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FOR THE RECORD

Via Hand Submission.

New York City Council
250 Broadway, Council Chamber
New York, New York 10007

Attn: Sergeant at Arms

Re: Consumer Affairs Committee Oversight Hearing
Submission in Support of Repeal of N.Y.C. Cabaret Law

Hon. Members of the City Council:

I appear today before the Consumer Affairs Committee to offer my experiences and insights as the proprietor of a small music venue in Brooklyn, and as the attorney overseeing a pending constitutional challenge to the New York City Cabaret Law. This is a law with no equivalent in other advanced nations. Japan and Sweden recently repealed their dancing bans, and such laws now exist only in nations like Iran, Afghanistan and Kuwait.

Legislative History

I understand this is the first hearing held by the New York City Council on the Cabaret Law since it was enacted in 1926. At that time, New York was experiencing what would come to be known as the Harlem Renaissance. To the consternation of the Board of Alderman, a number of jazz clubs had recently opened in Harlem, and were attracting white patrons from other parts of the City. In 1923, the Cotton Club and Connie's Inn opened. A larger establishment, the Savoy Ballroom, opened earlier in 1926. Some of these clubs, like the Cotton Club, admitted only white patrons, but hosted black musicians. Others, like the Savoy, allowed black and white patrons to dance and socialize together. On December 7, 1926, the Committee on Local Laws provided the following justification for enacting the Cabaret Law in its Recommendation No. 10:

> "there has been altogether too much running 'wild' in some of these night clubs and, in the judgment of your committee, the 'wild' stranger and the foolish native should have the check-rein applied a little bit."

Such a quote should bring a chill to any reader in 2017. If the legislative history did not make the racial animus behind the law sufficiently clear, one need look no further than the law's text. It prohibited the unlicensed performance of wind, brass or percussion instruments, while exempting instruments not commonly used in jazz music.

Litigation History

This distinction between jazz instruments and non-jazz instruments was found unconstitutional by the Supreme Court of New York in 1986 in *Chiasson v. N.Y.C. Dept. Of Consumer Affairs*, 132 Misc.2d 640 (N.Y. Sup. Ct. 1986). In 2006, the same attorney, NYU Law Professor Paul Chevigny, presented a broader challenge to the Cabaret Law under the New York State Constitution in *Festa v. New York City*, 2006 N.Y. Slip Op. 26125 (N.Y. Sup. Ct. 2006). While the Court refused to strike down the Cabaret Law in its entirety, the Court admonished the City to repeal or reform the law, concluding, "Surely, the Big Apple is big enough to find a way to let people dance."

Pending Constitutional Challenge

After a decade of inaction by the City, despite unsuccessful attempts at reform by the Bloomberg administration, I commenced a constitutional challenge to the Cabaret Law in federal court on behalf of my own music venue. I argued that, at least in the context of a live music venue, dancing is protected First Amendment expression. Almost every culture around the world has developed unique forms of music and dance, and these traditions are often central to one's cultural identity. Even if social dancing were not protected by the First Amendment, the rights of musicians and other performers clearly are. As a practical matter, my establishment, Muchmore's, is required by the Cabaret Law to censor musical genres that might lead to dancing. We can play folk music or experimental electronic music, but we cannot allow DJs or any kind of dance music. Most forms of hip hop and Latin music are dance-oriented, which has a disparate impact on minority musicians. Together with the racial motivation behind the Cabaret Law, this creates a violation of the Equal Protection Clause.

The Cabaret Law is also unconstitutionally vague and overbroad. It does not define "dancing", leaving officers to guess when toe-tapping, head-nodding, or swaying exceed permissible bounds. It defines a "public dance hall" as "Any room, place or space in the city in which dancing is carried on and to which the public may gain admission..." This could include a church, a wedding, or even this very chamber. It defines a "cabaret" as "Any room, place or space in the city in which any musical entertainment, singing, dancing or other form of amusement is permitted in connection with the restaurant business..." An unlawful "other form of amusement" could be almost any behavior that tends to elicit a smile. Caroline's Comedy Club has been ticketed for the unlicensed telling of jokes. I am not kidding. Kidding is illegal without a license in this City.

Sufficiency of Other Laws

This Committee may ask, if the Cabaret Law is repealed, what should it be replaced with? The answer is that all the laws needed to address its purported concerns were enacted years ago. To the extent the City is concerned about noise, the N.Y.C. Noise Code provides precise decibel limits that cannot be exceeded. To the extent the City is concerned about fire or overcrowding, the Fire Code and Building Code thoroughly address these issues. For an establishment to have a legal capacity of more than 74 persons, it must obtain a Place of Assembly Certificate of Operation, which requires submission of a seating plan and annual Fire Department inspections.

New York is one of the most heavily regulated jurisdictions on Earth. Were I not a lawyer, I could not have established a small music venue here. People with less resources and legal expertise, including artists, musicians and under-served communities, find the cost of compliance beyond reach. This crisis is compounded by rising rents. In my neighborhood, the number of music venues has fallen by half in two years. Artists have been priced out. New York is being sapped of its cultural vitality.

Zoning Considerations

In addition to the repeal of the Cabaret Law, the Zoning Resolution must be amended to remove references to dancing. Zoning Resolution Sec. 32-15 defines Use Group 6 to include, "Eating or drinking establishments with musical entertainment but not dancing, with a capacity of 200 persons or fewer." Zoning Resolution Sec. 32-21 defines Use Group 12 to include, "Eating and drinking establishments with entertainment and a capacity of more than 200 persons, or establishments of any capacity with dancing." Dancing presents no unique hazards. Use Groups should depend upon capacity.

According to Zoning Resolution Sec. 32-21, "Use Group 12 consists primarily of fairly large entertainment facilities that: (1) have a wide service area and generate considerable pedestrian, automotive or truck traffic; and (2) are, therefore, appropriate only in secondary, major or central commercial areas." Most eating and drinking establishments are not in central commercial areas. As a result, they cannot even apply for a Cabaret License. Of more than 25,000 bars and restaurants in New York City, no more than 118 can legally permit dancing. Entire neighborhoods such as Bedford Stuyvesant and El Barrio lack a single location where people can legally dance in public.

Establishment of a Nightlife Ambassador

I also support the proposal for the establishment of a nightlife ambassador to serve as an intermediary between nightlife establishments and City residents. This system appears to function well in cities where it has been adopted such as London, Paris and Amsterdam. I personally met with the night mayor of Amsterdam recently. He explained that measures such as the creation of phone hotlines and the posting of "hosts" in public squares have resulted in a reduction of noise complaints, even as the city legalized 24-hour operation. I understand the current proposal calls for the establishment of a task force to explore the concept, and I support this. However, any nightlife ambassador must serve solely in a mediative capacity, reducing the burdens on law enforcement. This should not result in additional compliance challenges for struggling artistic spaces.

Conclusion

It is astonishing that the Cabaret Law continues to exist in the 21st Century. The racial motivation behind the law is well-documented. It serves no legitimate purpose, yet suffocates the City's musicians, artists and creative economy. The law has been consistently disregarded and mocked, and is enforced only arbitrarily against the City's most vulnerable residents. The public outcry for repeal of the law has been large and unanimous, with headlines like *The Racist Legacy of NYC's Anti-Dancing Law* (VICE); *Arts Advocates Renew Call to End New York City's Antiquated Cabaret Laws* (Metro US); and *NYC's Racist, Draconian Cabaret Law Must Be Eliminated* (Village Voice). These sentiments have been echoed by other outlets such as the Wall Street Journal, New York Post, ABA Journal, and international media such as Germany's ARD or Japan's Asahi Shimbun. This is a law which has always been destined for the dustbin of history. The City Council of 2017 must right the wrong committed by the 1926 Board of Alderman. The people of New York have spoken, and the City Council should respond decisively with a full repeal of the Cabaret Law.

Respectfully submitted,

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