

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

Dave & Buster's, Inc.

Plaintiff,

- against -

Andrew M. Cuomo, in his official capacity as Governor of  
New York,

Defendant.

**COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiff Dave & Buster's, Inc., for its Complaint against Defendant Andrew M. Cuomo, in his official capacity as Governor of New York, alleges as follows:

**INTRODUCTION**

1. Plaintiff, one of the nation's leading arcade and restaurant chains, brings this action to challenge the arbitrary and unconstitutional decision by Governor Cuomo to close down all arcades statewide while allowing comparable businesses, including casinos, bowling alleys, and video lottery gaming facilities, to remain open. The arcade shutdown has resulted in the loss of thousands of jobs for hard-working New Yorkers across the State, and threatens to jeopardize Plaintiff's market share and the long-term economic viability of Plaintiff's New York stores, all without cause.

2. Plaintiff has been a leader in COVID-19 safety since the early days of the pandemic. It was one of the first national chains to implement daily temperature checks and to require all guests and employees to wear masks. As of today, Plaintiff is open and safely operating in virtually all of the states in which it does business with modified store layouts, frequent cleanings of all surfaces throughout the day by dedicated staff, installation of multiple hand sanitizer stations, and

other measures. It has repeatedly offered to comply with any reasonable public health guidelines that New York might prescribe.

3. Yet Defendant has ordered arcades to remain closed while permitting casinos, video lottery gaming facilities, bowling alleys, movie theaters, gyms, and other entertainment and recreation venues that pose similar or greater risks of COVID-19 transmission to reopen.

4. The arcade shutdown is causing unnecessary financial hardship for Plaintiff and its employees every day. Before the pandemic, Plaintiff employed over 1,200 team members at eleven locations across the state. Due to the shutdown, it has been forced to furlough all but forty of these individuals.

5. Plaintiff seeks declaratory and injunctive relief under 42 U.S.C. § 1983 to remedy Defendant's violations of the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Plaintiff also seeks declaratory and injunctive relief to remedy Defendant's violations of Article I, Section 8, of the New York State Constitution and Article I, Section 11, of the New York State Constitution.

### **JURISDICTION AND VENUE**

6. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391.

### **PARTIES**

8. Plaintiff Dave & Buster's, Inc., is the one of nation's leading arcade and restaurant chains.

9. Defendant Andrew M. Cuomo is the Governor of New York. He acted under color of state law at all relevant times. His official place of business is the State Capitol Building in Albany, New York. He is sued in his official capacity.

**PLAINTIFF'S COVID-19 SAFETY MEASURES**

10. Plaintiff's locations are large-footprint entertainment venues that allow patrons to play arcade games, including video games, while having the opportunity to share food and beverages with friends and family.

11. During the COVID-19 pandemic, Plaintiff has put the safety of its employees and guests first. By imposing stringent health protocols and making material modifications to its floor plans and guidelines, Plaintiff's arcades are open and safely operating in most jurisdictions where it does business throughout the country. These jurisdictions include the neighboring states of Connecticut, Massachusetts, New Jersey, and Pennsylvania. They also include Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

12. Plaintiff was one of the first national chains to implement daily temperature checks of employees and to require all guests and employees to wear masks.

13. In each of the dozens of locations where it is open and safely operating, Plaintiff continues to require masks for all guests and employees, and continues to screen all employees for symptoms at the start of every shift. Plaintiff's large store footprints naturally allow for greater social distancing, but to keep its employees and guests safe, Plaintiff has rearranged store layouts, posted new safety signs, and shut down games and tables to ensure adequate distancing. Hand sanitizer is strategically placed throughout the arcades to promote healthy practices, and all games and surfaces are cleaned frequently throughout the day by dedicated staff. Plaintiff works cooperatively with departments of health in all areas in which it operates to ensure that best

practices are instituted and followed by its employees and patrons. Plaintiff's stores have routinely and repeatedly passed health department inspections throughout the country.

**NEW YORK'S DISCRIMINATORY SHUTDOWN ORDERS**

14. On March 7, 2020, Defendant promulgated Executive Order 202 declaring a state disaster emergency based on the outbreak of COVID-19. On March 18, 2020, Defendant issued Executive Order 202.5. Among other things, this order directed "all places of public amusement, whether indoors or outdoors, including but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, arcades, fairs, children's play centers, funplexes, theme parks, bowling alleys, family and children's attractions" to close on March 19, 2020.

15. As a result of Executive Order 202.5, each of Plaintiff's locations in New York State were forced to close, including two locations in this District (in Albany and Syracuse) and nine other locations across the state (in Buffalo, Islandia, Manhattan, Massapequa, Pelham Manor, Rochester, Staten Island, West Nyack, and Westbury). Devastatingly, the arcades in each of these locations remains closed to this day—nearly eleven months later.

16. In contrast, on June 26, 2020, approximately three months after his initial executive order, Defendant issued Executive Order 202.45, which permitted certain "[l]ow-risk indoor arts and entertainment," including museums, aquariums, and art galleries, to reopen "in eligible regions" if "operated in compliance with the guidance promulgated by the Department of Health."

17. Shortly thereafter, on July 6, 2020, Defendant issued Executive Order 202.48, which provided that "the directives contained in Executive Order 202.5 that closed . . . all places of public amusement, whether indoors or outdoors," shall "remain in effect only until such time as a future Executive Order opening them is issued."

18. Almost two months after that, on August 20, 2020, Defendant issued Executive Order 202.57, which permitted “bowling alleys to open as of August 17, 2020 [*sic*] subject to adherence to Department of Health issued guidance.” Order 202.57 also permitted any “gym, fitness center or class, to operate subject to adherence to Department of Health issued guidance . . . no earlier than August 24, 2020.”

19. On September 4, 2020, Defendant issued Executive Order 202.60. It permitted “any facility authorized to conduct video lottery gaming or casino gaming . . . to open beginning on or after September 9, 2020, subject to adherence to Department of Health guidance.”

20. And next, on October 20, 2020, Defendant issued Executive Order 202.70, which permitted “movie theatres” in certain areas “to open effective October 23, 2020 at 25% capacity with up to 50 people maximum per screen, subject to adherence to Department of Health guidance.”

21. Defendant has never publicly explained how arcades are meaningfully different from casinos, video lottery gaming facilities, bowling alleys, movie theaters, film houses, museums, aquariums, art galleries, gyms, and fitness centers in the context of COVID-19.

22. Museum, aquarium, and art gallery guests engage in similar activities to arcade guests. Guests often visit with groups of family or friends and they typically spend extended periods of time indoors. They move throughout the facility and touch shared surfaces. Yet these “low-risk indoor arts and entertainment” facilities are permitted to operate under safety protocols that are similar to what Plaintiff has adopted in other states. For example, guests and employees are required to maintain appropriate distance and wear masks. Surfaces and equipment must be frequently cleaned, hand sanitizer must be made available throughout the facility, and hand hygiene must be encouraged. Employees must be screened daily for symptoms, and facilities must

cooperate with the health department in tracing positive cases. *See Low-Risk Indoor Arts & Entertainment Guidelines for Employers and Employees*, available at <https://on.ny.gov/3rgxECz>; *Interim Guidance for Low-Risk Indoor Arts & Entertainment During the COVID-19 Public Health Emergency*, available at <https://on.ny.gov/3o17JIC>.

23. Likewise, bowling alley patrons' activities do not meaningfully differ from the activities of arcade patrons. Like bowling alley patrons, arcade patrons often spend extended periods of time indoors, playing games for entertainment. They often visit with groups of family or friends, and they also move throughout the facility and touch shared surfaces. Yet bowling alleys are permitted to operate under safety protocols that are similar to what Plaintiff has adopted in other states. For example, guests and employees are required to maintain appropriate distance and wear masks. Surfaces and equipment must be frequently cleaned, hand sanitizer must be made available throughout the facility, and hand hygiene must be encouraged. Employees must be screened daily for symptoms, and facilities must cooperate with the health department in tracing positive cases. *See Sports and Recreation Guidelines*, available at <https://on.ny.gov/3rlrbGL>; *Interim Guidance for Sports and Recreation During the COVID-19 Public Health Emergency*, available at <https://on.ny.gov/36yLFUb>.

24. Similarly, gym and fitness center patrons also engage in similar activities to arcade patrons. They typically spend extended periods indoors and they also move throughout the facility and touch shared surfaces. Yet gyms and fitness centers are permitted to operate under safety protocols that are similar to what Plaintiff has adopted in other states. For example, guests and employees are required to maintain appropriate distance and wear masks, though only "to the maximum extent possible" under New York's guidance. Surfaces and equipment must be frequently cleaned, hand sanitizer must be made available throughout the facility, and hand

hygiene must be encouraged. Employees must be screened daily for symptoms, and facilities must cooperate with the health department in tracing positive cases. *See Gyms & Fitness Centers Guidelines*, available at <https://on.ny.gov/3jawCW5>; *Interim Guidance for Gyms & Fitness Centers During the COVID-19 Public Health Emergency*, available at <https://on.ny.gov/3cytFgz>.

25. And casino and video lottery gaming guests likewise engage in similar activities to arcade guests. They, too, typically spend extended periods of time indoors playing games of skill and chance for entertainment purposes. They often attend with groups of family or friends. They also move throughout the facility and touch shared surfaces, including video machines, slot machines, and other game equipment. Yet casinos and video lottery gaming facilities are permitted to operate under safety protocols that are similar to what Plaintiff has adopted in other states. For example, guests and employees are required to maintain appropriate distance and wear masks. Surfaces and equipment must be frequently cleaned, hand sanitizer must be made available throughout the facility, and hand hygiene must be encouraged. Employees must be screened daily for symptoms, and facilities must cooperate with the health department in tracing positive cases. *See Gaming Facility Guidelines for Employers and Employees*, available at <https://on.ny.gov/3pESVpc>; *Interim Guidance for Gaming Facilities During the COVID-19 Public Health Emergency*, available at <https://on.ny.gov/3oJZMMX>.

26. In fact, the similarities between casinos and arcades are so patent that no other state government currently requires Plaintiff to keep its arcades closed while allowing casinos in that state to reopen.

27. Similarly, movie theater guests engage in activities equally likely to present concerns about the transmission of COVID-19. Movie theater patrons spend extended periods of time indoors for entertainment purposes, with equivalent opportunities to purchase food and

beverages. Movie theater patrons often attend with groups of family or friends, and they also touch shared surfaces. Yet movie theaters are permitted to operate under safety protocols that are similar to what Plaintiff has adopted in other states. For example, guests and employees are required to maintain appropriate distance and wear masks. Surfaces and equipment must be frequently cleaned, hand sanitizer must be made available throughout the facility, and hand hygiene must be encouraged. Employees must be screened daily for symptoms, and facilities must cooperate with the health department in tracing positive cases. *See Movie Theater Guidelines for Employers and Employees*, available at <https://on.ny.gov/2NVJ0gV>; *Interim Guidance for Movie Theaters During the COVID-19 Public Health Emergency*, available at <https://on.ny.gov/2YBuahO>.

28. Thus, over the last seven months, Defendant has allowed each of these similarly situated businesses to reopen with appropriate safety protocols in place, while arcades inexplicably remain closed, even though Plaintiff stands ready, willing, and able to implement identical safety protocols to ensure the health and safety of its employees and patrons. Such disparate treatment for similarly situated businesses has no countenance under the laws and constitutions of the United States and the State of New York.

29. The closure persists despite the State's own data suggesting that similar businesses are not significant causes of COVID-19 transmission. According to data released by the State in December 2020, 73.84% of COVID-19 cases were traced to household or other social gatherings. *3707 Brewerton Road, LLC v. Cuomo*, No. 007139/2020, slip op. at 16 (N.Y. Sup. Ct. Jan. 15, 2020). Arts and entertainment accounted for just 0.08% of cases and gyms for just 0.06% of cases. Nick Reisman, *What New York's Contact Tracing Data Show*, Spectrum News (Dec. 11, 2020), <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/12/11/what-new-york-s-contact-tracing-data-show>.



**COUNT I**

**Violation of the First and Fourteenth Amendments to the United States Constitution  
(Freedom of Speech)  
42 U.S.C. § 1983**

30. Plaintiff incorporates by reference the factual allegations in ¶¶ 1–29.

31. The U.S. Supreme Court has held that video games that are the heart of Plaintiff’s unique business model constitute speech within the meaning of the First Amendment to the U.S. Constitution. “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).” *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 790 (2011).

32. Yet Defendant, through his executive order, has singled out Plaintiff’s speech on the basis of its content. Museums, aquariums, and art galleries are permitted to reopen in eligible regions of New York. So too are movie theaters and film houses. But arcades with video games are not permitted to reopen.

33. Defendant’s orders are overinclusive with respect to the State’s interest in reducing the transmission of COVID-19. The precautions that Plaintiff has been taking in other states—and that museums, art galleries, movie theaters, and film houses are required to take in New York—are adequate to reduce the risk of transmission.

34. Defendant’s orders are also underinclusive with respect to the State’s interest in reducing the transmission of COVID-19. The activities that patrons engage in at these other businesses are similar to the activities that guests engage in at Plaintiff’s arcades. Compared to Plaintiff’s arcades, the risk of exposure to COVID-19 is thus similar, if not greater, at businesses that Defendant has permitted to reopen.

35. Defendant has never publicly justified his discrimination against Plaintiff based on the subject, function or purpose of the speech central to Plaintiff's business.

36. As applied to Plaintiff, the issuance and enforcement of Defendant's orders violate the Free Speech Clause of the First Amendment made applicable to the states by the Fourteenth Amendment.

37. At all relevant times, Defendant's actions were taken under color of state law.

38. Plaintiff has no adequate remedy at law for the deprivation of its constitutional rights.

39. Plaintiff will be irreparably harmed in the absence of declaratory and injunctive relief.

## **COUNT II**

### **Violation of Article I, Section 8, of the New York Constitution (Liberty of Speech)**

40. Plaintiff incorporates by reference the factual allegations in ¶¶ 1–29.

41. The video games that are the heart of Plaintiff's unique business model constitute speech within the meaning of Article I, Section 8, of the New York Constitution.

42. Defendant's aforementioned orders single out Plaintiff's speech on the basis of its content.

43. Defendant's orders are overinclusive with respect to the State's interest in reducing the transmission of COVID-19 because they prohibit Plaintiff's speech when safety protocols would accomplish the same interest.

44. Defendant's orders are also underinclusive with respect to the State's interest in reducing the transmission of COVID-19 because they allow speech by other businesses that pose a similar or greater risk of COVID-19 transmission.

45. Defendant has never publicly justified his discrimination against Plaintiff based on the subject, function or purpose of the speech central to Plaintiff's business.

46. As applied to Plaintiff, the issuance and enforcement of Defendant's orders violate the right to freely speak protected by Article I, Section 8, of the New York Constitution.

47. Plaintiff has no adequate remedy at law for the deprivation of its constitutional rights.

48. Plaintiff will be irreparably harmed in the absence of declaratory and injunctive relief.

### **COUNT III**

#### **Fourteenth Amendment to the United States Constitution (Equal Protection of the Laws) 42 U.S.C. § 1983**

49. Plaintiff incorporates by reference the factual allegations in ¶¶ 1–29.

50. Defendant's orders intentionally treat arcades differently from similarly situated businesses. Casinos, video lottery gaming facilities, bowling alleys, movie theaters, film houses, museums, aquariums, art galleries, gyms, and fitness centers are all permitted to reopen in eligible regions of New York under Defendant's orders. The activities at these businesses are similar to the activities at Plaintiff's arcades, and they pose similar or greater risks of COVID-19 transmission.

51. Defendant has never explained his reasons for treating arcades differently from casinos, video lottery gaming facilities, bowling alleys, movie theaters, film houses, museums, aquariums, art galleries, gyms, and fitness centers. There is no rational basis for Defendant's actions.

52. Defendant's actions in promulgating and enforcing the closure of Plaintiff's arcades deprive Plaintiff of the equal protection of the laws guaranteed by the Fourteenth Amendment.

53. At all relevant times, Defendant's actions were taken under color of state law.

54. Plaintiff has no adequate remedy at law for the deprivation of its constitutional rights.

55. Plaintiff will be irreparably harmed in the absence of declaratory and injunctive relief.

#### **COUNT IV**

##### **Article I, Section 11, of the New York Constitution (Equal Protection of the Laws)**

56. Plaintiff incorporates by reference the factual allegations in ¶¶ 1–29.

57. Defendant's aforementioned orders intentionally treat arcades differently from businesses that conduct similar activities and pose similar or greater risks of COVID-19 transmission.

58. Defendant has never explained his reasons for treating arcades differently from businesses that pose similar COVID-related risks, and there is no rational basis for Defendant's actions.

59. Defendant's actions in promulgating and enforcing the executive orders requiring the closure of Plaintiff's arcades thus deprive Plaintiff of the equal protection of the laws guaranteed by Article I, Section 11, of the New York Constitution.

60. Plaintiff has no adequate remedy at law for the deprivation of its constitutional rights.

61. Plaintiff will be irreparably harmed in the absence of declaratory and injunctive relief.

#### **PRAYER FOR RELIEF**

Plaintiff respectfully prays that this Court grant the following relief:

1. A preliminary injunction, followed by a permanent injunction, restraining Defendant from issuing or enforcing any orders closing Plaintiff's arcades while any similar business, including a casino, video lottery gaming facility, bowling alley, movie theater, film house, museum, aquarium, art gallery, gym, or fitness center is permitted to operate, and further restraining Defendant from imposing any health and safety requirements on Plaintiff's arcades that are more restrictive than the least restrictive requirements imposed on any similar business, including a casino, video lottery gaming facility, bowling alley, movie theater, film house, museum, aquarium, art gallery, gym, or fitness center; and
2. A declaratory judgment that (1) Defendant's closure of Plaintiff's arcades violates the freedom of speech protected by the First and Fourteenth Amendments to the U.S. Constitution, as applied to Plaintiff; (2) Defendant's closure of Plaintiff's arcades violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; (3) Defendant's closure of Plaintiff's arcades violates the freedom of speech protected by Article I, Section 8, of the New York Constitution; (4) Defendant's closure of Plaintiff's arcades denies Plaintiff the equal protection of the laws guaranteed by Article I, Section 11, of the New York Constitution.
3. An award of costs of this litigation, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988.
4. Such other and further relief as this Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a jury trial as to all issues triable by a jury.

Dated: New York, NY  
February 3, 2021

PAUL, WEISS, RIFKIND,  
WHARTON & GARRISON LLP

By:           /s/ Julia Tarver Mason Wood          

Julia Tarver Mason Wood  
Bar Roll # 702455  
1285 Avenue of the Americas  
New York, NY 10019  
(212) 373-3000 (telephone)  
(212) 757-3990 (fax)  
jwood@paulweiss.com

Kannon K. Shanmugam (*pro hac vice*  
forthcoming)  
Brian M. Lipshutz (*pro hac vice* forthcoming)  
2001 K Street, N.W.  
Washington, DC 20006  
(202) 223-7300 (telephone)  
(202) 223-7420 (fax)  
kshanmugam@paulweiss.com

*Attorneys for Plaintiff*  
*Dave & Buster's, Inc.*