No. 20-2046

In the

UNITED STATES COURT OF APPEALS

for the

FIRST CIRCUIT

BOSTON BIT LABS, INC.
D/B/A BIT BAR SALEM,

Plaintiff-Appellant,

v.

CHARLES D. BAKER,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Massachusetts
No. 1:20-cv-11641
The Honorable Richard G. Stearns

BRIEF OF APPELLANT BOSTON BIT LABS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant Boston Bit Labs, Inc., files its statement relative to the identification of any parent corporation and/or any publicly held corporation that owns 10% or more of its stock, and hereby states there is no such corporation.

Date: December 28, 2020.

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One of the most pressing legal issues across the country has been how governors have claimed unchecked and unrestricted "emergency" powers in the name of COVID-19. While COVID-19 is a true concern, governors have abused their authority, violating various constitutional rights of Americans with impunity and arrogance. When Bit Bar, having exhausted its ability to seek a political remedy for Massachusetts Governor Charlie Baker's arbitrary decision to reopen casinos, but postpone the reopening of video game arcades, filed suit to vindicate its freedom of speech under the First Amendment, Gov. Baker did an about-face and permitted arcades to reopen. Though Bit Bar applauds this decision, the violation never should have occurred, and with the ongoing crisis, there is nothing to prevent Gov. Baker from resuming his capricious governance. Oral argument will aid the Court in addressing the most recent jurisprudence from the Supreme Court and across the country regarding the efforts of state governments to attempt to moot a case through voluntary cessation.

STATEMENT OF JURISDICTION

Plaintiff-Appellant brought suit against Governor Charles D. Baker under 42 U.S.C. §1983, seeking relief from deprivation of Plaintiff's rights under the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The district court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. On October 28, 2020, the district court entered a final judgment disposing of all claims. ADD1-2; ADD3.[1] Plaintiff filed a timely notice of appeal on October 28, 2020. (ADD4-5.) This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. Whether the District Court erred when it dismissed Bit Bar's claims moot without proper application of the voluntary cessation doctrine.

2. Whether the District Court erred when it denied Bit Bar's motion for preliminary injunction based on the erroneous dismissal of the case as moot.

[1] References to "ADD_" are to the Addendum; references to "A_" are to the Appendix.

STATEMENT OF THE CASE

Appellant Boston Bit Labs, Inc. d/b/a Bit Bar Salem ("Bit Bar") owns and operates a restaurant-arcade which is an establishment that provides food and drink to patrons while allowing them to play video games. (A039 at ¶3.) At Bit Bar, video games are presented in a stand-up kiosk-like format as well as tabletop formats, no differently than how casino slot machines are presented. (A005 at ¶2-3.) Despite this lack of distinction, Governor Baker discriminated between them in his plan to reopen businesses in Massachusetts – casinos were permitted to remain open and operate, but Bit Bar's arcade was required to remain closed. (A005 at ¶4.) After Bit Bar filed suit against Governor Baker seeking relief from his unconstitutional order, Governor Baker relented, recategorizing Bit Bar's arcade to fall into the same category as casinos, allowing Bit Bar's arcade to reopen. (A178-184.) Despite the continuing threat that Governor Baker could easily amend his order again, the district court dismissed Bit Bar's complaint, finding the case moot.

I. COVID-19 Pandemic and Gov. Baker's Response

On or about March 10, 2020, Appellee Governor Charles D. Baker ("Gov. Baker") declared a state of emergency in the Commonwealth of Massachusetts due to the outbreak of the 2019 novel Coronavirus ("COVID" or "COVID-19"). (A043-046.) The state of emergency continues to exist and, pursuant to Executive Order No. 591, invoking the authority of Sections 5, 6, 7, 8 & 8A of Chapter 639 of the

Acts of 1950, Gov. Baker issued and continues to issue a series of further orders under the nomenclature of "COVID-19 Order."

On March 3, 2020, Gov. Baker issued COVID-19 Order No. 13 shutting down most brick-and- mortar businesses in Massachusetts as "non-essential," allowing Bit Bar's business only to provide food takeout services. (A047-052.) Pursuant to COVID-19 Order No. 19, the Department of Public Health was charged with enforcing the shut-down of Bit Bar's business pursuant to Mass. Gen. Laws, ch. 111, §30. (A053-055.) The shut-down was extended on March 31, April 28, and May 15, 2020 by COVID-19 Orders No. 21, 30, and 32, respectively. (A056-059; A060-063; A064-066.)

On May 18, 2020, Gov. Baker instituted a planned phased reopening process. (A067-076.) COVID-19 Order No. 33 permitted certain types of businesses to reopen on May 18 & 25, 2020, with all other previously-closed businesses remaining closed. (A067-076.) On June 1, 2020, Gov. Baker issued COVID-19 Order No. 35 identifying certain businesses as "Phase II" businesses and permitting them to begin preparing to reopen, including restaurants and retail stores. (A077-085.) COVID-19 Order No. 35 also identified business sectors that would be reopened as part of the eventual Phases III & IV. (A077-085). Bit Bar's business, like casinos, museums, fitness centers, and performance halls, was categorized as part of the Phase III enterprises. (A077-085.)

Gov. Baker reiterated that arcades would be part of Phase III in an order of June 6, 2020. (A086-096.) By Order of July 2, 2020, Phase III businesses were permitted to reopen beginning July 6, 2020. (A097-106.) Without warning, explanation, or due process, in COVID-19 Order No. 43 Gov. Baker recategorized arcades as a Phase IV enterprise along with ball-pits, hot tubs, steam rooms, and dance clubs for 2020, while recategorizing theaters, concert halls, ballrooms, laser tag arenas, and private-party rooms as Phase III. (A097-106.)

Despite recategorizing arcades to Phase IV, casinos remained in Phase III under COVID-19 Order No. 43. (A097-106.) Notably, both casinos and arcades require people sitting or standing at similarly-sized, nearly identical, machines. There is no difference in the COVID risks for customers or employees. (A005-012.) According to Dr. Cassandra Pierre, an infectious disease specialist, the movement of arcades to Phase IV was "arbitrary." (A107-112.) Though Dr. Pierre noted that "[t]hey are high touch surfaces" and "[m]any people are potentially using the levers and joysticks and different pieces of machinery or the screens themselves," this is the same concern for users of slot machines and other casino gaming equipment. (A107-112.) Indeed, the web site <visit-massachusetts.com> advertised that Casinos were open in Massachusetts and provided an example of the floor layout of a Massachusetts casino showing electronic gambling machine kiosks in close proximity to one another. (A113-122.)

After learning of the arbitrary distinction Gov. Baker drew between gambling arcades and video game arcades, Bit Bar reached out to Gov. Baker's office for an explanation via state legislators. (A041 at ¶13.) The government's explanations for the movement of arcades from Phase III to Phase IV shifted from alleged determinations based on "input from public health experts" that failed to explain why casinos could open, but not arcades, to not wanting to "overwhelm local health departments," which ignored that the restaurant part of Bit Bar's business could open, subject to the oversight of local health departments, but not the arcade, and all businesses otherwise needed to draft and self-certify a COVID-19 Control Plan. (A041 at ¶13.)

Other members of Massachusetts government were similarly baffled by Gov. Baker's decision to discriminate and impose stronger restrictions on video arcades than on casinos. On July 16, 2020, Bit Bar's owner, Gideon Coltof, spoke with an aid of Massachusetts Representative Paul Tucker, who told him that Rep. Tucker agreed with Mr. Coltof's position and that Rep. Tucker would speak with Gov. Baker about it. (A041 at ¶11.) On July 21, 2020, Mr. Coltof spoke with Massachusetts Senator Joan B. Lovely, who similarly agreed with Mr. Coltof's position and said she would speak with Gov. Baker. (A041 at ¶12.) On July 21, 2020, Massachusetts Representative Ann-Margaret Ferrante sent a message to Mr. Coltof informing him that she had spoken with Gov. Baker's office about this issue, but that "the Baker

Administration is immovable on it." (A042 at ¶14; A123-126.) On July 28, 2020, Sen. Lovely's office forwarded Mr. Coltof an email from Gov. Baker's office nominally providing an explanation for Gov. Baker's COVID-19 Orders, claiming the reopening plan reflected "the latest science…with input from the public health experts", but providing no factual basis for any scientific evaluation of COVID risks at arcades vs. casinos or the input of public health experts relative to those comparative risks. (A042 at ¶15; A127-129.) Massachusetts Representative Jim Kelcourse also voiced his disagreement with Gov. Baker's arbitrary decision, telling The Eagle-Tribune "[i]f the (Encore Boston Harbor) casino can reopen, then Joe's [Playland, a video arcade,] should be open. Casinos have the same type of touch surfaces that arcades do … I just don't think it's reasonable to move arcades into Phase 4 because a place like Joe's Playland has done everything they are supposed to do." (A130-133.)

Gov. Baker's COVID-19 Orders caused tremendous harmed to Bit Bar, as the Orders had severely limited its operations. (A042 at ¶16.) While the video arcade portion of Bit Bar was closed, its revenue stream was limited considerably. (A042 at ¶16.) Specifically, one of the main draws of Bit Bar is the ability to play arcade games at a restaurant; without that appeal, one of the main reasons for patrons to visit Bit Bar was gone. (A042 at ¶16.) If the arcade portion continued to be forced to remain closed, Bit Bar would likely have gone out of business and would not have

been able to open again even after all COVID-19 Orders are lifted. (A042 at ¶16.) Other Massachusetts arcades affected by Gov. Baker's arbitrary decision were also faced with severe revenue shortfalls and the danger of going out of business. (A134-139.) Bit Bar had spent several weeks trying to obtain relief from Gov. Baker's arbitrary restrictions without court intervention, but it was met with prevarications and silence.

II. Relevant Procedural History in the District Court and Gov. Baker's Subsequent Voluntary Cessation

Bit Bar filed suit on September 2, 2020 under 42 U.S.C. § 1983, bringing two claims against Gov. Baker for violation of the First and Fourteenth Amendments of the United States Constitution. (A005-012.) Contemporaneously with the filing of its complaint, Bit Bar filed a Motion for Preliminary Injunction, seeking to restrain the Commonwealth of Massachusetts from enforcing its closure of Bit Bar's arcade. (A013-032.) On September 10, 2020, upon service of the complaint and motion, Gov. Baker reversed his decision and issued COVID-19 Order No. 50, which amended COVID-19 Order No. 43 to allow arcades to open within the Commonwealth of Massachusetts starting on September 17, 2020. (A178.)

Gov. Baker appeared in the district court action on October 13, 2020, opposed Bit Bar's Motion for Preliminary Injunction, and moved to dismiss Bit Bar's complaint. (A140-142, A143-A177.) Bit Bar opposed Gov. Baker's Motion to

Dismiss and replied in support of its Motion for Preliminary Injunction on October 26, 2020. (A220-A238, A239-A250.)

Two days later, on October 28, 2020, the District Court entered a short, electronic order denying Bit Bar's Motion for Preliminary Injunction and granting Gov. Baker's Motion to Dismiss. (ADD1-2.) In its Order, the District Court found that Bit Bar's claims were moot because of Gov. Baker's subsequent issuance of COVID-19 Order No. 50 and dismissed the case. (ADD1-2.) Specifically, the District Court's brief electronic order stated, in relevant part:

> Because arcades no longer face "any restrictions beyond those imposed on Phase III enterprises," Pl.'s Mot. for a Prelim. Inj. at 19, there is no effectual declaratory or injunctive relief that the court may award to plaintiff under the circumstances. The court accordingly finds plaintiff's claims moot.
>
> Plaintiff argues that Governor Baker's voluntary cessation of the challenged conduct exempts it from application of the mootness doctrine. But the court does not believe that there is any reasonable basis to believe that the specific conduct challenged here - the imposition of greater restrictions on the operation of arcades than certain other Phase III enterprises - will recur if it dismisses this case. Plaintiff's suggestions to the contrary rely on an undue degree of speculation regarding the future course of the virus and the measures Governor Baker may opt to take to counteract its spread. As it would be inappropriate for the court to engage in speculation at this juncture, particularly on a matter of public health, it finds the voluntary cessation doctrine inapplicable and therefore dismisses plaintiff's case as moot.

Id. Bit Bar filed its Notice of Appeal related to the District Court's order later that day. (ADD4-5.)

SUMMARY OF THE ARGUMENT

In COVID-19 Order No. 43, Gov. Baker recategorized video game arcades, including that operated by Appellant Boston Bit Labs, Inc. d/b/a Bit Bar Salem, from Phase III category businesses to Phase IV businesses. As a result, unlike casinos, Bit Bar could not reopen its arcade business to complement its restaurant business. The only meaningful difference between a casino, which offers video game boxes providing games of chance, and an arcade is the content of the video games.

The display of video games is protected speech under the First Amendment. By permitting casinos to reopen and prohibiting arcades from doing so, Gov. Baker discriminated against Bit Bar based solely on the content of that protected speech. One can sit and eat dinner at Bit Bar atop a video game, but plugging it in to display the gaming content is prohibited. Applying strict scrutiny, which the Court must, the recategorization of arcades under COVID-19 Order No. 43 is insufficiently narrowly tailored. Even were the rational basis test to apply, the recategorization is not rationally related to reducing the spread of COVID-19.

The disparate treatment between casinos and arcades further violated Bit Bar's rights under the Equal Protection clause of the Fourteenth Amendment. As fundamental rights are implicated, again the recategorization does not survive strict scrutiny analysis. Gov. Baker further violated the Due Process clause of the Fourteenth Amendment procedurally, in failing to provide any process by which

individual business sectors could seek reopening, and substantively, by acting arbitrarily and capriciously in recategorizing arcades as Phase IV businesses. This is not a case for money damages and, as it is not moot, the Eleventh Amendment does not preclude declaratory relief.

Although Gov. Baker enjoys considerable deference, his authority is not unchecked. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), does not give a governor *carte blanche* to run roughshod over the constitution. The Supreme Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206 (U.S. 2020) demonstrates that the Constitution is still paramount, with *Jacobson* itself being characterized, in Justice Gorsuch's concurrence, as essentially a rational basis case.

Although the District Court dismissed the case as moot, in light of the issuance of COVID-19 Order No. 50, two days after Gov. Baker was served, the District Court erred. As noted in *Roman Catholic Diocese*, a governor who keeps making changes to the COVID-19 response cannot avoid litigation by removing an unconstitutional restriction Wednesday when there is a real risk of it being reimposed on Thursday. Gov. Baker failed to meet his burden that the voluntary cessation doctrine does not apply.

The District Court should not have dismissed the case as it is not moot and the claims are plausible. In fact, they are likely to succeed on the merits. Further, the

motion for preliminary injunction should not have been denied as the case is not moot and an injunction should issue barring Gov. Baker from issuing further orders in derogation of the constitution. Not only does Bit Bar have a substantial likelihood of success, the First Amendment violation is *per se* irreparable harm, the balance of hardships favors Bit Bar, and non-discrimination in regulation is in the public interest.

In light of the foregoing, the orders dismissing the case and denying the preliminary injunction should be reversed and the matter should be remanded for further proceedings.

ARGUMENT

The District Court erroneously granted Gov. Baker's Motion to Dismiss, finding that Bit Bar's case was mooted by Gov. Baker's belated decision to stop discriminating against video game arcades, motivated by a desire to avoid this litigation. The Supreme Court of the United States has ruled on this very issue, finding that because COVID-19 restrictions implemented by states can be so easily altered, voluntary cessation by the state does not make a matter moot. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. __, 208 L. Ed. 2d 206, 210 (2020). This Court should reverse the district court's dismissal of this case and denial of the preliminary injunction.

I. Standard of Review

A district court's grant or denial of a motion to dismiss is reviewed *de novo*. *Doran v. Mass. Tpk. Auth.*, 348 F.3d 315, 318 (1st Cir. 2003); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 255 (1st Cir. 1994).

There are four factors in deciding whether to grant a preliminary injunction: "(1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant is enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest." *Charlesbank Equity Fund II v. Blinds to Go, Inc.*, 370 F.3d 151, 162 (1st

Cir. 2004). Denials of preliminary injunctions are reviewed for abuse of discretion, though under the rubric, the Court of Appeals reviews "answers to legal questions de novo, factual findings for clear error, and judgment calls with some deference to the district court's exercise of its discretion." *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92 (1st Cir. 2020). Likelihood of success on the merits "is the most important of the four preliminary injunction factors." *Doe v. Trs. Of Bos. Coll.*, 942 F.3d 527, 533 (1st Cir. 2019). Particularly in First Amendment cases, "the likelihood of success on the merits is the linchpin of the preliminary injunction analysis." *Sindicato Puertorrigueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10-11 (1st Cir. 2012).

II. Bit Bar's Claims for Relief are Likely to Succeed on the Merits

Without warning, explanation, or due process, Gov. Baker issued COVID-19 Order No. 43 on July 2, 2020, unconstitutionally discriminating against Bit Bar based solely upon the content of its speech. (A097-106). Despite the fact that similar businesses were permitted to remain open and operations, Gov. Baker chose to use his executive power to cause Bit Bar and other arcades in Massachusetts to remain closed. Bit Bar was, thus, entitled to relief under the First and Fourteenth Amendments and a preliminary injunction precluding Gov. Baker from re-imposing such discriminatory treatment.

The District Court offered no reason other than mootness to support dismissal, and none of the Commonwealth's arguments would otherwise warrant dismissal or denial of a preliminary injunction. Under Fed. R. Civ. P. 12(b)(6), a complaint only needs to allege facts sufficient to "state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court must "accept[] as true all well-pleaded facts, analyz[e] those facts in the light most hospitable to the plaintiff's theory, and draw[] all reasonable inferences for the plaintiff." *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 383 (1st Cir. 2011). In bringing a motion to dismiss for failure to state a claim, a defendant may not rely on evidence or information outside the four corners of the complaint without converting the motion to dismiss into a motion for summary judgment. Fed. R. Civ. P. 12(d); *see also Young v. Lepone*, 305 F.3d 1, 10-11 (1st Cir. 2002) (noting that "[t]he fact of a motion to dismiss under Rule 12(b)(6) ordinarily depends on the allegations contained within the four corners of the plaintiff's complaint").

Gov. Baker's discriminatory COVID-19 Orders are based on the content of speech and do not survive strict scrutiny. But, even if they were not content-based restrictions, Gov. Baker's Orders cannot withstand any degree of scrutiny.

1. Gov. Baker's Content-Based Discrimination in COVID-19 Order No. 43 is Subject to Strict Scrutiny

In COVID-19 Order No. 43, Gov. Baker treated video-game arcades and casinos differently based upon the images and text displayed by computer screens

affixed to large boxes. A regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (finding that regulation which specified "political signs" and "ideological signs" was content-based). In deciding whether a restriction is content-based, a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*. Some such restrictions are obvious, while "others are more subtle, defining regulated speech by its function or purpose." *Id*. Even facially content-neutral regulations are content-based if they cannot be "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Video games are expressive content protected under the First Amendment. "Like the protected books, plays, and movies that preceded them, video games communicate ideas — and even social messages — through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("EMA").

> Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny—a question to which we devote our attention in Part III, infra. Even if we can see in them "nothing of any possible value to society …, they are as much entitled to the protection of free speech as the best of literature."

Id. at 796 n.4. It is "self evident" that "video games are protected as expressive speech under the First Amendment." *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 148 (3d Cir. 2013).

In *EMA,* the Supreme Court found unconstitutional a California law that forbade the sale of violent video games to minors, *i.e.*, the provision of First Amendment-protected material to the consuming public. Because that law was based on the content of video games, it was subject to strict scrutiny. *EMA*, 564 U.S. at 799. Like the California law in *EMA*, Gov. Baker's COVID-19 Orders are content-based discriminations on speech. They allowed some businesses that offer one kind of video games (gambling games) to open, while forcing businesses that offered only non-gambling video games to remain closed. There is no meaningful distinction between the permitted and forbidden games other than their content. Gov. Baker allowed games of chance, while not allowing games made purely for entertainment. The government's regulations were thus based on the content of speech are subject to strict scrutiny.

In the District Court, Gov. Baker argued strict scrutiny does not apply because Bit Bar is the exhibitor of the video games, not the publisher. (A164-165.) This is an argument without support in First Amendment jurisprudence. The exhibition of creative works to customers is conduct protected under the First Amendment. Film exhibitors, for example, enjoy First Amendment protections like any other citizen.

See, e.g., Freedman v. Maryland, 380 U.S. 51 (1965). Booksellers, likewise, do as well. *See, e.g., Winters v. New York*, 333 U.S. 507 (1948). Murray Winters was a bookseller convicted of possession with to sell magazines that violated a criminal statute forbidding the sale of violent literature. *See New York v. Winters*, 268 A.D. 30, 30-31 (1st Dept. N.Y. 1944). Though styling this conduct in terms of the freedom of the press, the Supreme Court observed that First Amendment rights "cover[] distribution as well as publication." 333 U.S. at 509. The Supreme Court has found generally that one's rights under the First Amendment encompass the right to distribute and exhibit creative works. *See Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (holding that the "freedom [of speech and press] embraces the right to distribute literature, and necessarily protects the right to receive it"); *see also Lovell v. City of Griffin*, 303 U.S. 444, 452 (1937) (holding that liberty '"of circulating is as essential to … freedom [of speech and press] as liberty of publishing; indeed, without the circulation, the publication would be of little value'").

A restriction on the ability of businesses to distribute and exhibit non-gambling video games is no different than restrictions on bookstores or movie theaters. The First Amendment analysis has never turned on whether the bookstore or theater was the original creator of the works being suppressed. *See, e.g., Smith v. Cal.*, 361 U.S. 147, 150 (1959) (in suit by bookstore proprietor, stating that "it also

requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms. It is of course no matter that the dissemination takes place under commercial auspices. Certainly a retail bookseller plays a most significant role in the process of the distribution of books"). One has a First Amendment right to disseminate the ideas of others, and the existence of a profit motive has no bearing on this. *See Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations,* 413 U.S. 376, 385 (1973) (holding regulation of newspaper based on "profit motive…would be incompatible with the First Amendment.") Thus, as with any other law or regulation that facially discriminates based on the content of speech, COVID-19 Order No. 43 is subject to strict scrutiny.

2. Gov. Baker's Discriminatory COVID-19 Order No. 43 Does Not Survive Strict Scrutiny

To survive strict scrutiny, the government must show its COVID-19 Orders (1) further a compelling government interest and (2) the Oders are narrowly tailored to achieve that interest. *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). To avoid a preliminary injunction, the state must justify its restriction on speech. *See Comcast of Maine/New Hampshire, Inc. v. Mills*, 435 F. Supp. 228, 233 (D. Me. 2019) (*citing Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017)).

Gov. Baker's purported interest in promulgating his COVID-19 Orders, protecting the public during a global pandemic, is understandable – but discriminatory orders do not further any interest in protecting the public, much less a compelling one. Categorizing video game arcades as Phase IV enterprises did not further the Commonwealth's interest – nor anyone else's. Casinos with gambling machines were permitted to operate, while gaming arcades using functionally identical machines in a nearly identical manner could not. If casinos could operate safely, then so could gaming arcades. Similarly, if arcades could be open, as long as the machines are unplugged, but then become unsafe as soon as the video content begins to flow, then there is really no rhyme or reason for the regulations. In restaurant-arcades like Bit Bar, under COVID-19 Order No. 43, customers were allowed in the premises where video game machines were located (because the restaurant portion of the business is a Phase III enterprise), but they could not use the video games. They could stand next to them. They could rest cocktails on them. They could even pretend to play them. They could preen in their reflections in the dormant screens. But, plug in the machines and let the First Amendment protected content start flowing through the nearly-antique cathode ray tubes, and suddenly in the eyes of Gov. Baker, a Galaga machine became something as dangerous and sinister as the now-discredited moral panickers of the 1980s thought it was. *See* Ferguson, *The School Shooting/Violent Video Game Link: Causal Relationship or*

Moral Panic? 5 J. INVESTIGATIVE PSYCHOLOGY & OFFENDER PROFILING 25 at 33 (2008) (noting "[p]oliticians seize upon the panic, eager to be seen as doing something particular"). In attempting to address why machines turned off were safer than machines turned on, Gov. Baker argued that the burden on Bit Bar's speech caused by COVID-19 Order No. 43 was merely incidental to its First Amendment-protected activity. (A166.) The exact opposite is true; the Order exclusively and specifically prohibited the exhibition of video games protected by the First Amendment, making the Order a targeted restriction on speech, rather than an incidental one.

Gov. Baker's purported rationale undermined the importance of the asserted government interest. "[A] law cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." *Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015) (internal quotation marks omitted). Either both casinos and video game arcades are unsafe or they are both safe. There was no factual basis, let alone argument, for asserting one was safe while the other was not.

COVID-19 Order No. 43 was not narrowly-tailored. A burden on speech "is unacceptable if less restrictive alternatives would be at least as effective achieving [their] legitimate purpose." *Reno v. ACLU*, 521 U.S. 844, 849 (1997). In Gov.

Baker's judgment, gaming arcades were to remain closed to prevent the spread of COVID-19 because the CDC advised that the virus:

> is spread mainly by person-to-person contact and that the best means of slowing the spread of the virus is through practicing social distancing and protecting oneself and others by minimizing in-person contact with others and with environments where this potentially deadly virus may be transmitted including, in particular, spaces that present enhanced risks because of limited ventilation or large numbers of persons present or passing through who may spread the virus through respiratory activity or surface contacts.

(A098). If this were his purpose, Gov. Baker failed Massachusetts. The CDC's advice applies with equal (if not greater) force to casinos with gaming machines, which were allowed to operate. Casino floors have just as many, if not more, people in close proximity to one another as would be found in a restaurant-arcade like Bit Bar, particularly where casinos' electronic gambling machine kiosks are in such close proximity. Both types of business have the same sort of indoor ventilation. Both types of business have machine kiosks customers use where they will be touching the same surfaces as other customers. Both businesses' machines can be wiped down between users.

If Gov. Baker's purported rationale for treating arcades as Phase IV enterprises were his true motivation, his COVID-19 Orders were grossly underinclusive because they allowed businesses that posed the same (or greater) health risks to the public to open. State legislators and experts expressed bafflement at the purported justification for treating casinos more permissively than video game

arcades. (A007 at ¶¶11-12; A107-112, A123-126, & A127-129.) Gov. Baker's preference for gambling video game machines in casinos had no relationship to the stated purpose of his COVID-19 Orders, making them underinclusive, and thereby "rais[ing] serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *EMA*, 564 U.S. at 802. The more likely explanation was that Gov. Baker favored casinos and made political decisions unrelated to public health and safety. Such is far from the narrow tailoring necessary to justify a content-based restriction on speech to survive strict scrutiny.

In the District Court, Gov. Baker did not argue that intermediate scrutiny or rational basis review applied and there is no basis for him to change direction now. Even if one of those standards applied, his discriminatory orders would not survive such review. Under intermediate scrutiny, "the government still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2015)(quoting *Ward*, 491 U.S. at 799). If there is a "substantial mismatch between the Government's stated objective and the means selected to achieve it," the regulation is unconstitutional. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 199 (2014). "[I]ntermediate scrutiny is not satisfied by the assertion of abstract interests. Broad prophylactic prohibitions that fail to 'respond[] precisely to the

substantive problem which legitimately concerns' the State cannot withstand intermediate scrutiny." *Rideout v. Gardner*, 838 F.3d 65, 72-73 (1st Cir. 2016) (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)). Gov. Baker's prohibitions on turning on a video game did not precisely respond to the threat of COVID-19. His allusion to scientific data and consultation with health experts is no evidence of support for the proposition that casinos are safer than video arcades. There is, in fact, a substantial mismatch between the goals and the regulations if casinos are open in such circumstances.

Gov. Baker's inexplicable preference for casinos does not even pass muster under rational basis review. Rational basis review is satisfied if the government's "legislative means are rationally related to a legitimate government purpose." *Hodel v. Indiana*, 452 U.S. 314, 331 (1981). Here, there is no conceivable connection (and Gov. Baker offers none) between a preference for casinos and a legitimate government interest. Thus, the discrimination between casinos and video arcades survives no level of constitutional scrutiny. Bit Bar's claim is not only plausible but likely to succeed on its merits.

3. Gov. Baker Violated Bit Bar's Equal Protection Rights

In issuing COVID-19 Order No. 43, Gov. Baker violated Bit Bar's right to equal protection. The Equal Protection Clause contained in the U.S. Constitution provides that no state shall deny to any person within its jurisdiction equal protection

of the laws. *See* U.S. Const. *amend. XIV, § 1*. To bring a successful equal protection claim, a plaintiff must show disparate treatment from a similarly situated class. *Washington v. Davis*, 426 U.S. 229, 239 (1976). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 439 (1985) (citation omitted). The test applied depends on the type of classification and the conduct being regulated. If a regulation burdens "fundamental rights" such as free speech or employs "suspect" classifications such as race, the regulation is subject to strict scrutiny. *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003). If fundamental rights or suspect classifications are not implicated, then the regulation need only satisfy rational basis review. *Hodel v. Ind.*, 452 U.S. 314, 331-32 (1981).

The Supreme Court has at times fused together the analysis under the First and Fourteenth Amendments when dealing with content-based restrictions on speech. *See R.A.V. v. St. Paul*, 505 U.S. 377, 384 n.4 (1992) (stating "[t]his Court … has occasionally fused the First Amendment into the Equal Protection Clause"); *Burson v. Freeman*, 504 U.S. 191, 197 n.3 (1992) (stating "[u]nder either a free-speech or equal-protection theory, a content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny"); *Erznoznik v. Jacksonville*, 422 U.S. 205, 215 (1975) (holding that under either the First

Amendment or the Equal Protection Clause, there must be "clear reasons" for content-based restrictions).

The First Amendment and Equal Protection analyses are similar here. As explained in Section II (2), *supra*, COVID-19 Order No. 43 burdened Bit Bar's fundamental First Amendment right to exhibit video games. Gov. Baker gave preferential treatment to casinos over video game arcades, despite there being no real or imagined public health or safety related reason for doing so. Gov. Baker burdened Bit Bar's First Amendment rights without furthering a compelling government interest in a narrowly tailored fashion, violating Bit Bar's right to equal protection under the Fourteenth Amendment. Strict scrutiny, as discussed above, is not satisfied.

Gov. Baker argued that only rational basis need be satisfied; as a content-based regulation, this is the incorrect standard, as discussed above. However, even under rational basis review, the discrimination does not pass muster. Gov. Baker argued below that the higher number of video arcades and differing regulatory framework were sufficiently rational. Arcades, like Bit Bar, were open for business as restaurants; they only could not turn on their gaming machines. The number of arcades and the regulatory frameworks had nothing to do with prohibiting gaming machines from being turned on. Moreover, different regulatory frameworks does not have any reasonable relationship to one type of establishment being less COVID-

risky than another. They were not. Gov. Baker does not even purport to suggest casino patrons are at any less risk than arcade patrons. Thus, Bit Bar properly claimed violations of equal protection and is substantially likely to succeed on that claim.

4. Gov. Baker Violated Bit Bar's Due Process Rights

At the point that COVID-19 Order No. 43 had been implemented, the pandemic had been present for months, and Gov. Baker was in the process of opening the Massachusetts economy up to more business. Below, Gov. Baker argued Bit Bar was not entitled to any pre-deprivation due process due to the emergency nature of Defendant's response to the pandemic, relying on *Compagnie Francaise de Navigation a Vapeur v. Board of health of Sate of Louisiana*, 186 U.S. 380 (1902) and COVID-19 decisions that cited it. The Commonwealth misrepresented Bit Bar's due process deprivation claim. Bit Bar did not challenge the broad shutdown order imposed to stop an impending spread of disease, but rather challenged the discriminatory order that allowed substantially similar businesses to reopen while Bit Bar remained closed. Contrary to Gov. Baker's assertion, the decision to move arcades from Phase III to Phase IV did *not* affect a large number of people. (A175), quoting *Gallo v. U.S. Dist. Ct. for the Dist. of Arizona*, 349 F.3d 1168, 1182-83 (9th Cir. 2003)). There was no emergency need to move Bit Bar to Phase IV. Bit Bar was owed due process. *See Usery v. Turner Elkhorn Mining Co.*,

428 U.S. 1, 17 (1976) ("The retrospective aspects of legislation, as well as the prospective aspects must meet the test of due process[.]") This process may not necessarily amount to a full evidentiary hearing and trial prior to Gov. Baker taking action, but it must amount to something beyond the last-minute unilateral decisions of an unchecked executive.

Gov. Baker's actions also violates Bit Bar's substantive due process rights. Gov. Baker argued that, to be actionable, his actions must "shock the conscience." (A175.) Although political favoritism should shock the conscience, it is not necessary that the public conscience be shocked. In actuality, "[t]he criteria used for identifying government action proscribed by the constitutional guarantee of substantive due process vary depending on whether the challenged action is legislative or executive in nature." Government officials can act in either a legislative or executive capacity. *See, e.g., Carver v. Foerster*, 102 F.3d 96, 101 (3d Cir. 1996). Gov. Baker was acting in a legislative authority when he moved arcades to Phase IV.

As now-Justice Alito explained in *Nicholas v. Pennsylvania State Univ.*, "typically, a legislative act will withstand substantive due process challenge if the government identifies the legitimate state interest that the legislature could rationally conclude was served by the statute." 227 F.3d 133, 139 (3d Cir. 2000) (citation and quotation marks omitted). Executive action violates substantive due process if

"arbitrary, irrational, or tainted by improper motive," or if "so egregious that it shocks the conscience." *Id*. (citations and internal quotation marks omitted). The "shock the conscience" standard applies only to executive acts. *See Depoutot v. Raffaelly*, 424 F.3d 112, 118 (1st cir. 2005). And, the First Circuit similarly recognizes that "arbitrary and capricious" decisions by authorities also violates substantive due process. *See Newman v. Massachusetts*, 884 F.2d 19, 24-25 (1st Cir. 1989).

As discussed above, viewing COVID-19 Order No. 43 as a legislative act, where Gov. Baker made the irrational political choice to reopen casinos but not arcades, the purported public health interests and regulatory frameworks are not served by discriminatory treatment. Thus, Gov. Baker violated substantive due process.

Even if it were deemed executive, it was arbitrary and capricious. On December 8, 2020, the Los Angeles County Superior Court in Los Angeles, California granted motions for a preliminary injunction in *California Restaurant Association, Inc. v. County of Los Angeles Department of Public Health*, Case No. 20STCP03881, and *Mark's Engine Company No. 28 Restaurant LLC v. County of Los Angeles Department of Public Health*, Case No. 20STCV45134. The California court, using the same arbitrary and capricious standard, found that the county violated substantive due process where defendants had not properly shown there was

a rational basis for their decision due to their lack of attempting to perform scientific studies on how COVID-19 spread or a risk-benefit analysis that considered all relevant factors of economic and psychological harm that could justify the restrictions. Gov. Baker similarly did not perform any such spread studies or risk-benefit analysis.

5. *Jacobson* Does Not Grant Gov. Baker *Carte Blanche*

Below, Gov. Baker argued that, pursuant to *Jacobson v. Massachusetts*, 197 U.S 11, 27 (1905), he is entitled to "broad deference and wide latitude" to respond to COVID-19. (A161). However, this Court recently observed that:

> public officials do not have free rein to curtail individual constitutional liberties during a public health emergency. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 208 L. Ed. 2d 206, 2020 WL 6948354, at *3 (U.S. 2020) (per curiam) (stating that "even in a pandemic, the Constitution cannot be put away and forgotten"); *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (discussing courts' duty to intervene when legislative action lacks "real or substantial relation" to public health outcomes, or otherwise represents a "plain, palpable invasion" of constitutional rights)

Calvary Chapel of Bangor v. Mills, No. 20-1507, 2020 U.S. App. LEXIS 40086, at *12-13 (1st Cir. Dec. 22, 2020). Gov. Baker stated that COVID-19 Order 43 was rationally related to "slowing the spread of COVID-19 and protecting public health" (A163), but offered no explanation as to how the public health was protected by allowing Bit Bar to open so long as the video games were off. *Contrast Ramsek v. Beshear*, __ F. Supp. 3d __, 2020 WL 3446249 (E.D. KY. June 24, 2020) (noting

that the Governor has a significant interest in protecting their citizens from COVID-19 and that they have tools at their disposal to help mitigate the spread of coronavirus without infringing on First Amendment freedoms).

Moreover, *Jacobson* predates modern jurisprudence, but essentially applied a rational basis review test where neither suspect classifications nor fundamental rights were at stake. *See Roman Catholic Diocese*, *supra* at 212-13 (Gorsuch, J., concurring). First Amendment claims must still "meet the demands of strict scrutiny". *Id.* Although "[s]temming the spread of COVID-19 is unquestionably a compelling interest", New York's regulations were found by the Court to not be "narrowly tailored". *Id.* at 206 (per curiam). In light of *Roman Catholic Diocese*, the Ninth Circuit applied strict scrutiny to the regulations at issue regarding the First Amendment claims in *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 U.S. App. LEXIS 39266, 2020 WL 7350247 (9th Cir. Dec. 15, 2020), and found they were not sufficiently narrowly tailored.

Although the Commonwealth referred to *South Bay United Pentecostal Church v. Newsom* ("South Bay"), __ U.S. __, 140 S. Ct. 1613, 1613 (May 29, 2020) in its motion (A162), it must be noted that, on remand, it was found that "California did exactly what the narrow tailoring requirement mandates—that is, California has carefully designed the different exemptions to match its goal of reducing community spread, based on a neutral, seven-factor risk analysis." *S. Bay United Pentecostal*

Church v. Newsom, No. 20-cv-00865-BAS-AHG, 2020 U.S. Dist. LEXIS 240361, at *30 (S.D. Cal. Dec. 21, 2020). In contrast, there is no suggestion that Gov. Baker's actions in issuing COVID-19 Order No. 43 were carefully designed to match the public health goals or that he used anything like Gov. Newsom's neutral, seven-factor risk analysis. If Gov. Baker wants to be treated like Gov. Newsom, he needs to act like Gov. Newsom. Having failed to do so, and as discussed above, COVID-19 Order No. 43 fails strict scrutiny. Bit Bar's claims were plausible and likely to succeed on the merits.

6. Bit Bar is Entitled to Declaratory Relief

In the District Court, Gov. Baker cited *Green v. Mansour*, 474 U.S. 64, 71-73 (1985), for the proposition that the Eleventh Amendment bars declaratory relief in the absence of a "continuing violation of federal law[.]" However, the Court in *Mansour* also required that neither " can there be any threat of state officials violating the repealed law in the future[.]". *Id*. at 73. This means that the question of future constitutional violations is important to the Eleventh Amendment immunity analysis. As discussed below, there is a very real possibility of Defendant re-imposing discriminatory and arbitrary restrictions on Bit Bar's First Amendment rights, making this case distinguishable from *Mansour*. *Mansour* was concerned that declaratory relief would serve as a partial "end run" around the Eleventh Amendment in ancillary state court proceedings that would allow for the recovery

of money damages. *Id*. Those concerns are not present here, as there is no danger of Bit Bar attempting to use a declaratory judgment in its favor to obtain a money judgment elsewhere. Thus, the Eleventh Amendment does not require dismissal of the declaratory relief claim.

III. Bit Bar's Claims Are Not Moot

In COVID-19 Order No. 50, Gov. Baker re-classified arcades to Phase III. As a result, the District Court determined that Bit Bar's claims were moot. This is flawed; the District Court could still declare the content-based discrimination unconstitutional and enjoin Gov. Baker from arbitrarily reversing himself again. COVID-19 Order No. 50, issued two days after he was served, was motivated by nothing other than this litigation. *See Wyatt v. City of Boston*, 35 F.3d 13, 16 (1st Cir. 1994) (a close temporal nexus may establish causation).

When a defendant asserts that an event has mooted the case, "it bears the heavy burden of persuading the court that there is no longer a live controversy." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC) Inc.*, 528 U.S. 167, 189 (2000); *Conservation Law Found. v. Evans*, 360 F.3d 21, 24 (1st Cir. 2004) (finding that the party invoking the doctrine of mootness has the burden of establishing mootness). "[I]n instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework" further proceedings may be appropriate. *N.Y. State Rifle*

& Pistol Ass'n v. City of N.Y., 140 S. Ct. 1525, 1526 (2020) quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 483 (1990).

Subsequent to the dismissal, the Supreme Court rejected this same argument in *Roman Catholic Diocese, supra* at 210-211. "A claim is not moot unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). In *Roman Catholic Diocese*, the Supreme Court clarified that a temporary reprieve from unconstitutional executive order issued by a governor is not grounds for dismissal as moot. In that case, the Court considered an emergency application for injunctive relief brought by the Roman Catholic Diocese of Brooklyn and the plaintiffs in a related matter, *Agudath Israel of America, et al. v. Cuomo*, No. 29A90. The Governor of the State of New York had previously issued an order limiting the attendance at the churches' religious services. 208 L. Ed. 2d at 207. After asking the Court for relief, Gov. Cuomo changed the limitations such the attendance threshold for the churches was raised significantly. *Id.* at 210. The Supreme Court found that this this did not moot the request for injunctive relief, finding "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified…. The Governor regularly changes the classification of particular areas without prior notice." 208 L. Ed. 2d at 210 (internal citation omitted). Gov. Baker's COVID-19 Order No. 43 has

been superseded, but existing COVID-19 Orders could easily be replaced with an order containing the exact same kind of unconstitutional discrimination against businesses like Bit Bar.

Unsupported speculation that temporary cessation will at some point become permanent "cannot provide a sufficient foundation to moot a live controversy." *N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 143 (D.N.H. 2019), argued, No. 19-1835 (1st Cir. June 18, 2020). Gov. Baker continues to issue new COVID-19 Orders; on December 22, 2020, for example, he issued COVID-19 Order No. 59, which continues to categorize casinos and arcades differently, though it does *currently* treat them equally. Gov. Baker has made no commitment that he will not reinstate COVID-19 Order No. 43, or an order that similarly discriminates against businesses like Bit Bar, while COVID-19 cases spike again.

In deciding *Roman Catholic Diocese,* the Court relied on *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*., 528 U.S. 167, 189 (2000).[2] 2016 L. Ed. 2d. at 210. *Friends of the Earth* is a "voluntary cessation" case. 528 U.S. at 189. The voluntary cessation doctrine "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

[2] The Supreme Court also relied on *FEC v. Wis. Right to Life, Inc*., 551 U. S. 449, 462 (2007), which is a "capable of repetition yet evading review" case. Bit Bar does not argue that this is such a case.

U.S. 278, 284 n.1 (2001). A defendant's "voluntary cessation of challenged conduct does not ordinarily render a case moot." *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). "This is to avoid a manipulative litigant immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after." *ACLU of Mass. v. United States Conf. of Catholic Bishops*, 705 F.3d 44, 54-55 (1st Cir. 2013). As the Third Circuit recently explained:

> One scenario in which we are reluctant to declare a case moot is when the defendant argues mootness because of some action it took unilaterally after the litigation began. This situation is often called "voluntary cessation" and it "will moot a case only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" When a plaintiff seeks declaratory relief, **a defendant arguing mootness must show that there is no reasonable likelihood that a declaratory judgment would affect the parties' future conduct.**

Harnett v. Pa. State Educ. Ass'n, 963 F.3d 301, 306 (3d Cir. 2020) (citations omitted) (emphasis added).

The District Court erroneously found that this doctrine does not apply, believing there was no "reasonable basis to believe that the specific conduct challenged here - the imposition of greater restrictions on the operation of arcades than certain other Phase III enterprises - will recur if it dismisses this case," and that holding otherwise "rel[ies] on an undue degree of speculation regarding the future course of the virus and the measures Governor Baker may opt to take to counteract

its spread." (ADD1-2.) Finally, the district court held that applying the voluntary cessation doctrine here would require the court to "speculat[e] … on a matter of public health," which it found would be "inappropriate." (ADD1-2.) The District Court's belief lacked foundation.

Like the plaintiffs in *Roman Catholic Diocese of Brooklyn* and *Agudath Israel of America*, Bit Bar has yet to receive any actual relief. Instead, all it has is a temporary reprieve. Given the regularity with which Gov. Baker changes state guidelines and issues new and conflicting COVID-19 Orders, Bit Bar has no guarantee that Gov. Baker will not simply reinstate the previous restrictions and start again from square one. A government defendant claiming mootness on the basis of voluntary cessation "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*, 528 U.S. at 190. Gov. Baker has not met this showing.

Due to the uncertainties inherent in managing a pandemic and the unilateral nature of executive orders shutting down businesses, federal courts have quickly formed a pattern of applying the voluntary cessation doctrine to examine issues in governors' COVID-19 orders that were purportedly rendered moot by subsequent amendments. *See Dark Storm Indus. LLC v. Cuomo*, No. 1:20-CV-0360 (LEK/ATB), 2020 U.S. Dist. LEXIS 120514, at *19-20 (N.D.N.Y. July 8, 2020); *Antietam Battlefield KOA v. Hogan*, No. 20-CV-1130, 2020 WL 2556496, at *5 (D.

Md. May 20, 2020); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 345 (7th Cir. 2020) (finding voluntary cessation doctrine applied to governor lifting restrictions on in-person church services because they could be restored at will under new order); *Acosta v. Wolf*, 2020 U.S. Dist. LEXIS 113578, *3 n.7 (E.D. Pa. June 30, 2020) (finding that lessening of restrictions on ability to collect signatures necessary to appear on ballot did not moot civil rights claims because there was a "reasonable expectation" that the governor could issue similarly restrictive orders prior to the 2020 election).

By unilateral executive fiat and without prior notice, Gov. Baker kept Bit Bar's arcade business closed in a discriminatory fashion and then, using the same methods, allowed Bit Bar to re-open. The District Court stated it did not wish to "speculate", but all it did was speculate that Gov. Baker would abide the constitutional obligations he previously chose to ignore. Gov. Baker has not shown he is even mildly disinclined to restrain his own power; COVID-19 Orders Nos. 51-59 demonstrate his ongoing escalation of restrictions, separately categorizing arcades from casinos. Since Gov. Baker may well arbitrarily resume the challenged conduct and reinstate the shutdown Orders, the District Court erred in finding Bit Bar's claims moot.

IV. Injunctive Relief is Warranted

In dismissing the case as moot, the District Court also denied Bit Bar's motion for preliminary injunction. Because the dismissal should be reversed, the denial of the preliminary injunction should not be affirmed. On remand, the District Court should be instructed to take up the preliminary injunction motion, which has been fully briefed, hear evidence on it, and adjudicate it. As with the dismissal motion, there are no alternate grounds on which the denial of the motion should be affirmed.

As discussed above, Bit Bar has a strong probability of prevailing on its claims. The First and Fourteenth Amendments prohibit discriminatory treatment. Gov. Baker's reference to a purportedly stricter regulatory scheme on casinos and lack of scientific evidence of any kind demonstrating that video game arcades pose a greater threat than casinos show that no level of scrutiny is met. A different regulatory body does not make casinos operating game boxes any safer from COVID than Bit Bar operating different game boxes. Gov. Baker has offered no scientific basis for arbitrarily shifting arcades from Phase III to IV and back to III while simultaneously allowing casinos to operate.

The other factors of irreparable harm, balance of hardships, and public interest support injunctive relief. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 374 (1976); see also *414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir.

1974) (affirming an injunction of an arbitrary licensure ordinance where the infringement of First Amendment rights of a coin-operated film machine operator constituted irreparable harm). Because of this, if a plaintiff in a First Amendment case demonstrates a likelihood of success, they necessarily also establish irreparable harm. *Fortuño*, 699 F.3d at 15. If the discriminatory treatment is allowed to recur, Bit Bar faces a significant likelihood of going out of business.

When a government regulation restricts First Amendment-protected speech, the balance of hardships tends to weigh heavily in a plaintiff's favor. *See Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244, 251 (D.P.R. 2002) (observing that "insofar as hardship goes, the balance weighs heavily against Defendants, since they have effectively silenced Plaintiffs' constitutionally protected speech") *quoting Freedman v. Maryland*, 380 U.S. 51, 61-62 (1965) (Douglas, J., concurring)("I do not believe any form of censorship—no matter how speedy or prolonged it may be—is permissible.")[3] The balance here weighs decisively in Bit Bar's favor. The infringement on Bit Bar's First Amendment rights alone would normally be enough to resolve this factor in favor of Bit Bar. But, beyond this constitutional hardship, Bit Bar is in real danger of going out of business if Gov. Baker resumes his arbitrary discriminatory conduct. The government's

[3] The *Firecross* decision actually cited Justice Douglas's dissent in *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (1975), but Justice Douglas was quoting his *Freedman* concurrence.

countervailing interests would not be compromised in any way by entering the requested injunction. Video game arcades are no more dangerous than casinos, and they are no more dangerous with the machines on than if they are off. Allowing a business to operate that is as safe as other businesses that are already operating would not prejudice Gov. Baker's attempts to ensure the health and safety of Massachusetts citizens.

Below, Gov. Baker argued, essentially, that an injunction should not issue because it claimed Bit Bar waited six months to seek relief. (A176). Not only does not address the irreparable harm or balance requirements, it is false. The First Amendment violation occurred upon the issuance of COVID-19 Order No. 43, which took effect in July 2020, four months after the initial shut-down. Bit Bar then attempted to avail itself of the political process before resorting to the courts two months later. It did not sit on its rights.

Similarly, "[t]he public interest is served by protecting First Amendment rights from likely unconstitutional infringement." *Comcast of Maine/New Hampshire*, 435 F. Supp. at 250. The public interest is served by issuing an injunction where "failure to issue the injunction would harm the public's interest in protecting First Amendment rights in order to allow the free flow of ideas." *Magriz v. union do Tronquistas de Puerto Rico, Local 901*, 765 F. Supp. 2d 143, 157 (D.P.R. 2011) (citing *United Food & Commer. Workers Union, Local 1099 v. Sw. Ohio Reg'l*

Transit Auth., 163 F.3d 341, 363 (6th Cir. 1998)). "When a constitutional violation is likely, moreover, the public interest militates in favor of injunctive relief because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Id*. (quoting *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010)). Restraint of Bit Bar's exercise of its First Amendment rights harms the public interest in enforcing these rights. Such an injunction would not public health or safety. His past Orders undermine any such contention, and so the requested injunction would be in the public interest. Thus, on remand, the District Court may properly issue an injunction against future discriminatory conduct by Gov. Baker.

CONCLUSION

In light of the foregoing, the orders of the District Court denying the motion for preliminary injunction and dismissing the case should be reversed, and the matter should be remanded for further proceedings on the motion for preliminary injunction.

Date: December 28, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,894 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: December 28, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: December 28, 2020.

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ADDENDUM

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