UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HOGANWILLIG, PLLC,

Plaintiff,

Civil Case No. 20-cv-00577

v.

LETITIA A. JAMES, in her official capacity as the Attorney General for the State of New York, and

ANDREW M. CUOMO, in his official capacity as the Governor of the State of New York,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in support of Plaintiff HOGANWILLIG, PLLC's ("Plaintiff") Motion for Reconsideration of this Court's December 3, 2020 Text Order (Dkt. No. 26) granting Defendants' LETITIA A. JAMES and ANDREW M. CUOMO ("Defendants") Motion to Dismiss the Amended Complaint (Dkt. No. 7) pursuant to F.R.C.P. 12(b)(1) and 12(b)(6), and 28 U.S.C. § 1367(c)(3). Plaintiff asserts that reconsideration of the December 3, 2020 Text Order is appropriate, as the Court, respectfully, misapprehended and/or misapplied applicable law and did not consider the dual doctrines of voluntary cessation and capable of repetition yet evading review, which are relevant and compelling exceptions to the mootness doctrine, in dismissing Plaintiff's Amended Complaint, as well as new evidence and changing circumstances arising after the Motion to Dismiss was fully briefed that should impact this Court's decision.

STATEMENT OF FACTS

Plaintiff refers this Court to the Amended Complaint filed June 8, 2020, and the Exhibits annexed thereto (Dkt. No. 7), which Plaintiff expressly incorporates herein by reference, as well as the accompanying Declaration of Corey J. Hogan, Esq., dated December 31, 2020.

STANDARD OF REVIEW

"In deciding whether to grant a [Rule] 60(b) Motion, the Court must strike 'a balance between serving the ends of justice and preserving the finality of judgments.'" *Berry v. Kerik*, 2002 U.S. Dist. LEXIS 26187 at *1 (S.D.N.Y. Nov. 27, 2002) (citing *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986). A Rule 60(b) Motion for Reconsideration may be granted under the following circumstances: an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *New York v. Solvent Chemical Co., Inc.*, 235 F. Supp. 2d 238, at *1 (W.D.N.Y. Dec. 3, 2002).

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Courts have long recognized that defendants in myriad cases have voluntarily ceased offensive conduct to evade judicial review. *See infra.* In such cases, the Courts must assess whether the offensive conduct has indeed permanently ceased, or if it is capable of repetition. *Infra.* Even in instances in which the situation was mooted by happenstance, courts will allow cases to continue if the situation is likely to repeat in other contexts. The best known application of this was in *Roe v Wade* (*see infra*), in which the Court determined that the fact Plaintiff was no longer pregnant by the time the matter was before the Court did not render the matter moot.

Rule 60(b) provides an equitable remedy that "preserves a balance between serving the ends of justice and ensuring that litigation reaches an end within a finite period of time." *NEM Re Receivables, LLC v Fortress Re, Inc.*, 187 F Supp. 3d 390, 395 (S.D.N.Y. 2016). P*addington Partners v. Bouchard*, 34 F.3d 1132, 1144 (2d Cir. 1994) (internal citations omitted). As an equitable remedy, Rule 60(b) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice [and] it constitutes a grand reservoir of equitable power to do justice in a particular case." *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986).

The Second Circuit has noted that relief under Rule 60(b)(6) is proper where there are extraordinary circumstances justifying such relief, where the judgment entered may work an extreme and undue hardship upon the moving party, and where the grounds for relief are not within the scope of Rule 60(b). *Georgilis v. Corning Fed. Credit Union* (*In re Am. Made Tires Inc.*), 2016 Bankr. LEXIS 2278, at *30 (Bankr. E.D.N.Y. June 14, 2016); *see Nemaizer*, 793 F.2d at 63.

Moreover, even where the particularized grounds for reconsideration under Rule 60(b) are not met, a Motion for Reconsideration allows the Court to consider whether, if the question at issue were before it again, it would reach the same conclusion. "Where it is plain from the record that a

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substantial and consequential error was made, then the interests of finality should yield to the interests of justice and reconsideration may be appropriate." *Georgilis*, at *32.

ARGUMENT

This Court's December 3, 2020 Text Order (the "Text Order") dismissed Plaintiff's Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Twelfth Claims for Relief in Plaintiff's Amended Complaint pursuant to FRCP Rule 12(b)(1) under the standing, mootness, and ripeness doctrines, without prejudice to filing a new complaint in the future "if the facts or legal landscape materially change." (Dkt. No. 26). However, for the reasons that follow, this Court's reliance upon the aforementioned doctrines in dismissing Plaintiff's Claims misapprehend the applicability thereof, and have also been overtaken by changing circumstances constituting new evidence in this matter; accordingly, this Court should grant Plaintiff's Motion for Reconsideration of Defendant's Motion to Dismiss Plaintiff's Amended Complaint in its entirety.

I. PLAINTIFF HAS STANDING TO ASSERT ITS CLAIMS.

Plaintiff has standing to bring its claims because Plaintiff has alleged a concrete and particularized injury stemming from Defendants' conduct in issuing the Executive Orders and associated guidance, and investigating Plaintiff's business, and Plaintiff has adequately alleged causation and redressability. Defendants make two (2) primary arguments on the issue of standing: (i) Plaintiff cannot show injury-in-fact traceable to the challenged conduct; and (ii) Plaintiff seeks prospective injunctive relief, and as such, cannot rely upon past injury, and must instead prove the likelihood of future or continuing harm (*Dkt. No. 21, P. 1*). However, neither of these arguments dismisses Plaintiff's unqualified standing to assert its many Claims for Relief.

"In order to survive a defendant's motion to dismiss for lack of subject matter jurisdiction, a plaintiff must allege facts 'that affirmatively and plausibly suggest that it has standing to

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sue.'" *Brady v. Basic Research, L.L.C.*, 101 F.Supp.3d 217, 227 (E.D.N.Y. 2015) (citing *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)). "When the Rule 12(b)(1) motion is facial, *i.e.*, based solely on the allegations of the complaint or the complaint and exhibits attached to it . . . the plaintiff has no evidentiary burden." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). As standing is challenged on the basis of the pleadings, all material allegations of the complaint must be accepted as true, and the Court must construe the complaint in favor of plaintiff. *Cellco P'ship v. City of Rochester*, No. 6:19-cv-06583 EAW, 2020 U.S. Dist. LEXIS 102573, at *11-12 (W.D.N.Y. June 11, 2020). "[A]t the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 401 (2d Cir. 2015).

Here, in addition to the loss of Plaintiff's client base due to Defendants' business closures, threatened consequences by a governmental agency or body also give standing for the instant lawsuit. Plaintiff was forced to implement procedures and protocols, leading up to tooling up for electronic monitoring of its employees, that are more limiting and restrictive than the social distancing and mask mandates required by the State, all at a concrete cost to Plaintiff, and will only continue to suffer such harm, costs, and expenses as Defendant Cuomo's Executive Order 202.68, and "Cluster Zone Initiative," are now in full force and effect in Erie County. Moreover, despite Plaintiff's compliance with the Executive Orders, the fact of the matter is that Plaintiff's complied with unconstitutional Executive Orders, which is, in and of itself, damaging.

Moreover, Plaintiff's requested injunctive relief does not rely on past injury, as Defendants would have this Court believe. Significantly, should Defendants elect to levy a penalty and/or fine against Plaintiff, such fines could amount to more than $550,000.00, beginning with the issuance of the relevant Executive Orders and running up through and including the filing of these papers.

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Should the Court render a decision in Plaintiff's favor, Plaintiff will be permitted to operate without the looming threat of the Cease and Desist Order and prospective penalties and fines, which could be made exponentially worse given that Defendant Cuomo's Executive Order 202.68, and accompanying "Cluster Zone Initiative," are now in full force and effect in Erie County.

Further, Defendants have not rescinded the Cease and Desist Order, and Plaintiff continues to operate under the looming threat of closure, as well as the imposition of civil and/or criminal penalties. By reason of the above, Plaintiff has alleged a concrete and particularize injury stemming from Defendants' challenged conduct, which injury is redressable by this Court, and therefore has standing to pursue its claims as against Defendants before this Court. Accordingly, Plaintiff's Motion for Reconsideration of the Motion to Dismiss should be granted by this Court.

II. PLAINTIFF'S CLAIMS ARE NOT MOOT.

The mootness doctrine is derived from Article III of the United States Constitution, which provides, in part, that federal courts may only decide live cases or controversies. *Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir.1998). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir.1998), *cert. denied*, 526 U.S. 1131, 143 L. Ed. 2d 1009 (1999). Accordingly, a case becomes moot [only] when interim relief or events have eradicated the effects of the [D]efendant's act or omission, and there is no reasonable expectation that the alleged violation will recur." *Irish Lesbian and Gay Org.*, 143 F.3d at 647.

There are, however, two exceptions to the mootness doctrine which are applicable in this case: the "voluntary cessation" doctrine, and the "capable of repetition" doctrine. The defendant seeking dismissal for mootness based upon voluntary cessation bears the properly heavy burden of demonstrating their entitlement to dismissal, whereas the plaintiff seeking to avoid dismissal

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for mootness bears the burden of demonstrating the applicability of the "capable of repetition" doctrine. The two doctrines are, however, often interrelated and two sides of the same coin.

Chief Justice Warren's opinion for a unanimous Court in *Powell v. McCormack*, 395 U.S. 486 (1969) declared that, "[s]imply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 496. The doctrine of mootness ensures that a Court will not assert jurisdiction to decide a dispute that exists only on paper, and which no longer represents the true state of affairs between the parties. If the harm alleged constitutes a "continuing and brooding presence," *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974), or is "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), it provides "a classic justification for a conclusion of non-mootness." *Roe v. Wade*, 410 U.S. 113, 125 (1972). "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave 'the defendant . . . free to return to his old ways.'" *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). The defendant who attempts to moot a case bears a "heavy burden of persuasion" that the likelihood of future violations is remote. *W. T. Grant Co.*, 345 U.S. at 633.

a. Voluntary Cessation.

The voluntary cessation of allegedly illegal conduct does not *per se* deprive a court of the power to hear and determine the case; put differently, voluntary cessation does not make the case moot. *See Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944); *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897). A controversy may remain to be settled in such circumstances, *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945), e.g., a dispute over the legality of the challenged

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practices. *Walling*, 323 U.S. at 37; *Carpenters Union v. Labor Board*, 341 U.S. 707, 715 (1951). Thus, "a party seeking to have a case dismissed as moot [due to voluntary cessation] bears a heavy burden." *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ*., 397 F.3d 77, 84 (2d Cir. 2005).

The voluntary cessation doctrine recognizes that "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all [of] his unlawful ends." *Id.* Given this potential for abuse, a defendant "claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 190 (2000).

The "rule traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Courts have found that the voluntary cessation doctrine applies specifically in cases where "suspicious timing and circumstances pervade" a defendant's decision to end the purportedly unlawful conduct. *See Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 604 (2d Cir. 2016). "In this situation, courts infer that the defendant will renew its activity after the litigation concludes." *NRDC v. Zinke*, 2020 US Dist. LEXIS 178094, at *27-28 (S.D.N.Y. Sep. 28, 2020, No. 18-cv-6903 (AJN)). As the Second Circuit has observed, "the voluntary cessation doctrine of allegedly illegal conduct will only render a case moot 'if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Lamar Adver. of Penn., LLC v. Town of Orchard Park*, 356 F.3d 365,

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375 (2d Cir. 2004) (citing *Granite State Outdoor Adver., Inc. v. Town of Orange*, 303 F.3d 450, 451 (2d Cir. 2002) (per curiam) (internal citations omitted)).

Stated differently, an action is not moot where the voluntary cessation of the conduct complained of occurred after filing, and the party can be reasonably expected to repeat such conduct in the future. *See De Funis v. Odegaard,* 416 U.S. 312, 317-18 (1974). Furthermore, "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Laidlaw*, 528 U.S. at 189; *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (defendant bears the heavy burden of demonstrating there is no reasonable expectation of repetition). In *Laidlaw*, the Supreme Court stated in detail: "[T]he standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* at 189. The Supreme Court continued, "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 170.

In addition, even the repeal of a challenged law will not render a matter moot.[1] In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), a City law limited licensing of video arcades/amusement centers. The Plaintiff challenged the ordinance as being unconstitutionally vague in prohibiting licensing of operations that have "connections with criminal elements." The

[1] Here, Defendants assert only that they did not fully enforce the Executive Order 202.8 against Plaintiff, and/or that said Executive Order 202.8 has expired. Putting aside that Plaintiff's lawsuit also challenges the constitutionality of Executive Law § 29-a itself, Executive Law 29-a still purportedly authorizes Defendants to issue similar Executive Orders with the same practical effect, which Defendant Cuomo has now done vis-à-vis his issuance of Executive Order 202.68 on or about October 6, 2020.

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City repealed the subject language from the ordinance while the case was pending. Nonetheless, the Court held that the case was not moot. Justice Stevens, for the majority, explained: "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice . . . In this case the City's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289. In *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656 (1993), the Supreme Court again refused to dismiss as moot a challenge to a City ordinance that had been repealed, stating: "[t]here is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it already has done so. Nor does it matter that the new ordinance differs in certain respects from the old one. . . . [I]f that were the rule, a defendant could moot a case by repealing the challenged statute and *replacing it with one that differs only in some insignificant respect*." *Id.* at 662 (emphasis added). The Court held that given the new statute posed the same basic constitutional question, that repeal did not moot the case. *Id.*

Here, Defendants cannot establish that voluntary cessation moots Plaintiff's Claims for Relief, and/or Plaintiff's Amended Complaint in its entirety. Defendant simply cannot now, in good faith, argue that their actions complained of in the Amended Complaint will not recur. Defendants intimate that this matter is limited to the "Cease and Desist Letter" issued to Plaintiff and Executive Order 202.8 (the "Work from Home Order"). However, Plaintiff's Amended Complaint, read in its entirety, concerns both the above *and* the constitutionality of Defendants' actions taken pursuant to Executive Law § 29-a. Plaintiff herein challenges the constitutionality of that law, from which Defendants' various Executive Orders are, and have been, derived.

In fact, Executive Law § 29-a appears to be written intentionally to allow Defendants to skirt lawsuits such as the present on mootness grounds. As argued by Defendants in their Reply

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Memorandum of Law (Dkt. No. 21, at P. 3): "[Executive Order] 202.8 expired by its own terms. Indeed, [Executive Law § 29-a] requires any [Executive Order to be renewed every thirty days or else it expires. Thus, because Governor Cuomo's [W]ork-from-[H]ome Order expired by its own terms, Plaintiff's claim is moot." As Defendants well know, Defendant Cuomo has issued a flurry of additional Executive Orders that Plaintiff remains subject to, including, but not limited to, Defendant Cuomo's Executive Order 202.68, implementing the "Cluster Zone Initiative." Thus, the fact that one particular Executive Order expires while Plaintiff remains under threat of closure under another Executive Order – the legality and constitutionality of which Plaintiff is challenging by virtue of its issuance outside of the proper mechanics of the State of New York's constitutionally mandated form of government – Plaintiff's Claims are not mooted.

The reality is that, without any advance notice, Defendants could, under their purported authority pursuant to Executive Order 202.68, declare the localities in which Plaintiff conducts business a "Red Zone," and force Plaintiff to close. This is precisely what Defendants have done to multiple other businesses throughout the Western District of New York. For example, in the beginning of March, 2020, Defendant Cuomo issued Executive Orders 202.5, 202.6, 202.7 and 202.8, among others, which designated certain businesses as "non-essential," thereby forcing the closure of same. Said businesses were permitted to re-open in and around June 2020, only if in compliance with certain COVID-19 safety regulations and guidelines. Then, however, on or about November 18, 2020, Defendants announced that various businesses in the Western District of New York (largely in Erie and Monroe Counties) needed to cease operations under the Cluster Zone Initiative. Regardless of the specific Executive Order upon which Defendants' enforcement measures may be based, the closure of these businesses has the same practical effect, and is issued under the same dubious legal and constitutional authority of Executive Law § 29-a.

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By reason of the foregoing, as Defendants have not affirmatively stated that additional Executive Orders requiring the closure of Plaintiff's business will not be issued, and/or that no further enforcement action will be instituted as against Plaintiff, and Defendants have not renounced their authority to issue such Executive Orders under Executive Law § 29-a, Defendants have failed to satisfy *their burden* of demonstrating the conduct complained of in the Amended Complaint cannot reasonably be expected to recur again in the future.

b. Capable of Repetition, Yet Evading Review.

The "capable of repetition, yet evading review" exception to the mootness doctrine was first clearly articulated by the Supreme Court in *Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U.S. 498 (1911), which involved a challenge to an Interstate Commerce Commission Cease and Desist Order. In *Southern Pacific Terminal*, the Supreme Court granted judicial review of an otherwise moot issue because the challenged order was of such short duration that it effectively precluded litigation before its expiration, and because the same Plaintiffs were likely to be affected by the same type of order in the future. *Id.* at 514.

In *Weinstein v. Bradford*, 96 S. Ct. 347, 349 (1975), the Supreme Court further stated that: "[T]he 'capable of repetition, yet evading review' doctrine [is] limited to the situation[s] where two elements combine[.]" *Id*. The first element, as defined by the Supreme Court, is that the challenged action must be "too short to be fully litigated prior to its cessation or expiration." *Id.* Second, and in addition, there must be "[a] reasonable expectation that the same complaining party [will] be subjected to the same action again" in the future. *Id.*

Defendants argue that Defendant Cuomo's Executive Orders expire in thirty (30) days if not otherwise explicitly renewed by Defendant Cuomo; as such, there appears to be no dispute as to the first element of this exception – that the challenged action is too short to be fully litigated

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prior to the action's cessation or expiration. However, as set forth above, there is clearly a "reasonable expectation" that Plaintiff will be subject to the same action again. In *Honig v. Doe*, 484 U.S. 305, 319 n. 6 (1988), the Supreme Court noted that controversies have sometimes been deemed "capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable." *Id.* at 319 n.6. Thus, Plaintiff need not demonstrate that reoccurrence here is probable; only that repetition is merely reasonably possible. Moreover, Plaintiff has clearly done so – a number of similarly situated business located throughout Western New York and deemed non-essential have already been closed by Defendants under the purported authority of a new Executive Order 202.68, and Defendant Cuomo's Cluster Zone Initiative. Plaintiff should not be made to wait for a second round of enforcement actions against its operations, under only a different Executive Order, in order to challenge Defendants' continued and unconstitutional actions takes pursuant to Executive Law § 29-a.

By reason of the foregoing, Plaintiff has demonstrated that its Claims for Relief and its Amended Complaint, and the actions taken by Defendants complained of therein, are capable of repetition yet evading review, and thus fall under the second exception to the mootness doctrine. Accordingly, such Claims for Relief are not moot, and should be considered by this Court.

c. Public Interest Weighs Against a Finding of Mootness.

Finally, the "public interest in having the legality of the [challenged] practices settled militates against a mootness conclusion." *W. T. Grant Co.*, supra, 345 U.S. at 632; *United States v, Trans-Missouri Freight Assn*., 166 U.S. 290, 309-10 (1897). Courts have considered whether the conflict at issue in the case is a matter of public concern that ought, in the public interest, be decided. *See, e.g., United States v. Iverson*, 14-CR-197 (LIV), 2016 WL No. 143195, at *1 (W.D.N.Y. Oct. 21, 2016), *aff'd*, 897 F.3d 450 (2d Cir. 2018) (courts consider public concern

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when evaluating whether a matter is capable of repetition yet evading review); *Sherman v. United States Parole Comm'n*, 502 F.3d 869, 872 (9th Cir. 2007) (case fell within "capable of repetition yet evading review" exception in part because the issue was "an issue of continuing and public importance"); *R.C. Bigelow*, 867 F.2d at 107 ("[B]ecause of the significant public interest involved in having the legality of the practices challenged in this case finally settled, we conclude that the case is not moot[.]") (citing *United States v. W.T. Grant Co*., 345 U.S. 629, 632 (1953)); *In re Ballay*, 157 U.S. App. D.C. 59, 482 F.2d 648, 651 (D.C. Cir. 1973).

Plaintiff is one of the countless businesses that has been threatened with, suffered, and/or continues to suffer from closure as a result of the hodgepodge of Defendants' various Executive Orders, issued under the challenged legality and constitutionality of Executive Law § 29-a. Permitting Defendants' actions to evade judicial review, by virtue of Defendants' having allowed certain Executive Orders to expire, and thereafter having issued new Executive Orders which have the same practical force and effect – the closure of certain businesses throughout the State of New York when certain metrics are met, is not in the public interest. To the contrary, the public interest is served vis-à-vis litigation on the merits of Defendants' authority to take the actions challenged in Plaintiff's Amended Complaint. By reason of the foregoing, Plaintiff's Claims for Relief are not moot, and Plaintiff's Motion for Reconsideration should be granted by this Court.

III. PLAINTIFF'S CLAIMS ARE RIPE FOR REVIEW.

For this Court to exercise proper jurisdiction over Plaintiff's Claims for Relief, Plaintiff's Claims must generally be ripe for this Court's review. "The ripeness doctrine protects the government from 'judicial interference until a[] . . . decision has been formalized and its effects felt in a concrete way by the challenging parties." *Thomas v. City of New York*, 143 F.3d 31, 34

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(2d Cir. 1998) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977)).

In determining whether a claim is fit for review, the question is whether consideration of the underlying legal issues would be facilitated if raised in the context of a specific attempt to enforce the challenged provisions. *See Gardner v. Toilet Goods Assoc.*, 387 U.S. 167, 171 (1967); *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 225 (2d Cir. 1998); *In re Combustion Equip. Assoc., Inc.* 838 F.2d 35, 37-38 (2d Cir. 1988). "Ripeness is peculiarly a question of timing," *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1975), intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.*, 387 U.S. at 136. Its purpose is to forestall judicial determinations until they are presented in a concrete form. *See Renne v. Geary*, 501 U.S. 312, 322 (1991) (citing *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 584 (1947)). The focus of any ripeness inquiry is guided by a two-factor analysis, requiring courts to consider: (1) the fitness of the issues presented for judicial decision; and (2) the injury or hardship to the parties of withholding such consideration. *See Abbott Labs.*, 387 U.S. at 149; *AMSAT Cable v. Cablevision of Conn.*, 6 F.3d 867, 872 (2d Cir. 1993); *In re Drexel Burnham Lambert Group Inc.*, 995 F.2d 1138, 1146 (2d Cir. 1993). However, even if the resolution of a dispute could be facilitated if a court waited for a specific application of the issues in contention, the question may, nonetheless, be justiciable under the second factor if the challenged action creates a direct and immediate hardship for the parties. *Nutritional Health Alliance v. Shalala*, 144 F.3d at 225.

The above notwithstanding, there are situations in which pre-enforcement review of the validity of a statute is warranted. *Thomas*, 143 F.3d at 35. This occurs principally when an individual would, in the absence of court review, be faced with a choice between risking likely

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criminal prosecution entailing serious consequences, or forgoing potentially lawful behavior. *Id.* Put differently, where the controversy originates from a challenge to a statute or policy *prior to its enforcement*, the ripeness doctrine requires that the challenge arise from a real, substantial dispute between the parties involving a definite and concrete matter. *Kittay v. Giuliani*, 112 F Supp. 2d 342, 348 (S.D.N.Y. 2000); *Sanger v. Reno*, 966 F Supp. 151, 159 (E.D.N.Y. 1997). Significantly, and moreover, the Supreme Court has found that "facial challenges to regulation are generally ripe the moment challenged." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997); *see also Pennell v. San Jose*, 485 U.S. 1, 11 (1988); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.), *cert. denied*, 513 U.S. 870 (1994) ("ripeness requirements are relevant only to as-applied challenges, and not to facial challenges").

The Court's holding in *Murphy v. Zoning Comm.*, 148 F Supp. 2d 173, 186-87 (D. Conn. 2001) is instructive in this case. In Murphy, the Court found that, "because [P]laintiffs potentially face[d] the choice between complying with a cease and desist order that violates federally protected rights and facing civil and criminal penalties for violating the order, the hardship to which they are subject tips the balance in favor of finding th[e] matter ripe for review." *Id.* (citing *D.H.L. Assoc., Inc. v. O'Gorman*, 199 F.3d 50, 53-54 (1st Cir. 1999) ("[I]t is clear that D.H.L. is subject to a real and immediate threat of enforcement of . . . [the] zoning ordinance and therefore its claims are ripe for review[.]")). The Court in *Murphy* then held that, because plaintiffs' harm was real, immediate, and threatened to continue, Plaintiffs' claims were ripe for review. *Id.*

Here, Defendants' sole contention with respect to whether Plaintiff's claims are ripe for review because "Plaintiff bases its claim on the *possibility* of future events," Plaintiff's Claims for Relief are not yet ripe for this Court's review. (*Dkt. No 21, P. 4*) (emphasis in original). However, this contention is but a misguided attempt to distract this Court, and is belied by Defendants' own

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actions to date. As described above, Defendant Cuomo's Executive Order 202.68, and accompanying "Cluster Zone Initiative," are now in full force and effect in Erie County. In effect, Defendants could, under their purported authority pursuant to Executive Order 202.68, declare the localities in which Plaintiff conducts business a "Zone," and force Plaintiff to close. This is precisely what Defendants have done to multiple other businesses throughout the Western District of New York. Plaintiff should not be made to wait for a second round of enforcement actions against its operations, under only a different Executive Order, in order to challenge Defendants' continued and unconstitutional actions takes pursuant to Executive Law § 29-a.

In fact, Plaintiff is not even *required* to wait for a second round of enforcement actions before its Claims for Relief may be deemed fit for judicial review. Here, as in *Murphy*, "because [Plaintiff] potentially face[d] the choice between complying with [Defendants' Cease and Desist Order] that violate[d] [Plaintiff's] federally protected rights and facing civil and criminal penalties for violating the [O]rder, the hardship to which they are subject tips the balance in favor of finding th[e] matter ripe for review." *See Murphy v. Zoning Comm.*, 148 F Supp. 2d at 186-87. Moreover, as set forth in Plaintiff's Amended Complaint, Plaintiff is explicitly asserting a facial challenge to the constitutionality of Executive Law § 29-a, making its Claims for Relief, and challenges to the scope and breadth of the actions taken by Defendants, immediately ripe for review. *See Suitum*, 520 U.S. at 736 n.10; *see also Pennell*, 485 U.S. at 11; and *Kawaoka*, 17 F.3d at 1232.

By reason of the foregoing, Plaintiff's Claims for Relief are ripe for review, and Plaintiff's Motion for Reconsideration should be granted by this Court.

CONCLUSION

By reason of the foregoing, this Court should grant Plaintiff's Motion for Reconsideration of Defendant's Motion to Dismiss Plaintiff's Amended Complaint.

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