At a Term of the Supreme Court of the State of New York held in and for the County of Onondaga at the Onondaga County Courthouse, Syracuse, New York, on the 15th day of December, 2020.

PRESENT: HON. GERARD J. NERI, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

3707 BREWERTON ROAD, LLC d/b/a Brick House Billiards Bar and Restaurant; RACK THEM INC. d/b/a The Billiard Company; 110 E 11 ASSOCIATES, LLC d/b/a Amsterdam Billiards; SJEN ENTERPRISE INC. d/b/a Cue Bar; AAA BILLIARDS CORP. d/b/a Boardwalk Billiards; BQE CAFE BILLIARDS INC. d/b/a BQE Cafe Billiards; OLYMPIAN SUMMIT INC. d/b/a "BrownstoneBilliards"; GS ENTERPRISE HOLDING INC. d/b/a Set Bar Lounge & Billiards; LTM HOULDING NANUET LLC d/b/a The Spot; JAY MAC'S BAR AND BILLIARDS CORP d/b/a Skyline Bar & Billiards; SR CITY ENTERTAINMENT, LLC d/b/a Society Billiards and Bar; CHICKIES BILLIARDS CORP d/b/a Status Q,

Plaintiffs/Petitioners,

-against-

ANDREW M. CUOMO, in his Official Capacity as Governor of the State of New York; ATTORNEY GENERAL OF THE STATE OF NEW YORK; and THE STATE OF NEW YORK,

Defendants/Respondents.

DECISION and ORDER
Index No. 007139/2020

Plaintiff filed the instant action on November 2, 2020 along with an Order to Show Cause seeking a hearing for a preliminary injunction, alternative service, and a schedule for filing of papers in advance of the requested hearing. The Court signed the Order to Show Cause setting the hearing, granting alternative service, and setting forth a schedule for filing of papers (*see* Order to Show Cause, NYSCEF Doc. No. 8). The Complaint seeks a declaratory judgment

concerning Executive Orders 202, *et seq.* (the "Executive Orders"), preliminary and permanent injunctive relief, damages, attorneys' fees, as well as any other relief as this Court deems just and proper (*see* Complaint, NYSCEF Doc. No. 1). Defendants filed opposing papers (*see* Memorandum of Law in Opposition and Supporting Papers, NYSCEF Doc. Nos. 24, *et seq.*). On January 12, 2021, the Court held a hearing to determine Plaintiff's application for a preliminary injunction, with James Mermigis appearing on behalf of Plaintiffs and Assistant Attorney General William Arnold IV appearing on behalf of Defendants Governor Andrew M. Cuomo, Attorney General of the State of New York, and the State of New York.

Plaintiffs allege certain Executive Orders issued and enforced by Defendants violate the Fifth and Fourteenth Amendments of the Federal Constitution as well as Article 1, Section 11 of the New York State Constitution. Plaintiffs allege it is legal to play pool in a bowling alley, but playing pool is prohibited in a billiard hall. Plaintiffs further allege this distinction is arbitrary and capricious. Plaintiffs allege they have been shut down due to the Executive Orders since March 18, 2020. Plaintiffs note other enterprises and activities have been allowed to reopen, yet they continue to remain closed. Specifically they note that businesses deemed "essential", such as Target, Walmart, and Home Depot, were allowed to remain open at all times (*see* Complaint, NYSCEF Doc. No. 1, para. 35). Plaintiffs allege that the "Executive Orders were premised on the perceived need to 'flatten the curve' so as to avoid overwhelming the State's hospitals and healthcare centers, not to eradicate the virus" (*see* Complaint, NYSCEF Doc. No. 1, para. 36). Plaintiffs further allege: "What were initially billed as temporary measures necessary to 'flatten the curve' and protect hospital capacity have become open-ended and ongoing restrictions aimed at a very different end – stopping the spread of an infectious disease and preventing new cases from arising – which requires ongoing and open-ended efforts" (*see* Complaint, NYSCEF Doc.

No. 1, para. 37). Plaintiffs further allege there has been no inspections of Plaintiffs' billiard halls, no analysis of the health status of billiard halls, nor any protocols which would allow billiards halls to open safely (*see* Complaint, NYSCEF Doc. No. 1, para. 38).

Plaintiffs note that during a press conference, Defendant Governor Andrew Cuomo ("Cuomo") stated "this is a public health issue and you don't want people sick and dead" and later during the same press conference thanked protesters for protesting in the thousands throughout New York City (*see* Complaint, NYSCEF Doc. No. 1, para. 40). Plaintiffs allege this amounts to selective enforcement of the Executive Orders. Plaintiffs note that the Executive Orders continue to be selectively enforced as entertainment venues such as Saturday Night Live are permitted to operate while Plaintiffs are forced to remain closed (*see* Complaint, NYSCEF Doc. No. 1, para. 43). Plaintiffs allege there was not a basis for the Executive Orders and even if there was, such basis no longer exists (*see* Complaint, NYSCEF Doc. No. 1, para. 45).

Plaintiffs allege Defendants have violated the Fifth and Fourteenth Amendments of the Federal Constitution and have violated New York State's guarantee of equal protection under Article 1, Section 11 of the State Constitution.

Defendants oppose the relief sought and first raise a procedural objection that the Court lacks personal jurisdiction over the State Defendants. Defendants point to CPLR §307 and allege that Plaintiffs have failed to serve Cuomo or the Executive Office (*see* Memorandum of Law, NYCEF Doc. No. 24, p. 17 of 55). Defendants further argue that "service of process on the Attorney General authorized by the order to show cause [is] insufficient to confer personal jurisdiction over respondent" (*see* Matter of Van Bramer v. Selsky, 293 A.D.2d 901 [Third Dept. 2002]).

Defendants next raise the affirmative defense that Plaintiffs lack standing. Defendants note that Plaintiffs seek a declaration that all of the subject Executive Orders are void.

> "'Under the common law, there is little doubt that a 'court has no inherent power to right a wrong unless thereby the civil, property or personal rights of the plaintiff in the action or the petitioner in the proceeding are affected' (Society of Plastics Indus. V. County of Suffolk, 77 NY2d 761, 772 778 [1991], *quoting* Schieffelin v. Komfort, 212 NY 520, 530 [1914]). Related to this principle is 'a general prohibition on one litigant raising the legal rights of another' (Society of Plastics, 77 NY2d at 773). Thus, if the issue of standing is raised, a party challenging governmental action must meet the threshold burden of establishing that it has suffered an "injury in fact" and that the injury it asserts 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted' (New York State Assn. of Nurse Anesthetists v. Novello, 2 NY3d 207, 211, [2004]). The injury-in-fact requirement necessitates a showing that the party has 'an actual legal stake in the matter being adjudicated' and has suffered a cognizable harm (*see* Society of Plastics at 772) that is not 'tenuous,' 'ephemeral,' or 'conjectural' but is sufficiently concrete and particularized to warrant judicial intervention (Novello at 214; *see* Spokeo. Inc. v. Robins, 578 US ___, ___, 136 S Ct 1540, 1548, 194 L Ed 2d 635 [2016])" (Matter of Mental Hygiene Legal Serv. V. Daniels, 33 NY3d 44, 50 [2019]).

Defendants allege that Plaintiffs do not have standing to seek such relief as the complaint has not demonstrated the Plaintiffs' harm from all of the Executive Orders.

Defendants then argue that Plaintiffs have no clear or substantial likelihood of success on the merits of the action. "The liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances wholly freed from restraint, nor is it an element in such liberty that one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State" (Jacobson v. Massachusetts (197 U.S. 11, 22 [1905]). Defendants argue Jacobson set a deferential standard for state action, and therefore, Plaintiffs are unlikely to succeed.

Defendants further argue that State Defendants had and have a duty to protect the public health and safety. To this end, Defendants argue, recent trends show more restrictions are needed to combat the rising infection rates (*see* Defendants Memorandum of Law, NYSCEF Doc. No. 24, p. 25 of 55).

Defendants argue Plaintiffs' procedural due process arguments fail on the merits. "[A] plaintiff must first identify a property rights, second show that the state has deprived him [or her] of that right, and third show that the deprivations was effected without due process" (Progressive Credit Union v. City of New York, 889 F.3d 40, 51 [Second Cir. 2018]). Defendants assert that "doing business" is not a property right protected by the Fourteenth Amendment (*see* " Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 [1999]). Defendants next claim that the Executive Orders are legislative in nature and therefore are not subject to procedural due process claims (*see* Murphy v. Lamont, 2020WL 4435167, at 11 [D. Conn. Aug. 3, 2020]). Finally, the Defendants argue that even should the Court find the procedural due process applies, Article 78 of the CPLR provides a sufficient post-deprivation remedy (*see* Grillo v. N.Y.C. Transit Auth., 291 F.3d 231, 234 [Second Cir. 2002]).

Defendants argue Plaintiff's fail to state a substantive due process claim. "[T]o state a valid substantive Due Process claim, the Plaintiff must sufficiently allege: (1) a valid property interest or fundamental right; and (2) that the defendant infringed on that right by conduct that shocks the conscience or suggests a gross abuse of governmental authority." (Leder v. Am. Traffic Solutions, Inc., 81 F Supp 3d 211, 223 [EDNY 2015], *internal citations and quotations omitted*). Defendant argues the substantive due process claim must be dismissed as it is redundant of other claims. Defendants next argue that "Plaintiffs' claims related to economic livelihood simply do not constitute an infringement of a 'fundamental right' protected by the U.S. Constitution" (*see* Defendants' Memorandum of Law, NYSCEF Doc. No. 24, p. 34 of 55). Defendants continue, "reasonable minds may differ over the right response to an unprecedented global pandemic, but a difference in opinion does not give rise to a substantive due process violation" (*ibid* at 37 of 55).

Defendant asserts takings claims must be brought in the New York State Court of Claims (*see* N.Y. Const., Art. VI, §9).

Defendants assert that Plaintiffs' application for a preliminary injunction must be denied because Plaintiffs cannot establish irreparable injury. Defendants note in a similar action: "[P]laintiffs have failed to provide factual support or documentary evidence for their assertions that they will suffer irreparable harm in the form of insolvency if they are not permitted to resume operations at 50% indoor capacity. Their affidavits are speculative and conclusory and absent the appropriate proof, plaintiffs cannot demonstrate a likelihood of success on the merits since economic loss alone does not constitute irreparable harm" (Bocelli Ristorante Inc. v. Cuomo, et al., Index No. 151500/2020, at NYSCEF No. 107, p. 14 [Sup. Ct. Richmond Cty.

Nov. 9, 2020]). Defendants allege in this action, Plaintiffs papers are similarly devoid of factual support.

Defendants argue the fact that Plaintiffs waited until November 2, 2020, when Executive Order 202.5 closed places of amusement on March 18, 2020, demonstrates the matter does not have the requisite urgency for emergency relief.

Defendants argues the balance of the equities favor the State in combating a global pandemic. "'In ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation.'" Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp., 69 A.D.3d 212, 223 [Fourth Dept. 2009] *citing* De Pina v. Educ. Testing Serv., 31 A.D.2d 744. 745 [Second Dept. 1969]). Defendants argue, "a balancing of the equities between the parties unquestionably favors the great public interest in maintaining the status quo of the EOs to continue to protect the public from the risks of the deadly pandemic" (*see* Defendants' Memorandum of Law, NYSCEF Doc. No. 24, pp. 52-53 of 55). Defendants assert that the Executive Orders are the sole cause to greatly reduced rates of transmission in New York "and have undoubtedly saved thousands of lives" (*ibid* at 54 of 55).

Plaintiffs in reply note the recent Federal Supreme Court opinion in Roman Catholic Diocese v. Andrew Cuomo, in which Justice Gorsuch stated in his concurring opinion: "People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able and willing to follow all the safety precautions required of 'essential' businesses" (Roman Catholic Diocese v. Andrew Cuomo, 592 U.S. ____ [2020]).

Plaintiffs note they are ready, willing, and able to make all safety precautions which are required of similar entertainment venues, including bowling alleys, indoor gymnastics, casinos, jazz dinner theaters, restaurants and bars with live music, and catering halls.

Plaintiffs note that a primary case relied upon by Defendants, Jacobson, was addressed in Justice Gorsuch's concurring opinion in Roman Catholic Diocese v. Andrew Cuomo, and found not to be applicable in the present COVID situations. "Jacobson hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction" (Roman Catholic Diocese, 208 L.Ed.2d 206, 212).

Plaintiffs note that bowling alleys are allowed to open at 50% capacity and there is no significant difference in the manner of their operations. Plaintiffs proffer the affidavit of Peter Pitts in opposition to the State's expert, Dr. Blog (*see* NYSCEF Doc. No. 84). Pitts states disinfectants like Lysol kill COVID-19, and contrary to assertions, there is no data to support the conclusion that disinfectants will not work on cloth such as billiard tables (*see* Pitts Affidavit, NYSCEF Doc. No. 84, paras. 10-13). Plaintiffs note that other businesses where patrons touch cloth, such as clothing stores, have been allowed to remain open (*see* Plaintiffs' Memorandum in Reply, NYSCEF Doc. No. 82, p. 8).

Plaintiffs argue there are studies which conclude lockdowns are not effective, and further, lockdowns have unintended consequences (*ibid* at 10). Plaintiffs argue if they are not able to open up now, they may close permanently (*ibid*).

Plaintiffs note they must demonstrate the following to get a preliminary injunction: (1) irreparable injury; (2) a likelihood of success on the merits; (3) a balance of equities tipping in the moving party's favor; and (4) that the public interest would not be disserved by injunctive

relief (*see* Winter v. Nat. Res. Def Council. Inc., 555 U.S. 7, 20 [2008]). Plaintiffs argue a "threat to the continued existence of a business can constitute irreparable injury" (*see* Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp., 992 F.2d 430, 435 [Second Cir. 1993]). Plaintiffs assert that as a result of the Federal Supreme Court's decision in Roman Catholic Diocese, Plaintiffs are likely to succeed in the instant action. Plaintiffs further argue the equities lay in their favor, as industries which Defendants have permitted to open pose greater risks to public safety than Plaintiff's businesses. Plaintiffs pray this Court grants the preliminary injunction.

Defendants filed a sur-reply addressing issues raised in Plaintiffs' reply. Defendants assert COVID-19 continues to pose a grave threat to New York State. Defendants state that on December 9, 2020, 197,406 individuals were tested and 10,178 tested positive, for a positivity rate of 5.2%. Defendant notes that many of the Plaintiffs' businesses are located within "yellow zones". Defendants further note that since opposition papers were filed, rates have continued to climb. Defendants claim this data disproves Plaintiffs' assertion that COVID-19 is under control.

Defendants assert "Plaintiffs are sorely mistaken" concerning the effect of Roman Catholic Diocese. Defendants assert Roman Catholic Diocese is limited to the religious institutions subject to ten and twenty-five person limits. Further, Defendants assert the religious liberty at stake in that case is different from the issues at bar.

Defendants argues that the expert affidavit provided by Pitts is of no value as his curriculum vitae does not properly establish his credentials. Defendants further argue the individual points made by Pitts are not relevant.

Defendants reiterate their claims concerning Plaintiffs' likelihood of success. Defendants also reiterate their belief the equities lay in their favor.

Defendants also filed a follow-up letter dated January 10, 2021 further addressing Jacobson. Defendants note a recent Second Department Case (C.F. v. N.Y.C. Dept of Health & Mental Hygiene, 2020 WL 7636501, at 6-7 [Second Dept. 2020]) which they assert affirms Jacobson's continued relevance (*see* NYSCEF Doc. No. 94).

Plaintiffs submitted their own letter dated January 11, 2021, in which they noted three other courts granting preliminary injunctions (*see* NYSCEF Doc. No. 95).

The Court held a hearing on January 12, 2021. The Parties argued their points, highlighting what they believed to be their most important issues. At the conclusion of the hearing, the Court invited the Parties to make supplemental submissions by mid-morning Friday, January 15, 2021.

Plaintiff's submitted a revised affidavit of their expert, Peter Pitts, wherein he included his education: a B.A. in Political Science from McGill University and completing his coursework at McGill University in a combined MA./Phd program in Public Health (*see* Pitts Affidavit, NYSCEF Doc. No. 103, paras. 25-26).

Also included were the affidavits of some of the Plaintiffs expressing specific concerns with their industry (*see* NYSCEF Docs. 97-102). Brad Rees, a member of Plaintiff 3707 Brewerton Road, LLC, took issue with the Defendants' counsel's comment that gaming facilities were taking many precautions and visited Turning Stone Casino on January 13, 2021 (NYSCEF Doc. No. 97). Contrary to Defendants' assertions, there were no dividers and patrons and employees alike were in constant contact with the felt playing surfaces (*ibid* at para. 7). Also attached to Rees' Affidavit were photos detailing what Rees saw (NYSCEF Doc. No. 98).

Discussion:

The Court would note at the outset that at the hearing held on January 12, 2021, both attorneys competently, zealously, and respectfully represented their respective clients.

Defendants first raise the question of jurisdiction, alleging service upon the Attorney General's Office was improper. The Fourth Department has recognized the authority of the Court to grant alternative service via an order to show cause (*see* Francis v. Goord, 266 A.D.2d 845 [Fourth Dept. 1999]; *see also* Jarvis v. Coughlin, 88 A.D.2d 1041 [Third Dept. 1982]; Lowrance v. Coughlin, 190 A.D.2d 915 [Third Dept. 1993]). The Court permitted alternative service in the Order to Show Cause (*see* NYSCEF Doc. No. 8). Plaintiffs complied with the service requirements (*see* Affidavit of Service, NYSCEF Doc. No. 22). The Court has jurisdiction over the instant matter.

Defendants standing argument is not applicable at this time for reasons discussed below and therefore the Court does not rule on the issue at this time.

Plaintiffs seek a preliminary injunction enjoining Defendants from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with the subject Executive Orders, or otherwise preventing Plaintiffs from operating their billiard halls as long as CDC guidelines are followed. "In order to establish its entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence, three separate elements: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp., 69 A.D.3d 212, 216 [Fourth Dept. 2009]). For purposes of securing a preliminary injunction, Plaintiffs need only demonstrate success on one of the causes of action. The Court will address each prong in turn.

In order for Plaintiffs to obtain a preliminary injunction, they must demonstrate a likelihood of ultimate success on the merits. Plaintiffs have demonstrated their likelihood of success on their equal protection and Article 78 claims. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational (City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 [1985]). The State concedes it must "treat similarly situated people alike" (*see* Giano v. Senkowski, 54 F.3d 1050, 1057 [2nd Cir. 1995]). Further, "[a]ction taken which has no foundation in fact or reason is, by definition, arbitrary and capricious" (Miller v. Valley Forge Village, 43 N.Y.2d 626, 632 [1978]; *see also* Zoom Tan, Inc. v. Cuomo, *et al.*, Index No. 815019/2020, Decision and Order, NYSCEF Doc. No. 25, p. 6 [Sup. Ct. Erie County December 14, 2020]). "Upon reviewing administrative action under CPLR Article 78, courts must uphold the administrative exercise of discretion unless it has no rational basis or is arbitrary and capricious" (Amherst Pizza & Ale House, Inc., *et al.* v. Andrew M. Cuomo, *et al.*, Index No. 816373/2020, Decision, NYSCEF Doc. No. 148, p. 17 [Sup. Ct. Erie County, January 13, 2021] *citing* Krug v. City of Buffalo, 34 N.Y.3d 1094, 1096 [2019; Lemma v. Nassau County Police Officer Indem. Bd., 31 N.Y.3d 523, 528 [2018]). "When a plaintiff alleges an equal protection violation (without also alleging discrimination based upon membership in a protected class), the plaintiff must plausibly allege that he or she has been intentionally treated differently from others similarly situated and no rational basis exists for that different treatment" (Progressive Credit Union v City of NY, 889 F3d 40, 49 [Second Cir. 2018]).

The State's distinction for not allowing Plaintiffs to open, according to Dr. Blog, is that a pool table has a felt surface which they allege is a porous surface which cannot be properly sanitized: "there are no Environmental Protection Agency ("EPA") registered disinfectants

suitable for porous surfaces, such as the felt used in billiards tables, that allow for easy cleaning between patrons; instead, disinfectant for porous surfaces require more thorough laundering, which would not be possible on a large table between each game" (*see* State Memorandum of Law, NYSCEF Doc. No. 24, p. 14 of 55; *see also* Blog Affidavit, NYSCEF Doc. No. 29, para. 89). This distinction is not limited between pool halls, bowling alleys, and casinos, but extends to the "essential services" the State has allowed to remain open. Large department or "big box" stores which sell clothing and other items with "porous surfaces" remain open and selling the items which cannot be easily disinfected. Even stores which sell items with hard surfaces are not required to disinfect items which consumers take off a shelf to examine and then replace without purchasing. Many restaurants, airports, doctor's offices, and other open business have fabric covered seating areas, yet there is seemingly no way to disinfect those areas according to the non-scientifically supported opinion of the State. The Court requested the State provide statistics regarding COVID-19 transmissions as related to these supposed porous surfaces, yet in its supplemental papers the State failed to identify any significant transmissions from porous surfaces. The State claims it may take its actions because it has a rational basis, but as demonstrated, there is nothing rational about its actions.

Plaintiffs also highlighted the irrational and arbitrary standards of the reopening process by showing the Defendants' statements that casinos were operating with certain safety precautions to be demonstrably false. Photos supplied by Plaintiffs clearly show the only precaution enforced at Turning Stone Casino was mask-wearing. Patrons were sitting and playing on felt tables. Patrons and employees were in constant contact with the felt playing surface. There were no physical barriers between tables or individuals as represented by the State in oral arguments. The Defendants main point had been that pool tables present a unique

risk in that their felt surface could not be readily cleaned or sanitized. From the photos presented, the alleged unique risk is far from unique. Further, as detailed above, porous surfaces are not unique to billiard halls, making that reasoning for not allowing them to open arbitrary and capricious.

Plaintiffs' supplemental affidavits feature another truism which has been lost in the Defendants' efforts to combat COVID-19. Kevin Buckley, owner of Plaintiff Gotham City Billiard Club, states: "We have lost all our client [*sic*] who simply go to New Jersey and Connecticut, where they are allowed to play pool" (Buckley Affidavit, NYSCEF Doc. No. 100, para. 5). Lenore Donovan, member of Plaintiff LTM Holding Nanuet, LLC, states: "In addition, we have lost several customers to New Jersey and Connecticut. Pool Halls are open in New Jersey and Connecticut. We have been forced to lay-off our loyal employees" (Donovan Affidavit, NYSCEF Doc. No. 101, para. 7). The shutdown of Plaintiffs specifically, and shutdowns in general, have not stopped social activity, but have simply moved it. As was noted in a recent decision in Erie County, only 1.43% of COVID-19 cases can be traced to restaurants and bars (*see* Amherst Pizza & Ale House, Inc., *et al.* v. Andrew M. Cuomo, *et al.*, Index No. 816373/2020, Decision, NYSCEF Doc. No. 148, p. 17 [Sup. Ct. Erie County, January 13, 2021]). That same State study showed that 73.84% of COVID-19 cases were the result of household/social gatherings (https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/12/11/what-new-york-s-contact-tracing-data-show).

Plaintiffs must also demonstrate irreparable harm should the preliminary injunction not be granted. Preliminary injunctions are not appropriate where there are calculable damages (*see* D&W Diesel, Inc. v. McIntosh, 307 A.D.2d 750, 751 [Fourth Dept. 2003]). Plaintiffs assert their injuries are represented by the loss of customers, goodwill, and future business. Defendants

characterize this as solely an economic damages question. The Court disagrees. By permitting some entertainment venues to continue to operate and closing others, such as Plaintiffs' operations, it will become virtually impossible to measure the economic impact attributable to Defendants' actions short of complete and total failure of the enterprises. Further, there is no way to calculate damages as a result of this closure as we cannot know whether these businesses would have naturally lasted a few more months, years, or decades. The Defendants also compare the situation to another case challenging an executive order's requirement of 50% capacity. The situations are distinguishable as 50% capacity allows something while zero percent allows categorically nothing.

The State further argued that Plaintiffs waited too long to prosecute their action, thus betraying their claims of irreparable harm. In view of the facts of this matter, such a delay was reasonable. As was pointed out in the Western District Court for Pennsylvania: "What were initially billed as temporary measures necessary to 'flatten the curve' and protect hospital capacity have become open-ended and ongoing restrictions aimed at a very different end – stopping the spread of an infectious disease and preventing new cases from arising – which requires ongoing and open-ended efforts" (Cty of Butler v. Wolf, 2020 U.S. Dist. LEXIS 167544 at 26 [W.D. Penn. 2020]). Individuals should not be punished for taking the public comments of public officials at face value that the measures were only temporary. Further, the State provided for the phased reopening of businesses in New York. There were only four phases identified with no indication of a fifth. Many businesses which were not open assumed they would be allowed to open in the fourth phase. It is interesting that the State would seek to penalize businesses for some delay in taking legal action because they cooperated by following State

mandates and initial guidelines to fight this little-known disease. The State's argument on this point is without merit.

The final prong is a balancing of the equities. The Court must determine whether the irreparable harm outweighs the harm caused to the Defendants by granting the preliminary injunction (*see* McLaughlin, Piven, Vogel v. Nolan & Co., 114 A.D.2d 165, 174 [Second Dept. 1986]). On December 11, 2020, the State released results of its contract tracing showing that 73.84% of COVID-19 cases were the result of household/social gatherings (https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/12/11/what-new-york-s-contact-tracing-data-show). The next largest sources of spread came from healthcare delivery (7.81%), higher education student (2.02%), education employees (1.5%), restaurants and bars (1.43%), and travel/vacation 1.06% (*ibid*). Retail, which has largely remained open albeit with restrictions, accounts for 0.61% (*ibid*). The State attempts to justify its actions by trying to stop the spread of COVID-19. However, as exemplified by the story of King Canute, nature is above human law and COVID-19 continues to spread through basic human contact, the majority of which is within one's family unit and basic social circles. With the limited numbers the State has made publicly available, it is hard to see how, with basic precautions taken, billiard halls present a unique threat in spreading COVID-19. As the Court stated during oral arguments in this case the Governor is in an unenviable position of making decisions based on opinions he receives from persons in this field. However, as scientific evidence has evolved over time and as the Governor has acknowledged: "We simply cannot stay closed until the vaccine hits critical mass. The cost is too high. We will have nothing left to open. We must reopen the economy, but we must do it smartly and safely."[1] In this matter, there has been no substantial scientific proof that

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[1] https://twitter.com/NYGovCuomo/status/1348673192609591296 (as last viewed 1/15/2021)

would suggest that these Plaintiffs, because of porous material which has to be cleaned between uses, should be treated any differently than bowling alleys, casinos, restaurants, airports, doctor's offices, and other open business which have fabric covered seating areas, or businesses which sell porous-surface items such as clothing, bedding, toys, or other items. The equities lay in Plaintiffs' favor.

Having found that Plaintiffs are likely to succeed on their equal protection and Article 78 claims for purposes of granting a preliminary injunction, the Court declines to review the due process and constitutionality claims at this time and will only consider them for final determination.

NOW, THEREFORE, based upon all the papers submitted under this action (NYSCEF Docs. 1-105) and the hearing held on January 12, 2021, it is hereby

ORDERED that Plaintiff's application for a preliminary injunction is GRANTED; and it is further

ORDERED, that Plaintiffs' billiard halls shall be permitted to open immediately under the same guidelines as phase four industries such as low-risk indoor arts and entertainment venues and/or gaming facilities; and it is further

ORDERED, that the Parties shall within seven (7) days of this Order advise the Court of their availability and confer with Chambers for the scheduling of a final hearing of the matter.

Dated: January 15, 2020

HON. GERARD J. NERI, J.S.C.

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