UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSTON BIT LABS, INC., d/b/a BIT BAR SALEM, a Massachusetts corporation, Plaintiff, v. CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts, Defendant.	Civil Action No. 1:20-cv-11641 **MOTION FOR A PRELIMINARY INJUNCTION** **[REQUEST FOR ORAL ARGUMENT]**

Plaintiff Boston Bit Labs, Inc., d/b/a Bit Bar Salem ("Bit Bar") brings its Motion for a Preliminary Injunction against Defendant Charles D. Baker preventing Gov. Baker from restricting Bit Bar's ability to operate its business.

Bit Bar believes that oral argument may assist the Court in deciding this Motion and wishes to be heard, and thus requests that the Court conduct oral argument on this Motion.

MEMORANDUM OF REASONS

1.0 INTRODUCTION

Bit Bar operates a video game arcade in Salem, Massachusetts. At Bit Bar, video games are presented in a stand-up kiosk-like format as well as tabletop formats. In Massachusetts' casinos, gambling services are provided in kiosk like machines, which are functionally no different from video game machines. The Commonwealth of Massachusetts, however, treats them differently – based on the content presented by the kiosk. Casinos, with kiosks that present gambling services, are allowed to be open and operate, but video arcades that feature kiosks with video games are not. On May 18, 2020, Governor Baker instituted a planned phased reopening of Massachusetts. In an order of June 1, 2020, Plaintiff's business was categorized as part of the Phase III enterprises. Gov. Baker reiterated that arcades would be part of Phase III in an order of June 6, 2020. Suddenly, and without warning, explanation, or due process, on July 2, 2020, Gov. Baker ordered that Phase III enterprises may reopen beginning July 1, 2020, but shunted arcades to Phase IV. Casinos, however, were permitted to remain in Phase III. Thus, in two simple pictures:

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. As a result, Bit Bar has had to keep the arcade portion of its business closed (its restaurant is open under Phase 3) while casinos enjoy the advantage of the house always winning.

2.0 FACTUAL BACKGROUND

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. (*See* Declaration of Gideon Coltof ["Coltof Decl."], attached as **Exhibit 1**, at ¶ 3.)

On or about March 10, 2020, 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"). (*See* Massachusetts Executive Order No. 591, attached as **Exhibit 2**.)[1] The state of emergency continues to exist and, pursuant to Executive Order No. 591, involving the authority of Sections 5, 6, 7, 8 & 8A of Chapter 639 of the Acts of 1950, Gov. Baker has 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. (*See* COVID-19 Order No. 13, attached as **Exhibit 3**.)[2] Pursuant to COVID-19 Order No. 19, the Department of Public Health is charged with enforcing the shut-down of Bit Bar's business pursuant to Mass.Gen.Laws, ch. 111, § 30. (*See* COVID-19 Order No. 19, attached as **Exhibit 4**.)[3] The shut-down was extended on March 31, April 28, and May 15, 2020 by COVID-19 Orders No. 21, 30, and 32, respectively. (*See* COVID-19 Order No. 21, attached as **Exhibit 5**;[4] COVID-19 Order No. 30, attached as **Exhibit 6**;[5] COVID-19 Order No. 32, attached as **Exhibit 7**.)[6]

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[1] Available at: https://www.mass.gov/executive-orders/no-591-declaration-of-a-state-of-emergency-to-respond-to-covid-19 (last accessed Aug. 18, 2020).

[2] Available at: https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download (last accessed Aug. 26, 2020).

[3] Available at: https://www.mass.gov/doc/virtual-shareholder-meeting-order/download (last accessed Aug. 26, 2020).

[4] Available at: https://www.mass.gov/doc/march-31-2020-essential-services-extension-order/download (last accessed Aug. 26, 2020).

[5] Available at: https://www.mass.gov/doc/signed-second-extension-of-essential-services-order/download (Aug. 26, 2020).

[6] Available at: https://www.mass.gov/doc/may-15-2020-24-hour-extension-order/download (last accessed Aug. 26, 2020).

On May 18, 2020, Gov. Baker instituted a planned phased reopening process. (*See* COVID-19 Order No. 33, attached as **Exhibit 8**.)[7] 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. 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. (*See* COVID-19 Order No. 35, attached as **Exhibit 9**.)[8] COVID-19 Order No. 35 also identified business sectors that would be reopened as part of the eventual Phases III & IV. Bit Bar's business, like casinos, museums, fitness centers, and performance halls, was categorized as part of the Phase III enterprises.

Gov. Baker reiterated that arcades would be part of Phase III in an order of June 6, 2020. (*See* COVID-19 Order No. 37, attached as **Exhibit 10**.)[9] By order of July 2, 2020, Phase III businesses were permitted to reopen beginning July 6, 2020. (*See* COVID-19 Order No. 43, attached as **Exhibit 11**.)[10] 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.

According to Dr. Cassandra Pierre, an infectious disease specialist, the movement of arcades to Phase IV is "arbitrary." (Michael Rosenfield, "'I Don't See It Ending Well': Arcades Struggling to Survive Amid Pandemic Closures," NBC BOSTON (Aug. 4, 2020), attached as **Exhibit 12**.)[11] Though Dr. Pierre notes that "[t]hey are high touch surfaces" and "[m]any people are potentially using the

[7] Available at: https://www.mass.gov/doc/may-18-2020-re-opening-massachusetts-order/download (last accessed Aug. 26, 2020).

[8] Available at: https://www.mass.gov/doc/order-preparing-for-phase-ii-reopening/download (last accessed Aug. 26, 2020).

[9] Available at: https://www.mass.gov/doc/june-6-2020-phase-ii-reopening/download (last accessed Aug. 26, 2020).

[10] Available at: https://www.mass.gov/doc/phase-3-order-july-2-2020/download (last accessed Aug. 26, 2020).

[11] Available at: https://www.nbcboston.com/news/coronavirus/i-dont-see-it-ending-well-arcades-struggling-to-survive-amid-pandemic-closures/2171296/ (last accessed Aug. 27, 2020).

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. (*Id.*) Indeed, the web site <visit-massachusetts.com> advertises that Casinos are open in Massachusetts and provides an example of the floor layout of a Massachusetts casino showing electronic gambling machine kiosks in close proximity to one another.

(*See* <visit-massachusetts.com> page, attached as **Exhibit 13**.)[12]

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. (Coltof Decl. at ¶ 13.)The government's explanations for the movement of arcades from Phase III to Phase IV have shifted from alleged determinations based on "input from public health experts" that fails to explain why casinos can open, but not arcades, to not wanting to "overwhelm local health departments," which makes little sense where the restaurant part of Plaintiff's business can open, but not the arcade, and all businesses otherwise need to draft and self-certify a COVID-19 Control Plan. (*Id*. at ¶ 13.)

Other members of Massachusetts government are also baffled by Gov. Baker's decision to impose stronger restrictions on video arcades than on casinos. On July 16, 2020, Bit Bar's owner, Gideon Coltof, spoke with the aid of Massachusetts Representative Paul Tucker, who told him that

[12] Available at: https://www.visit-massachusetts.com/state/casinos/ (last accessed Aug. 26, 2020).

Rep. Tucker agreed with Mr. Coltof's position and that Rep. Tucker would speak with Gov. Baker about it. (*Id*. 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. (*Id*. 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." (*Id*. at ¶ 14; *see* July 21-22 emails with Rep. Ferrante, attached as **Exhibit 14**.) 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, but providing no factual basis for his rationale. (Coltof Decl. at ¶ 15; July 28, 2020 email chain with Gov. Baker, attached as **Exhibit 15**.) 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." (Jim Sullivan, "Legislators rally for Joe's Playland in Salisbury," THE EAGLE-TRIBUNE (Aug. 5, 2020), attached as **Exhibit 16**.)[13]

To further illustrate the lack of a rational basis for the regulations, examine the Ms. Pac Man video game machines BitBar uses as dining tables. (Coltof Decl. at ¶ 9.) In their powered off state, Bit Bar may allow customers to dine on them without issue. Their accepted use looks like this:

[13] Available at: https://www.eagletribune.com/news/merrimack_valley/legislators-rally-for-joes-playland-in-salisbury/article_322d40f8-6dd1-52fb-b46f-51e88046c03c.html (last accessed Aug. 26, 2020).

(*Id*. at ¶ 9.) However, flip the switch, turn them on, and according to Gov. Baker's Orders, this table turns into a deadly disease vector. This is what they look like in their "dangerous" state:

(*Id*. at ¶ 10.) There is, of course, no safety-related distinction between an active or non-active dining table/video game machine. The only distinction is whether content flows through the cathode ray tube under the dining surface – in other words, whether the table is displaying First Amendment-protected

games or not. This doesn't even pass the smell test, much less the rational basis test, and it isn't even in the same hemisphere as strict scrutiny, which is truly the proper test to apply here.

Gov. Baker's COVID-19 Orders have caused tremendous harm to Bit Bar, as the Orders have severely limited its operations. (Coltof Decl. at ¶ 16.) While the video arcade portion of Bit Bar is closed, its revenue stream is limited considerably. (*Id*. 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 is gone. (*Id*. at ¶16.) If the arcade portion continues to be forced to remain closed, Bit Bar likely will go out of business and will not be able to open again even after all COVID-19 orders are lifted. (*Id*. at ¶ 16.) Other Massachusetts arcades affected by Gov. Baker's arbitrary decision are also faced with severe revenue shortfalls and the danger of going out of business. (*See* **Exhibit 12**; Kevin Slane, "Despite casinos reopening, it's currently game over for arcades in Massachusetts," BOSTON.COM (Aug. 17, 2020), attached as **Exhibit 17**.)[14] Bit Bar has spent several weeks trying to obtain relief from Gov. Baker's arbitrary restrictions without court intervention, but has been met with prevarications and silence. Bit Bar has no choice now but to bring this suit to force the Commonwealth to respect its rights.

3.0 LEGAL STANDARD

A district court must consider 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). "The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). The plaintiff has the burden of establishing these four factors weigh in their favor. *Esso Standard Oil Co. (P.R.) v. Monroig-Zayas*, 445 F.3d 13, 18 (1st Cir. 2006).

[14] Available at: https://www.boston.com/culture/entertainment/2020/08/17/arcades-phase-4-massachusetts (last accessed Aug. 26, 2020).

4.0 ARGUMENT

4.1 Bit Bar Has Standing

"To qualify as a party with standing to litigate, a person must show, first and foremost, an invasion of a legally protected interest that is concrete and particularized and actual or imminent." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). In the First Amendment context in particular, a plaintiff has standing to sue if a challenged statute or regulation operates to "chill" the plaintiff's exercise of their First Amendment rights. *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

Here, Bit Bar's harm is readily apparent. It has been forbidden from operating its business, meaning customers cannot enjoy the video games Bit Bar makes available to them, and thus Gov. Baker is infringing on its constitutional rights. Beyond this deprivation of rights, Bit Bar is in serious danger of permanently going out of business. (*See* Coltof Decl. at ¶ 16.) This creates a true case and controversy sufficient to confer Article III standing, and Bit Bar has standing.

4.2 Likelihood of Success on the Merits

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).

4.2.1 Violation of the First Amendment

In seeking a preliminary injunction, the plaintiff has the burden to show the state law or regulation infringes on their First Amendment rights, at which point the state must then justify its restriction on speech. *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)).

In any First Amendment claim based on a government restriction on speech, the first question is what level of scrutiny the government must satisfy. This ranges from strict scrutiny, which is the most difficult to satisfy, to rational basis review, which is the most deferential. Gov. Baker's COVID-19 Orders are based on the content of speech and cannot survive strict scrutiny. But even if they were not content-based restrictions, Gov. Baker's Orders cannot withstand any degree of scrutiny.

4.2.1.1 Gov. Baker's COVID-19 Orders are Subject to Strict Scrutiny

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*, 135 S. Ct. 2218, 2227 (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 will be considered 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). To survive strict scrutiny analysis, a restriction on speech must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011).

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).

EMA dealt with 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. Similarly, Gov. Baker's COVID-19 orders are content-based. They allow some businesses that offer some kinds of electronic games to stay open, while forcing business that offer different kinds of games to remain closed. Specifically, the orders allow casinos in Massachusetts, which offer electronic gambling games using machine kiosks, to stay open while forcing video game arcades, which offer electronic non-gambling games using machine kiosks, to remain closed. There is no meaningful distinction between the permitted and forbidden games other than their content. Gov. Baker is allowing games of chance, while not allowing games made purely for entertainment. The government's regulations are thus based on the content of speech and must be struck down unless they can survive strict scrutiny. They cannot.

4.2.1.2 Gov. Baker's Orders Cannot Survive Strict Scrutiny

To survive strict scrutiny, the government must show its COVID-19 orders (1) further a compelling government interest and (2) the orders are narrowly tailored to achieve that interest. *Bennett*, 131 S. Ct. at 2817. Poor and haphazard decisions in the early days of the pandemic were understandable. With competing information and on-the-fly decision-making, anyone could be forgiven for making illogical decisions in February or March of 2020. But, it is now September, and cooler heads should prevail. So far, the only thing cool about the process is the cold silence from Beacon Hill when the Plaintiff and his array of legislators have asked the government to behave with reason and respect for the Constitution.

Gov. Baker's purported interest in promulgating his COVID-19 Orders, protecting the public during a global pandemic, is *potentially* compelling enough to justify suspending the First Amendment – but not if cooler heads actually do prevail. The Orders do not further this interest. Casinos with gambling machines are permitted to operate, while gaming arcades using functionally identical machines in a nearly identical manner cannot. If Casinos can operate safely, then so can gaming arcades. If arcades can be open, as long as the machines are unplugged, but they become unsafe as soon as the video content begins to flow, then there is really no rhyme or reason for the regulations. Categorizing video game arcades as Phase IV enterprises does not further Gov. Baker's interest – nor

anyone else's. This is especially so for restaurant-arcades, where customers are allowed in the premises where video game machines are located (because the restaurant portion of the business is a Phase III enterprise), but simply cannot use them. They can stand next to them. They can rest cocktails on them. They can even *pretend* to play them. They can preen in their reflection 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 all of a sudden, a Galaga machine becomes something as dangerous and sinister as the now-discredited moral panickers of the 1980s thought it was.

This gaping hole in Gov. Baker's purported rationale undermines 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 is no factual basis for asserting one is safe while the other is not.

If Gov. Baker decides to assert, however, Massachusetts has a compelling interest in allowing regulated gambling, it will fail. As the Fifth Circuit reasoned:

> While the Supreme Court has recognized regulating gambling as a substantial state interest, there is no authority suggesting that it is a compelling interest. Moreover, we fail to see how Texas's interest in regulating gambling is furthered by restricting the Charities' political speech, which may or may not relate to gambling, and the Commission has failed to present any convincing argument to that effect.

Dep't of Tex. v. Tex. Lottery Comm'n, 760 F.3d 427, 439-40 (5th Cir. 2014) (citations omitted). The only possible compelling interest in play is thus public health and safety.

Where Gov. Baker's Orders more particularly fail is in their lack of narrow tailoring. Their 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 must remain closed to prevent the spread of COVID-19 because the CDC advises 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.

(**Exhibit 11** at 1.) The problem with this reasoning is that it applies with equal (if not greater) force to casinos with gaming machines, which are allowed to operate. Casino floors have just as many, if not more, people in close proximity to one another as you would find in a restaurant-arcade like Bit Bar, particularly where their 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 rationale for treating arcades as Phase IV enterprises is accepted, his COVID-19 Orders are grossly underinclusive because they allow businesses that pose the same (or greater) health risks to consumers to stay open. Gov. Baker's preference for gambling machines in casinos has no relationship at all 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 is that Gov. Baker is expressing favoritism for Casinos in Massachusetts and is making decisions completely unrelated to public safety. Other state legislators and experts have also expressed bafflement at the purported justification for treating casinos more permissively than video game arcades. (*See* **Exhibit 1** at ¶¶ 11-12; **Exhibits 12, 14-15**.)

This is far from the narrow tailoring necessary to justify a content-based restriction on speech. Bit Bar thus has a strong likelihood of success on the merits of its First Amendment claim.

4.2.1.3 Gov. Baker's Orders Cannot Survive Intermediate Scrutiny

Assuming, *arguendo*, that Gov. Baker's Orders are not content-based, they still burden Bit Bar's First Amendment rights and must survive intermediate scrutiny. *See Martin v. Gross*, 340 F.

Supp. 3d 87, 92-93 (D. Mass. 2018) (applying intermediate scrutiny to statute that criminalized willful interception of communications, to extent it prohibited secret recordings of public officials performing their duties); *Rideout v. Gardner*, 838 F.3d 65, 67-68 (1st Cir. 2016) (applying intermediate scrutiny to statute forbidding citizens from photographing marked ballots and publicizing said photographs).

Content-neutral regulations "do not apply to speech based on or because of the content of what has been said, but instead 'serve[] purposes unrelated to the content of expression.'" *Rideout*, 838 F.3d at 71 (quoting *Ward*, 491 U.S. at 791). Such restrictions must be "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 791. The "narrow tailoring" for intermediate scrutiny does not require the regulation to '"be the least restrictive or least intrusive means of' serving the government's interests." *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) (quoting *Ward*, 491 U.S. at 798). However, "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.'" *Coakley*, 134 S. Ct. at 2535 (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*, 134 S. Ct. 1434, 1446 (2014).

Gov. Baker claims to have imposed his COVID-19 Orders for the purpose ensuring public health and safety. In the abstract, this is a significant government interest, "[b]ut intermediate 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*, 838 F.3d at 72 (quoting *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 US. 789, 810 (1984)). Gov. Baker alludes to scientific data and consultation with health experts, but there is a dearth of evidence to support his preference for casinos. It is extraordinarily unlikely that any such unspecified information or experts support the position that casinos are safer than video arcades. Because there is no meaningful health-related distinction to be drawn between casinos and video arcades, Gov. Baker's asserted interest is merely an abstract one that is not furthered in any way by his COVID-19 Orders.

For the same reason, Gov. Baker's COVID-19 Orders are not narrowly tailored to achieve his purported ends. There is a "substantial mismatch" in the government's purported goal caused by closing arcades but allowing casinos to operate. Accordingly, the majority of the burden on speech does not advance the state's goals, causing the COVID-19 Orders to fail intermediate scrutiny.

4.2.1.4 Gov. Baker's Orders Cannot Survive Even Rational Basis Review

Gov. Baker's COVID-19 Orders are arbitrary and they cannot survive even 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).

Though this standard of review is extremely deferential to the government, the COVID-19 Orders fail even this easy test for the same reasons they fail to survive strict and intermediate scrutiny. There are no facts that would support the assertion that a casino with electronic gambling machine kiosks is a safer environment than a restaurant-arcade that uses similar video game machine kiosks in a similar layout. There is no factual basis for believing that casinos are safer than video game arcades. There is no rational basis to allow the presence of dormant video games, with a health hazard only appearing if they are turned on. To highlight the absurdity of Gov. Baker's orders, Bit Bar has video game machines as dining tables, but it cannot allow them to be turned on while people are eating on them. (Coltof Decl. at ¶ 9.) Gov. Baker's Orders fail rational basis review, and Bit Bar has a strong likelihood of success on the merits of his First Amendment claim.

4.2.2 Violation of the Fourteenth Amendment

The COVID-19 Order violates 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 differential 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) (superseded by statute on unrelated grounds as stated in *Human Res. Research & Mgmt. Group v. County of Suffolk*, 687 F. supp. 2d 237, 255-56 (E.D.N.Y. 2010)). 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 4.2.1.1, *supra*, Gov. Baker's COVID-19 Orders burden Bit Bar's fundamental First Amendment right to allows customers to play video games. And as explained in Section 4.2.1.2, *supra*, the Orders clearly give preferential treatment to casinos over video game arcades, despite there being no conceivable public health or safety related reason for doing so. Gov. Baker thus burdened Bit Bar's First Amendment rights without furthering a compelling government interest in a narrowly tailored fashion, thus violating Bit Bar's right to equal protection under the Fourteenth Amendment. The fact that the majority of the burden imposed on free speech does not advance Gov. Baker's purported goals shows that the Orders do not satisfy intermediate scrutiny. Gov. Baker's inexplicable preference for casinos does not even pass muster under rational basis review, as there is no conceivable connection between this preference and a legitimate government interest.

Accordingly, Bit Bar has a strong likelihood of prevailing on the merits of its Fourteenth Amendment claim.

4.3 Irreparable Harm

"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). Because of this, if a plaintiff demonstrates a likelihood of success, they necessarily also establish irreparable harm. *Fortuño*, 699 F.3d at 15.

Because there is a strong likelihood of success on the merits of Bit Bar's claims under the First and Fourteenth Amendments, Bit Bar has also shown a probability of irreparable harm in the absence of an injunction. But beyond this presumption of irreparable harm, Bit Bar is being demonstrably harmed by Gov. Baker's COVID-19 Orders. A significant portion of its business cannot operate at all, leading to a decrease in revenue that likely could lead to Bit Bar going out of business entirely. (Coltof Decl. at ¶ 16.) Other similar arcades are suffering from this same problem and are in similar danger of going out of business. (*See* **Exhibits 12, 17**.)

There is little difference between this case, in which coin-operated entertainment machines are banned, and a case from the 1970s, under a similar, unconstitutional ban of coin-operated entertainment machines. In *414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974), a coin-operated film machine operator sought injunctive relief from an arbitrary licensure ordinance. In affirming the injunction, the Second Circuit found,

> Upon the facts of this case, if the ordinance were enforced against appellee, appellee would be required to choose between continuing without a license in the business of offering its films, thereby subjecting itself and its employees to the threat of criminal and civil prosecution, and removing the film machines from its premises permanently, obviating the need for a license, or temporarily, pending the determination of a license application. The latter possibility -- removing the film machines -- involves a deprivation of appellee's and the public's first amendment rights to show and to view films, and in itself constitutes irreparable injury justifying injunctive relief, because there is no means to make up for the irretrievable loss of that which would have been expressed. Moreover, the other option -- violating the law to exercise one's constitutional rights and awaiting the sure hand of the law -- itself may cause, as it is alleged to cause, irreparable injury both economic (in the form of loss of revenue because customers are fewer and increase in costs due to the difficulty of finding employees willing to risk arrest, prosecution and possible imprisonment) and personal (the freedom to exercise first amendment rights without genuine fear of prosecution). Where other plaintiffs have

> faced the similar situation of being required to forego constitutionally protected activity in order to avoid arrest, the Supreme Court has found irreparable injury. So also do we find the position of appellee, between the Scylla of intentionally flouting the ordinance and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding, to cause irreparable injury where the result is the stifling of first amendment expression.

499 F.2d at 1160 (internal citations and quotation marks omitted. The Second Circuit decision was favorably cited in this District in the issuance of an injunction against a fortune telling business, where the Court stated "I am satisfied that if this injunction does not issue, the plaintiff will suffer damages in the form of a lost business opportunity that cannot be fully compensated by some future monetary award and further that she will suffer irreparable injury to the exercise of her constitutional rights. I therefore am satisfied that she has established a substantial risk of irrevocable harm." *Talamov v. Provincetown Bd. of Selectmen*, Case No. 83-1195-MA, 1983 U.S. Dist. LEXIS 17058, at *6 (D. Mass. May 10, 1983). So, too, will Bit Bar suffer irreparable harm if it cannot operate its video games and offer their content to the public.

4.4 Balance of Hardships

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) (holding that "insofar as hardship goes, the balance weighs heavily against Defendants, since they have effectively silenced Plaintiffs' constitutionally protected speech").

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 due to Gov. Baker's arbitrary COVID-19 Orders. (*See* Coltof Decl. at ¶ 16.) The government's 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 certainly no more dangerous with the machines on than if they are off, and so allowing a business to operate that is just 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.

4.5 Public Interest

"The public interest is served by protecting First Amendment rights from likely unconstitutional infringement." *Mills*, 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)).

Gov. Baker's COVID-19 Orders serve to restrain Bit Bar's exercise of its First Amendment rights, thus harming the public interest in enforcing these rights. Gov. Baker will likely argue that the injunction would be against the public interest because it would harm public health and safety. This contention is without merit, as discussed above. Gov. Baker's own Orders undermine any such contention, and so the requested injunction would be in the public interest.

5.0 CONCLUSION

For the foregoing reasons, the Court should enter a preliminary injunction against Gov. Baker forbidding him from enforcing any restrictions beyond those imposed on Phase III enterprises.

REQUEST FOR ORAL ARGUMENT

Plaintiff believes that oral argument may assist the court. This matter involved significant Constitutional issues that oral argument will help to address.

Dated: September 02, 2020

Respectfully Submitted,

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