UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE CLEMENTINE COMPANY, LLC, et al., Plaintiffs, -against- BILL DE BLASIO, in his official capacity as Mayor of New York City, Defendant.	No. 1:21-cv-07779-KPF **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

PLEASE TAKE NOTICE, that upon the Memorandum of Law in Support of their Motion for Preliminary Injunction dated September 21, 2021, and all exhibits attached thereto, and upon all prior proceedings, pleadings, and filings in this action, the Plaintiffs move this Court, before the Honorable Katherine Polk Failla at the United States Courthouse for the Southern District of New York located at 500 Pearl St., New York, New York for a preliminary injunction enjoining the enforcement of Mayor de Blasio's Key to NYC Vaccine Mandate against Plaintiffs The Clementine Company, LLC; The Actors Temple Theatre; Soho Playhouse Inc.; and Caral Ltd., and similarly situated theaters and comedy clubs in New York City.

Dated: September 21, 2021.

Respectfully submitted,

s/ James G. Mermigis

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I also sent a copy of this filing to Ms. Aimee Lulich, counsel for Mayor de Blasio in the related case of *Clementine Theater Co. v. Cuomo*, No. 1:20-cv-08899-CM via email at alulich@law.nyc.gov.

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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

For a year and a half, the City of New York, like the rest of the nation, has grappled with the COVID-19 pandemic. Even though COVID-19 has presented unique challenges, the constitutional guarantees of freedom of speech and equal protection remain steadfast and immovable: The same rules should apply to all speakers, regardless of their message.

Yet since the start of the pandemic Defendant Mayor Bill de Blasio and other state and city officials have continually singled out certain types or categories of speech for disfavored treatment in violation of those constitutional protections. Mayor De Blasio's recent executive orders requiring that theaters enforce the Key to NYC vaccine mandate—but not applying that requirement to other similar venues and speakers—is the latest manifestation of that unequal treatment.

Under Defendant's Key to NYC Executive Orders, religious speech such as a sermon or Sunday school nativity play is not subject to a vaccine mandate; in contrast, theatrical and comedic performances are subject to the mandate and face severe penalties if they do not confirm all audience members' vaccine status. Some of Plaintiffs' theaters serve as venues for both religious services and theatrical performances—yet only one type of speech is subject to the Key to NYC mandate, even when it occurs in the same building only hours apart. The only reasons the two events are treated differently is the content of speech and the identity of the speaker. This type of content-based discrimination is constitutionally suspect, under both the First Amendment's Free Speech Clause and the Fourteenth Amendment's Equal

Protection Clause. Indeed, under either Amendment, content-based discrimination triggers strict scrutiny—the *least* deferential standard of review.

Constitutional rights are never more important than in times of emergency, when the tendency to overlook or abridge those rights is particularly acute. This principle has been repeatedly affirmed by the Supreme Court, including in a case involving New York's COVID-19 orders. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Supreme Court rejected the argument that New York's executive orders restricting church activity were entitled to deferential review. The Court's decision clarified what should not have needed clarification: constitutional rights—including those protected by the First Amendment—do not receive diminished protection simply because the government abridges them in an effort to curb the spread of a disease.

Live theater and comedy are venerated forms of speech that are protected by both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Just as New York could not lawfully discriminate against churches, it likewise cannot lawfully discriminate against theatrical and comedic performances.

Plaintiffs are likely to succeed on the merits of their First and Fourteenth Amendment claims because the discriminatory Executive Order imposing the Key to NYC mandate on Plaintiffs' theaters and comedy venues cannot be justified. Burdening this speech causes irreparable harm, and it is in the public interest to vindicate Plaintiffs' constitutional rights. Accordingly, this Court should grant Plaintiffs' request for a preliminary injunction. *Citigroup Global Markets, Inc. v. VCG*

Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010) (citing *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)).

STATEMENT OF FACTS

Plaintiffs are a group of small theaters and comedy clubs of less than 199 seats each in New York City that were subjected to total closure from March 16, 2020, to April 2, 2020, as a result of a series of COVID-19 related executive orders issued by Governor Andrew Cuomo and enforced by Mayor Bill de Blasio. Complaint ¶¶ 3–4.

COVID-19 Emergency Orders

From the beginning of the COVID-19 pandemic, executive orders by the Governor and the Mayor treated theaters and comedy clubs worse than other businesses, even though the First Amendment protects the expressive activity that defines these venues. Complaint ¶ 30. Since then, the disparity between the treatment of theaters and comedy clubs and other types of businesses has continued.

In March 2020, theaters were shutdown along with many other businesses in New York via executive orders issues by Governor Cuomo which were adopted and enforced by Defendant de Blasio. As outlined more fully in the Complaint, these Executive Orders subjected Plaintiffs to unequal and discriminatory operations, capacity, and health and safety restrictions. Complaint ¶¶ 19-37. A group of theaters and comedy venues, including Plaintiffs in this action, challenged that unequal treatment. *Clementine Co. v. Cuomo*, Case No. 1:20-cv-08899-CM (S.D.N.Y.). Claims for nominal damages in that case are ongoing. *Id.*

On May 3, 2021, Governor Cuomo announced a plan to lift capacity limits from most businesses in New York including theaters as of May 19, 2021. In preparation for reopening, Plaintiffs took extensive safety precautions to minimize the risk that patrons would be exposed to COVID-19. These measures include: (a) mandating that all employees and actors be tested for COVID-19 according to New York guidelines, as well as vaccinated; (b) requiring all patrons and staff to have a temperature check before entering the premises; (c) requiring that masks be worn throughout the theater; (d) implementing seating policies that facilitate spacing groups and ensuring that they are always a minimum of six feet apart; (e) installing plexiglass barricades between employees and patrons; (f) placing hand sanitizer stations throughout the theater; and (g) installing air filters and air scrubbers to disinfect and improve air flow. Russell Decl. ¶¶ 9-16.

On August 3, Mayor de Blasio announced that under his new Key to NYC Executive Orders, proof of vaccination would be required for patrons and staff at certain indoor businesses, but not others, starting on August 17. (Executive Orders 225, 228, 237, 239).

The City began enforcing this requirement in full force on September 13, 2021, with a first violation subjected to a $1,000 fine, a second violation subjected to a $2,000 fine, and each subsequent violation subjected to a $5,000 fine. Each instance when a covered entity fails to check an individual's vaccination status is a separate violation. This means that if Plaintiffs do not check vaccination status during a single performance, they may be subject to hundreds of thousands of dollars in fines. Under

Section 562 of the New York City Charter, a failure to comply may also be prosecuted as a criminal misdemeanor.

The Unequal Application of the Key to NYC Vaccine Mandate

The new Key to NYC vaccine mandate does not apply to worship services, schools, or community centers.[1] Counsel for Defendant has confirmed the unequal application of the mandate.[2]

Some worship services in New York City meet in buildings that are used or were once used as theaters. But theatrical performances are subject to more stringent restrictions than worship services, even if they occur in the same or a nearly identical space. On Sunday mornings, Plaintiff Clementine Company's Orbach Theater is rented by a church, which conducts worship services. Russell Decl. ¶ 22. Plaintiff Clementine Company's Owner and General Manager, Ms. Russell, has spoken to the

[1] According to an online FAQ published by the city on August 25, 2021 and updated on September 14, 2021: "Indoor dining, entertainment and fitness located in the following settings are exempted from Key to NYC: • Private residential buildings when those settings are available only to residents • Office buildings when those settings are available only to office staff • Pre-K through grade 12 schools • Senior centers • Community Centers • Child care programs." Frequently Asked Questions Key to NYC (Sept. 14, 2021), https://www1.nyc.gov/assets/counseltothemayor/downloads/Key-to-NYC-FAQ.pdf.

[2] In an August 20, 2021, email to undersigned counsel, counsel for Mayor de Blasio confirmed that the mandate does not apply to religious services in Plaintiffs' theaters. Decl. of Daniel Ortner ¶ 4 Exhibit 1 ("I know one of your client theaters holds religious services on certain days. Religious services are exempt from the order even if they are held in a theater. The 'regardless of the activity' language is meant to cover the various activities that employees and customers might do in an entertainment venue that are not identified as exempt in the EO. Guidance on schools and school programming, and various exempt community centers such as senior centers, will be released separately according to the safety and logistic needs of the populations served.").

pastor of the church who has admitted that some members of the congregation who attend services are not vaccinated. *Id.* Ms. Russell has also seen people not wearing masks during worship services, even though she has requested that they do so. *Id.* Plaintiff The Actors Temple Theatre also operates as a non-denominational Jewish synagogue, as well as a theater space. *Id.* ¶ 23. The worship services occurring in Plaintiffs' theaters are not subject to the Key to NYC vaccine mandate requirements of checking vaccination status and excluding persons who cannot prove that they are vaccinated.

Schools and community centers are also allowed to have unvaccinated patrons attend theatrical or comedy performances that they host and the Key to NYC mandate imposes no obligation on these groups to check vaccine status. Meanwhile, Plaintiffs are barred from allowing individuals who cannot produce proof of vaccination status from attending the same kinds of performances in similar spaces.

The Negative Impact of the Key to NYC Vaccine Mandate

Plaintiffs have already been harmed by the Key to NYC vaccine mandate and will continue to be harmed if the City is allowed to continue enforcing the Key to NYC vaccine mandate. Russell Decl. ¶¶ 26-32.

Many guests come to see theatrical productions and comedy shows from outside of the City or State. *Id.* ¶ 27. These guests struggle to comply with New York City's mandate and to show proof of vaccination either because they are not aware of the requirements or because of difficulty displaying their proof of vaccination, such as due to a dead cell phone. *Id.* ¶ 29. Since implementing the Key to NYC vaccine

mandate on August 17, 2021, Plaintiff Clementine Company has been required to process multiple refunds at every performance for individuals who are unable to produce proof of vaccine status, even though it posts prominently on its website and social media that customers need to provide proof of vaccination. *Id.* ¶ 28. Many tickets were purchased before Mayor de Blasio ordered this policy to take effect and other customers did not know about the policy. *Id.*

At every performance at Plaintiff Clementine Company's theaters since August 17, 2021, there have been angry outbursts from people who are not allowed to attend because they have either not been vaccinated or because they have forgotten, cannot find, or cannot display their proof of vaccination (such as if their phone has died). *Id.* ¶ 29. Several staff members have quit after being screamed at, physically threatened, or even spat on by customers upset about Plaintiffs' enforcement of the Key to NYC vaccine mandate. *Id.* ¶¶ 29-30.[3]

People have also attempted to sneak into Plaintiff Clementine Company's theaters using other people's vaccine cards. *Id.* ¶ 31. This has required Plaintiff to hire more staff to check ID cards, which has increased costs and slowed down the entry process for customers who can provide proof of vaccination. *Id.* ¶ 31. Enforcing the Key to NYC vaccine mandate has therefore caused financial hardship, both by

[3] Employees at businesses subject to the Key to NYC vaccine mandate have even been physically assaulted for enforcing the mandate. *See* Karen Matthews, *NYC Restaurant Host Attacked Over Vaccine Status Report*, Associated Press (Sept. 17, 2021), https://apnews.com/article/health-texas-new-york-new-york-city-coronavirus-pandemic-355b61677d4996c42c11b1f12dd8106c.

necessitating Plaintiffs to hire more staff and to process refunds for customers denied entry. *Id.* ¶ 32.

Theater goers who are not vaccinated are completely unable to attend a theatrical production in Plaintiffs' theaters—regardless of the medical, disability related, religious, or other reason for their lack of vaccination. Under the Key to NYC, "[i]f a customer is unable to show proof of vaccination due to a disability," Plaintiffs "must engage with them in a cooperative dialogue, or a good faith discussion, to see if a reasonable accommodation is possible."[4] But Plaintiffs are still required to turn these customers away, which engenders ill-will, subjects Plaintiffs to the risk of a complaint under the New York City Human Rights Law, and makes it less likely that these customers return after the restrictions are lifted. Russell Decl. ¶ 33.

Plaintiffs support and encourage vaccination and taking other steps to ensure that patrons are safe. For instance, Plaintiff Clementine Company requires all of its staff and performers to be fully vaccinated. *Id.* ¶ 34. It does not sell the front row of seats at its performances, to provide more distance between customers and performers. *Id.* ¶ 35. And it requires all customers to wear masks throughout each

[4] Interim Guidance for Small and Medium Scale Performing Arts & Entertainment During the COVID-19 Public Health Emergency, https://www.governor.ny.gov/sites/default/files/atoms/files/Small_and_Medium_Performing_Arts_Detailed_Guidance.pdf; Interim Guidance for Religious & Funeral Services During the COVID-19 Public Health Emergency, https://www.governor.ny.gov/sites/default/files/atoms/files/ReligiousandFuneralServicesMasterGuidance.pdf; Guidance for Businesses on Equitable Implementation of Key to NYC, https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/KeyToNYC_FactSheet-Business.pdf.

performance regardless of vaccination status. Indeed, Plaintiff Clementine Company has hired additional staff solely for the purpose of ensuring that all customers keep their masks on. *Id.* ¶ 36. On its websites and on social media, Plaintiff Clementine Company also encourages unvaccinated customers and potential customers to get the COVID-19 vaccine. *Id.*

The unequal treatment of theaters and comedy clubs over the past year and a half has created a stigma and a false impression that such activities are particularly unsafe. *Id.* ¶ 38. The new Key to NYC vaccine mandate perpetuates that stigma and creates a false impression that theaters are uniquely dangerous venues. *Id.* In fact, the opposite is true: theaters are uniquely safe indoor spaces. There have been few if any COVID-19 cases traced to theater audiences. *Id.* ¶ 39. In other countries, such as South Korea, theaters were opened before many other businesses because they were deemed to be safer than other places for people to congregate and more amenable to contact tracing efforts than other businesses. *Id.* Theater customers are already expected to remain in their seats and observe other codes of conduct during performances and so compliance with mask mandates has been extremely high during performances at Plaintiffs' theaters. *Id.* ¶ 39.

ARGUMENT

I. Standard of Review

In order to qualify for a preliminary injunction, Plaintiffs must show "(1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Agudath Israel*

of Am. v. Cuomo, 983 F.3d 620, 631 (2d Cir. 2020). Because Defendant's Executive Orders unjustifiably infringe on Plaintiff's right to free speech and equal treatment under the law, this Court must enjoin them.

II. Plaintiffs Are Likely to Succeed on the Merits

The Supreme Court's decision in *Diocese*, 141 S. Ct. 63, and its more recent cases regarding shutdown orders that infringe upon fundamental rights, show that ordinary standards of review and scrutiny apply to executive orders issued during a pandemic. Because Defendant's Executive Orders challenged in this lawsuit discriminate against expressive activity based on the type of speech and the identity of the speaker, they are content-based and therefore not entitled to deference, but instead subject to strict scrutiny. And under that demanding standard, the arbitrary distinction between live theater and other types of commercial and expressive activity imposed by the challenged Executive Orders cannot be justified.

A. Ordinary Standards of Review Apply to COVID-19 Restrictions

Under binding Supreme Court and Second Circuit precedent, ordinary standards of Constitutional review apply to claims like Plaintiffs', even in the midst of the COVID-19 pandemic. This is made clear by the Supreme Court's decision in *Diocese,* 141 S. Ct. 63. That case involved a challenge to Governor Cuomo's Executive Order that placed different percentage-of-occupancy limits on religious versus secular institutions.

Even though the orders were issued as a response to the COVID-19 pandemic, the Supreme Court did not apply a diminished or more deferential form of review.

Instead, it applied ordinary Free Exercise Clause principles to find that Governor Cuomo's order regarding churches was not "neutral" and was therefore subject to strict scrutiny. *Diocese*, 141 S. Ct. at 66. That decision confirms that ordinary constitutional scrutiny continues to apply during a pandemic.

That conclusion is further amplified by the concurrences of Justices Gorsuch and Kavanaugh in *Diocese*. Justice Gorsuch explained that the Supreme Court's case of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld a vaccine requirement, is best seen as an application of rational basis review, and that application of that standard is not "the same fate [that] should befall [a] textually explicit right." *Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring). Indeed, COVID-19 restrictions that burden First Amendment activity—like any restriction on First Amendment rights—must be "concerned with the risks various activities pose, not the reasons why people gather." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (citing *Diocese*, 141 S. Ct. at 66 (Gorsuch, J., concurring)). Likewise, Justice Kavanaugh explained that state and local authorities are entitled to some level of deference in an emergency, but not "when important questions of religious discrimination, racial discrimination*, free speech*, or the like are raised." *Diocese,* 141 S. Ct. at 74 (Kavanaugh, J., concurring) (emphasis added).

In *Diocese*, the Supreme Court granted an emergency injunction pending appeal against New York's unequal capacity limits on religious worship and remanded the case to the Second Circuit. On remand, the Second Circuit emphasized that in light of *Diocese*, ordinary standards of review applied and the court granted a

preliminary injunction. It explained that there is no support for the proposition that "courts should defer to the executive in the face of the COVID-19 pandemic" when fundamental rights are at stake. *Agudath Israel of Am.*, 983 F.3d at 635. **Error! Bookmark not defined.**The Second Circuit then concluded that New York's unequal capacity limits were likely unlawful. The "lack of general applicability" meant the capacity limits were subject to strict scrutiny. *Agudath Israel*, 983 F.3d at 632. The court noted that the State had "expressly single[d] out religion for less favorable treatment," while singling out certain "essential" businesses for more favorable treatment. *Id*. The unequal capacity limits were likely to fail strict scrutiny in part, the court held, because the process of determining what percentage capacity limits applied to houses of worship seemed arbitrary and lacked any "contemporaneous evidence." *Id*. at 635. The Second Circuit subsequently ordered a preliminary injunction against the hard capacity limits, *Agudath Israel*, 983 F.3d at 634–35, which was issued and made permanent by the Eastern District of New York on February 9, 2021. *Agudath Israel v. Cuomo*, No. 20-cv-04834, ECF No. 44 (making the injunction permanent).

The Supreme Court's subsequent decisions granting injunctions in COVID-19 related cases further highlight that ordinary levels of scrutiny apply and that the Constitution does not tolerate COVID restrictions that target speech. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Tandon*, 141 S. Ct. 1294. In *Tandon*, the Supreme Court invalidated a California policy that treated religious exercise less favorably than "comparable secular activities" such as "hair salons,

retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." 141 S. Ct. at 1297. Because of this unequal treatment, the Supreme Court applied strict scrutiny and enjoined the policy. Even the dissenters in *Tandon* agreed that the State must treat religious and secular activities equally to pass First Amendment scrutiny. *Id.* at 1298 (Kagan, J., dissenting) ("California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment."). The standard applied in *Diocese*, *South Bay,* and *Tandon* is clear: ordinary First Amendment principles apply to Plaintiffs' claims, and unequal COVID restrictions targeting only certain kinds of speech cannot stand.

B. Strict Scrutiny Applies to Plaintiffs' Free Speech Claim Because Mayor de Blasio's Policy Is Content-Based and Speaker-Based

Strict scrutiny applies to Mayor de Blasio's Executive Order because it is content- and speaker-based. Theatrical and comedic productions are unquestionably a constitutionally protected form of expression, as the court in the related case of *Clementine Theatre Co. v. Cuomo* observed in its request for supplemental briefing on Plaintiffs' motion for preliminary injunction in that case. No. 1:20-cv-08899-CM, Order, ECF No. 42, at 3–4; *see also, e.g.*, *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) ("[L]ive entertainment, such as musical and dramatic works fall within the First Amendment guarantee."); *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975); *Rogers v. Grimaldi*, 875 F.2d 994, 997 (2d Cir. 1989) ("Movies, plays, books, and songs are all indisputably works of artistic expression and deserve protection."). Live theater has existed since at least the time of ancient Greece and is regarded as

having contributed to the rise of Athenian Democracy.[5] It has also played an important part in American history,[6] frequently conveying important insights into American culture and society, such as with Arthur Miller's keen-eyed critique of McCarthyism in *The Crucible*. While modern technology has made viewing of recorded theatrical productions more widely accessible, there remain unique elements of live theater that cannot be replicated outside of the theater. Russell Decl. ¶ 5. Live performance has been described as the "essential artform of democracy" because of its ability to provide a unique shared artistic experience among strangers.[7] And in recent years, theatrical productions in New York City have increasingly used "immersion theater," which transforms the physical venue into an integral part of the production.[8] Russell Decl. ¶ 6. Moreover, for those who perform on stage, a live

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[5] Richard Halpern, *Theater and Democratic Thought: Arendt to Rancière*, 37 Critical Inquiry 545 (2011) ("Present-day scholars largely concur in the view that theater helped to educate the demos in deliberative reason, critical judgment, and civic values that undergirded political life.")

[6] *How American Theater Has Prevailed Through History*, Arcadia Publishing Blog, https://www.arcadiapublishing.com/navigation/community/arcadia-and-thp-blog/july-2018/how-american-theatre-has-prevailed-through-history (last visited Sept. 17, 2021).

[7] *Talk—Oskar Eustis: Why Theater is Essential to Democracy*, Stanford Live, https://live.stanford.edu/2020-digital-season/oskar-eustis-why-theater-essential-democracy (last visited Sept. 17, 2021).

[8] One of the most celebrated examples of this was the show *Natasha, Pierre & the Great Comet of 1812*, which originated off-Broadway in a theater that had been completely transformed into a Russian tearoom. When the show later moved to the Imperial Theater on Broadway, the auditorium was transformed to mimic that intimate setting. Michael Schulman, *Immersion Theatre, on Broadway*, New Yorker (Oct. 14, 2016), https://www.newyorker.com/magazine/2016/10/24/immersion-theatre-on-broadway; Jonathan Mandell, *What is immersive theater? The six elements that define it at its best*, New York Theater (Oct. 4, 2019),

performance for a theater of patrons is a uniquely powerful form of artistic expression. Russell Decl. ¶ 7.

Mayor de Blasio's Executive Orders discriminate against this venerated and vibrant type of expression by disfavoring theatrical productions while treating other types of speech (particularly religious expression) more favorably. This is made particularly clear by the fact that two of Plaintiffs' theaters host worship services. Russell Decl. ¶¶ 22-23. Under the Executive Orders, the church that rents the Orbach Theater is allowed to admit unvaccinated individuals for a worship service on Sunday morning, even though that service contains praise music, live congregational singing, and lax mask wearing. Russell Decl. ¶ 22. But two hours later, Plaintiffs must bar individuals who cannot produce proof of vaccination status from attending a matinee production of a play in that same theater—even though the play does not involve the audience singing and a mask mandate is strictly enforced. The only reasons the two events are treated differently under Defendant's Executive Order is the content of speech or the identity of the speaker. The orders are therefore constitutionally suspect.

The Supreme Court has repeatedly emphasized that federal, state, and local governments have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Thus, laws that "target speech based on its communicative content . . .

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https://newyorktheater.me/2019/10/04/what-is-immersive-theater-the-six-elements-that-define-it-at-its-best/.

are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). This is true even if the policy is advanced with the best of intentions, because "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based" law. *Id.* at 167.

In *Reed*, the Supreme Court invalidated a sign ordinance that provided different rules for different types of expression. Ideological messages were treated more favorably than messages regarding political candidates, which were treated more favorably than signs announcing events like worship services. *Id.* at 168–70. That discriminatory framework, the Court concluded, was unconstitutional. *Id.* More recently, the Supreme Court held that a law that allowed robocalls for the purpose of collecting a government debt, but not for political purposes, was content-based. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020). The Court explained that the law must be evaluated under strict scrutiny because enforcement of the law both turned on the message that was being expressed and "favor[ed] some speakers over others" in a manner that "reflects a content preference." *Id.* at 2347 (quoting *Reed*, 576 U.S. at 170); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (invalidating an ordinance that prohibited the distribution of commercial flyers and handbills while allowing newspapers and magazines to be displayed).

Mayor de Blasio's Executive Orders are similarly content-based. To know what vaccine requirements apply to expressive activity, officials enforcing the Executive

Orders would need to consider what kind of speech was occurring, where it was occurring, and who was speaking. The Key to NYC mandate does not apply to venues hosting a wide variety of religious, commercial, and expressive activities, but live theater or comedy performances—even those held in the same space as religious services—are subject to the mandate. For instance, an unvaccinated individual could attend a worship service at the Times Square Church with a 1,500-seat capacity, but anyone wishing to view a theatrical performance in a small 199-person theater (with state-of-the-art air filtration equipment) must produce proof of vaccination status. Individuals unable to produce proof of vaccination status could attend a Church's nativity play, but not a performance of Tony Kushner's celebrated *Angels in America* at one of Plaintiffs' theaters. In other words, the City discriminates against live theater and comedy in favor of religious worship. These restrictions are content-based, just as "banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Reed*, 576 U.S. at 169.[9]

The Key to NYC Executive Orders' hostility towards theaters and comedy clubs is further demonstrated by the arbitrary favorable treatment extended to schools and community centers. For instance, parents without proof of vaccination are allowed to

[9] Mayor de Blasio's restrictions may also be viewpoint based because they favor religious speech and, under Supreme Court precedent, religious speech qualifies as a viewpoint. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995)*; see also Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2607 (2020) (Alito, J., dissenting from denial of application for injunctive relief) (arguing that Nevada executive orders engaged in viewpoint discrimination by favoring "casino shows over the religious expression in houses of worship").

attend an elementary school production of Lion King Jr., but those same individuals are barred from attending The Lion King on Broadway, merely because of the location of the performance and the identity of the performers (as actors at a theater rather than students at a school). This speaker-based discrimination shows that Mayor de Blasio has unfairly stigmatized theaters and comedy clubs while allowing the same types of performances to take place in favored venues.

The disfavored treatment of theaters and comedy clubs also cannot be explained—or exempted from strict scrutiny—by concerns over any supposed dangers posed by the physical venue of a theater or by occupancy calculations. *See Agudath Israel*, 983 F.3d at 634 ("It bears noting, however, that the Building Code's occupancy calculations do not refer to 'houses of worship,' but are instead based on neutral considerations like the type of seating used and the 'function of [the] space.'"). Many former theaters in New York City are now owned and operated by churches or other religious organizations.[10] They were built as theaters and are similar to Plaintiffs' theaters in physical form and intended function. The only salient difference is the content of the speech and the speaker.

The unequal treatment of protected First Amendment activity is even starker here than the unequal treatment enjoined by the Supreme Court and the Second Circuit. Not only do the Executive Orders discriminate among similar activities in

[10]For instance, the Mark Hellinger Theater on Times Square now houses the Times Square Church. History of Times Square Church, https://tsc.nyc/history// (last visited Sept. 17, 2021); United Palace, https://www.unitedpalace.org/ (last visited Sept. 17, 2021).

similar venues, but they even single out certain kinds of expressive activity in the exact same venue for favorable treatment. As a result, strict scrutiny applies.

C. Strict Scrutiny Also Applies to Plaintiffs' Equal Protection Claim

Under the Equal Protection Clause, there are two distinct pathways that require a court to apply heightened judicial scrutiny. The first is the well-trodden framework involving classifications based on "presumptively invidious" characteristics such as race or sex. *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982). That is not at issue here. But the Supreme Court has also laid out an equally clear route: classifications that "impinge upon the exercise of a 'fundamental right'" are also "presumptively invidious" and subject to strict scrutiny. *Id.* Even if an "argument sounds more in" due process or the First Amendment, there is "no reason why [such a] claim cannot properly be considered under the Equal Protection Clause." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 354 n.23 (4th Cir. 1994); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("a [statutory] classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right"). As the Supreme Court has made clear, "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Mosley*, 408 U.S. at 101.

It is this second pathway that applies to Plaintiffs' Equal Protection claim, as the Court has noted in Plaintiffs' related case. *See Clementine Co., et al. v. Cuomo*, No. 1:20-cv-08899-CM, ECF No. 60 at 2 ("The plaintiffs are engaged (or would be, if they were open) in expressive conduct that is protected by the First Amendment's

guarantee of free speech. It is not activity that the State is ordinarily privileged to regulate, or to shut down. As a result, Defendants may need to meet a different and higher standard of justification, even in the face of a compelling state interest."). As already discussed above, the Mayor's Executive Orders infringe on Plaintiffs' First Amendment rights and do so in a discriminatory and unequal fashion. Accordingly, strict scrutiny applies under the Equal Protection Clause.

D. Defendant's Executive Orders Cannot Survive Strict Scrutiny

When held to the standard of strict scrutiny, Defendant cannot justify his discriminatory treatment of theaters and comedy clubs. Under strict scrutiny, a law must be "narrowly tailored" to meet a "compelling governmental interest." *Reed*, 576 U.S. at 171 (applying strict scrutiny in the free speech context); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 312 (2013) (applying strict scrutiny in the equal protection context). Under both the Equal Protection and Free Speech Clauses, strict scrutiny "is a searching examination, and it is the government that bears the burden to prove" that its laws are truly necessary. *Fisher*, 570 U.S. at 310. The government must prove not only that it has a compelling interest, but also that "the means chosen" to achieve its compelling interest "are narrowly tailored to that goal." *Id.* at 311. It "receives no deference" in the process. *Id.*

The City has a compelling interest in protecting public health by preventing the spread of an infectious disease. But this interest stated at "a high level of generality" is insufficient to justify the specific Executive Orders at issue in this case. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021). Rather,

"the First Amendment demands a more precise analysis." *Id.* The City must offer a compelling justification for its failure to extend the same treatment to theaters and comedy clubs that it extends to houses of worship, schools, or community centers. The City does not have a compelling interest in support of this unequal treatment.

But even assuming the Executive Orders serve a compelling interest, it is not narrowly tailored. As the Second Circuit explained in *Agudath Israel*, the Government "must show that it 'seriously undertook to address the problem with less intrusive tools readily available to it'" and that "imposing lesser burdens . . . 'would fail to achieve the government's interests, not simply that the chosen route was easier.'" *Agudath Israel*, 983 F.3d at 633 (quoting *McCullen v. Coakley*, 573 U.S. 464, 494–95 (2014)).

The Mayor's Orders permit on more favorable terms a wide swath of other activities that pose no different risk than live theater performances—such as attending church services or going to a theatrical performance at a school or community center. The unequal mandate is "'far more severe than has been shown to be required to prevent the spread of the virus at [Plaintiffs' performances],' particularly because the [Mayor] has pointed to no evidence of any outbreaks related to [Plaintiffs' businesses]." *Agudath Israel*, 983 F.3d at 633 (quoting *Diocese*, 141 S. Ct. at 67). The imprecise and inconsistent nature of the City's restrictions significantly "diminish[es] the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). The Executive Orders here are, at best, based "on broad generalizations made by public-health

officials about inherent features of" theatrical performances, rather than based on evidence showing that theaters and comedy clubs are more dangerous than houses of worship or any of the other businesses that are being treated more favorably. *Agudath Israel*, 983 F.3d at 633–34.

There is no reason the Mayor could not treat theaters similarly to how he treats houses of worship, schools, and community centers. That could include continuing to require steps to keep patrons safe from COVID-19, such as requiring them to wear masks and requiring theater owners (like churches) to take other measures such as improving the air circulation system in the building where needed to reduce the risk of spread—measures that Plaintiffs in this case have already instituted. Russell Decl. ¶¶ 9-16, 34-37. But there is simply no justification for treating live theater significantly worse than comparable activities. There is no conceivable public health justification for allowing people without proof of vaccination to attend a Church service or a school play, but to impose strict limitations on attendance at theaters or comedy clubs. *See Clementine Co., et al., v. Cuomo*, No. 1:20-cv-08899-CM, ECF No. 60 at 2 ("If strict scrutiny must be applied, then I am having a hard time figuring out how a regulation passes muster."). There is no reason that theatrical productions should not be permitted on equal footing, and the Constitution demands no less.

Nor can Mayor de Blasio's disfavored treatment of artistic expression be justified by the Constitution's protection of the free exercise of religion. It is true that the Mayor's favorable treatment of churches may be justified or even required by the Free Exercise Clause. *Diocese*, 141 S. Ct. at 67–68. But that Clause does not justify

discrimination against other types of expression. Instead, the Mayor must explain why he cannot extend the same treatment to other First Amendment protected activities. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021). If he cannot justify disfavored treatment of artistic expression, then the heightened protection extended to religious expression should extend equally to other types of expression. After all, "respecting some First Amendment rights is not a shield for violating others." *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2607–08 (Alito, J., dissenting from denial of application for injunctive relief).

III. Plaintiffs Will Suffer Irreparable Harm Without an Injunction

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013). Accordingly, "[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342, 349 (2d Cir. 2003). That is the case here, because compliance with the Key to NYC mandate is required before Plaintiffs can speak through theatrical productions, and the mandate limits who can listen to Plaintiffs' speech.

Plaintiffs suffer from other harm that is also irreparable. Plaintiffs face the imminent risk of financial penalties and even criminal liability if they allow even a single unvaccinated customer into a performance, which is very possible given that individuals are regularly attempting to seek admission using someone else's

vaccination card. Russell Decl. ¶ 31. *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) ("The fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution."). And the Mayor's discriminatory treatment of theaters and comedy clubs has created the false impression that such performances are less important and more dangerous to the public health than other activities, such as going to a church service. Russell Decl. ¶ 41. This stigma will continue in the absence of an injunction and have a negative impact on Plaintiffs' business and expressive activities.

IV. The Remaining Preliminary Injunction Factors Also Favor an Injunction

The balance of hardships and public interest also weigh heavily in Plaintiffs' favor. An allegation of a violation of a fundamental right—such as freedom of expression or equal protection—tips the balance sharply in favor of the plaintiff. *See Agudath Israel,* 983 F.3d at 637 ("No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal."). Moreover, "the Government does not have an interest in the enforcement of an unconstitutional law," and "securing First Amendment Rights is in the public interest." *Walsh*, 733 F.3d at 488 (quoting *Am. Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)).

In this case, an injunction in favor of Plaintiffs would allow them to operate on equal terms with other comparable activities such as performances at schools, community centers, and houses of worship. In light of the extensive precautions that Plaintiffs have taken to protect public health, an injunction is unlikely to have any

public health impact. Because the Mayor cannot "demonstrate[] that 'public health would be imperiled if less restrictive measures were imposed,'" the public interest supports an injunction against the Mayor's disfavored treatment of Plaintiffs. *Agudath Israel*, 983 F.3d at 637 (quoting *Diocese*, 141 S. Ct. at 68). Accordingly, an injunction is appropriate to halt the discriminatory burden on Plaintiffs' First Amendment rights.

CONCLUSION

The Court should grant Plaintiffs' request for a preliminary injunction.

DATED: September 21, 2021.

Respectfully submitted,

s/ James G. Mermigis

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**Pro Hac Vice Pending*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I also sent a copy of this filing to Ms. Aimee Lulich, counsel for Mayor de Blasio in the related case of *Clementine Theater Co. v. Cuomo*, No. 1:20-cv-08899-CM via email at alulich@law.nyc.gov.

s/ James G. Mermigis
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Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLEMENTINE COMPANY, LLC d/b/a THE THEATER CENTER; WEST END ARTISTS COMPANY d/b/a THE ACTORS TEMPLE THEATRE; SOHO PLAYHOUSE INC. d/b/a SOHO PLAYHOUSE; and CARAL LTD. d/b/a BROADWAY COMEDY CLUB Plaintiffs, -against- BILL DE BLASIO, in his official capacity as Mayor of New York City, Defendants.	No. 1:21-cv-07779-KPF **DECLARATION OF DANIEL ORTNER IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Oral Argument Requested

Daniel Ortner, on the date noted below and pursuant to 28 U.S.C. § 1746, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

1. I am an individual citizen of the United States and live in Rocklin, California.

2. I am one of the attorneys representing the Plaintiffs in this case and in the related case of *Clementine Co. v. Cuomo*, No. 1:20-cv-08899-CM.

3. On August 16, 2021, I e-mailed Mr. Aimee Lulich, counsel for Defendant Mayor Bill de Blasio in the *Cuomo* case, and asked her several questions regarding her client's position on the language of the Key to NYC vaccine mandate executive order which had been issued that day.

4. On Friday August 20, 2021, Ms. Lulich responded and provided her client's position.

5. A copy of that email exchange is attached as Exhibit 1.

6. On September 8, 2021, I emailed Mr. Lulich again to ascertain whether Defendant would oppose if Plaintiffs attempted to amend the complaint in the *Cuomo* case. I attached a copy of a proposed amended complaint as well as a redline copy comparing the new proposed complaint to an earlier proposed amended complaint that Plaintiffs filed in the *Cuomo* case in May 2021.

7. On September 10, 2021, Ms. Lulich responded that Defendant believed that "to the extent plaintiffs wish to challenge the Key to NYC program, that challenge should be a separate lawsuit." In response to a follow up e-mail, Ms. Lulich reiterated that if Plaintiffs were to move to amend in *Clementine Co. v. Cuomo*, No. 1:20-cv-08899-CM., Defendant would oppose that motion.

8. A copy of that email exchange is attached as Exhibit 2.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: September 21, 2021

DANIEL ORTNER

Exhibit 1

Thank you for getting back to me with these details.

We will discuss and get back to you with how we would like to proceed if we are going to raise new claims against this vaccine requirement.

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From: Lulich, Aimee (Law) <alulich@law.nyc.gov>
Sent: Friday, August 20, 2021 12:30:12 PM
To: Daniel M. Ortner <DOrtner@pacificlegal.org>
Cc: Aimee Lulich <alulich.nyclaw@gmail.com>; Glenn E. Roper <GERoper@pacificlegal.org>; mermigislaw@gmail.com <mermigislaw@gmail.com>; Riggs, Scali (Law) <sriggs@law.nyc.gov>; Jim M. Manley <JManley@pacificlegal.org>
Subject: Re: Contact Information, Clementine Company v. Cuomo, et. al.

Good afternoon,

Thanks for your patience on this. I have some answers to your questions. First, I know one of your client theaters holds religious services on certain days. Religious services are exempt from the order even if they are held in a theater. The "regardless of the activity" language is meant to cover the various activities that employees and customers might do in an entertainment venue that are not identified as exempt in the EO.

Guidance on schools and school programming, and various exempt community centers such as senior centers, will be released separately according to the safety and logistic needs of the populations served. To the extent organizations have questions about specific circumstances that arise, and that are not covered by the FAQs and other guidance on the Keys to NYC website, they can call 311 or the number to small business services provided on the website.

From: Daniel M. Ortner <DOrtner@pacificlegal.org>
Sent: Monday, August 16, 2021 5:49 PM
To: Lulich, Aimee (Law) <alulich@law.nyc.gov>
Cc: Aimee Lulich <alulich.nyclaw@gmail.com>; Glenn E. Roper <GERoper@pacificlegal.org>; mermigislaw@gmail.com <mermigislaw@gmail.com>; Riggs, Scali (Law) <sriggs@law.nyc.gov>; Jim M. Manley <JManley@pacificlegal.org>
Subject: [EXTERNAL] RE: Contact Information, Clementine Company v. Cuomo, et. al.

Aimee,

We are fine with a two week extension for your response to the amended complaint.

After looking at the new Executive Order, we had a few follow up questions to try to clear up some ambiguities. Please let us know your client's position on these questions

1. Is a house of worship holding religious services inside of a theater covered by the new order? There is an ambiguity because the definition of "covered premises" appears to at one point define the term based on the function (so that houses of worship would be exempt), and at other times define it based on location "regardless of the activity at such locations" (so that houses of worship would be covered).
2. What if a theater company holds a performance in a house of worship rather than the other way around?
3. Schools and Community Centers are not considered "covered entities." Does that mean that a theatrical production put on by a school or community center would not be subject to the mandate? And does it make a difference if the theatrical production is put on at the school's gymnasium or in a nearby theater that is rented for this purpose?

Thank you,

Daniel M. Ortner | Attorney
Pacific Legal Foundation
930 G Street | Sacramento, CA 95814
916.419.7111

From: Lulich, Aimee (Law) <alulich@law.nyc.gov>
Sent: Monday, August 16, 2021 12:06 PM
To: Daniel M. Ortner <DOrtner@pacificlegal.org>
Cc: Aimee Lulich <alulich.nyclaw@gmail.com>; Glenn E. Roper <GERoper@pacificlegal.org>; mermigislaw@gmail.com; Riggs, Scali (Law) <sriggs@law.nyc.gov>; Jim M. Manley <JManley@pacificlegal.org>
Subject: RE: Contact Information, Clementine Company v. Cuomo, et. al.

Hi everyone,

First, the new Executive Order is available: https://www1.nyc.gov/office-of-the-mayor/news/225-001/emergency-executive-order-225. It was just signed and issued today.

Second, our deadline to answer or move to dismiss the current amended complaint is Wednesday. We are still working with the clients to determine the best course of action on that, and so we intend to ask for an additional 2 weeks to respond. It might also be helpful to have that time for you to review the new EO and decide whether you would want to amend again. Can you please let us know plaintiffs' position on a 2-week adjournment of the response to the amended complaint by tomorrow?

Thanks,
Aimee Lulich

From: Daniel M. Ortner <DOrtner@pacificlegal.org>
Sent: Monday, August 9, 2021 11:54 AM
To: Lulich, Aimee (Law) <alulich@law.nyc.gov>
Cc: Aimee Lulich <alulich.nyclaw@gmail.com>; Glenn E. Roper <GERoper@pacificlegal.org>; mermigislaw@gmail.com; Riggs, Scali (Law) <sriggs@law.nyc.gov>; Jim M. Manley <JManley@pacificlegal.org>
Subject: [EXTERNAL] Re: Contact Information, Clementine Company v. Cuomo, et. al.

Exhibit 2

Daniel M. Ortner

From: Lulich, Aimee (Law) <alulich@law.nyc.gov>
Sent: Friday, September 10, 2021 12:07 PM
To: Daniel M. Ortner
Cc: Aimee Lulich; Glenn E. Roper; mermigislaw@gmail.com; Riggs, Scali (Law); Jim M. Manley
Subject: Re: Contact Information, Clementine Company v. Cuomo, et. al.

Yes, we will oppose

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From: Daniel M. Ortner <DOrtner@pacificlegal.org>
Sent: Friday, September 10, 2021 3:05:28 PM
To: Lulich, Aimee (Law) <alulich@law.nyc.gov>
Cc: Aimee Lulich <alulich.nyclaw@gmail.com>; Glenn E. Roper <GERoper@pacificlegal.org>; mermigislaw@gmail.com <mermigislaw@gmail.com>; Riggs, Scali (Law) <sriggs@law.nyc.gov>; Jim M. Manley <JManley@pacificlegal.org>
Subject: [EXTERNAL] RE: Contact Information, Clementine Company v. Cuomo, et. al.

Thanks Aimee,

Just to make sure, does that mean that you will oppose a motion to amend the complaint?

Daniel M. Ortner | Attorney
Pacific Legal Foundation
930 G Street | Sacramento, CA 95814
916.419.7111

From: Lulich, Aimee (Law) <alulich@law.nyc.gov>
Sent: Friday, September 10, 2021 11:44 AM
To: Daniel M. Ortner <DOrtner@pacificlegal.org>
Cc: Aimee Lulich <alulich.nyclaw@gmail.com>; Glenn E. Roper <GERoper@pacificlegal.org>; mermigislaw@gmail.com; Riggs, Scali (Law) <sriggs@law.nyc.gov>; Jim M. Manley <JManley@pacificlegal.org>
Subject: Re: Contact Information, Clementine Company v. Cuomo, et. al.

Yes, I apologize for the delay. I have been conferring with my office and clients, and we still believe that, to the extent plaintiffs wish to challenge the Key to NYC program, that challenge should be a separate lawsuit.

From: Daniel M. Ortner <DOrtner@pacificlegal.org>
Sent: Friday, September 10, 2021 12:44 PM
To: Lulich, Aimee (Law) <alulich@law.nyc.gov>

Cc: Aimee Lulich <alulich.nyclaw@gmail.com>; Glenn E. Roper <GERoper@pacificlegal.org>; mermigislaw@gmail.com <mermigislaw@gmail.com>; Riggs, Scali (Law) <sriggs@law.nyc.gov>; Jim M. Manley <JManley@pacificlegal.org>
Subject: [EXTERNAL] RE: Contact Information, Clementine Company v. Cuomo, et. al.

Aimee,

I wanted to follow up and see if you had seen my email and find out if you have a sense for when you might have an answer regarding whether you will oppose a motion to amend.

Thank you,

Daniel M. Ortner | Attorney
Pacific Legal Foundation
930 G Street | Sacramento, CA 95814
916.419.7111

From: Daniel M. Ortner
Sent: Wednesday, September 8, 2021 10:36 AM
To: 'Lulich, Aimee (Law)' <alulich@law.nyc.gov>
Cc: 'Aimee Lulich' <alulich.nyclaw@gmail.com>; Glenn E. Roper <GERoper@pacificlegal.org>; 'mermigislaw@gmail.com' <mermigislaw@gmail.com>; 'Riggs, Scali (Law)' <sriggs@law.nyc.gov>; Jim M. Manley <JManley@pacificlegal.org>
Subject: RE: Contact Information, Clementine Company v. Cuomo, et. al.

Aimee,

Hope you are doing well. As I mentioned previously, we are looking to amend our complaint to add claims regarding the Key to NYC vaccine mandate which we believe discriminates our clients by subjecting them to a mandate that does not apply to similarly situated entities such as houses of worship, community centers, and schools. I am attaching our proposed amended complaint both as a clean copy and as a red line compared to the proposed Amended Complaint that we filed with the Court in May 2021. Could you please let us know as soon as you can what your client's position will be on whether he will oppose our request to amend?

I know that you earlier mentioned that you thought that these claims should be brought as a separate action. If that is still your position could you please confirm that for me specifically?

Daniel M. Ortner | Attorney
Pacific Legal Foundation
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916.419.7112

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE CLEMENTINE COMPANY, LLC, et al., Plaintiffs, -against- BILL DE BLASIO, in his official capacity as Mayor of New York City, Defendant.	No. 1:21-cv-07779-KPF **DECLARATION OF CATHERINE RUSSELL IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Catherine Russell, on the date noted below and pursuant to 28 U.S.C. § 1746, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

1. I am an individual citizen of the United States and live in New York City.

2. I am the General Manager and Owner of Plaintiff The Clementine Company, LLC d/b/a The Theater Center. I make this declaration in support of Plaintiffs' application for a preliminary injunction restraining Defendant, and all those acting in concert with him, from enforcing the continued unequal treatment against theaters.

3. The Theater Center consists of two theaters: The Jerry Orbach Theater and the Anne L. Bernstein Theater. Each theater has 199 seats.

4. Small theaters like mine play a vital role in the arts scene in New York City. Many important and celebrated productions such as *Hamilton*, *Avenue Q*, *Dear Evan Hansen*, *The Band's Visit*, and *Rent* had their debuts in smaller off-Broadway theaters. Every Pulitzer Prize winning play over the past 15 years originated off-Broadway. Small theaters also host many innovative and avant-garde productions.

5. Although some theater companies attempted to live stream or broadcast productions in response to COVID-19, there is something unique and special about live theater that cannot be replicated through the internet or on a TV screen. Live theater has the power to make people feel something and it inherently connects with people in some way.

6. In addition, many theaters rely on immersive theater which involves the audience in different ways as part of the theatrical production. This immersive experience cannot be replicated online.

7. I love performing on stage. I have played the role of Margaret Thorne Brent in the play *Perfect Crime* since its opening in April 1987 (only missing four performances), and I am proud to be in the Guinness Book of World Records for the most theatre performances in the same role. For me, my job is a way to connect with an audience and make them experience and feel something special when they come to the theater.

8. My small venue theaters were fully shut down by Defendant from March 16, 2020 to April 2, 2021. Each day of the shutdown inflicted devastating

economic loss and denied me the ability to engage in expressive activity that is fundamentally important to me and my patrons.

9. In preparation for reopening, I took extensive safety precautions to minimize the risk that our patrons would be exposed to COVID-19.

10. I mandated that all staff and actors be tested for COVID-19 according to New York guidelines, as well as vaccinated.

11. I required all patrons, staff, and actors to have a temperature check before entering the premises.

12. I required that masks be worn throughout the theater regardless of vaccination status.

13. I implemented seating policies that facilitate spacing groups and ensuring that they are always a minimum of six feet apart.

14. I installed plexiglass barricades between employees and patrons.

15. I placed hand sanitizer stations throughout the theater.

16. I installed air filters and air scrubbers to disinfect and improve air flow.

17. Even after being allowed to reopen, my theaters were subject to unequal capacity limits from April 2, 2021 to May 19, 2021, and subject to disparities in health and safety requirements on social distancing from May 19, 2021 to June 16, 2021.

18. After less than one month when theaters were not subject to unequal COVID-19 restrictions, Mayor de Blasio announced that proof of vaccination would be mandatory for patrons and staff at some indoor businesses, including theaters starting on August 17, 2021.

19. Starting on September 13, 2021, I face fines of hundreds of thousands of dollars if I do not check the vaccination status of patrons at even a single performance. A failure to comply may also be prosecuted as a criminal misdemeanor.

20. My understanding is that the new Key to NYC vaccine mandate does not apply to worship services, schools, or community centers.

21. Some worship services in New York City meet in buildings that are used or were once used as theaters. But theatrical performances are subject to more stringent restrictions than worship services, even if they occur in the same or a nearly identical space. This does not make sense to me.

22. The different treatment of theaters and houses of worship is particularly nonsensical in my case. On Sunday mornings, Plaintiff Clementine Company's Orbach Theater is rented by a church, which conducts worship services. I have spoken to the pastor of the church who has admitted that some members of the congregation are not vaccinated. I have also seen people not wearing masks during worship services, even though I have requested that they do so.

23. Another Plaintiff, The Actors Temple Theatre, also operates as a non-denominational Jewish synagogue, as well as a theater space.

24. My understanding is that schools and community centers are also allowed to have unvaccinated patrons attend theatrical or comedy performances that they host.

25. Mayor De Blasio has offered no rationale for why small venue theaters like mine are subjected to more onerous restrictions than community centers, schools, and worship services.

26. I have already been adversely impacted by the Key to NYC vaccine mandate and will continue to be harmed if the City is allowed to enforce the Key to NYC vaccine mandate.

27. Many guests come to see theatrical productions and comedy shows from outside of the City or State. These guests struggle to comply with New York's mandate and to show proof of vaccination.

28. Since implementing the Key to NYC vaccine mandate on August 17, 2021, my theaters have been required to process multiple refunds at every performance for individuals who are unable to produce proof of vaccination, even though my theaters post prominently on their website and social media that customers need to provide proof of vaccination. Many tickets were purchased before Mayor de Blasio ordered this policy to take effect and others did not know about the policy.

29. At every performance at my theaters since August 17, 2021, there have been angry outbursts from people who are not allowed to attend because they have either not been vaccinated or because they have forgotten, cannot find, or cannot display their proof of vaccination (such as if their phone has died).

30. Several staff members have quit after being screamed at, physically threatened, or even spat on by customers upset about our enforcement of the Key to NYC vaccine mandate.

31. People have also attempted to sneak into my theaters using other people's vaccine cards. This has required me to hire more staff to check ID cards, which has slowed down the entry process for customers who can provide proof of vaccination.

32. Enforcing the Key to NYC vaccine mandate has already caused financial hardship, both by necessitating us to hire more staff and to process refunds for customers denied entry.

33. Theater goers who are not vaccinated are completely unable to attend a theatrical production in Plaintiffs' theaters—regardless of medical, disability-related, religious, or other reason for their lack of vaccination. We are required to turn them away even though doing so engenders ill-will, subjects us to the risk of a complaint under the New York City Human Rights Law, and makes it less likely that these customers return after the restrictions are lifted.

34. I support vaccination and taking other steps to ensure that patrons are safe. For instance, we require all of our staff and performers to be fully vaccinated.

35. We also do not currently sell the front row of seats to provide more distance between customers and performers.

36. We require all customers to wear masks throughout the performance regardless of vaccination status. Indeed, we have hired additional staff solely for the

purpose of ensuring that all customers keep their masks on. On our websites and social media we encourage unvaccinated customers and potential customers to get the COVID-19 vaccine.

37. Based on my conversations with the owners, I know that the other Plaintiff theaters and comedy clubs have employed similar safety precautions.

38. The unequal treatment of theaters and comedy clubs over the past year and a half has created a stigma and a false impression that such activities are particularly unsafe. The new Key to NYC vaccine mandate perpetuates that stigma and creates a false impression that theaters are uniquely dangerous venues.

39. In fact, I believe that theaters are uniquely safe indoor spaces. There have been few if any COVID-19 cases traced to theater audiences. In other countries, such as South Korea, theaters were opened before many other businesses because they were deemed to be safer than other places for people to congregate and more amendable to contact tracing efforts than other businesses. Theater customers are already expected to remain in their seats and observe other codes of conduct during performances and so compliance with mask mandates has been extremely high at my theaters.

40. New York has long been seen as a mecca for live theater. It is frustrating to see how live theater has consistently been treated worse than other businesses and to comparable venues like community centers, schools, and houses of worship. From being told that my business was “non-essential” to continually being forgotten and treated as second-class, the past year has been very dispiriting. As an actress who

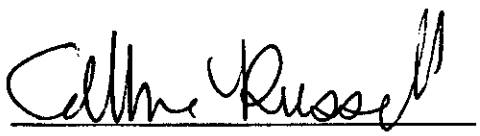
prides herself in rarely missing even a single performance, being unable to go on stage for more than a year was also frustrating.

41. There is something valuable and essential about the arts. People come to the theatre to feel something and to let out emotion that they would not feel while looking at a TV screen or buying a slice of pizza. People also come to the theater for connection and a shared experience with others. I hate to be required to deny unvaccinated individuals access to that experience when everyone in the lobby and auditorium is masked throughout the performance.

42. The unequal treatment of theaters has created a stigma about live theaters, and I fear that people will be unwilling to return to the theater because they have been erroneously told that it is less safe than other comparable activities.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: September 21, 2021



CATHERINE RUSSELL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLEMENTINE COMPANY, LLC d/b/a THE THEATER CENTER; WEST END ARTISTS COMPANY d/b/a THE ACTORS TEMPLE THEATRE; SOHO PLAYHOUSE INC. d/b/a SOHO PLAYHOUSE; and CARAL LTD. d/b/a BROADWAY COMEDY CLUB

Plaintiffs,

-against-

BILL DE BLASIO, in his official capacity as Mayor of New York City,

Defendant.

No. 1:21-cv-07779-KPF

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on Plaintiffs' application for a preliminary injunction prohibiting Defendant from enforcing the Key to NYC Vaccine Mandate (Executive Orders 225, 228, 237, 239).

IT IS ORDERED that Plaintiffs' application for a preliminary injunction is GRANTED.

It is FURTHER ORDERED that Defendants are enjoined from enforcing the Key to NYC Vaccine Mandate against Plaintiffs and similarly situated theaters and comedy clubs in New York City.

It is FURTHER ORDERED that Plaintiffs will not be required to pay a bond.

IT IS SO ORDERED

DATED: _____.

_____
KATHERINE POLK FAILLA
U.S. District Court Judge