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

CYNTHIA PAGE,
Plaintiff,

v.

ANDREW CUOMO, in his official capacity as Governor of the State of New York; HOWARD A. ZUCKER, in his official capacity as Commissioner, Department of Health of the State of New York,
Defendants.

No. 1:20-cv-732 (DNH/TWD)

Hon. David N. Hurd

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS

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INTRODUCTION

Defendant Cuomo is the consummate politician, having mastered the art of speaking out of both sides of his mouth with equal conviction and sincerity. The governor's hypocrisy is well-known to most of us residing in the Empire State, irrespective of political affiliation, but it has hit home fatally to those New Yorkers whose nursing home bound family members died as a direct result of the governor's order requiring senior care facilities to re-admit COVID-19 infected residents transferred from New York hospitals. So it was after his order led to thousands of nursing home fatalities forcing the governor to finally rescind the tragically fatal order, Defendant Cuomo responded to a reporter's question about his personal responsibility for those deaths by famously proclaiming no one was to blame and no one was to be prosecuted—except of course the true culprits: "Who can we prosecute for those 139 deaths? Nobody. Mother Nature, God, where did this virus come from? People are going to die by this virus, that is the truth." At the time, of course, New York infamously led the nation in infection and death rates from the virus that God and Mother Nature caused. Caroline Linton, *Cuomo says no one should be prosecuted for coronavirus deaths in New York, including those in nursing homes*, CBS News (May 18, 2020 3:04 PM), https://www.cbsnews.com/news/nursing-homes-deaths-coronavirus-prosecution-andrew-cuomo-new-york/.

Only one month later, with the apparent "flattening of the curve" in New York, the same governor just as famously sought to take full credit for the change and expressly denied divine involvement: "The number is down because we brought the number down. God did not do that, fate did not do that, destiny did not do that, a lot of pain and suffering did that." Michael W. Chapman, *Gov. Cuomo on Battling COVID-19: 'We Brought the Number Down, God Did Not Do That'*, CNSNews (April 16, 2020, 1:33 PM), https://www.cnsnews.com/blog/michael-w-

chapman/gov-cuomo-battling-covid-19-we-brought-number-down-god-did-not-do. Apparently, when confronted with his own policy failures, Defendant Cuomo is a true believer in divine providence. When he believes it is time to take a political victory lap, it is all about the governor's policies.

Similarly, in this case we have on display a politician who literally threatened armed conflict if President Trump or any of New York's sister states imposed a quarantine on travelers from New York. In March of this year when President Trump merely suggested the possibility of a two-week quarantine for travelers from New York due to the fact that the state was leading the nation in infection and death rates, Defendant Cuomo responded: "This would be a federal declaration of war on states." He added for good measure: "It would be chaos and mayhem. If we start walling off areas all across the country it would just be totally bizarre, counterproductive, anti-American, anti-social." Victoria Bekiempis and Richard Luscombe, *Cuomo and Trump clash over talk of New York 'quarantine'*, The Guardian (Mar. 28, 2020 9:21 PM), https://www.theguardian.com/us-news/2020/mar/28/donald-trump-virginia-usns-comfort-travel. Doubling down on his position that quarantines were "reactionary" and "illegal," Defendant Cuomo publicly threatened to sue the governor of Rhode Island for doing back in March exactly what he is doing now. Tim O'Donnell, *Cuomo threatens to sue Rhode Island if it doesn't ease up on New Yorkers during coronavirus pandemic*, Yahoo! News (March 29, 2020), https://news.yahoo.com/cuomo-threatens-sue-rhode-island-115524335.html.

And lest someone not understand the import of his words, or believe that the passage of time might have mellowed his stance, just last month Defendant Cuomo engaged in the following dialogue with a besotted journalist:

> **Nicolle Wallace:** I'm old enough to remember when I believe it was Florida and maybe one other state that was warning against people coming from New York,

> warning them about us and asking to us quarantine when we traveled to their states. Have you given any thought to asking people from any of the states spiking, to take their temperatures or to quarantine or do anything when they come back into our state?
>
> **Governor Cuomo:** Well, wouldn't that be karma? Wouldn't it be karma if I went out and said, "I'm thinking of quarantining. I won't let those people from Florida come in. You know, they have a very high infection rate in Florida. I don't want them coming here." I think I would do it just one morning, just for the enjoyment of it. But no, I would not do that.
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> . . .
>
> **Governor Cuomo:** By the way, the President of the United States talked about quarantining New York and New Jersey. Don't forget that.
>
> **Nicolle Wallace:** I remember. I remember.
>
> **Governor Cuomo:** He talked about having enforced quarantine. Not since the Civil War - they were talking about blocking access to New York. You want to see a second civil war, you would have if they did that.

Audio & Rush Transcript: Governor Cuomo is a Guest on MSNBC's Deadline: White House with Nicolle Wallace, Governor Andrew M. Cuomo (June 12, 2020), https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-msnbcs-deadline-white-house-nicolle-wallace-1 (grammatical errors in original). Today, however, Defendant Cuomo embraces forced quarantines upon outsiders seeking to travel to New York. Notwithstanding Defendant Cuomo's manifest duplicitousness, his arguments before this Court are legally wrong and no less "counterproductive, anti-American, anti-social," "reactionary," and "illegal."

In effect, the governor and his health commissioner take two tacks in defense of their quarantine. The first is to hide behind *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905), and claim that once the state declares a public health crisis, constitutional analysis gives way to an oblique and ever-expanding standard of deference that appears to have no boundaries. In other

words, per Defendants, it is the fiat of the governor, and not the Constitution of the United States, that becomes the supreme law of the land in times like this. To reach this conclusion, Defendants have ignored the plain language of *Jacobson* and how the Second Circuit and other circuits have treated *Jacobson*.

Defendants' second tack in defense of the quarantine is to seek dismissal of this lawsuit by trying to deny the reality that the governor's quarantine order is an unconstitutional imposition on the right to interstate travel falling mainly on residents of the designated states. As we will see below, the claim that the governor's quarantine order does not expressly forbid travel to New York or that it might incidentally affect New Yorkers as well, does not save the order from constitutional infirmity. Defendants' arguments completely miss the mark.

ARGUMENT

I. The Court Should Grant Injunctive Relief.

A. *Jacobson* Requires the Court to Apply Extant Constitutional Analysis in this Case Involving a "plain, palpable invasion of rights secured by the fundamental law."

As noted above, Defendants first line of defense, and indeed their overarching argument against the motion for preliminary injunction and in support of their motion to dismiss, is to argue that *Jacobson* creates a different constitutional standard of review for public health crises than would otherwise hold sway under less trying times. (*See* Defs.' Br. at 6-11 [Dkt. No. 11-31]). Thus, Defendants selectively cite to the language of certain opinions to get at two important considerations. One, an exigent public health crisis requires public officials to act quickly and oftentimes based on an incomplete factual understanding of the risks and policies best suited to address those risks. Two, executive and legislative branch officials are in a better position to assess risk and to create policies to address those risks than judges.

There is little room for argument that these two general propositions are true and that the *Jacobson* decision is undergirded by these principles. *Jacobson*, 197 U.S. 11, 38; *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020). The error inherent in Defendants' sweeping and indiscriminate arguments about the humility and deference required of the judicial branch in the face of a public health crisis, and this applies as well to those courts which have adopted this approach, is that they ignore or misconstrue the plain language of *Jacobson*, sound judicial precedent, and rudimentary constitutional logic.

As noted in Plaintiff's moving papers, the *Jacobson* Court, and others after it, including the Second and Sixth Circuits, recognize that the judicial branch must not subject itself to a self-imposed analytical quarantine when public health edicts manifestly impose a burden on a fundamental liberty. (Pl.'s Br. at 1-3 [Dkt. No. 7-3]). The Court's disjunctive language is not immaterial to a proper legal analysis even if Defendants, while quoting it, choose to ignore it: "Under this standard—which is far more deferential to the state than the principles that would control in ordinary times—'judicial scrutiny is reserved for a measure that has no real or substantial relation to' the object of protecting public health, '***or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law***.'" (Defs.' Br. at 6-7 [quoting *Jacobson*, 197 U.S. at 31] [emphasis added]). Defendants, incorrectly, want this Court to focus on the "real or substantial relation" language in the first condition of the disjunctive, which by all appearances bypasses strict scrutiny and even intermediate level scrutiny for what might be termed a "reasonableness" standard. Thus, Defendants quite understandably cite to the Fifth Circuit opinion in *In re Abbott* for the proposition that "*Jacobson* instructs that all constitutional rights may be reasonably restricted to combat a public health emergency." (Defs.' Br. at 8 [citing to *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020)]). And there is no dearth of recent

district court cases following this approach, similarly cited to by Defendants. (Defs.' Br. at 7).

To the extent that these cases stand for the proposition that an executive order issued in the context of a public health crisis is merely subject to a "real or substantial relation to" test of *Jacobson*'s first disjunctive even when the executive order is a "plain, palpable invasion of rights secured by the fundamental law", they are dead wrong. Indeed, circuit and district courts across the country are not of one mind on the application of *Jacobson*. For example, the Sixth Circuit has expressly acknowledged *Jacobson*'s application to an executive order burdening religious worship, but having found an obvious disparate treatment of religious gatherings (*i.e.*, "an invasion of rights secured by the fundamental law"), the court applied the standard strict scrutiny analysis to issue an injunction pending appeal. *Roberts v. Neace*, 958 F.3d 409, 414-15 (6th Cir. 2020) ("All of this requires the orders to satisfy the strictures of strict scrutiny. They cannot."); *accord Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 927 (6th Cir. 2020) (having found a "plain and palpable invasion of the fundamental law," the court held expressly that *Jacobson* does "not countenance . . . the notion that COVID-19 has somehow demoted *Roe* and *Casey* to second-class rights"); *see also Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 U.S. Dist. LEXIS 111808, at *20-33 (N.D.N.Y. June 26, 2020) (applying strict scrutiny standard in a Free Exercise context as required by *Jacobson* and standard free exercise Supreme Court jurisprudence); *Bayley's Campground Inc. v. Mills*, No. 2:20-cv-00176-LEW, 2020 U.S. Dist. LEXIS 94296, at *18-24 (D. Me. May 29, 2020) (applying strict scrutiny to a right to travel case in light of *Jacobson*).[1]

[1] The Maine district court gets it half right. It appropriately finds that strict scrutiny should apply to the travel restriction but then it applies a watered-down, rational-basis-type of review and not the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

B. The Quarantine Order Is a Plain and Palpable Invasion of the Fundamental Law.

Following *Jacobson*, this Court must address the question whether the quarantine order is a plain and palpable invasion of the fundamental law. As noted in Plaintiff's moving papers, *Dunn v. Blumstein*, 405 U.S. 330 (1972) is illustrative. In *Dunn*, the state of Tennessee had imposed a 12-month in-state residency requirement and a three-month county residency requirement to vote. The plaintiff sued and three questions, *inter alia*, before the Court were (1) whether the durational requirements violated the right to travel; (2) what was the appropriate constitutional standard to apply; and (3) whether the standard was met.

Just as in this case, the state argued that the right to travel was not impacted because the durational requirements did not ban or even burden travel directly but only created an indirect burden. Thus, the state argued that out-of-state residents could travel freely, but if they chose to do so, they would have to wait to vote. In this case, Defendants have made the same argument, but it is not a delayed right to vote, rather it is a two-week, self-administered, solitary house arrest, precluding all freedom of movement for the quarantine period. In *Dunn*, the Court explained the right to travel in no-uncertain terms, and it matters not that the burden on the right to travel affects travel only indirectly:

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be indirectly denied. The right to travel is an *unconditional* personal right, a right whose exercise may not be conditioned. Durational residence laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right.

Dunn, 405 U.S. at 341-43 (internal quotations and citations omitted) (emphasis in the original).

Moreover, the fact that the burden on the right to travel also affects New Yorkers who wish to travel out of state to one of the designated states does not save the executive order. That

argument simply goes to the equal protection aspect of the impairment of the right to interstate travel—not the impairment to the right to travel itself. Indeed, Defendants themselves quote the very language which memorializes the right to travel as more than just the relative right of a non-resident to travel as freely as a resident:

> The "right to travel" discussed in our cases embraces at least three different components. It protects ***the right of a citizen of one State to enter and to leave another State***, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz v. Roe, 526 U.S. 489, 500 (1999) (emphasis added). (Defs.' Br. at 15). To emphasize this point, *Saenz* itself cites to *United States v. Guest*, 383 U.S. 745 (1966), for the very proposition that the right to interstate travel may not be impeded as an absolute federal constitutional right, not simply a relative right compared to whether in-state residents are similarly burdened. *Id*. Not surprisingly, *Guest* stood for the proposition that African-American citizens, irrespective of whether they were residents of the state of Georgia, had the right to travel in and out of the state freely. And to make this point as an absolute and still authoritative historical legacy of the Constitution, the *Guest* Court cited *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1868), which held unconstitutional the imposition of a tax for exiting the state of Nevada—a tax that applied equally to residents and non-residents alike:

> The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. In *Crandall v. Nevada*, 6 Wall. 35, invalidating a Nevada tax on every person leaving the State by common carrier, the Court took as its guide the statement of Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 492:
>
> > "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the

> right to pass and repass through every part of it without interruption, as freely as in our own States." *See* 6 Wall., at 48-49.

Guest, 383 U.S. at 757-58.

The Supreme Court has spoken clearly on the two fundamental points at issue here. One, the burden on the right to interstate travel need not be an absolute ban on travel. The tax on those exiting Nevada was not a ban. The harassment of Blacks in Georgia was not about an absolute impediment to interstate travel. A residency requirement to vote is not a ban on interstate travel. These impositions on interstate travel, all of which the Court found to be unconstitutional, are no more of an imposition than what is, in this case, a two-week sentence of solitary confinement under house arrest. Two, it matters not whether New Yorkers' right to interstate travel is similarly burdened. The right to interstate travel is both a relative right (compared to in-state residents) and an absolute right (irrespective of residency).

C. The Quarantine Order Does Not Survive Strict Scrutiny.

As noted above, strict scrutiny demands not only a compelling state interest, but also a necessary connection between the regulation and the compelling state interest. And beyond the necessity of the regulation, the state has the burden to demonstrate that the necessary regulation is the least restrictive method to address the compelling state interest. *Dunn*, 405 U.S. at 353 ("Our conclusion that the waiting period is not the least restrictive means necessary for preventing fraud is bolstered by the recognition that Tennessee has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973) ("[A]s previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with

'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives . . . .")

Defendants offer only the declaration of Brad Hutton, the Deputy Commissioner of the Office of Public Health at the New York State Department of Health, to meet *their* strict scrutiny burden. Hutton's declaration, however, only tells us the obvious: (1) the response to the pandemic is a compelling state interest (Hutton Decl. at ¶¶ 1-32 [Dkt. No. 11-5]); (2) we fear that people travelling from other states might infect our residents (*id*. at ¶¶ 32-35); and (3) we have chosen two parameters to distinguish which states we consider high risk (*id*. at ¶ 33). Nowhere in the Hutton declaration are we told why at this point a quarantine *is in fact necessary*, insofar as the very same declaration informs us that the state of New York *successfully* "flattened the curve" *without* any quarantine. (*Id*. at ¶¶ 27-29). This fact alone belies the necessity prong of the strict scrutiny analysis. This is not a small point. Strict scrutiny is the "most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534, for a reason: its *proper* application prevents "a plain, palpable invasion of rights secured by the fundamental law," as in this case. Indeed, the fundamental liberties enshrined in our Constitution are not simple pushovers to be ignored or discarded during a time of public crisis as Defendants suggest. *See, e.g., Coolidge v. N.H.*, 403 U.S. 443, 455 (1971) ("In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.").

Further, nowhere in the Hutton declaration are we provided any scientific evidence, or even anecdotal evidence, that interstate travelers are more likely to cause infections than purely intrastate travelers. None. Moreover, the Hutton declaration provides not even a hint why or

how the two parameters and the particular positivity rate levels chosen operate to *necessarily* reduce the risk of infections. None. The simple fact that a traveler comes from a state with a 10% positive test rate or from a state with 0.01% (10 out of 100,000) positive test rate is not *ipso facto* an indication, or even suggestive by way of common logic, much less scientifically persuasive, that travelers from that state are more likely to cause infections in New York than the same individuals who have been subjected to solitary confinement in New York for 14 days (or, of course, infected individuals from non-restricted states who are permitted to travel throughout New York with impunity). There are so many variables we know of for carrying the disease and then transmitting it to another, and so many opportunities to become infected *once in New York*, that the draconian imposition of a 14-day solitary house arrest based merely on the fact that one has travelled from a designated state to New York reeks of irrational and pseudo-scientific desperation.

For example, if a resident from a non-designated state is flying (or traveling via bus or train) into New York and is joined at a layover or stop in a designated state, how is the risk somehow mitigated for the non-designated state resident versus the designated-state resident? If a non-designated state resident, such as someone from New Jersey, knows that she has been exposed to someone with COVID-19, there is no similar 14-day quarantine requirement and heavy monetary fine for violating the quarantine requirement, yet that individual is far more likely to infect New Yorkers than designated-state resident travelers.

Furthermore, Defendants provide no explanation why lesser invasive regulations would not be as or more effective. For example, why not require travelers to either be tested at home or provide a written statement under oath upon request that they have been symptom-free for 14 consecutive days prior to entering New York. When New Yorkers visit a medical facility or any

other public building, Defendants have no qualms about relying on the honesty and civic responsibility of those individuals answering questions posed by the staff to screen for symptoms and the like. Similarly, Defendants have no problem permitting food service employees to prepare take-out and delivery orders and relying upon the employees' good will and civic responsibility to answer honestly whether they have been around someone with COVID-19 or someone manifesting symptoms. The number of scenarios one might reasonably consider where a non-travelling New Yorker poses a far greater risk of infecting other New Yorkers than a traveler from a designated state is nearly infinite. That being the case, what is the scientific or evidentiary basis for Defendants' claim that this onerous invasion of the right to travel is both necessary and the least restrictive? The burden is on Defendants to satisfy the necessity and least restrictive prongs of the strict scrutiny analysis—not on Plaintiff. In sum, strict scrutiny requires the government to regulate with the precision of a scalpel and not with the blunt force of a sledgehammer. *See, e.g., Rodriguez*, 411 U.S. at 16-17 (stating that strict scrutiny requires "precision"). The travel restriction fails this test.

Finally, we note that the alleged alternatives considered by Defendants as set out in the Hutton declaration fail to address any of the problems addressed above. (Hutton Dec. at ¶¶ 44-49). For example, the fact that a person might be asymptomatic for 14 days does not suggest that asking that individual to self-isolate for 14 days at home prior to travelling to New York would not be as effective as forcing that individual to quarantine once she has arrived in New York and presumably has to pay for lodging (and after already potentially exposing New Yorkers by travelling through an airport, bus terminal, cab, subway, or Uber). Further, given that New Yorkers are constantly being trusted to self-isolate when they believe they might be symptomatic but not tested, or exposed to someone symptomatic but not tested, why do Defendants treat

travelers as somehow less trustworthy and civic minded? Once again, these kinds of examples and queries are nearly endless, which further demonstrate the failure of Defendant Cuomo's quarantine order to satisfy strict scrutiny.

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

Defendants argue that the law as set out by the Second Circuit is not in fact the law. Thus, Defendants proffer an argument that the violation of a constitutional right does not carry with it the presumption of irreparable harm unless it is a First Amendment claim. (Defs.' Br. at 19-21). This is wrong, and it is wrong because the Second Circuit has said it is wrong. Two of the three Second Circuit cases cited in Plaintiff's motion were not First Amendment cases. *Conn. Dep't of Envtl. Prot. v. OSHA*, 356 F.3d 226, 231 (2d Cir. 2004) (adjudicating the constitutional rights of a state agency versus the federal government) and *Statharos v. N.Y.C. Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) (holding that a claim based upon an inchoate right to privacy requires "no separate showing of irreparable harm."). Irreparable harm is established as a matter of law.

E. The Balance of Equities Tips Sharply in Favor of Granting the Injunction and Granting the Injunction Is in the Public Interest.

Defendants' argument that the balance of equities tips in their favor and that granting the injunction is not in the public interest is essentially nothing more than a statement that the risk of rampant COVID-19 infections represents a compelling state interest. In other words, Defendants would like to suggest that simply demonstrating a compelling state interest necessarily precludes injunctive relief, notwithstanding Defendants' failure to satisfy strict scrutiny. This is not the law, and Defendants cite no such precedent. As noted in Plaintiff's motion, the law is in fact inapposite. *Saget v. Trump*, 375 F. Supp. 3d 280, 377 (E.D.N.Y. 2019) ("Because Plaintiff [has] shown both a likelihood of success on the merits and irreparable harm, it is also likely their

interest supports preliminary relief."); *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."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws"); *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.'").

In sum, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). As noted previously, the challenged restriction violates "a virtually unconditional personal right, guaranteed by the Constitution to us all." It is in the public interest to issue the injunction.

II. The Court Should Deny Defendants' Motion to Dismiss.

Defendants' motion to dismiss is little more than yelling "Pandemic!" in a crowded theatre and waiting for the judges in the audience to flee for the exits. Beyond the exclamatory aspect of their motion, the remainder consists of the corrupted *Jacobson* argument and a peculiar reliance on facts Defendants deem contrary to the facts alleged in the Complaint. In essence, Defendants' motion to dismiss is little more than a repeat of their opposition to the motion for a preliminary injunction and specifically to the likelihood-of-success prong. We won't belabor the points made previously by repeating those arguments here, but rather ask the Court to understand

them to be made here by incorporation. What we will do is note that the facts alleged in the Complaint are deemed true and are thus the ones by which the legal allegations are judged. *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 737 (2d Cir. 2017) ("At the pleading stage, . . . [a plaintiff] need only generally allege facts that, *accepted as true*, make his alleged injury plausible.") (emphasis added); *Desarrolladora Farallon S. de R.L. de C.V. v. Cargill Fin. Servs. Int'l*, 666 F. App'x 17, 21 (2d Cir. 2016) ("To survive a motion to dismiss, the complaint must include sufficient facts which, *accepted as true*, would state a facially plausible claim for relief.") (emphasis added).

Given the facts as alleged, Defendants are left with an executive order that places an onerous burden on interstate travel that does not satisfy strict scrutiny. That is a violation of the Privileges and Immunities Clause as set out in *Saenz v. Roe*, 526 U.S. 489, 500 (1999), as noted above. Further, treating travelers from designated states differently than travelers wholly within New York without satisfying strict scrutiny violates the Equal Protection Clause. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

Finally, imposing a 14-day sentence of solitary confinement on travelers to New York without even pretending to satisfy strict scrutiny is shocking and the Court need not rely on Plaintiff's assessment. *Charles v. Orange Cty.*, 925 F.3d 73, 85 (2d Cir. 2019) ("In order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."). Rather, Plaintiff would ask this Court to rely on the public pronouncements of Defendant Cuomo himself when he explained on several occasions that a quarantine on travelers from New York, which at the time led the nation in infection and death rates well beyond the parameters his Department of Health now sets to

trigger the quarantine, "would be a federal declaration of war on states." "It would be chaos and mayhem. If we start walling off areas all across the country it would just be totally bizarre, counterproductive, anti-American, anti-social." Bekiempis, *supra* Introduction.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's motion, issue the requested injunction, and deny Defendants' motion to dismiss.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ David Yerushalmi
David Yerushalmi, Esq. (NY Bar No. 4632568; DC Bar No. 978179; Cal. Bar No. 132011; Ariz. Bar No. 0096)
383 Kingston Avenue
Suite 103
Brooklyn, New York 11213
Tel: (646) 262-0500; Fax: (801) 760-3901

/s/ *Robert J. Muise*
Robert J. Muise, Esq.* (MI P62849)
PO Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756; Fax: (801) 760-3901
rmuise@americanfreedomlawcenter.org

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2020 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

AMERICAN FREEDOM LAW CENTER

/s/ David Yerushalmi
David Yerushalmi, Esq.