred to herein as the "City Defendants."

[3] Of note here, neither the City Defendants nor Defendant Cuomo provide the full correspondence of the parties to the Second Circuit motions panel regarding Defendants' non-enforcement litigation position vis-à-vis Plaintiff. In response to an objection raised by Plaintiff's counsel to the City Defendants' first formulation of non-enforcement, which left the door open for Defendants to apply some other limitation on the number of demonstrators in the future, the City Defendants clarified in a second letter that the City of New York would not enforce the then-current executive orders or "an applicable size limit for outdoor gatherings against plaintiff's planned protest activities." (City Defs.' Second Ltr. [dated Oct. 2, 2020], as Exhibit 3, together with City Defs.' First Ltr. [dated Oct. 1, 2020] and Plaintiff's Responsive Ltr. [dated Oct. 2, 2020] as Exhibits 1 and 2, respectively, to the Declaration of David Yerushalmi, Esq., filed concurrently herewith and incorporated by reference.).

any other 100-person First Amendment demonstration, the executive orders remain extant and enforceable (with the obvious other exception being the Black Lives Matter ["BLM"] protestors asserting the politically-favored message of systemic racism). Defendants chose this non-enforcement position as a litigation strategy insofar as it was quite apparent to all that the appellate court was not very receptive to Defendants' position that their favored treatment of the BLM protestors was not content- and viewpoint-based and unconstitutional. (*See* Hr'g Recording in *Geller v. Cuomo*, No. 20-2561 [2d Cir.] at https://www.ca2.uscourts.gov/decisions/isysquery/12489005-a88a-4197-92ea-368739f79b30/211-220/list/ [dated Sept. 30, 2020] [last accessed Feb. 16, 2021]). Quite simply, Defendants' litigation strategy has created a catch-22 for themselves. On the one hand, if Defendants' representation to the Second Circuit of non-enforcement is a truthful representation of Defendants' formal interpretation of its challenged executive orders, then perforce the executive orders are facially unconstitutional because they can survive neither strict scrutiny nor intermediate level scrutiny. On the other hand, if Defendants' representation to the appellate court was simply an ad hoc decision to avoid the motion panel's obvious incredulity that Defendants had not engaged in content-based censorship of Plaintiff's speech by permitting and encouraging the BLM protests, then the executive orders are unconstitutional as applied insofar as they are arbitrarily applied and subject to unlimited discretion in their enforcement.

Beyond Defendants' aforementioned inconvenient elephant and catch-22 problem, Defendant Cuomo's motion papers have misrepresented relevant facts by both omission and commission, and Defendant Cuomo and his counsel have scurrilously inserted facts entirely irrelevant to these proceedings in an effort to gain some emotional leverage with the Court. We

begin with Defendant Cuomo's misrepresentations.[4]

In describing the Second Circuit dismissal of Plaintiff's motion for injunction pending appeal in *Geller I,*[5] Defendant Cuomo represents to this Court that "the Second Circuit denied the motion summarily . . .." (Def. Cuomo Mem. at 6); *see, e.g., Drake v. L.A. Portuondo*, 321 F.3d 338, 345 (2nd Cir. 2003) (describing "summarily denied" as "without a hearing"). This is patently false. The appellate court conducted a full and lengthy hearing on the motion during which the motion panel's focus was directed to the *Geller I* Defendants and how they could assert that Plaintiff was not subject to a content-based standard denying her First Amendment rights given the obvious favored treatment of the BLM protests. (*See* Hr'g Recording in *Geller v. De Blasio*, No. 20-1592 [2d Cir.] at https://www.ca2.uscourts.gov/decisions/isysquery/12489005-a88a-4197-92ea-368739f79b30/391-400/list/ [dated June 2, 2020] [last accessed Feb. 16, 2021]). Indeed, the appellate court emphasized in its denial that it was without prejudice so Plaintiff could put the new facts of the BLM protests and Defendants' favored treatment of those protests into the record before the district court so that the Second Circuit could address these new facts. This is precisely what Plaintiff sought to do when it filed this litigation. (Compl. ¶ 67).

Defendant Cuomo further misrepresents to this Court that Plaintiff Geller's lawsuit is only

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[4] Given the New York State Attorney General's recent report highlighting Defendant Cuomo's underreporting of nursing home deaths following the governor's disastrous executive order mandating nursing homes admit COVID-19 patients, and given recent revelations about Defendant Cuomo's intentional cover-up of the true extent of the nursing home deaths, it should come as no surprise that he and his attorneys have chosen to misrepresent the factual record in this case. *See* "Attorney General James Releases Report on Nursing Homes' Response to COVID-19" at https://ag.ny.gov/press-release/2021/attorney-general-james-releases-report-nursing-homes-response-covid-19 (last accessed Feb. 16, 2021); "New York Gov. Andrew Cuomo draws bipartisan ire for withholding data on nursing home deaths," Wash. Post (Feb. 12, 2021) (last accessed Feb. 16, 2021). As Defendant Cuomo has pointed out, the Court may take judicial notice of both sources cited above. *See* Def. Cuomo's Mem.of Law in Support of Mot. to Dismiss (Doc. No. 51) ("Def. Cuomo Mem.") at 3 n.1 & 8 n. 6.

[5] We utilize the same nomenclature as Defendants in referencing Plaintiff's first lawsuit ("*Geller I*") challenging the earlier versions of the executive orders at issue in this litigation, which is also described in the Complaint. Compl. ¶¶ 60-69.

about her desire to protest near City Hall. (Def. Cuomo Mem. at 7 n.5 ["These 'cluster' restrictions are not germane to the present case, as Plaintiff does not purport to challenge them, and she indicates that her putative protests would have taken place at and around City Hall, *see* Compl. ¶ 59, which is not in a yellow, an orange, or a red zone."].

In fact, paragraph 59 of the Complaint states expressly: "But for the challenged First Amendment restrictions, Plaintiff 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." (Compl. ¶ 59). Indeed, the Complaint states clearly that "Plaintiff was planning to protest throughout the months of May and June, and possibly as long as the restrictions continued, ***in public fora throughout the City***." (*Id*. at ¶ 47 [emphasis added]). Defendant Cuomo misrepresents the plain language of the Complaint precisely because he does not want the Court to take note of the fact that Defendants now have in place even more restrictive executive orders limiting public protests in certain areas of New York City that apparently Defendants would enforce against Plaintiff, contradicting their representations to the Second Circuit.

Defendant Cuomo's factual omissions are also of note and relevant. For example, Defendant Cuomo seeks to have this Court take judicial notice of an abundance of COVID-19 facts taken up in the media and "well-known" in the jurisdiction, yet he studiously ignores his additional statements to the media beyond his press release quoted in paragraph 51 of the Complaint embracing the BLM protests. (Def. Cuomo Mem. at 8 ["Plaintiff makes reference to only one action taken by Governor Cuomo, *i.e.,* a June 1, 2020 joint press release with Mayor de Blasio in which the Governor said "I stand behind the protestors and their message."]). Indeed, these additional statements in support of the BLM protestors and their message were quoted verbatim by this Court in its denial of Plaintiff's motion for preliminary injunction. The Court

cited to facts determined by the District Court for the Northern District of New York. *Geller v. Cuomo*, 20 Civ. 4653 (ER), 2020 U.S. Dist. LEXIS 137863, at *12-14 (S.D.N.Y. Aug. 3, 2020).

Finally, we turn to a sophomoric yet still utterly improper attempt by Defendant Cuomo to label Plaintiff as a politically conservative religious bigot in an obvious attempt to leverage the Court's emotional biases. Specifically, without any relevance whatsoever to this litigation, Defendant Cuomo crafts the narrative that Plaintiff's First Amendment activities focus on "various conservative causes, in particular those concerning antipathy toward the Islamic faith." (Def. Cuomo Mem. at 5). What is fascinating, and certainly ironic, about this scurrilous personal attack is that Defendants want this Court to believe that their own viewpoint- and content-based biases in favor of the BLM protestors have nothing to do with viewpoint or content. Yet, Defendant Cuomo cannot hold himself back and attacks Plaintiff based upon what he purports to be Plaintiff's motivating animus (her purported viewpoint) even though Defendants claim Plaintiff's viewpoint is entirely irrelevant to the facts of this case. It should go without being said, but alas in today's environment it must be said, that the Court should not only ignore this attempt at ad hominem attack, but also condemn it as utterly unwelcome in a federal court of law.

II. STANDARD OF REVIEW.

Motions to dismiss filed pursuant to Rule 12(b)(6) require the Court to determine if the Complaint satisfies the plausibility test. Thus, the Second Circuit has explained:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "In ruling on a motion pursuant to Fed. R.Civ.P. 12(b)(6), the duty of a court is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *DiFolco v. MSNBC Cable L.L.C.,* 622 F.3d 104, 113 (2d Cir.2010) (internal quotation marks omitted).

Hogan v. Fischer, 738 F. 3d 509, 514-15 (2nd Cir. 2013).

Furthermore, the Court's prior conclusions regarding the facts, and notably whether Defendants' conduct and statements supportive of the BLM protestors satisfied the heightened standard of a motion for preliminary injunction to establish either a content-based free speech restriction or unequal treatment, are neither controlling nor relevant to the motions to dismiss now before the Court. Specifically, the Court's analysis in denying Plaintiff's motion for a preliminary injunction was based upon a heightened standard of "probability of success" whereas for the extant motions the test is merely "plausibility." *Geller v. Cuomo*, 2020 U.S. Dist. LEXIS 137863, at *19-20 (citing *New York ex. Rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) for the proposition that "the movant must show a 'clear' or 'substantial' likelihood of success on the merits."); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (holding that the trial court's denial of a preliminary injunction did not establish the law of the case with respect to the court's subsequent summary judgment determination); *Tech. Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984) ("A factual finding made in connection with a preliminary injunction is not binding" on a motion for summary judgment); *City of Angoon v. Hodel,* 803 F.2d 1016, 1024 n.4 (9th Cir. 1986) (determinations corresponding to a preliminary injunction do not constitute law of the case).

III. ARGUMENT.

A. The Executive Orders Are Facially Unconstitutional.

While "the government may impose reasonable restrictions on the time, place, or manner of protected speech" in a public forum, it may only do so if the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for

communication of the information." *Housing Works v. Kerik*, 283 F.3d 471, 478 (2d Cir. 2002). "[I]ntermediate scrutiny [] looks to whether a law is no more extensive than necessary to serve a substantial governmental interest[.]" *Evergreen Ass'n v. City of N.Y.*, 740 F.3d 233, 245 (2d Cir. 2014). "Content-neutral time, place, and manner restrictions are permitted so long as they are 'narrowly tailored to serve a significant government interest, leave open ample alternatives for communication,' and do 'not delegate overly broad licensing discretion' to government officials." *Beal v. Stern*, 184 F.3d 117, 124 (2d Cir. 1999) (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992)); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Defendants have the burden of establishing that the challenged restrictions are a legitimate, content-neutral, time, place, and manner regulation. *See Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334, 346 (S.D.N.Y. 1998), *modified in part by* 155 F.3d 124 (2d Cir 1998); *see also Thomas v. Chic. Park Dist*, 534 U.S. 316 (2002). This standard is not a pushover. *See McCullen v. Coakley*, 573 U.S. 464, 495 (2014) ("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.").

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

> A court's power to review government restrictions imposed on the exercise of a First Amendment right occupies middle ground between extremes. It does not kowtow without question to agency expertise, nor does it dispense justice according to notions of individual expediency "like a kadi under a tree."[6] *Terminiello v.*

[6] The quote from Justice Frankfurter's opinion in *Terminiello*, oft quoted by lower courts, references an Islamic judge. The context of the quote is the fact that Islamic law does not permit precedent to bind a judge. Each ruling, even by the same judge, is independent of all previous rulings. *See, e.g., Nat'l Grp. for Communs. & Computers Ltd. v. Lucent Techs. Int'l Inc.*, 331 F. Supp. 2d 290, 295 (D.N.J. 2004) ("When a Saudi Arabian judge, known as a 'qadi,' attempts to resolve disputes, his decision must be in accordance with the Shari'a. Therefore, he will turn to the aforementioned Qur'an, the Sunnah, and fiqh to guide his legal determination. Saudi Arabian judges are not bound by judicial precedent (in fact, Saudi Arabian judicial opinions are not

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

Olivieri v. Ward, 801 F.2d 602, 606 (2d Cir. 1986). Accordingly, this Court must play an active and probing role in testing any underlying factual assertions serving as Defendants' basis for imposing the 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").

Here, Defendants claim their limit on peaceful protests, like Plaintiff seeks to organize, are narrowly tailored to serve "New York's interest in protecting the public against the health risks posed by a global Pandemic." (Def. Cuomo Mem. at 14). Yet, Defendants have informed the

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published) and the concept of *stare decisis* does not exist.") (parenthetical in the original) (citations omitted).

appellate court (as well as this Court in their filings in support of their respective motions to dismiss) that they will not enforce against Plaintiff the current limit, or any future limit, that on its face prohibits Plaintiff's proposed First Amendment activity even when that activity would violate the plain language of the executive orders. Defendants' willingness to abandon their claimed interest in the face of litigation suggests at the very least that the rationale for the restriction as ***protecting*** a substantial government interest is simply not the case. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

Put slightly differently, by carving out exceptions (whether for the BLM protestors or for Plaintiff), Defendants have created a free speech restriction that is fatally underinclusive and not narrowly tailored to serve the purported significant government interest. As stated eloquently by the Supreme Court, "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citations omitted); *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.) ("A law's underinclusiveness — its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest — can raise with it the inference that the government's claimed interest isn't actually so compelling after all.").

Furthermore, by adopting this new policy of non-enforcement of the executive orders against individuals, like Plaintiff, who sue, Defendants have made their policy a speaker-based restriction that is subject to strict scrutiny. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation

may not favor one speaker over another."); *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) ("Because [s]peech restrictions based on the identity of the speaker are all too often simply a means to control content, we have insisted that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.") (internal citations and quotation marks omitted). "[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). 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 apparently permit litigants like Plaintiff and the BLM protestors to violate the executive orders with impunity as long as they are not violent and are otherwise lawful, notwithstanding the fact that they violate the limits on public gatherings imposed by the executive orders at issue. As noted above, creating broad or unreasoned exceptions to the free speech restrictions Defendants claim are "necessary" to protect a compelling state interest perforce vitiates the argument that the free speech restrictions are necessary in the first instance.

Finally, the government is required "to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Smith v. Gofuen*, 415 U.S. 566, 573 (1974) (internal quotation marks omitted). Here, Defendants have no guidelines on what speakers, message, or viewpoint they will exempt from their executive order. Plaintiff only received her exemption from the unconstitutional executive order after undertaking the extreme financial and time-consuming burden of initiating a lawsuit against Defendants. "The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based

bans." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 812 (2000). Defendants' litigation exemption requires citizens, like Plaintiff, to endure the burden of litigation to exercise rights protected by the First Amendment.

For all of the reasons set forth above, the executive orders are facially unconstitutional.

B. Plaintiff's Facial Claim Is Not Barred by Collateral Estoppel.

As we argued earlier at the motion for preliminary injunction phase, collateral estoppel does not apply when the law or the facts have changed. As stated by the Second Circuit, a "change in facts essential to a judgment renders collateral estoppel inapplicable." *Stone v. Williams*, 970 F.2d 1043, 1055 (2d Cir. 1992) (citing *Montana v. United States*, 440 U.S. 147, 159 (1979)); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 719 (2d Cir. 1993) ("There are exceptions to the use of collateral estoppel. For example, a court should decline to give preclusive effect to a prior judgment if there have been changes either in the applicable legal rules or the factual predicates essential to that prior judgment.") (citing *Haitian Ctrs. Council v. McNary*, 969 F.2d 1350, 1356 (2d Cir. 1992)).

Here, the essential facts have changed dramatically. It is this change of facts (recognized by the Second Circuit in *Geller I*) that compels a conclusion different from the one reached by Judge Cote. In *Geller I*, Judge Cote relied upon the pre-BLM protest facts to conclude that "the City has taken measures that are ***reasonable*** and ***narrowly tailored*** in temporarily prohibiting public gatherings." *Geller v. De Blasio*, No. 20cv3566 (DLC), 2020 U.S. Dist. LEXIS 87405, at *10 (S.D.N.Y. May 18, 2020) ("*Geller I*") (emphasis added). When this lawsuit was filed and Plaintiff moved for a preliminary injunction, the facts on the ground had changed dramatically from those before Judge Cote. Specifically, Defendants were embracing and encouraging the BLM protestors (as long as they observed the curfew and were not violent) notwithstanding the fact that they were clearly violating the limitation on the number of protestors permitted to gather

together. Indeed, Defendant de Blasio and senior police officials under the command and control of Defendant Shea were actively participating in these illegal public gatherings. For the reasons we have set out, these exceptions for the BLM protestors' favored speech were collectively strong evidence of both content- and viewpoint-based distinctions. Furthermore, even if the BLM message was not particularly favored by Defendants, these broad enforcement exceptions resulted in obvious underinclusiveness.

In denying Plaintiff's motion for preliminary injunction, this Court concluded that "Defendants' statements [and actions in support of the BLM protestors] ***may reasonably be construed*** as acquiescing to the inevitability of the protests, rather than actively 'encouraging' protests." *Geller I*, 2020 U.S. Dist. LEXIS 137863, at *24 (emphasis added). Presumably, the Court crafted this reasonable construal explanation because of the procedural posture of the motion for preliminary injunction and its heightened standard of "probability of success on the merits." At this stage, however, the analysis is whether Defendants' statements and actions constitute plausible evidence of a content-based bias in favor of the BLM protests. Plaintiff respectfully suggests that the facts now before the Court are more than sufficient to pass the plausibility test.

Of course, those are not the only facts now properly before the Court. The facts now, and not available to Judge Cote in *Geller I*, include Defendants' representation to the Second Circuit that they will not enforce the executive orders, or any future applicable executive orders, against Plaintiff's proposed protests. Defendants' representations to the Second Circuit and to this Court are consequential. As this Court itself has explained, "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.'" *Geller I*, 2020 U.S. Dist. LEXIS 137863, at *22-23 (citing *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988) ("[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.")). The Court now has before it Defendants' formal representation that they will not enforce the executive orders against Plaintiff. Defendants' purportedly authoritative construction and stated practice of their own respective executive orders render them woefully underinclusive, arbitrarily enforced, and, as such, facially unconstitutional.

C. Plaintiff's As-Applied Claims Remain Viable.

Quite obviously, to the extent that the Court does not accept Defendants' statements as binding representations as to the proper interpretation of the executive orders, then Plaintiff remains at risk for enforcement and the Complaint provides more than a plausible factual predicate for an as-applied challenge for purposes of a Rule 12(b)(6) motion and its plausibility standard. If the Court accepts Defendants' representations of selective non-enforcement of their own respective executive orders (despite the fact that these representations were not formally issued as part of a new executive order and run contrary to the plain language of the current orders under review), Plaintiff's as-applied challenge remains extant against the City Defendants because Plaintiff is entitled to nominal damages for the past loss of her constitutional rights caused by the issuing of this edict. We now turn to Defendants' arguments with respect to Plaintiff's as-applied challenge.

1. Plaintiff's As-Applied Challenge Need Not Allege Prior Enforcement.

Defendant Cuomo argues that Plaintiff's as-applied challenge should be dismissed because it is not ripe insofar as Defendants have not heretofore enforced the executive orders against Plaintiff. (Def. Cuomo Mem. at 19-20). City Defendants make a similar argument asserting that Plaintiff's claims are moot because the City Defendants have represented not only that the executive orders have not been enforced against Plaintiff, but also that they will not enforce the

executive orders in the future against Plaintiff. (City Defs.' Mem. at 8-9).[7] As to the ripeness or pre-enforcement claim raised by Defendant Cuomo in the context of Plaintiff's as-applied challenge, he was wrong when he made the same argument opposing the preliminary injunction motion, and he is wrong now.

It is well established that Plaintiff need not subject herself to arrest to advance a challenge to an executive order that she claims restricts *her right to engage in free speech*—which, as Defendants admit, the restriction at issue here does. As stated by the U.S. Supreme Court, "[I]t is not necessary that [Plaintiff] first expose [herself] to actual arrest or prosecution to be entitled to challenge a statute that [she] claims deters the exercise of [her] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). This is precisely the situation presented here. Indeed, in *Steffel*, the petitioner challenged the constitutionality of a criminal trespass statute *as applied* to prevent him from distributing political handbills at a shopping center. *See id*. at 455-56. The Court didn't limit the challenge to a "facial" challenge to the trespass statute which, on its face,

[7] While the City Defendants do not appear to make a distinction between Plaintiff's facial and as-applied challenges, it is clear that Plaintiff's facial challenge is not subject to a mootness argument simply because the City Defendants have decided after oral arguments before the Second Circuit motions panel to forego enforcement of the executive order against Plaintiff. Indeed, the Governor's representation to the Second Circuit was simply that he leaves enforcement to the City Defendants not that he has abandoned his authority to enforce his executive order. As noted below in the text (*see infra* at 18), the governor has the authority to independently enforce his executive orders irrespective of the position taken by the City Defendants. *Adarand Constructors v. Slater*, 528 U.S. 216, 224 (2000) ("Because, under the circumstances of this case, it is impossible to conclude that respondents have borne their burden of establishing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.") (internal quotation marks omitted); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1, 198 L. Ed. 2d 551 (2017) (changing a policy at the direction of the governor did not moot the case); *Carpenter-Barker v. Ohio Dep't of Medicaid*, 752 F. App'x 215, 222-23 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 928, 202 L. Ed. 2d 647 (2019) (finding the case not mooted by voluntary cessation where rulemaking authority lay solely with the defendant); *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003). *See also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537, 200 L. Ed. 2d 792 (2018) (holding that a change of policy by the Southern District of California did not moot an issue when the Southern District intended to reinstate its policy once it was not bound by the court of appeals).

had nothing to do with First Amendment activity. Defendants' reliance on *Jacoby & Meyers, LLP v. Presiding Justices*, 852 F.3d 178, 184 (2d Cir. 2017), for the proposition that, in the First Amendment context, an as-applied challenge is not ripe prior to enforcement is plainly wrong, as *Steffel* illustrates. *See also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15-16 (2010) (permitting an as-applied, pre-enforcement First Amendment challenge to a statute); *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 234, 248–49 (2010) (considering an as-applied pre-enforcement challenge brought under the First Amendment); *see also Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90-91 (2d Cir. 2002) (citing multiple authorities for the proposition that the ripeness doctrine is relaxed in First Amendment cases). To the extent that this Court does not treat Defendants' representations of non-enforcement against Plaintiff as an authoritative statement from Defendants as to their interpretation of the executive orders for Plaintiff's facial claims[8], then Plaintiff is demonstrably advancing a valid pre-enforcement, as-applied challenge to the executive orders as she remains very much subject to enforcement. As such, there is no question that this is a justiciable issue before this Court. As *Steffel, Holder,* and *Milavetz* make clear, Plaintiff need not wait to be arrested or prosecuted before advancing her as-applied challenges.

2. Plaintiff's Equal Protection Claims Are Adequately Pled.

Plaintiff's claims that the executive orders are being enforced in a manner that favors some protestors (BLM protests) over others (including her protests) are plainly before this Court as a matter of undisputed fact and law. (Compl. ¶¶ 48-72, 79, 80, 85). Notwithstanding Defendants' attempt to argue that the Court should ignore their words and actions encouraging (and in the City

[8] Indeed, if Defendants were serious about non-enforcement, then they would formally set forth the enforcement exceptions by issuing new executive orders—a practice they are quite familiar with; the fact that they have not done so is rather troubling and calls into question the sincerity of their "repentence and reform." *See supra* at 14 n.7.

Defendants' case, even participating in) the BLM protests, all of which patently violated the executive orders at issue here, the fact remains that the Complaint expressly alleges that, unlike the BLM protestors, other First Amendment protestors were threatened with arrest and subject to enforcement in the form of police orders to disband. (Compl. ¶ 39). Such disparate treatment violates the First (freedom of speech) and Fourteenth (equal protection) Amendments.

Further, the argument that the BLM protestors are not proper comparators is an argument without any substantive logic. The Second Circuit has explained:

> The Equal Protection Clause fundamentally requires that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 40 S. Ct. 560, 562, 64 L. Ed. 989 (1920). An Equal Protection violation based upon selective enforcement requires that "(1) the [plaintiff], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980). "A plaintiff generally must satisfy both elements to establish a claim of selective enforcement." *LaTrieste Restaurant v. Village of Port Chester*, 188 F.3d 65, 70 (2d Cir. 1999).
>
> To satisfy the first *LeClair* prong, "plaintiffs must plausibly allege facts showing a 'reasonably close resemblance' between themselves and a proffered comparator." *Hsin v. City of New York*, 779 Fed. Appx. 12, 15 (2d Cir. 2019) (quoting *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000)). In the Second Circuit, courts have found that "[s]imilarly situated does not mean identical, but rather a 'reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases,' to the extent that an 'objectively identifiable basis for comparability' exists." *Walker v. City of New York*, No. 05-CV-1283, 2010 U.S. Dist. LEXIS 132801, 2010 WL 5186779, at *7 (E.D.N.Y. Dec. 15, 2010) (quoting *Graham*, 230 F.3d at 39). It is not necessary that the plaintiff demonstrate an exact correlation between him-or herself and the comparator. *Abel v. Morabito*, No. 04 Civ. 07284(PGG), 2009 U.S. Dist. LEXIS 9631, 2009 WL 321007, at *5 (S.D.N.Y. Feb. 11, 2009). Instead, the "plaintiff must identify comparators whom a 'prudent person would think ... [were] roughly equivalent.'" *Id.* (alteration in original) (quoting *Estate of Morris v. Dapolito*, 297 F. Supp. 2d 680, 686 (S.D.N.Y. 2004)). A factual issue—such as whether two entities are similarly situated—is usually left up to a jury, "[b]ut this rule is not absolute and 'a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met.'" *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 790-91 (2d Cir. 2007) (citation omitted) (quoting *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 n.2 (2d 2001)).

Carminucci v. Pennelle, No. 18 CV 2936 (LMS), 2020 U.S. Dist. LEXIS 146937, at *53-55 (S.D.N.Y. Aug. 14, 2020). In the case at bar, the Complaint expressly alleges that the selective treatment in favor of the BLM protestors was a result of an impermissible content- and viewpoint-based bias. As to the "reasonably close resemblance" prong, the Complaint expressly alleges two different groups of protestors—the BLM protestors versus all others, including Plaintiff—protesting publicly. The only meaningful distinction between the two is the content of their speech. If Defendants wish to argue that there were meaningful distinctions between the two groups that belie a "reasonably close resemblance," they must do so after there are facts in the record to support their defense, either before a jury or after discovery at the summary judgment stage. It is not sufficient to simply list different characteristics of protests (*i.e.*, whether they were spontaneous or organized, conducted pursuant to a permit or not) as Defendants have done, without explaining or citing to legal authority why those particular characteristics are relevant to establish a reasonably close resemblance. There is a reason why this analysis is typically a jury question and, at the very least, one subject to a post-discovery motion for summary judgment.

For his part, Defendant Cuomo also argues, based largely on this Court's ruling at the preliminary injunction stage, that he cannot be liable for selective enforcement because his public announcements in support of the BLM protests and message do not amount to supporting selective enforcement. (Def. Cuomo Mem. at 21-23). To begin, Defendant Cuomo's statements as alleged in the Complaint and as available to the Court through judicial notice, manifestly demonstrate his support not only of the message of the BLM protestors, but also their protests that violate the executive orders as long as those protests are not violent, and do not violate the curfew. In other words, he has expressly taken an enforcement position as the chief executive officer for the State.

In addition, Defendant Cuomo is the state actor who issued the executive orders, and we are told that he expects and relies upon the City Defendants to enforce those executive orders. The

City Defendants, as the enforcement agents for Defendant Cuomo, have not only failed to enforce the executive orders against the BLM protestors, Defendant de Blasio and the New York police department have actively participated in them. Defendant Cuomo cannot artificially insulate himself by simply blaming the City Defendants as independent actors (Defendant Cuomo apparently has a penchant for pointing blame at others).

Moreover, while Defendant Cuomo might choose to allow the City Defendants to enforce his orders, he is not prohibited from enforcing them. As the Governor of New York, he has authority to enforce his edicts by directing the State Police. *See, e.g.*, N.Y. Exec. Law § 30 (providing for an executive department and appointing the governor as the "head of the executive department"); *id*. at § 31 (providing for a state police as part of the executive department). Defendant Cuomo, in his official capacity, is no less liable for the City Defendants' selective enforcement than the City Defendants themselves.

For their part, the City Defendants attempt to argue that they are relieved of liability based upon their claim of qualified immunity. (City Defs.' Mem. at 19-24). To begin, qualified immunity does not protect a defendant against claims for declaratory and injunctive relief, it does not apply to claims against a municipality, nor does it apply to claims against a defendant in his official capacity. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct [or] in an action against a municipality"); *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 360 (2d Cir. 2002) (explaining that qualified immunity does not apply to claims for declaratory and injunctive relief); *Cannon v. City & Cnty. of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) ("[T]here is no qualified immunity to shield the defendants from claims [for declaratory and injunctive relief]"); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) (same); *Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir. 1993) ("Qualified immunity is not a defense to a claim against

a municipal official in his official capacity."); *Hall v. Tollett*, 128 F.3d 418, 430 (6th Cir. 1997) (same). There is no doubt that the City Defendants were enforcing a City policy (*i.e.*, the mayor's executive order). *See Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978) (holding that that municipalities are liable under 42 U.S.C. § 1983 if municipal policy or custom was the "moving force" behind the alleged unconstitutional action and stating that "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under § 1983."). Consequently, the City as a municipality does not enjoy a qualified immunity defense and is thus liable for nominal damages regardless of whether the City Defendants in their *individual* capacities are liable. As set forth in the Complaint, the City Defendants were sued individually and in their official capacities. The official capacity claims are essentially claims against the City. *See Ky. v. Graham*, 473 U.S. 159, 165 (1985) (stating that an action against a government official in his official capacity is an "action against the entity of which the officer is an agent").

As to Plaintiff's nominal damages claim against the City Defendants in their individual capacities, the defense of qualified immunity does not shield the defendants from liability for violating Plaintiff's clearly established rights. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court stated the applicable standard as follows: government officials are protected from personal liability and thus enjoy qualified immunity only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. And "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted). "The test focuses on the ***objective*** **legal reasonableness** of an official's

acts, and the qualified immunity defense fails if the official violates a clearly established right because 'a ***reasonably competent public official should know the law governing his conduct***.'" *Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993) (quoting *Harlow*, 457 U.S. at 818-19) (emphasis added). And "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court mandated a two-step sequence for resolving qualified immunity claims. First, a court must decide whether the facts alleged or shown by a plaintiff make out a violation of a constitutional right. And second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id*. at 201; *see also Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (stating that courts have discretion to "decid[e] which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").

Consequently, whether a right is "clearly established" is ultimately an *objective*, legal analysis. As stated by the Supreme Court, "By defining the limits of qualified immunity essentially in objective terms, ***we provide no license to lawless conduct***." *Harlow*, 457 U.S. at 819 (emphasis added).

As set forth above, this Court should have little difficulty rejecting Defendants' qualified immunity defense as to nominal damages. The City Defendants went well beyond selective enforcement based upon their bias toward the content and viewpoint of the BLM protestors. Indeed, they actively participated in those protests. Such lawless conduct is objectively unconstitutional today and it has been since day one of the BLM protests.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully asks this Court to deny Defendants' respective motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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