UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JON JONES, GINA CARANO, FRANKIE EDGAR, MATT HAMILL, BRIAN STANN, ZUFFA, LLC d/b/a ULTIMATE FIGHTING CHAMPIONSHIP, DANIELLE HOBEIKA, BETH HURRLE, DONNA HURRLE, STEVE KARDIAN, JOSEPH LOZITO, ERIK OWINGS, CHRIS REITZ AND JENNIFER SANTIAGO,

Plaintiffs,

-against-

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, and CYRUS R. VANCE, Jr., in his official capacity as District Attorney for the County of New York,

Defendants.

ECF Case

11 Civ. 8215 (KMW) (GWG)

DEFENDANT SCHNEIDERMAN'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS INITIAL LIMITED MOTION TO DISMISS THE FOURTH AND FIFTH CAUSES OF ACTION IN THE COMPLAINT

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Defendant Eric T. Schneiderman, in his official capacity as Attorney General of the State of New York, submits this reply memorandum in further support of his initial limited motion as directed by the Court, pursuant to Fed. R. Civ. Proc. Rules 12(b)(1) and 12(b)(6), to dismiss the Fourth and Fifth Causes of Action in the Complaint in this action. More specifically, it is submitted in reply to Plaintiffs' Memorandum of Changed Circumstances and in Opposition dated February 17, 2011 ("Pl. Mem.").

Plaintiffs appear to suggest that defendants have gone beyond the Court's directed "limited motions to dismiss" in making what they describe as "full-blown motions to dismiss."

Defendants, however, understood that the Court's directed "motions to dismiss" (a) would, as motions, require the inclusion of requests for relief and (b) would be more focused, and more helpful to the Court, if framed in the context of the specific claims in this case and the legal standards applicable thereto, rather than in an abstract "law review article" format.

ARGUMENT

THE COMPLAINT ALLEGES NO POST-LEGISLATION CIRCUMSTANCES THAT WOULD DESTROY THE RATIONAL BASIS OF THE 1997 LEGISLATION

A. The Effect of the Deferential Standard on Post-Legislation Circumstances

Plaintiffs criticize defendants' motions primarily on the ground that they allegedly "conflate two separate questions; [sic] the standard of review (which is deferential no matter what), and whether facts and circumstances since enactment can be taken into account to evaluate present-day rationality." Pl. Mem. at 12. These questions are not so easily separated, however. Plaintiffs do not dispute the principles of judicial deference to be accorded to legislative choices in rational basis analysis as set forth in the Attorney General's motion, Def. AG Mem. at 11-14.[1] Those principles do not evaporate once a statute is enacted, however. Whether examined at the time of enactment or thereafter, a law may not be overturned under a rational basis analysis if there is a "reasonably conceivable state of facts" that could provide a rational basis for the statute. F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

More specifically, a law cannot be stricken because it is not "logically consistent," is "unwise, improvident, or out of harmony with a particular school of thought," or applies a remedy to "one phase of one field..., neglecting the others," Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-89 (1955); because it will not "*in fact* promote the Legislature's intended purpose," New York State Ass'n of Career Schools v. State Education

[1] The Attorney General's moving memorandum of law is referred to herein as "Def. AG Mem."

Dep't, 749 F. Supp. 1264, 1273 (S.D.N.Y. 1990), citing Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981), rehearing denied, 450 U.S. 1027 (1981); or because it is "based on rational speculation unsupported by evidence or empirical data," Heller v. Doe, 509 U.S. 312, 320 (1993); accord, Beach Communications, 508 U.S. at 315; Adams v. New York State Educ. Dept., 752 F.Supp.2d 420, 459 (S.D.N.Y. 2010). Post-legislation changed circumstances in any of these respects cannot destroy the law's rational basis, since such circumstances would not have affected the law's rational basis in the first place. Indeed, since "when reviewing challenged social legislation, a court must look for 'plausible reasons' for legislative action, whether or not such reasons underlay the legislature's action," Beatie v. City of New York, 123 F.3d 707, 712 (2d Cir.1997), courts have more freedom to consider post-legislation circumstances to uphold a law than to overturn it.

B. The Failure of Plaintiffs' "Factual Predicate" Theory

Plaintiffs argue that the Supreme Court approved consideration of post-legislation events in Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924), and that the Chastleton statement is still viable authority, as cited in *dicta* in United States v. Carolene Products Co., 304 U.S. 144 (1938) and later cases. Pl. Mem. at 6-7. The so-called Chastleton rule, however, recognizes only that "a law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." 264 U.S. at 547-48 (emphasis added); see also Carolene, 304 U.S. at 153 ("constitutionality of a statute predicated upon the existence of a particular state of facts" may be challenged if "those facts have ceased to exist"). The post-legislation circumstances that may destroy the rational basis of a law thus are limited to the disappearance of such a "factual predicate" on which the law depended and absent which it would not have been enacted. As demonstrated below, the

Complaint in the case at bar contains no allegations that such a *sine qua non* "predicate" for the 1997 Legislation has ceased to exist.

1. UF/EF's Popularity and Success

In Pl. Mem at 24-25, plaintiffs list eleven "changes in the factual landscape" that they contend make the legislature's decision to ban Ultimate Fighting or Extreme Fighting ("UF/EF") "simply irrational." Id. at 26. The first five of these all consist of alleged increases in the popular, political or commercial support of UF/EF and its media accessibility in recent years across the country. Id. at 24; see also, Complaint ¶¶ 41-66. But the constitutionality of a prohibitory statute does not shift with the popularity, accessibility or political support of the prohibited conduct. Cf., National Organization for the Reform of Marijuana Laws (NORML) v. Bell, 488 F. Supp. 123, 143 (D.D.C. 1980) (efforts to decriminalize marijuana having succeeded in eleven states and continuing in others, '[t]he people, and not the courts, must decide whether the battle will be won or lost"). The constitutionality of New York's prohibition of UF/EF, like its prohibition of narcotic possession or prostitution for example, does not lack a rational basis either because it is widely practiced and popular or because other states' laws approach it differently. The issue here is not which states' laws affecting UF/EF are more or less rational than others; different approaches could each be supported by "a reasonably conceivable state of facts" in the context of their own states even though they differ or disagree.

2. Safety

The sixth, seventh and eighth so-called "changes in the factual landscape" alleged by plaintiffs, Pl. Mem. at 24-25, all relate to new regulations and practices developed by "UFC" - i.e., plaintiff Zuffa LLC ("Zuffa") - that the Complaint alleges have improved the safety of UF/EF. See also, Complaint ¶¶ 41-46, 79-89. Despite plaintiffs' occasional vague references to

the efforts of "promoters such as UFC," see, e.g., id. ¶ 79, it is clear that their claimed improvements are those of plaintiff Zuffa. See, id. ¶¶ 41-44, 81-83. The Complaint contains no such allegations concerning other promoters, including the owners of the "Extreme Fighting" operation that was represented at the 1996 legislative hearing preceding the 1997 Legislation and that took great pains to distinguish itself from UFC. Schwartz Aff. Ex. A at 57-58, 60. There thus is still a "reasonably conceivable state of facts" that might warrant the prohibitions of the 1997 Legislation generally, notwithstanding UFC's alleged reformation.[2]

Moreover, nowhere in the Complaint (or in their motion papers) do plaintiffs suggest that their post-legislation reforms have removed what Senator Goodman described as the "focal point" of the 1996 hearing : "basically whether Ultimate Fighting poses a threat of severe injury or death to the participants," irrespective of its comparison with other sports. Id. at 28. The Complaint concedes that even today, UF/EF is "undoubtedly a combat sport and not without risk," Complaint ¶ 67, and even takes pride in UFC's mandatory waiting period "should a fighter suffer a concussion during competition," id. ¶ 88, as well as in its insurance coverage for injuries sustained, id. ¶ 89. Plaintiffs may argue that the continuing risk of harm from UF/EF is no longer substantial enough to justify a ban, but they cannot deny that the risk of harm is still present and that the law "might be thought" a rational way to correct the still-existing "evil at hand for correction." Williamson, 348 U.S. at 487-88.

3. Comparison with Unregulated Amateur UF/EF and Other Sports

The ninth and tenth alleged "changes in the factual landscape" upon which plaintiffs rely are (a) the flourishing of amateur UF/EF, which is neither banned nor regulated in New York and is dangerous, and (b) the increasing attention to injuries in boxing, football and hockey, which

[2] Nor does the Complaint state any reason to believe that if the 1997 Legislation is stricken, other promoters, and perhaps even UFC itself, would respond to the absence of legislation in New York by reverting to the savagery of their prior years.

unlike UF/EF are not banned in New York. Pl. Mem. at 25. But the solution for either an alleged loophole in the law or its failure to remedy every related evil is not to strike the law. As the Supreme Court said in Carolene, on which plaintiffs heavily rely, to satisfy the rational basis requirement "[a] legislature may hit at an abuse which it has found, even though it has failed to strike at another." 304 U.S. at 151; see also, Williamson, 348 U.S. 489 (legislature may "select one phase of one field and apply a remedy there, neglecting the others"). It is for the legislature, rather than the courts, to consider the appropriate way to plug holes and fill gaps that have become apparent since the enactment of the existing statute. Indeed, increased legislative and regulatory attention to sports such as boxing, football and hockey may well be coming.

4. Muay Thai

The last "change in the factual landscape" cited by plaintiffs is a new allegation that an event of "Muay Thai," which plaintiffs describe as a "*mixed* martial art not exempted from the Ban," has scheduled an event in New York under the auspices of one of the martial arts organizations specifically listed in NY Unconsol. Laws § 8905-a(1). Pl. Mem. at 26 and fn. 14. Why plaintiffs believe Muay Thai is "not exempted from the Ban" is unclear, since exempted "martial arts" are defined as" any professional match or exhibition sanctioned by any" of the listed organizations. The proposed Muay Thai event appears to confirm that the 1997 Legislation provides a procedure by which a sport claiming to be a "martial art" or to have similar characteristics can enter the New York market under the sponsorship of a listed organization. The UFC has apparently decided not to even explore this path, preferring an all-out attack on the statute, but the procedure's availability shows the legislature's reasonable intent in 1997 to allow for future flexibility.

5. The Continued Rational Basis of the 1997 Legislation

As indicated above, the "factual predicate" for the perception of the legislature in 1997 that UF/EF poses a threat of severe injury or death to the participants, irrespective of its comparison with other sports, has not disappeared. Whether or not UFC has made progress in reducing the risk in its own events, the risk is still there even accepting the allegations of the Complaint. In addition, however, the other rationales for the 1997 Legislation identified in its legislative history remain intact as well.

Prior to enacting the 1997 Legislation, the legislature had before it testimony from the Attorney General's office and the State Athletic Commission expressing concern at "the dangerous message to our youth" conveyed by "virtual fights to the death." Schwartz Decl. Ex. A at 37-38, 42. Both the Commission and the Assembly Sponsor of the bill repeated this concern to the Governor in urging that the bill be signed. Id. Ex. C at 1, Ex. D at 000010. The Complaint agrees that this concern over the "wrong message for youth" was an important reason for the law. Complaint ¶¶ 31-37.[3] It contends that the legislators have "misread that message, " id. ¶ 113, but it cannot deny the perception of the legislators at the time the 1997 Legislation was enacted, even if mistaken, that the sport was a brutal glorification of violence or that today such a perception would still have a rational basis.

As for what we have called the "civilization" or "disgust" factor that was so important to

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[3] Plaintiffs contend that this allegedly "content-based" legislation violates the First Amendment, Pl. Mem. at 3 fn. 2, but also argues that even in an Equal Protection rational basis inquiry, the assertion of their First Amendment claim requires heightened scrutiny. Id. at 21 fn. 11. Before reaching the First Amendment issue of whether the statute was directed at the content of the sport's perceived message, however, plaintiffs must show that the proscribed activity is either speech or expressive conduct and that the First Amendment applies to it. Texas v. Johnson, 491 U.S. 397, 403 (1989); Zalewska v. County of Sullivan, New York 316 F.3d 314, 319 (2d Cir. 2003). Courts have consistently been unwilling to extend such protection to sports or athletics. See, Maloney v. Cuomo, 470 F. Supp.2d 205, 212 -213 (E.D.N.Y. 2007) (surveying current law), aff'd 554 F.3d 56 (2d Cir. 2009), vacated and remanded on other grounds ___U.S. ___, 130 S. Ct. 3541 (2010), 390 Fed. App'x 29 (2d Cir. 2010). As a matter of law, UF/EF as described in the Complaint [as opposed to literary or artistic depictions of violence, cf. Brown v. Entertainment Merchants Assn.,131 S. Ct. 2729, 2733 (2011)] is neither speech nor protected expressive conduct.

the 1997 Legislation - the perception of the law's supporters that the activity "debases all of us and coarsens our society," Schwartz Decl. Ex D at 000010, and "brings to mind the grotesque spectacle of the Roman Coliseum in which gladiators fought to the death," id. Ex. A at 7, nothing in the Complaint suggests that such a perception could not still be reasonably conceivable, even if some former opponents of UF/EF have changed their minds.

Thus, the Complaint alleges no "factual predicate" upon which the 1997 Legislation depended but that has disappeared in the intervening years. Even if there have been some changes in UF/EF practice by some of its practitioners, there remains intact some if not all of the rational bases that were behind the law when passed.[4]

C. Plaintiffs' Misguided Attempt to Distinguish the Attorney General's Authorities

Plaintiffs concede that "introducing facts that show a statute did not achieve its goal and was not rational at the time of enactment " is "not permitted in rational basis review," Pl. Mem. at 14. Indeed, they attempt to distinguish several authorities cited by the Attorney General because, they contend, the claimants therein were simply challenging the rational basis of the legislation when passed. Id. at 15-16. Plaintiffs misread those cases, however. For example, they read Judge Marrero's statement in Adams v. New York State Educ. Dept., 752 F.Supp.2d 420 (S.D.N.Y. 2010), that "[t]he issue is the rational basis for the law when passed - which plaintiff's concede - not looking back with hindsight," id. at 460, as indicating that "no one was arguing about changed circumstances." Pl. Mem. at 15-16. A reading of the case, however, makes it clear that what the plaintiffs in Adams conceded was "the rational basis for the law when passed," and that they had argued (unsuccessfully) that "rational basis 'can no longer be

[4] The Reply Memorandum of Defendant Cyrus R, Vance, Jr, as District Attorney ("Def. DA Mem.") submitted in support of his limited motion to dismiss, addresses plaintiffs' contention that the 1997 Legislation was irrational even at the time of enactment, as well as plaintiffs' cited authorities from various jurisdictions. To avoid duplication, this memorandum will not address those topics and respectfully refers to Def. DA Mem. with respect thereto.

justified'" because complexities of the labor market in New York since the legislation had destroyed the law's perceived efficiency. Adams, 752 F. Supp.2d at 460 (emphasis added).

Plaintiffs also misread Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994), in which the court described plaintiff's burden on the rational basis issue as applying to the "time of the enactment." Id. at 1323. Rather than suggesting that the proper point in time for the rational basis analysis was not a contested issue, as plaintiffs here suggest, Pl. Mem. at 15, the Fourth Circuit's decision focused on that very question: the legislators' awareness of the reasonably conceivable justification for the state's action "at the time they acted" and the absence of evidence of "arbitrary and irrational behavior on the part of the legislature." Id. at 1324 (emphasis added)

Plaintiffs attempt a distinction of certain authorities cited by the Attorney General on the purported ground that they were merely "upholding a legislative decision not to make a statute retroactive." Pl. Mem. at 17-20. In United States v. Acoff, 634 F.3d 200 (2d Cir. 2011), cert. denied 180 L.Ed.2d 837 (2011), however, no party contended that the amendment reducing sentences for crack cocaine possession was retroactive or should be so interpreted; rather the plaintiff argued that Congress' change in position was new evidence that the earlier more draconian Guidelines were irrational. The Second Circuit rejected that argument. Id. at 203; see also Smart v. Ashcroft, 401 F.3d 119, 123 (2d Cir. 2005) (applying same principle to immigration statute); Howard v. United States Dep't of Defense, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004) (same for a military retirement and disability statute).

Plaintiffs also misread Murillo v. Hambrick, 681 F.2d 898 (3d Cir. 1982), cert. denied, 459 U.S. 1017 (1982), in which the Third Circuit reversed the district court's finding that a nine-year-old statute "'became' irrational by reason of subsequent events," id. at 910, and held (1) that

those subsequent events were not really relevant to the statute's rationality, id. at 910-11, and (2) that even if post-legislation facts showed that the assumptions on which the legislation was based "turned out to have been incorrect," the legislature could not be required to "reassess the continuing validity of the factual premises" of legislation after it was enacted, at least within the modest period of nine years, id. at 911-12. "The Constitution presumes," the court held, "that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial interference is generally unwarranted no matter how unwisely we may think the political branch has acted." id. at 911, quoting United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 n. 12 (1980).

CONCLUSION

The Attorney General's motion to dismiss the Fourth and Fifth Causes of Action in the Complaint should be granted.

Dated: New York, New York
March 2, 2012

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