

EXHIBIT A
(Ct. App. Dkt. No. 82)

E.D.N.Y. – Bklyn.
20-cv-4834
Matsumoto, J.
20-cv-4844
Garaufis, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of November, two thousand twenty.

Present:

Raymond J. Lohier, Jr.,
Michael H. Park,
Circuit Judges,
Jed S. Rakoff,*
Judge.

Agudath Israel of America, Agudath Israel of Kew Garden Hills,
Agudath Israel of Madison, Agudath Israel of Bayswater, Rabbi
Yisroel Reisman, Rabbi Menachem Feifer, Steven Saphirstein,

Plaintiffs-Appellants,

v.

20-3572

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

Defendant-Appellee.

The Roman Catholic Diocese of Brooklyn, New York,

Plaintiff-Appellant,

v.

20-3590

Governor Andrew M. Cuomo, in his official capacity,

Defendant-Appellee.

* Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

These appeals, which are being heard in tandem, arise from the ongoing COVID-19 pandemic. The pandemic has caused more than 25,000 deaths in New York State and more than 10,000 deaths in Brooklyn and Queens alone. In response to a recent spike in cases concentrated in parts of Brooklyn, Queens, and other areas, Governor Andrew Cuomo issued an executive order to limit further spread of the virus in these COVID-19 “hotspots.”

The executive order directs the New York State Department of Health to identify yellow, orange, and red “zones” based on the severity of outbreaks, and it imposes correspondingly severe restrictions on activity within each zone. For example, the order provides that in “red zones,” non-essential gatherings of any size must be cancelled, non-essential businesses must be closed, schools must be closed for in-person instruction, restaurants cannot seat customers, and houses of worship may hold services but are subject to a capacity limit of 25 percent of their maximum occupancy or 10 people, whichever is fewer.

The Appellants—Agudath Israel of America, Agudath Israel of Kew Garden Hills, Agudath Israel of Madison, Agudath Israel of Bayswater, Rabbi Yisroel Reisman, Rabbi Menachem Feifer, Steven Saphirstein (collectively, “Agudath Israel”), and The Roman Catholic Diocese of Brooklyn, New York (the “Diocese”)—each challenged the executive order as a violation of the Free Exercise Clause of the First Amendment. In each case, the district court denied the Appellants’ motion for a preliminary injunction against the enforcement of the order. The Appellants now move for emergency injunctions pending appeal and to expedite their appeals, after an applications Judge on our Court denied their requests for an administrative stay, No. 20-3572, doc. 30; No. 20-3590, doc. 29.

Preliminarily, we conclude that Agudath Israel did not “move first in the district court for” an order “granting an injunction while an appeal is pending” before filing with this Court its present motion for an injunction pending appeal. Fed. R. App. P. 8(a)(1)(C). Instead, Appellant moved for a preliminary injunction pending the district court’s final judgment. In its briefs and at oral argument before this panel, moreover, Agudath Israel has not explained or otherwise justified its failure to comply with the straightforward requirement of Rule 8(a). Agudath Israel also has failed to demonstrate that “moving first in the district court would be impracticable,” Fed. R. App. P. 8(a)(2)(A), or even futile, particularly in light of the fact that a full eleven days elapsed after the district court’s ruling before Agudath Israel sought relief from this Court. We deny Agudath Israel’s motion for these procedural reasons. *See Hirschfeld v. Bd. of Elections in N.Y.*, 984 F.2d 35, 38 (2d Cir. 1993).

We deny the Diocese’s motion for an injunction pending appeal—and would deny the motion filed by Agudath Israel if it were properly before us—for the reasons that follow.

As an initial matter, an injunction is “an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). To obtain an injunction from a district court, movants generally bear the burden of showing that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Id.* at 20.

To obtain a stay of a district court’s order pending appeal, more is required, including a “strong showing that [the movant] is likely to succeed on the merits.” *New York v. U.S. Dep’t of Homeland Sec.*, 974 F.3d 210, 214 (2d Cir. 2020). The motions at issue here seek a remedy still more drastic than a stay: an injunction issued in the first instance by an appellate court. “Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.” *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quotation marks omitted).

“The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status.” *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quotation marks omitted); see *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014) (“[T]he Free Exercise Clause . . . protects the performance of (or abstention from) physical acts that constitute the free exercise of religion: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.”) (quotation marks omitted)). But the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability,” *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (quotation marks omitted), “even if the law has the incidental effect of burdening a particular religious practice,” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

“A law burdening religious conduct that is *not* both neutral and generally applicable, however, is subject to strict scrutiny.” *Cent. Rabbinical*, 763 F.3d at 193 (citing *Lukumi*, 508 U.S. at 531–32). “A law is not neutral if it is specifically directed at a religious practice.” *Id.* (cleaned up). Similarly, a law is “not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it.” *Id.* at 197.

The Court fully understands the impact the executive order has had on houses of worship throughout the affected zones. Nevertheless, the Appellants cannot clear the high bar necessary to obtain an injunction pending appeal. The challenged executive order establishes zones based on the severity of the COVID-19 outbreaks in different parts of New York. Within each zone, the order subjects religious services to restrictions that are similar to or, indeed, *less severe than* those imposed on comparable secular gatherings. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, *C.J.*, concurring) (denying emergency injunctive relief to houses of worship that were subject to similar or less severe restrictions than those applicable to comparable secular gatherings); see also *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 342, 346–47 (7th Cir. 2020) (upholding an order that capped religious gatherings at ten people where the most comparable activities—those “that occur in auditoriums, such as concerts and movies”—had been banned completely); cf. *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210–11 (2d Cir. 2011) (holding that a Kosher food labeling act was a neutral and generally applicable law subject to rational basis review because it applied

to “food purchased by individuals of many different religious beliefs” and impacted consumers who purchased kosher products “for reasons unrelated to religious observance”).

Thus, while it is true that the challenged order burdens the Appellants’ religious practices, the order is not “substantially underinclusive” given its greater or equal impact on schools, restaurants, and comparable secular public gatherings. *Cf.* No. 20-3590, doc. 20, Ex. L at 2 (Governor Cuomo criticizing the order’s policy of “clos[ing] every school” as “a policy being cut by a hatchet,” not “a scalpel”). To the contrary, the executive order “extend[s] well beyond isolated groups of religious adherents” to “encompass[] both secular and religious conduct.” *Cent. Rabbinical*, 763 F.3d at 195.

In a dissent from this Court’s order, our colleague asserts that the executive order is subject to strict scrutiny because it violates the minimum requirement of neutrality. The fact that theaters, casinos, and gyms are more restricted than places of worship, the dissent reasons, “only highlights the fact that the order is not neutral towards religion.” But this view is undermined by recent precedent, which makes clear that COVID-19 restrictions that treat places of worship on a par with or more favorably than comparable secular gatherings do not run afoul of the Free Exercise Clause. *See, e.g., S. Bay*, 140 S. Ct. at 1613 (Roberts, *C.J.*, concurring) (guidelines that “place[d] restrictions on places of worship” less severe than those on comparable gatherings “appear consistent with the Free Exercise Clause”); *see also Elim*, 962 F.3d at 347 (same).

The dissent attempts to distinguish *South Bay* as having been decided during the early stages of the pandemic while local governments were actively shaping their response to changing facts on the ground. But here, too, the executive order is a response to rapidly changing facts on the ground. For several months, New York’s “limits and restrictions lessen[ed] and evolve[d] as the curve continue[d] to flatten,” and the State’s “limits and restrictions . . . increase[d]” only when “a review of the data indicate[d] a trend of increasing COVID-19 cases or spikes of cases in [the] cluster areas” targeted by the challenged executive order. No. 20 Civ. 4834 (KAM) (E.D.N.Y. 2020), doc. 12 at 14, 18–19. In any event, *South Bay* did not draw a distinction between the pandemic in its early or late stage. Its central relevant facts exist in New York in November 2020 just as they existed in California in May 2020: There is no vaccine or known cure for COVID-19; the pandemic has killed hundreds of thousands of Americans; and “[b]ecause people may be infected but asymptomatic, they may unwittingly infect others.” *S. Bay*, 140 S. Ct. at 1613 (Roberts, *C.J.*, concurring).

Upon due consideration, and for the foregoing reasons, it is hereby ORDERED that the Appellants’ motions for injunctions pending appeal are DENIED. Among other infirmities in their arguments, the Appellants have failed to meet the requisite standard for an injunction pending appeal. *See New York v. U.S. Dep’t of Homeland Sec.*, 974 F.3d at 214. It is further ORDERED that the motion to expedite the appeals is GRANTED.

We address here only the Appellants’ motions for injunctions pending appeal and to expedite their appeals, not their underlying appeals challenging the district courts’ refusals to provide preliminary injunctive relief. With respect to the underlying appeals, the parties have agreed to the following

merits briefing schedule: Appellants' briefs are due Tuesday, November 17, 2020; Appellee's brief is due Tuesday, December 8, 2020; Appellants' reply briefs are due Monday, December 14, 2020, and the matter is to be calendared as early as the week of December 14, 2020.

Judge Park dissents from the denial of the motions for injunctions pending appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A handwritten signature in cursive script that reads "Catherine O'Hagan Wolfe". The signature is written in black ink and is positioned over a circular official seal.

A circular official seal for the United States Second Circuit Court of Appeals. The seal features a blue outer ring with the text "UNITED STATES" at the top and "SECOND CIRCUIT COURT OF APPEALS" at the bottom. The center of the seal is white with the words "SECOND CIRCUIT" in blue capital letters, flanked by two small blue stars.

Park, *Circuit Judge*, dissenting:

In response to the COVID-19 pandemic, the Governor of New York issued an executive order imposing strict capacity limits on “houses of worship” in certain specified “zones.” Those restrictions apply only to religious institutions; in the same zones, pet shops, liquor stores, and other businesses the Governor considers “essential” remain open, free from any capacity limits. By singling out “houses of worship” for unfavorable treatment, the executive order specifically and intentionally burdens the free exercise of religion in violation of the First Amendment. I would thus grant the motions for injunctive relief pending appeal.

I

Discrimination against religion is “odious to our Constitution.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). “Official action that targets religious conduct for distinctive treatment” must thus satisfy “the most rigorous of scrutiny.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993).

A

First, the executive order fails the “minimum requirement of neutrality” towards religion, which means that a government policy may “not discriminate on its face.” *Id.* at 533. The order authorizes the New York State Department of Health to designate “areas in the State that require enhanced public health restrictions” as red, orange, or yellow zones. N.Y. Exec. Order No. 202.68. In each zone, the order subjects only “houses of worship” to special “capacity limit[s]”: in red zones, “25% of maximum occupancy or 10 people, whichever is fewer”; in orange zones, “the lesser of 33% of maximum occupancy or 25 people”; and in yellow zones, “50% of . . . maximum occupancy.” *Id.* But in the very same zones, numerous businesses deemed “essential” may operate with no such restrictions.¹ This disparate treatment of religious and secular institutions is plainly not neutral.

The Governor’s public statements confirm that he intended to target the free exercise of religion. The day before issuing the order, the Governor said that if the “ultra-Orthodox [Jewish] community” would not agree to enforce the rules, “then we’ll close the institutions down.”² *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018) (factors relevant to the assessment of neutrality include “the specific series of events leading to the enactment or

¹ See *Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Recent Executive Orders*, N.Y. State Dep’t of Econ. Dev. (updated Oct. 23, 2020), <https://esd.ny.gov/guidance-executive-order-2026>; *Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Executive Order 202.68*, N.Y. State Dep’t of Econ. Dev. (updated Oct. 7, 2020), <https://esd.ny.gov/ny-cluster-action-initiative-guidance>; Hearing Tr. at 81–82, No. 20-cv-4844 (E.D.N.Y. Oct. 15, 2020).

² *Governor Cuomo Updates New Yorkers on State’s Progress During COVID-19 Pandemic*, Off. of the Governor (Oct. 5, 2020), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1>.

official policy in question” and “contemporaneous statements made by members of the decisionmaking body”).

The Governor argues that the executive order should nonetheless be subject to only rational-basis review because it treats houses of worship “more favorably” than “non-essential” secular businesses, like theaters, casinos, and gyms. But this only highlights the fact that the order is not neutral towards religion. Rational-basis review applies when a generally applicable policy incidentally burdens religion, but a policy that expressly *targets* religion is subject to heightened scrutiny. *See Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 194 (2d Cir. 2014). Here, the executive order does not impose neutral public-health guidelines, like requiring masks and distancing or limiting capacity by space or time. Instead, the Governor has selected some businesses (such as news media, financial services, certain retail stores, and construction) for favorable treatment, calling them “essential,” while imposing greater restrictions on “non-essential” activities and religious worship. Such targeting of religion is subject to strict scrutiny.

South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.), is not to the contrary. Summary decisions of the Supreme Court are precedential only as to “the precise issues presented and necessarily decided.” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Petitioners in *South Bay* sought a writ of injunction, which is granted only when “the legal rights at issue are indisputably clear.” *Id.* at 1613 (Roberts, *C.J.*, concurring) (citation omitted). Here, Appellants seek injunctions pending appeal, for which they need to show, at most, a “‘substantial’ likelihood” of success on the merits. *United for Peace & Just. v. City of New York*, 323 F.3d 175, 178 (2d Cir. 2003). In addition, the motions before this Court arise from quite different circumstances. *South Bay* was decided during the early stages of the pandemic, when local governments were struggling to prevent the healthcare system from being overwhelmed and were “actively shaping their response to changing facts on the ground.” 140 S. Ct. at 1614 (Roberts, *C.J.*, concurring). By contrast, the Governor’s stated concern here is maintaining localized containment. In April, New York reported a seven-day average of nearly 1,000 deaths per day from COVID-19.³ Six months later, that average has not exceeded 20 for months. *See id.*

Finally, the Governor overstates the import of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld a mandatory vaccination law against a substantive due process challenge. *Jacobson* was decided before the First Amendment was incorporated against the states, and it “did not address the free exercise of religion.” *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). Indeed, the Court specifically noted that “even if based on the acknowledged police powers of a state,” a public health measure “must always yield in case of conflict with . . . any right which [the Constitution] gives or secures.” 197 U.S. at 25. *Jacobson* does not call for indefinite

³ *See New York Covid Map and Test Count*, N.Y. Times (updated Nov. 4, 2020), <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html>.

deference to the political branches exercising extraordinary emergency powers, nor does it counsel courts to abdicate their responsibility to review claims of constitutional violations.

B

Applying strict scrutiny, there is little doubt that the absolute capacity limits on houses of worship are not “narrowly tailored.” *Lukumi*, 508 U.S. at 546. As the Governor himself admitted, the executive order is “not a policy being written by a scalpel,” but rather is “a policy being cut by a hatchet.” See Appellant’s Br., No. 20-3590, at 4.

First, the fixed capacity limits do not account in any way for the sizes of houses of worship in red and orange zones. For example, two of the Diocese’s churches in red or orange zones as of October 8, 2020 seat more than a thousand people. But the order nonetheless subjects them to the same 10-person limit in red zones applicable to a church that seats 40 people. Such a blunderbuss approach is plainly not the “least restrictive means” of achieving the State’s public safety goal. *Lukumi*, 508 U.S. at 578.

The fixed capacity limits also bear little relation to the particular COVID-19 transmission risks the Governor identifies with houses of worship, such as “singing or chanting” and mingling before and after services. Churchgoers and daveners remain subject to generally applicable distancing and mask requirements, so the additional capacity limits assume that worshippers—unlike participants in “essential” activities—will not comply with such restrictions. The Governor may not, however, “assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings.” *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020). Here, Appellants have made clear that they would follow any generally applicable public-health restrictions.⁴

II

The remaining injunction factors also support granting the motions. Appellants presented un rebutted evidence that the executive order will prevent their congregants from freely exercising their religion. And “[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)).⁵

⁴ For example, the Diocese presented evidence that, even before the order, it had voluntarily restricted attendance to 25% of building capacity and required masks during Mass; it has also “agreed to accept potential further restrictions (such as eliminating congregant singing and choirs during Mass) as a condition of injunctive relief.” Appellant’s Br., No. 20-3590, at 4.

⁵ The district court in the *Agudath Israel* case found that plaintiffs had not demonstrated irreparable harm because “the Orthodox community has previously complied with the total lockdown” and they could “continue to observe their religion” with “modifications.” Tr. of Proceedings at 66, No. 20-cv-04834 (E.D.N.Y. Oct. 9, 2020). This was error, in light of which plaintiffs reasonably believed that another motion for injunction in the district court would be futile. See, e.g., *Hernandez v. Comm’r*, 490 U.S. 680, 699

Finally, the balance of equities and public interest favor Appellants. The question is not whether the State may take generally applicable public-health measures, but whether it may impose greater restrictions only on houses of worship. It may not.

I respectfully dissent from the denial of the motions for injunctions pending appeal.

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Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


Catherine O'Hagan Wolfe



(1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

EXHIBIT B
(Dist. Ct. Dkt. No. 36)

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U.S. District Court

Eastern District of New York

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Case Name: The Roman Catholic Diocese of Brooklyn, New York v Cuomo

Case Number: [1:20-cv-04844-NGG-CLP](#)

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Docket Text:

ORDER: For the reasons stated in the court's [32] memorandum and order, the [34] motion for an injunction pending appeal is DENIED. Ordered by Judge Nicholas G. Garaufis on 10/20/2020. (Lazarus, Benjamin)

1:20-cv-04844-NGG-CLP Notice has been electronically mailed to:

Randy M. Mastro rmastro@gibsondunn.com, aarias@gibsondunn.com, mao@gibsondunn.com

Seth J. Farber seth.farber@ag.ny.gov, Stephanie.Rosenberg@ag.ny.gov, oaglita@ag.ny.gov

Akiva Shapiro ashapiro@gibsondunn.com, AMasters@gibsondunn.com

William John Moccia wmoccia@gibsondunn.com, amasters@gibsondunn.com, dconroy@gibsondunn.com, lkole@gibsondunn.com, shartnett@gibsondunn.com

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EXHIBIT C
(Dist. Ct. Dkt. No. 32)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE ROMAN CATHOLIC DIOCESE OF
BROOKLYN, NEW YORK,

Plaintiff,

-against-

GOVERNOR ANDREW M. CUOMO, in his
official capacity,

Defendant.

MEMORANDUM & ORDER
20-CV-4844 (NGG) (CLP)

NICHOLAS G. GARAUFIS, United States District Judge.

Plaintiff The Roman Catholic Diocese of Brooklyn, New York (“the Diocese”) claims, under 42 U.S.C. § 1983, that Defendant Governor Andrew M. Cuomo’s New Cluster Action Initiative, as enacted by New York Executive Order 202.68 in response to a recent spike in COVID-19 cases in certain areas of the state, violates the Free Exercise Clause of the First Amendment as applied to the Diocese’s churches. The Diocese seeks a preliminary injunction to bar the enforcement of Executive Order 202.68 against it. (*See* Pl. Mot. for a Prelim. Inj. (Dkt. 3); Pl. Mem. in Supp. of Mot. (“Mem.”) (Dkt. 4); Def. Mem. in Opp. to Mot. (“Opp.”) (Dkt. 18); Pl. Reply (Dkt. 24).) For the reasons that follow, the motion is DENIED.

I. BACKGROUND¹

A. The COVID-19 Pandemic in New York

In the past seven months, more than 479,000 people in New York State have tested positive for COVID-19 and more than 25,000

¹ The court takes the facts from the declarations and affidavits submitted, as well as witness testimony taken at an evidentiary hearing conducted on October 15, 2020. Citations to witness testimony refer to the hearing transcript that will be filed to the public docket.

people have died.² The most fortunate New Yorkers will remember always the devastation that the first wave of the pandemic wrought. Tens of thousands of others, disproportionately front-line workers, low income people, and people of color³—or a combination thereof—will not. New York today is not like the New York of October 2019, but it is also a much different, and safer place than the New York of April and May 2020. That is due, in no small part, to the response of state and local governments, as well as the efforts of non-governmental institutions, like the Diocese.

New York was among the first states hit by the pandemic and, at its worst, the state had more COVID-19 cases than any single country in the world other than the United States. (Declaration of Dr. Debra S. Blog (“Blog Decl.”) (Dkt. 20) ¶ 25.) Beginning in March 2020 and continuing up to the present day, Governor Cuomo has implemented a series of executive orders to combat the virus: from a facemask mandate, to closures of certain businesses and gathering places, to efforts to reduce density and promote social distancing, to cleaning protocols, and more. (*See id.* ¶¶ 29-36.) The efforts to “flatten the curve” have worked. In March and April 2020, over ten-thousand people were testing positive for COVID-19 in New York daily. (*Id.* ¶ 37, *see also* n. 2 *supra.*) By June 2020, daily positive cases were in the hundreds with a positivity rate around 1%, where it has remained thus far. (*Id.*) On April 14, 2020 over one-thousand New Yorkers died of COVID-19, with a seven-day average of over nine-hundred

² *See* New York State Dep’t of Health COVID-19 Tracker, <https://covid19tracker.health.ny.gov> (last viewed Oct. 16, 2020).

³ *See, e.g.* Centers for Disease Control, Health Equity Considerations and Racial and Ethnic Minority Groups, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> (last viewed Oct. 16, 2020).

deaths per day.⁴ On October 14, 2020, eleven New Yorkers died, with a seven-day average of nine deaths per day.⁵

For all of the State's leadership, COVID-19 safety protocols have been adopted and self-enforced, primarily and necessarily, within communities. And from the beginning, the Diocese has been an exemplar of community leadership. At each step, the Diocese—a division of the Roman Catholic Church that heads 186 parishes in Brooklyn and Queens—has been ahead of the curve, enforcing stricter safety protocols than the State required at the given moment. On March 16, 2020, the Diocese cancelled all public masses, although it was not required to until days later. (Declaration of Bishop Raymond F. Chappetto (“Chappetto Decl.”) (Dkt. 5) ¶ 7; Blog Decl. ¶¶ 29-32.) The Diocese's churches did not hold in-person mass again until July, a week after the State permitted. (Chappetto Decl. ¶ 10.) Before reopening, the Diocese formed a committee chaired by Joseph Esposito, a career New York City public servant who has served as Chief of the Department of the New York City Police Department and as Commissioner of the New York City Office of Emergency Management. (Declaration of Joseph J. Esposito (“Esposito Decl.”) (Dkt. 6) ¶ 1.) Based on the committee's recommendations, when the Diocese's churches finally reopened, they did so with rigorous safety protocols including:

⁴ New York Times, New York COVID Map and Case Count, <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html> (last viewed Oct. 16, 2020).

⁵ *Id.*

- A 25% capacity limit, which survives to this day, even though under state law, churches were permitted to increase attendance to 33% of capacity when New York City entered “Phase 4” of the state reopening guidelines on July 20, 2020. (Chappetto Decl. ¶¶ 14, 16.)
- A mask requirement for any person entering a church.
- Strict seating protocols to keep parishioners six feet apart, including seating only in alternating pews.
- Hand sanitizer at every door as well as bulk cleaning supplies and cleaning protocols in every church.
- Prominent signage about safety protocols.
- Significant changes to the mass itself, including measures to reduce the mass’s length and an order that communion would be received only by hand, meaning that the host would never be placed directly into a parishioner’s mouth. Churches also eliminated altogether the wine, or Precious Blood, from communion.

(See Testimony of Bishop Chappetto (“Chappetto Tr.”) at 13-20.) According to Bishop Chappetto, there has not been any COVID-19 outbreak in any of the Diocese’s churches since they reopened. (Chappetto Decl. ¶ 15.)

B. New Cluster Action Initiative and Executive Order 202.68

Unfortunately, while New York has had success fighting the pandemic for the past few months, it is still with us, and positivity rates remain over 10% in 33 other states. (Blog Decl. ¶ 48.) In early October, the State noticed spiking COVID-19 positivity in certain geographic hotspots. On October 5, the State identified twenty problematic zip codes in which the average positivity rate was 5.5%, compared to 1.2% in the rest of the state. (Oct. 5,

2020 Stmt. of Gov. Cuomo (Dkt. 22-3) at 3.) And in discrete areas within those zip codes—areas that are now the subject of this litigation—positivity rates reached approximately 8% on October 8. (See Declaration of Dr. Howard Zucker (“Zucker Decl.”) (Dkt. 29-1) ¶ 23.) On Tuesday, October 6, in response to those spikes, Governor Cuomo announced that a “New Cluster Action Initiative” (“Initiative”) would go into effect as soon as the next day and no later than Friday, October 9. (See Oct. 6, 2020 Announcement (“Announcement”) (Dkt. 7-4) at ECF pp. 15-17.) The Initiative was codified by Executive Order 202.68 (“EO”). (See EO 202.68 (Dkt. 12-1).)

Under the EO, which remains in effect, the New York State Department of Health (“DOH”) is directed to “determine areas in the State that require enhanced public health restrictions based upon cluster-based cases of COVID-19” and to designate those areas as a “red zones”, “orange zones”, or “yellow zones” based on the state of the outbreak there. (*Id.*) Red zones are areas where there is currently an active cluster of COVID-19 cases; orange zones are “warning zones”; and yellow zones are “precautionary zones.” (*Id.*) In “red zones”:

Non-essential gatherings of any size shall be postponed or cancelled; all non-essential businesses, as determined by the Empire State Development Corporation based upon published guidance, shall reduce in-person workforce by 100%; **houses of worship shall be subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer**; any restaurant or tavern shall cease serving patrons food or beverage on-premises and may be open for takeout or delivery only; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.

In “orange zones”:

Non-essential gatherings shall be limited to 10 people; certain non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus, including gyms, fitness centers or classes, barbers, hair salons, spas, tattoo or piercing parlors, nail technicians and nail salons, cosmetologists, estheticians, the provision of laser hair removal and electrolysis, and all other personal care services shall reduce in-person workforce by 100%; **houses of worship shall be subject to a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer**; any restaurant or tavern shall cease serving patrons food or beverage inside on-premises but may provide outdoor service, and may be open for takeout or delivery, provided however, any one seated group or party shall not exceed 4 people; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.

In “yellow zones”:

Non-essential gatherings shall be limited to no more than 25 people; **houses of worship shall be subject to a capacity limit of 50% of its maximum occupancy and shall adhere to Department of Health guidance**; any restaurant or tavern must limit any one seated group or party size to 4 people; and the Department of Health shall issue guidance by October 9, 2020 regarding mandatory testing of students and school personnel, and schools shall adhere to such guidance.

(*Id.* (emphasis added).) DOH initially identified five counties experiencing an increase in COVID-19 cases for enhanced restrictions: Kings (Brooklyn), Queens, Broome, Orange, and Rockland. (Announcement at ECF p. 15.) All five counties are home to large Orthodox Jewish populations. (See Eric Levenson, Kristina Sgueglia, and Melanie Schuman, *New York Sees Uptick in*

COVID-19 Cases in Orthodox Jewish Neighborhoods, CNN, Sept. 30, 2020 (Dkt. 7-7).)

At the press conference to announce the Initiative, Governor Cuomo said “the new rules are most impactful on houses of worship” and that the Initiative “is about mass gatherings” and “one of the prime places of mass gatherings are houses of worship.” (Mem. at 14.) He also referenced his “love for the Orthodox [Jewish] community” and noted that the “Torah speaks about how certain religious obligations can be excused if you are going to save a life.” (*Id.*) On October 9, Governor Cuomo was interviewed on CNN, where he said “the cluster is a predominantly ultra-Orthodox cluster. The Catholic schools are closed because they happen to be in that cluster. But the issue is with that ultra-Orthodox community . . . This is in the middle of Brooklyn. They will make other people sick.” (Tr. of Excerpts from Gov. Cuomo Oct. 9 Interview (Dkt. 12-2).)

C. Procedural History

The Diocese operates 26 churches in red zones and orange zones, split roughly evenly between the two. (Chappetto Decl. ¶ 18; Suppl. Decl. of Bishop Raymond F. Chappetto (“Chappetto Suppl. Decl.”) (Dkt. 21) ¶¶ 3-5.) It maintains that EO 202.68 would “effectively close” those churches by limiting their capacity to 10 people in the red zone and 25 people in the orange zone. (Mem. at 22.) On Thursday, October 8, 2020, the Diocese filed a complaint demanding, among other remedies, emergency injunctive relief in the form of a Temporary Restraining Order (“TRO”) and a preliminary injunction. (Compl. (Dkt. 1) at 22.)

On Friday, October 9, Judge Eric R. Komitee held an emergency oral argument in this case to consider the Diocese’s TRO motion before weekly mass on Sunday, October 11. That night, he denied the motion in a short memorandum and order. (*See* Oct. 9 M&O (“TRO Denial”) (Dkt. 15).) Judge Komitee identified the central question in the case as whether EO 202.68 is a “neutral,

generally applicable regulatory law” which is subject only to ordinary rational basis review under *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 880 (1990)⁶, or whether the EO “single[s] out acts of worship for ‘distinctive treatment,’” which triggers a strict scrutiny analysis, as discussed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). (TRO Denial at 2.) Judge Komitee characterized the case as “a difficult decision for two reasons.” (*Id.*) First, unlike the laws at issue in other COVID-related free exercise cases in the Second Circuit, EO 202.68 “contains provisions made expressly applicable to houses of worship.” (*Id.* at 3.) Second, Governor Cuomo “made remarkably clear that this Order was intended to target a different set of religious institutions,” namely ultra-Orthodox Synagogues, and the Diocese “appears to have been swept up in that effort despite having been mostly spared, so far at least, from the problem at hand.” (*Id.*) However, Judge Komitee sided with the State and denied the TRO, citing the government’s “wide latitude” to manage public health policy to combat disease, as discussed in *Jacobson v. Massachusetts*, 197 U.S. 11, 27, 31 (1905), as well as in COVID-specific decisions *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) and *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344 (7th Cir. 2020). (TRO Denial at 4.)

Just a few hours before Judge Komitee’s hearing, Judge Kiyo A. Matsumoto held a hearing in a related litigation in this district, *Agudath Israel of America et al. v. Cuomo*, 20-cv-4834 (KAM) (RML), in which Orthodox Jewish synagogues and rabbis challenged EO 202.68 both facially and as applied to the Orthodox Jewish community. The court denied the plaintiffs’ request for a TRO in that case, as well. In a ruling from the bench, relying on

⁶ When quoting cases, and unless otherwise noted, all citations and quotation marks are omitted and all alterations are adopted.

Jacobson and its progeny, as well as the State’s “medical, epidemiological and other expertise in formulating” the EO, Judge Matsumoto concluded that the regulation was not intended to burden religious practice and that it passed rational basis review. (Tr. of Oct. 9, 2020 Hr’g in *Agudath Israel of America et al. v. Cuomo* (“*Agudath Israel*, Hr’g Tr.”) (Dkt. 19-1) at 50.)

II. LEGAL STANDARD

In general, a court “may grant a preliminary injunction where a plaintiff demonstrates irreparable harm and meets one of two related standards: either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party.” *Otoe-Missouria Tribe of Indians v. New York State Dep’t of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014). However, to obtain a preliminary injunction against a duly enacted government action, a plaintiff cannot rely on a “fair ground for litigation” and must show a likelihood of success on the merits. *Id.* “This exception reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.” *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). The moving party must also show that the balance of the equities tips in its favor and that an injunction would be in the public interest. *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

III. DISCUSSION

At this stage, the court finds that the Diocese has met its burden to show irreparable harm. However, under the appropriate rational basis standard of review, the Diocese cannot demonstrate

a likelihood of success on the merits. And even if strict scrutiny applied, it would not be in the public interest to grant an injunction while the parties develop a record sufficient for the court to decide the issue on the merits.

A. Irreparable Harm

The Supreme Court has held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Further, “it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm.” *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (emphasis in original).

On the other hand, some courts have held that plaintiffs forced to modify their religious practice due to COVID-19 regulations have failed to show irreparable harm. In *Agudath Israel*, Judge Matsumoto held that in light of “the fact that the Orthodox community has previously complied with the total lockdown and has continued to comply with the Phase Four restriction . . . the injuries that it brings to the Court’s attention are not irreparable, they are unfortunate. . . . They can continue to observe their religion but there will have to be modifications.” (*Agudath Israel*, Hr’g Tr. at 66.) Other courts have collapsed the irreparable harm inquiry with the inquiry into likelihood of success on the merits. See *Legacy Church, Inc. v. Kunkel*, __ F. Supp. 3d __, 2020 WL 3963764, at *99 (D.N.M. July 13, 2020) (“courts must interpret the ‘irreparable harm’ factor in conjunction with whether the movant is likely to succeed on the merits”); *Carmichael v. Ige*, __ F. Supp. 3d __, 2020 WL 3630738, at *11 (D. Haw. July 2, 2020) (“[a]n alleged constitutional infringement will often alone constitute irreparable harm, but not if the constitutional claim is too tenuous.”).

The court finds that the Diocese has adequately alleged that the State unconstitutionally infringed on its religious practice to establish irreparable harm for the court’s current purposes.

B. Likelihood of Success on the Merits

1. Applicable Law

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend. I. The most important question before the court is which standard of review to apply in order to determine the Diocese’s likelihood of success on the merits. The Diocese argues that the correct standard is strict scrutiny, which the court employs when a plaintiff mounts a challenge on free exercise grounds to “[a] law burdening religious practice that is not neutral or not of general application[.]” *Lukumi*, 508 U.S. at 546. To survive strict scrutiny, a law must be narrowly tailored to address a compelling government interest, *id.* at 531-32, and the State would need to show that its regulation is “the least restrictive means” to achieve its end, *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981). In contrast, the State argues for rational basis review, which courts employ in free exercise challenges to a “neutral, generally applicable law.” *Smith*, 494 U.S. at 881. Under that standard, “legislation is presumed to be valid and will be sustained if the [burden imposed] by the statute is rationally related to a legitimate state interest.” *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007). In the alternative, the State argues that EO 202.68 can survive a strict scrutiny analysis, although the Supreme Court has instructed that, “[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.” *Lukumi*, 508 U.S. at 531.

To know whether rational basis review or strict scrutiny is appropriate, courts must distinguish laws that are “neutral and generally applicable” from those which are “specifically directed at . . . religious practice.” *Smith*, 494 U.S. at 878. In *Lukumi*, a

Florida municipality enacted ordinances against ritual animal sacrifice that “were gerrymandered with care to proscribe religious killings of animals” only by Santeria church members, and which were therefore subject to strict scrutiny analysis and struck down. *Lukumi*, 508 U.S. at 542. Similarly, in *Central Rabbinical Congress of United States & Canada v. New York City Department of Health & Mental Hygiene*, the Second Circuit applied strict scrutiny to a New York City Board of Health regulation targeting metzitzah b’peh, a practice of certain Hasidic groups where a mohel who performs a circumcision stanches the infant’s wound with his mouth. 763 F.3d 183, 194 (2d Cir. 2014). Although, in theory, the regulation applied to anybody who used “direct oral suction” during a circumcision, the agency admitted that “the burdens of the Regulation fall on only a particular religious group—and in fact *exclusively* on members of one particular subset of that religious group.” *Id.* at 196 (emphasis in original.) On the other hand, in *Smith*, the Court rejected the argument that the Free Exercise Clause required that adherents of a Native American church that ingested peyote as a sacrament be exempt from an Oregon statute that prohibited the use of peyote in secular or religious practices. *Smith*, 494 U.S. at 874. When laws are not targeted at specific religious groups or specific types of religious practice, “[t]he teaching of *Smith* is that a state can determine that a certain harm should be prohibited generally, and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption.” *Centr. Rabbinical Cong.*, 763 F.3d at 196 (citing *Smith*, 494 U.S. at 888).

Since the onset of COVID-19 in the winter of 2020, some public health authorities have identified religious gatherings as environments well suited to the transmission of the virus. (See, e.g. Allison James et al., *Morbidity and Mortality Weekly Report*, Centers for Disease Control and Prevention (“CDC”) (May 22, 2020) (“May 22 MMWR”) (Dkt. 20-21) at 3 (“Faith-based organizations that are operating or planning to resume in-person operations,

including regular services, funerals, or other events, should be aware of the potential for high rates of transmission of [COVID-19].”).) Among the other problematic features of religious gatherings, congregants arrive and leave at the same time, physically greet one another, sit or stand close together, share or pass objects, and sing or chant in a way that allows for airborne transmission of the virus. (See CDC Guidance, Considerations for Communities of Faith, (May 23, 2020) (Dkt. 20-28).) As a result, a number of states and localities have adopted specific regulations for houses of worship, along with regulations for other gathering places such as businesses, restaurants, and schools. In turn, a number of those laws have been challenged on free exercise grounds and courts have been confronted with the issue before the court now: Is a law that expressly regulates religious gatherings, including provisions that apply only to houses of worship, “specifically directed at religious practice” like the ordinances in *Lukumi*? Or, if the law regulates houses of worship in a manner that is equally or less restrictive than regulations applied to similar secular gatherings, is it a neutral and generally applicable public health regulation that burdens religious practice only incidentally in the course of protecting the community from the dangers of COVID-19 transmission?

In May, the Supreme Court provided guidance on that question in *South Bay*. There, the Court declined an application to enjoin a California order that limited attendance at places of worship to 25% of a building’s capacity or 100 attendees, whichever was fewer. *South Bay*, 140 S. Ct. at 1613. Chief Justice Roberts, concurring in the denial of the application, found that “those restrictions appear consistent with the Free Exercise Clause.” *Id.* He reasoned:

Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances,

where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545(1985).

Id. at 1613-14.

Since *South Bay*, nearly every court to consider the issue has followed suit and applied a rational basis analysis to free exercise challenges to COVID-related restrictions on religious gatherings. For example, in *Elim Romanian Pentecostal Church v. Pritzker*, the Seventh Circuit confronted a challenge to an Illinois law that limited gatherings in places of worship to 10 people, while closing completely all places of public amusement (including theme parks, theaters, concert halls, and country clubs). 962 F.3d 341 (7th Cir. 2020). The law exempted essential services providing food, shelter, social services, and other life necessities to those in

need (including religious organizations to the extent they offered such services) from the 10-person limit. *Id.* at 343. The court rejected the plaintiff's contention that houses of worship were more akin to grocery stores or meat-packing plants, which were deemed essential, finding that "movies and concerts seem a better comparison group, and by that standard the discrimination has been in favor of religion. While all theaters and concert halls in Illinois have been closed since mid-March, sanctuaries and other houses of worship were open, though to smaller gatherings." *Id.* at 347. As in *South Bay*, as long as the restriction was part of a larger effort to regulate like public spaces, and as long as religious gatherings were not comparatively disadvantaged, the court held that the law was subject to rational basis review and did not run afoul of the Free Exercise Clause.

Similarly, in *Calvary Chapel Lone Mountain v. Sisolak*, __ F. Supp. 3d __, 2020 WL 3108716 (D. Nev. June 11, 2020), the court declined to apply strict scrutiny where houses of worship were subject to the same 50-person cap as comparable secular activities like "lectures, museums, movie theaters, specified trade/technical schools, night-clubs and concerts," *id.* at *4, even as casinos were permitted to operate at 50% capacity. Likewise in *Legacy Church, Inc. v. Kunkel*, __ F. Supp. 3d __, 2020 WL 3963764, at *1, *80 (D.N.M. July 13, 2020), the court declined to apply strict scrutiny to a restriction limiting mass gatherings, including religious gatherings, to 25% of maximum occupancy while allowing restaurants, gyms, and pools to operate at 50% capacity. The court found the restriction was neutral because it did not target houses of worship due to "their religious nature,

but because they involved masses of people in closed spaces and in close proximity.” *Id.* at *81.⁷

⁷ See also *Harvest Rock Church, Inc. v. Newsom*, __ F.3d __, 2020 U.S. App. LEXIS 31226, 2020 WL 5905327 (9th Cir. Oct. 1, 2020) (affirming district court’s denial of preliminary injunction of EO restricting in-person worship services under *South Bay*); *Murphy v. Lamont*, No. 20-cv-694, 2020 WL 4435167 (D. Conn. Aug. 3, 2020) (finding challenged restrictions on religious gatherings were neutral and subject to rational basis review); *Ass’n of Jewish Camp Operators v. Cuomo*, No. 20-cv-687, 2020 WL 3766496 (N.D.N.Y. July 6, 2020) (denying preliminary injunction after finding the restriction would survive either rational basis or strict scrutiny review); *Antietam Battlefield KOA v. Hogan*, __ F. Supp. 3d __, 2020 WL 2556496 (D. Md. May 20, 2020) (upholding restriction on religious gatherings); *Calvary Chapel of Bangor v. Mills*, No. 20-cv-156, 2020 WL 2310913 (D. Me. May 9, 2020) (upholding order restricting indoor religious gatherings to no more than 10 people); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758 (E.D. Cal. 2020) (upholding stay-at-home order despite free exercise claim); *Cassell v. Snyders*, __ F. Supp. 3d __, 2020 WL 2112374 (N.D. Ill. May 3, 2020) (upholding stay-at-home order after applying rational basis review to free exercise claim); *Lighthouse Fellowship Church v. Northam*, __ F. Supp. 3d __, 2020 WL 2110416 (E.D. Va. May 1, 2020) (upholding restriction on religious gatherings after applying rational basis review); *Gish v. Newsom*, No. EDCV 20-755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) (upholding prohibition on religious gatherings under *Jacobson* and rational basis standards); *Carmichael v. Ige*, __ F. Supp. 3d __, 2020 WL 3630738 (D. Haw. July 2, 2020) (finding quarantine restrictions would survive either rational basis or strict scrutiny review); *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App’x 125 (6th Cir. 2020) (upholding order closing certain business and not others after applying rational basis review); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020) (applying *Jacobson* to uphold order postponing non-emergency medical procedures including abortions); *Elmsford Apt. Assocs., LLC v. Cuomo*, __ F. Supp. 3d __, 2020 WL 3498456 (S.D.N.Y. June 29, 2020) (upholding eviction moratorium); *McCarthy v. Cuomo*, No. 20-cv-2124, 2020 WL 3286530 (E.D.N.Y. June 18, 2020) (upholding gathering restriction after applying intermediate scrutiny); *Slidewaters LLC v. Wash. Dep’t of Lab. & Indus.*, No. 20-cv-210, 2020 WL 3130295 (E.D. Wash. June 12, 2020) (upholding order closing certain businesses); *Pro. Beauty Fed’n of Cal. v. Newsom*, No. 20-cv-4275, 2020 WL 3056126 (C.D. Cal. June 8, 2020) (upholding order closing non-essential businesses); *Talleywhacker, Inc. v. Cooper*, __ F. Supp.

The Diocese urges the court to rely on a pair of Sixth Circuit decisions that applied strict scrutiny to strike down a Kentucky executive order prohibiting religious mass gatherings. *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020); *see also Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020). However, those cases predated *South Bay*. Likewise, the two district courts that have applied strict scrutiny to enjoin regulations on free exercise grounds post-*South Bay* are readily distinguishable.⁸

3d __, 2020 WL 3051207 (E.D.N.C. June 8, 2020) (upholding order closing certain businesses while allowing others to remain open after applying rational basis review); *Best Supplement Guide, LLC v. Newsom*, No. 20-cv-965, 2020 WL 2615022 (E.D. Cal. May 22, 2020) (upholding order closing non-essential businesses); *Open Our Oregon v. Brown*, No. 20-cv-773, 2020 WL 2542861 (D. Or. May 19, 2020) (upholding order closing non-essential businesses); *Geller v. De Blasio*, __ F. Supp. 3d __, 2020 WL 2520711 (S.D.N.Y. May 18, 2020) (upholding order restricting non-essential gatherings); *Henry v. DeSantis*, __ F. Supp. 3d __, 2020 WL 2479447 (S.D. Fla. May 14, 2020) (upholding order closing certain businesses); *McGhee v. City of Flagstaff*, No. 20-cv-8081, 2020 WL 2308479 (D. Ariz. May 8, 2020) (upholding stay-at-home order).

⁸*See Soos v. Cuomo*, 20-cv-651, 2020 WL 3488742 (N.D.N.Y. June 26, 2020); *Capitol Hill Baptist Church v. Bowser*, 20-cv-2710, 2020 WL 5995126 (D.D.C. Oct. 9, 2020). In *Soos*, Judge Sharpe granted a preliminary injunction to Catholic priests and Orthodox Jewish congregants against an earlier iteration of New York's capacity restriction on religious gatherings. *Soos*, 2020 WL 3488742, at *1. That decision was premised on two circumstances that differ from this case. First, the court held that houses of worship were treated less well than comparable non-essential businesses, and second, the court found that the state selectively enforced the restrictions. *Id.* at 10-13. As discussed *infra*, here the court does not find EO 202.68 treats like gatherings better than houses of worship, and there is no evidence of selective enforcement as between religious and secular activities. In *Capitol Hill Baptist*, Judge McFadden enjoined enforcement of a District of Columbia ordinance that forbid a congregation from meeting outdoors, when the District allowed mass protests in the wake of the murder of George Floyd, among other events. *Capitol Hill Baptist*, 2020 WL 5995126, at *12. Like *Soos*, *Capitol Hill Baptist* rested on

2. Analysis

Consistent with *Smith*, and *Lukumi*, the court must determine whether EO 202.68 was fashioned for the purpose of containing the spread of COVID-19 in public spaces in general or whether it was to curtail religious practice. In conducting that analysis, the court must also bear in mind that the State is afforded latitude to confront public health emergencies, as discussed in *Jacobson* and its progeny.⁹ Of course, *Jacobson* does not grant the state license to “contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument.” 197 U.S. at 25.

The reasoning of the Chief Justice in *South Bay* and the Seventh Circuit in *Elim* are instructive. Where religious gatherings are treated alike or better than secular comparators, it would be inappropriate for the court to apply strict scrutiny. Under EO

disfavored treatment for religious gatherings as compared to comparable activities, specifically, comparable outdoor activities. *Id.* at *8.

⁹ In *Jacobson*, the Supreme Court declared that “a community has the right to protect itself against an epidemic of disease which threatens its members,” 197 U.S. at 27, and that in such cases judicial scrutiny is limited to whether the state’s action “has no real or substantial relation to” the object of protecting the public or is “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Id.* at 31. *Jacobson* did not discuss the Free Exercise Clause because it was decided prior to the incorporation of the First Amendment against the states in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). However, it is the seminal case regarding the state’s powers in the face of a public health emergency. See, e.g. *South Bay*, 140 S. Ct. at 1613 (citing *Jacobson* for deference to state COVID-19 regulations); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Jacobson* for the proposition that religious grounds are not sufficient for an exemption from a mandatory vaccination law); see also *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (holding that *Jacobson* foreclosed a due process claim against mandatory vaccination for public school students, and on a related free exercise challenge, “[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”).

202.68, religious gatherings are treated more favorably than similar gatherings, which the State defines as “public gatherings with scheduled starting and ending times such as public lectures, concerts or theatrical performances” and which remain closed entirely. (State Opp. at 13.) In red zones, schools, restaurants, and non-essential businesses are closed entirely, while religious gatherings are permitted with significant capacity limitations. In orange zones, houses of worship are afforded more leeway than schools, restaurants, and high-risk businesses—many of which share salient public health characteristics with religious services. *See Elim*, 946 F.3d at 346 (“[worship services] seem most like other congregate functions that occur in auditoriums, such as concerts and movies. Any of these indoor activities puts members of multiple families close to one another for extended periods, while invisible droplets containing the virus may linger in the air. Functions that include speaking and singing by the audience increase the chance that persons with COVID-19 may transmit the virus through the droplets that speech or song inevitably produce.”); *see also South Bay*, 140 S. Ct. at 1613 (holding that worship services are comparable to “lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.”). Unlike the ordinances in *Lukumi* and *Central Rabbinical Congress*, which singled out practices of particular religious ceremonies, EO 202.68 targets public gatherings based on COVID-19 transmission risk factors. In other words, although the EO establishes rules specific to religious gatherings, it does so because they are gatherings, not because they are religious. Accordingly, strict scrutiny does not apply.

Neither of the Diocese’s two principal arguments for applying strict scrutiny is persuasive. First, in order to argue that EO 202.68 treats religious gatherings worse than secular comparators, the Diocese urges the court to second guess the State’s judgment about what should qualify as an essential business. To

do so would violate the principle of *Jacobson*, reiterated in *South Bay*, that “when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement” and left to the political branches of the states, not the judiciary, to decide. *South Bay*, 140 S. Ct. at 1613. In addition, the essential businesses referenced are distinguishable from religious services in key ways: they do not involve people arriving and leaving simultaneously, and they do not involve people packed in closely, or greeting each other, or singing or chanting.¹⁰ But the first point is the more important one: on an emergency preliminary motion, the court should not and will not parse the reasonable distinctions that the State has made, in very difficult circumstances, between essential and non-essential businesses. The court is therefore satisfied that EO 202.68 does not discriminate against religious gatherings, even if some businesses face less onerous restrictions.

Likewise, the excerpts from the Governor’s public comments do not transform a neutral law into a religiously targeted one. The evidence shows that Governor Cuomo is clearly aware and concerned that EO 202.68 burdens religious practice, and particularly the religious practice of Orthodox Jews, but awareness that the burden of a law falls unequally does not establish that the law was designed to target religious groups. Indeed, as the Governor reportedly told a group of Jewish community leaders, although the policy is a “very blunt” instrument, its purpose

¹⁰ The Diocese urges that its churches are following protocols to address each of these concerns and the court believes them. However, in normal circumstances, a Catholic mass would involve these potentially dangerous activities. (See Testimony of Bryon Backenson at 87.) The State’s concern about the risks associated with large gatherings of religious observance in general is at issue and those concerns are founded. There is documented evidence of COVID-19 spread at religious services, and in fact, the first COVID-19 cluster in New York was likely the product of a religious gathering. (See May 22 MMWR; see also Decl. of Howard Zucker in *DiMartile et al. v. Cuomo* (Dkt. 20-37) ¶ 14.)

is to “get the numbers down in the zip codes.” (Third Suppl. Decl. of Randy Mastro (Dkt. 28) ¶ 4.) The court reads the Governor’s statement to say that EO 202.68 is targeted temporarily at all gatherings in the areas where there are spikes in COVID-19 positivity rates, not at religious gatherings in particular.

The evidence submitted by the state corroborates that the purpose of EO 202.68 is to intervene and enforce heightened protocols in certain geographic areas experiencing disturbing new outbreaks in order to keep the outbreaks from spreading, not to regulate religious practice. As DOH Commissioner Dr. Howard Zucker stated in his declaration, the goal of the policy is “to contain the threat of the virus spreading throughout a community and creating a larger potential super-spreader event.” (Zucker Decl. ¶ 10.) To that end, the State is relying on data from the Electronic Clinical Laboratory Reporting System to generate precise maps to allow for microtargeting of neighborhoods with high positivity rates and evidence of community spread. (*Id.* ¶¶ 12, 16.) In Dr. Zucker’s words: “[w]e look solely at the data and do not take into account who or what are located in that zone—whether it is a non-essential business, school, yeshiva, church, synagogue, or a car dealership—as they all face restrictions, if justified by the scientific data[.]” (*Id.* ¶ 19.) And so far, the policy appears to be working, with positivity rates in the red zones falling from 7.9% the week of September 20-26, to 4.8% as of October 15. (*Id.* ¶ 23.) For the purpose of this emergency proceeding, the court is satisfied, based on the evidence submitted, that the State’s policy is guided by science, not a desire to target religious practice.¹¹

¹¹ The court appreciates that Mr. Backenson made time to testify at the evidentiary hearing before it on October 15. However, given the nature of this case, the Attorney General should be aware of the necessity for sworn testimony from a witness who possesses personal knowledge of the process

Finally, although the Diocese has done everything it could be expected to do and more, it is clear that there are COVID-19 risk-factors not accounted for by its protocols. Although churches instruct parishioners not to attend services if they are sick, they do not require a negative COVID-19 test result for entry, and therefore must rely on parishioners to self-police. (Chappetto Tr. at 26-27.) That is particularly problematic because it is well established that asymptomatic people—who would have no reason under the Church’s own protocols to stay away—can spread COVID-19; in fact, in one Arkansas case, two asymptomatic carriers infected 35 other churchgoers. (See May 22 MMWR.) Further, as the Diocese’s witnesses admitted, parishioners traditionally congregate outside of churches after mass to greet one another. (Chappetto Tr. at 24.) The Diocese is doing everything it can to discourage people from doing so, but it is reasonable for the State to worry whether people will abandon their normal practices when they are outdoors with nobody to enforce the guidelines. In his testimony before the court, Commissioner Esposito said that he recently had to confront a person at a Diocese church, who was only there for a Confirmation, not a regular churchgoer, and who refused to wear a mask until he was forced to after a confrontation. (Testimony of Joseph Esposito at 47-48.) That anecdote illustrates the validity of the State’s concern, even in light of the Diocese’s exemplary work to combat the pandemic and to make safe the operations of its churches.

Because EO 202.68 treats religious gatherings as well or better than comparable gatherings, and in light of the fact that state and local governments are more equipped than courts to determine

by which EO 202.68 was developed, which he does not. Given the emergency nature of this proceeding, the court employs relaxed evidentiary standards. *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010). As the case continues and the parties build the record, the Attorney General should be mindful of the importance of producing sworn testimony from witnesses who have personal knowledge of the relevant facts.

what is comparable, the court finds that it is a neutral, generally applicable law, subject to rational basis review. Based on the evidence proffered, the court has no reason to doubt that the policy was crafted based on science and for epidemiological purposes. Given the pandemic, EO 202.68 is clearly “rationally related to a legitimate state interest” and it is therefore exceedingly unlikely to infringe on the Diocese’s First Amendment free exercise rights.

C. Balance of the Equities and Public Interest

If the court applies a rational basis standard of review, its analysis ends at the “likelihood of success” prong of the preliminary injunction inquiry. However, the decision to award preliminary injunctive relief is an interim step in larger litigation, and it is “often based on procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Mullins*, 626 F.3d at 52. Especially here, where the State’s intent is at issue, the court cannot foreclose the possibility that future evidence could require it to revisit whether strict scrutiny should attach. If so, the court would require a more developed factual record to consider the question, for which both sides have made strong arguments. However, even if strict scrutiny were appropriate, the Diocese’s motion for a preliminary injunction would fail because the injunction would not be in the public interest. *See Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (“the court must ensure that the public interest would not be disserved by the issuance of a preliminary injunction.”).

The public interest analysis, and accordingly the balance of the equities, cuts in favor of the State, which is trying to contain a deadly and highly contagious disease. If the State is correct that allowing large religious gatherings in areas currently experiencing COVID-19 outbreaks could lead to a “second wave” that puts the entire City and State at risk, then it is not in the public interest to grant a preliminary injunction. In fact, if the court issues an injunction and the State is correct about the acuteness of the

threat currently posed by hotspot neighborhoods, the result could be avoidable death on a massive scale like New Yorkers experienced in the Spring. If the court fails to issue an injunction and the Diocese is ultimately successful on the merits, the unfortunate result will be that 26 of the Diocese's churches will have experienced extra weeks with severely curtailed in-person ceremonies. That is not meant, in any way, to downplay the seriousness of that constitutional harm, which is unlikely to be remedied. *See Id.* (“[T]he court must actually consider the injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury.”). But if EO 202.68 is improperly enjoined, the enormity of the potential harm to the entire public, including to the parishioners of the 26 relevant churches, is overwhelming. In light of that danger, it would not be in the public interest to do so.

IV. CONCLUSION

For the reasons stated, the Diocese's motion for a preliminary injunction is DENIED.

SO ORDERED.

Dated: Brooklyn, New York
October 16, 2020

/s/ Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge

EXHIBIT D
(Dist. Ct. Dkt. No. 31-1)

EXHIBIT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,	:	20-CV-4844 (NGG)
Plaintiff,	:	
	:	United States Courthouse
	:	Brooklyn, New York
-against-	:	
	:	Thursday, October 15, 2020
	:	2:00 p.m.
GOVERNOR ANDREW M. CUOMO in his official capacity,	:	
Defendant.	:	

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TRANSCRIPT OF CIVIL CAUSE FOR PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE NICHOLAS G. GARAUFGIS
SENIOR UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Plaintiff: GIBSON, DUNN & CRUTCHER, LLP
200 Park Avenue, 48th Floor
New York, New York 10166
BY: RANDY MASTRO, ESQ.
WILLIAM J. MOCCIA, ESQ.
AKIVA SHAPIRO, ESQ.

For the Defendant: LETITIA JAMES
ATTORNEY GENERAL OF THE STATE OF NEW YORK
28 Liberty Street
New York, New York 10005
BY: SETH FARBER, ESQ.

Court Reporter: Linda A. Marino,
Official Court Reporter
E-mail: lindacsr@aol.com

Proceedings recorded by computerized stenography. Transcript
produced by Computer-aided Transcription.

Proceedings

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1 THE COURTROOM DEPUTY: This is a preliminary
2 injunction hearing.

3 Beginning with the Plaintiffs, please state your
4 appearances for the record.

5 Plaintiff?

6 MR. SHAPIRO: This is Akiva Shapiro from Gibson
7 Dunn. I believe Randy Mastro is on.

8 THE COURT: Mr. Mastro, state your appearance.
9 Where are you?

10 THE COURTROOM DEPUTY: He was just on. Now we lost
11 him.

12 THE COURT: Let's just wait a moment for him to
13 reappear.

14 (Pause in proceedings.)

15 MR. MASTRO: Hi.

16 THE COURT: Mr. Mastro, please state your
17 appearance.

18 MR. MASTRO: Certainly, your Honor. Randy Mastro,
19 of Gibson Dunn & Crutcher, along with my colleagues Akiva
20 Shapiro and William Moccia.

21 THE COURT: Just for the sake of seeing all of your
22 head, could you adjust the camera? It's disconcerting
23 otherwise.

24 MR. MASTRO: My head is big enough already, your
25 Honor.

Proceedings

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1 Is this better?

2 THE COURT: It's somewhat better, yes. Books are
3 helpful to make the adjustment.

4 MR. MASTRO: There's a reason I went into the law:
5 Because I'm not that athletic.

6 I lost the video.

7 THE COURTROOM DEPUTY: I see you.

8 THE COURT: He lost his video.

9 I can hear you.

10 (Pause in proceedings.)

11 MR. FARBER: Your Honor, this is Seth Farber for the
12 Defendant. Unfortunately, I've been having connection
13 problems.

14 THE COURT: All right, Mr. Farber.

15 FEMALE SPEAKER: Can you see Randy now?

16 THE COURT: Yes, we can.

17 MR. MASTRO: Thank you. Sorry about the delay.

18 THE COURT: All right. So, we have Mr. Mastro and
19 co-counsel and Mr. Farber.

20 That's all counsel?

21 Mr. Farber, anyone else?

22 MR. FARBER: No, I'll be the only one appearing for
23 the Defendant today, your Honor.

24 THE COURT: Thank you very much, sir.

25 This is the case of the Roman Catholic Diocese of

1 Brooklyn against Governor Andrew Cuomo. The purpose of this
2 proceeding is to provide an evidentiary hearing in connection
3 with the Plaintiff's motion for preliminary injunction against
4 the Governor of the State of New York in connection with
5 limitations on religious worship in Catholic churches during
6 the COVID-19 pandemic under Executive Order 202.68.

7 So, let me just state how we're going to proceed
8 here. The Plaintiff has two witnesses, I understand, and the
9 Defendant has one witness. The Plaintiff has objected to the
10 Defendant's witness, and the Court has considered the
11 objection and overruled the objection.

12 So, we're going to proceed. And how we will proceed
13 is that we will take the Plaintiff's witnesses first and then,
14 depending on how much time has transpired, we'll take a break
15 and then take the Defendant's witness.

16 First, I'll indicate that I've reviewed all of the
17 papers that have been submitted by the parties. And my hope
18 is that we will complete all of the testimony this afternoon,
19 which will permit the Court to try to issue a decision before
20 the weekend. So, I wish to mention that that's my hope and my
21 objective.

22 Also, before we move into the testimony, let me
23 thank Judge Eric Komitee for handling the application for
24 temporary restraining order last Friday when I was not
25 available.

1 So, at this point, is there anything preliminary
2 prior to beginning hearing from the witnesses?

3 Anything from you, Mr Mastro?

4 MR. MASTRO: Your Honor, nothing other than will
5 your Honor take any argument at the conclusion of the hearing?

6 THE COURT: It really depends on how late we go, but
7 I could hear some argument. I have all of your papers which
8 discuss all those issues in great detail and that may be
9 sufficient, but if there's something that you want to put a
10 finer point on I certainly would like to hear from you --

11 MR. MASTRO: Thank you, your Honor.

12 THE COURT: -- and from the State's attorney.

13 And Mr. Farber, anything from you before we get
14 started?

15 Mr. Farber?

16 Well, we need Mr. Farber.

17 Is Mr. Backenson on the call?

18 MR. BACKENSON: Yes, I am.

19 THE COURT: I just wanted to identify you.

20 I know Commissioner Esposito for many years in
21 dealing with the City of New York.

22 And Bishop Chappetto, is this the Bishop?

23 BISHOP CHAPPETTO: Yes, your Honor.

24 THE COURT: So, we have all of our witnesses. I'm
25 just waiting for Mr. Farber.

Proceedings

6

1 (Pause in proceedings.)

2 THE COURT: Would everyone put their microphones on
3 mute until they're called upon?

4 That will make it a lot easier. If you want to
5 object --

6 MR. FARBER: Can anyone hear me?

7 THE COURT: Mr. Farber?

8 MR. FARBER: Yes, yes, your Honor.

9 THE COURT: You're back? Okay.

10 Are we ready? Did you hear what I said about the
11 order of proceedings?

12 MR. FARBER: I did, your Honor. You asked
13 Mr. Mastro if he had anything prior to proceeding and you then
14 asked me.

15 I do not, your Honor.

16 THE COURT: Thank you.

17 MR. FARBER: We are ready to proceed. I apologize
18 for my technical issues. I don't understand them, but okay.
19 Thank you.

20 THE COURT: Is there a phone number, just in case?
21 Did you provide a phone number to Mr. Reccoppa, my
22 courtroom deputy, just in case?

23 MR. FARBER: Yes, he has my cell phone number.

24 THE COURT: All right. Let's proceed, then.

25 Mr. Mastro, you may call your first witness.

Chappetto - Direct - Moccia

7

1 MR. MASTRO: Your Honor, Bishop Chappetto.

2 And my colleague Will Moccia is going to do the
3 direct examination.

4 THE COURT: Thank you.

5 MR. MOCCIA: Your Honor, this is Will Moccia, Gibson
6 Dunn, on behalf of Plaintiff.

7 We call Bishop Raymond Chappetto.

8 THE COURT: Please swear in the witness.

9 THE COURTROOM DEPUTY: Sir, just raise your right
10 hand, please.

11 Do you solemnly swear the testimony you shall give
12 to the Court will be the truth, the whole truth, and nothing
13 but the truth, so help you God?

14 BISHOP CHAPPETTO: I do swear that.

15 THE COURTROOM DEPUTY: Thank you.

16 THE COURT: Thank you.

17 Go ahead, sir.

18 MR. MOCCIA: Thank you, your Honor.

19 **RAYMOND F. CHAPPETTO,**

20 called by the Plaintiff, having been

21 first duly sworn, was examined and testified

22 as follows:

23 DIRECT EXAMINATION

24 BY MR. MOCCIA:

25 Q Good afternoon, Mr. Chappetto.

1 A Good afternoon, Will.

2 Q Could you briefly describe for the Court your current
3 occupation?

4 A Yes. I am a Roman Catholic bishop of the Diocese of
5 Brooklyn, and I serve as the Vicar General and the Vicar for
6 Clergy.

7 Q And that's a clerical position within the Roman Catholic
8 Church; is that correct?

9 A That's correct.

10 Q How long have you held that position?

11 A I have been the Vicar for Clergy since 2009 and I've been
12 the Vicar General of the Diocese since 2013.

13 Q And just in brief, what are your responsibilities as
14 Vicar General?

15 A Vicar General is sort of the vice president, you might
16 say, of the Diocese of Brooklyn. I work very closely with
17 Bishop DiMarzio and the governance of the Diocese.

18 Q And since assuming that role, have you continued to also
19 offer public Mass within the Diocese?

20 A Yes, I have.

21 Q And is that at one church?

22 A My role consists of going around to various churches for
23 many different reasons; various celebrations, I help out in
24 different churches. I also get specific assignments to
25 different churches for special occasions, so I do visit many

1 churches.

2 Q When were you initially ordained as a priest in the Roman
3 Catholic Church?

4 A I was ordained on May 29, 1971.

5 Q And can you briefly walk us through some of the positions
6 you've held in the Diocese since your ordination?

7 A I've been a parochial vicar -- that means an assistant
8 pastor -- at four different parishes. I served as a
9 territorial vicar, taking care of 62 parishes in the Brooklyn
10 west region. I was pastor of three different parishes; one in
11 Brooklyn, two in Queens.

12 Then I became an auxiliary bishop, and, after that,
13 I assumed the responsibilities in the administration of the
14 Diocese as well as my pastoral functions.

15 Q And, so, is it fair to say that you held what would be
16 referred to in the Catholic Church as "pastoral roles"?

17 A Yes, I have both roles; I have an administrative role and
18 a pastoral role as well.

19 Q Just so that we're clear for the record, can you please
20 just in general terms explain what it means in the Catholic
21 Church when someone refers to a "pastoral role"?

22 A "Pastoral role" means that you celebrate the sacraments
23 of the Church and you preside over various celebrations;
24 baptisms, funerals, weddings, of course the Eucharist every
25 Sunday and weekday Mass as well.

Chappetto - Direct - Moccia

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1 Q I'd like to turn now, just so that we're all talking
2 about the same thing, to a few documents that have been filed
3 in this case.

4 Do you have in front of you a document titled,
5 "Declaration of Bishop Raymond F. Chappetto in support of
6 Plaintiff's application for temporary restraining order and
7 preliminary injunction"?

8 A Yes, I do.

9 Q Do you recognize that document?

10 A Yes, I do.

11 Q And, again, just so that we're clear for the record, does
12 the document at the top have a header that identifies it as
13 Document No. 5?

14 A Yes, it does.

15 Q And are you familiar with the contents of that document?

16 A Yes, I am very familiar with it.

17 Q And are you familiar with the materials that are attached
18 to it as Exhibit A?

19 A Yes. They are memos, and I'm familiar with them.

20 Q And have you re-read that document since you first
21 executed it?

22 A Yes, I have.

23 Q And you signed that document under penalty of perjury; is
24 that correct?

25 A That's correct.

1 Q To the best of your knowledge as you sit here today, are
2 the contents of that document true and correct?

3 A There are some corrections that I think one of which we
4 have corrected in a supplemental document.

5 Correction number one would be the names and number
6 of parishes that have been affected by the executive order.
7 We have corrected it in a supplemental document because we
8 received interactive maps that helped us to get a clearer
9 picture and better identify the parishes that were affected.
10 So, yes, that's the first correction, would be in the
11 supplemental document. We do say that there are 26 parishes
12 that have been affected by the executive order.

13 The second correction is that in the listing of the
14 people who have assisted Joseph Esposito in the reopening
15 committee that was formed, the last -- it's paragraph eight on
16 page three, the last sentence is incorrect. It must be a
17 typographical error.

18 The last sentence reads, "The commission regularly
19 consulted with a mental health expert." It should say a
20 medical health expert. The word "medical" should be
21 substituted for "mental." That's the second correction.

22 Q Thank you very much for those.

23 Aside from those two corrections that you've
24 identified, are the remaining contents of the declaration true
25 and correct as you sit here today?

1 A Aside from those two items, the documents are correct and
2 true.

3 Q Thank you very much.

4 The second document I want to just briefly discuss
5 is titled, "Supplemental declaration of Bishop Raymond F.
6 Chappetto in further support of Plaintiff's application for
7 preliminary injunction."

8 Do you have that document in front of you?

9 A Yes, I do.

10 Q And are you familiar with that document?

11 A Yes, I'm very familiar with it, yes.

12 Q And, again, just so the record is clear, does the header
13 at the top of that document identify it as Document 21?

14 A That's correct.

15 Q And have you re-read that document since you first
16 executed it?

17 A Yes, I have.

18 Q And you signed that document under penalty of perjury; is
19 that correct?

20 A Yes, I did.

21 Q And to the best of your knowledge as you sit here today,
22 are the contents of that document true and correct?

23 A Yes, they are correct and true.

24 Q Thank you very much. So, I want to just now talk briefly
25 about COVID-19.

1 In your role as Vicar General, have you been
2 involved in the Diocese of Brooklyn's response to COVID-19?

3 A Very much so. I have been working very closely with
4 Bishop DiMarzio on all aspects of it.

5 Q And could you please identify who Bishop DiMarzio is?

6 A Yes. Bishop Nicholas DiMarzio is the Bishop of the Roman
7 Catholic Diocese of Brooklyn. I am Auxiliary Bishop.

8 Q Thank you. For simplicity here on out in this
9 questioning, if I refer simply to the "Diocese," I'll be
10 referring to the Diocese of Brooklyn; is that okay?

11 A Yes, certainly.

12 Q How did the Diocese initially respond to the COVID-19
13 outbreak in New York?

14 A Well, we took the initiative of closing our churches to
15 the public for the safety and protection of the people. When
16 the pandemic first broke out and we saw that it was
17 escalating, we wanted to be proactive at that point. We took
18 the initiative of closing the churches to the public.

19 Q And was that before or after the City and State
20 prohibited large public gatherings?

21 A We did it before the public demand to do so.

22 Q And what, if anything, did the Diocese do in between the
23 time it closed for public Mass and the time it reopened?

24 A During that time, we encouraged our pastors and our
25 parishes to do virtual Masses, livestreaming Masses, so that

1 the faithful people could continue to worship, you might say,
2 at a distance.

3 We did keep in touch with people through phone
4 calls, through robocalls, through various communications, our
5 Diocesan newspaper, keeping the people informed of what was
6 happening, why it was happening, and always looking forward to
7 a change.

8 Q And were there any specific steps taken with respect to
9 the pandemic itself to prepare for an eventual reopening?

10 A Very much so.

11 When we came towards the end of the time, we
12 realized that we would be reopening but we wanted to be
13 prepared. So, we formed a committee headed by Joseph
14 Esposito, and this committee's charge was to give advice and
15 recommendations to the Bishop on how to safely reopen the
16 churches.

17 Q Is it correct that the commission developed protocols
18 that would later be implemented by the Diocese?

19 A That's correct. After many meetings -- we met many
20 times -- we decided to present our recommendations to the
21 Bishop for his approval.

22 Q And you mentioned some meetings of the commission. Well,
23 I guess let me take a step back.

24 Approximately how many people were on this
25 commission?

1 A Approximately ten to twelve people.

2 Q In general, can you describe their backgrounds?

3 A They came from all different walks in life; some were
4 police officers, some were legal representatives, some were
5 Diocesan representatives who knew things about buildings.

6 So, we had various disciplines represented on the
7 commission.

8 Q And you touched on this earlier when we were discussing
9 corrections to the declarations, but am I correct that there
10 were also consultations with medical professionals?

11 A Yes, we had a consultation with a medical professional,
12 that's correct.

13 Q And was it one consultation or were there ongoing
14 consultations?

15 A I believe there were several consultations.

16 Q And in general, how often was the commission meeting
17 during this time period?

18 A We were meeting weekly. For between four to six weeks,
19 we met weekly. And then as the time came closer, we did not
20 meet as often. But at the beginning, I would say it was every
21 week for four to six weeks.

22 And then once the document was ready, the commission
23 had served its purpose, so we disbanded and we did not meet
24 again.

25 Q And this document that you're referring to, are those the

1 protocols that we discussed a few minutes ago?

2 A That's correct.

3 Q And could you just walk us through some of the protocols
4 that are in that document?

5 A Yes. We instructed all of our pastors to carefully mark
6 out the church -- and that means with masking tape, other
7 kinds of markings -- to make sure that the people when they
8 came back would be socially distanced, so that they would be
9 six feet apart, they'd be seated every other row. And that
10 was the first thing, was the social distancing.

11 Then we instructed the people that they would not be
12 admitted into the church unless they had a mask on.

13 We told our pastors to get hand sanitizers at the
14 doors of the church and to post signs at the church entrances
15 instructing the people that if they did not have a mask on,
16 they would not be admitted in; and to use the hand sanitizers
17 upon entrance.

18 We also instructed them to get cleaning supplies, to
19 buy them in bulk, so that we could make sure that after every
20 service, after every Mass, the churches would be cleaned and
21 sanitized. Many of them bought the machines to do it
22 mechanically to make sure that the churches were being cleaned
23 and sanitized in a proper way.

24 These are just some of the ways in which we
25 instructed our pastors to prepare, to get ready, so when the

1 day would come when we could reopen, then we would be entirely
2 ready and prepared to make sure the people were kept safe.

3 Q And how about the Mass itself? Were any changes made to
4 the parts of the Mass?

5 A Well, we encouraged the celebrants of the Mass to make it
6 as short as possible so that the people would not be detained
7 unnecessarily.

8 We changed the way in which Holy Communion was
9 distributed. People were told that they would receive in
10 their hand and not on the tongue, which is an option that we
11 generally do have. But for this time period, people were told
12 that they would receive in the hand; that they would come up
13 to the altar, keeping the social distancing, they would keep
14 their masks on when they received Holy Communion, they would
15 step to the side, they would then remove their mask, they
16 would receive the Holy Communion, and then they would put
17 their mask back on again as they returned to their seats.

18 Q And in terms of capacity at Mass, am I correct that you
19 reopened at a limited capacity?

20 A Yes, we opened up at 25 percent capacity. The first
21 reopening, however, was with ten people in which -- the first
22 reopening was just for visits to the church, without services.

23 And then we went to the second phase, which was
24 services with ten people. I, myself, celebrated a funeral for
25 a priest with ten people present. Only ten people.

1 And then we went to the third phase, which was the
2 reopening at 25 percent capacity.

3 Q And you've remained at 25 percent even after the State
4 has permitted larger gatherings; is that correct?

5 A Yes, we have.

6 Q Bishop Chappetto, to your knowledge, were the protocols
7 recommended by the commission adopted by the Diocese?

8 A Yes, they were.

9 Q And to your knowledge, were those protocols implemented
10 by churches within the Diocese?

11 A Yes, they were.

12 I have visited many of the churches myself because,
13 as I mentioned before, I am a Sunday Mass celebrant in the
14 different churches, and I see how the pastors have implemented
15 the protocols in a very serious way.

16 Q And does the Diocese have a way for parishioners to
17 report any incidence of COVID-19?

18 A They can call the pastors and let them know if there were
19 any incidences.

20 Q And are you aware of any outbreaks of COVID-19 in any
21 churches within the Diocese since the reopening you described?

22 A I am not aware of anything that has come to my attention.

23 Q And if there were such incidences, would you expect them
24 to come to your attention?

25 A I think I would be among the first to know.

1 Q And why is that?

2 A Because of the position that I hold. And the pastors,
3 they all have my cell number, they know they can call me at
4 any time about any reason pertaining to the church or
5 pertaining to the situation. So, they would inform me if
6 there was a COVID breakout from the church.

7 Q And based on your firsthand observations while visiting
8 and saying Masses at the parishes within the Diocese, how
9 would you describe the level of compliance with the protocols?

10 A I am very much impressed. I have to be -- what I see is
11 complete compliance as I go around.

12 I complimented one parish that I was at recently.
13 They formed teams of people because they have four or five
14 services on a Sunday, four or five Masses on a Sunday, and
15 there's a team after each Mass that does the cleaning. And,
16 in fact, in this particular parish, one time the team for some
17 reason was not able to make it, and one of the priests himself
18 did the cleaning to be sure that it was done.

19 So, I can tell you my own eyes have seen what
20 they're doing as far as sanitizing, cleaning, people wearing
21 masks. I compliment the people. I tell them it's not easy,
22 it's an annoyance to wear it, they must wear it. And they're
23 all doing it.

24 So, I would have to say the compliance is excellent.

25 Q For those on the call who might not be familiar with the

1 Catholic faith, could you just in brief explain what it means
2 to go to Mass?

3 A Well, for us, the attendance at Mass is obligatory on
4 Sunday; they can go to the vigil Mass on Saturday night or
5 Mass on Sunday. It's obligatory.

6 And the Mass consists of readings from the Sacred
7 Scriptures; a Homily, which is an explanation of those
8 readings and how they apply to our daily life; and then the
9 celebration of the Eucharist, which is the presentation of the
10 bread and wine, the consecration of the bread and wine into
11 what we believe is the Body and Blood of our Lord and Savior,
12 and then the distribution of the Holy Communion to the
13 individual people. That is the heart and center of the
14 Eucharist, is the consecration and the distribution of the
15 Eucharist. And then there's a dismissal, final prayer and a
16 dismissal.

17 Q How important is it that the Mass be celebrated in
18 person?

19 A It's absolutely essential because people who have watched
20 on TV have said, "It's a nice thing to watch it on the TV, but
21 it's not the same. You cannot receive Communion at home."

22 The priest has no way of bringing Communion to every
23 household. It's impossible. So, for them to be in attendance
24 at church, it's the fullness of the Eucharist, it's the
25 complete Eucharist by receiving Holy Communion, and it's

1 really absolutely essential.

2 People were starved for Holy Communion during the
3 pandemic because while they could watch it on TV, which was
4 very nice, they couldn't receive the Eucharist. And that was
5 the heartbreak of our people because that's what defines us as
6 Catholics. We are what we call a "Eucharistic people." We
7 are people of the Mass, and the Mass defines us and it really
8 tells us who we are.

9 Q And you touched on this briefly, but if you could just
10 elaborate, please, on how the lack of in-person Mass impacted
11 parishioners during the pandemic.

12 A It was definitely a hunger to receive the Eucharist. It
13 was a hunger on the part of the people. I spoke to many of
14 them personally who told me the spiritual void that they felt
15 in not being able to receive Holy Communion. It was a great
16 loss for them.

17 So, coming back to the -- when the Mass was again
18 allowed to be celebrated with people present, it was a great
19 joy and a great relief. The hunger that they had is now being
20 satisfied.

21 Q I'd like to hone in a little more. You referenced Holy
22 Communion. I realize there are whole theological treatises
23 written on this, but, if you could, just succinctly spell out
24 from a theological perspective what the significance of Holy
25 Communion itself is.

1 A We believe that Jesus at the Last Supper with the twelve
2 Apostles changed the bread and the wine into the Body and
3 Blood of Christ. That was the first Mass, at the Last Supper.

4 We believe that every Mass is a recreation of the
5 Last Supper, every Mass is a celebration of the Lord's Supper.
6 And we believe that Jesus said to do this in His memory. To
7 continue that, we celebrate Mass daily. Every day at every
8 church there is a Mass.

9 But on Sunday, the people have the obligation to
10 attend the Mass because we believe that they are listening to
11 the Word of God and that they are participating in the Lord's
12 Supper. The consecration of the bread and wine is the most
13 serious part of the Mass and receiving the Holy Communion for
14 a Catholic is the essence of what it means to be a Catholic.

15 Q And prior to the pandemic, how would one normally receive
16 Holy Communion during Mass?

17 A Prior to the pandemic, people would have a choice, and
18 the choice is up to them: To receive Communion in their hand
19 and then to place the Holy Eucharist into their mouths by
20 themselves; or the other option that was there prior to the
21 pandemic was the opportunity receive Communion on their
22 tongue. They would extend their tongue and the priest would
23 place the Holy Eucharist on their tongue and then they would
24 consume it that way.

25 Q And you said that that choice has been removed; is that

1 correct?

2 A We removed that choice for sanitary reasons so that we
3 could keep our people safe, yes.

4 Q And again now speaking prior to the pandemic, was there
5 also an option of receiving the Precious Blood during Holy
6 Communion?

7 A Yes, there was. Thank you for mentioning that.

8 That was completely discontinued -- completely -- so
9 that there would be no chance of anything.

10 It is not necessary for a Catholic to receive both
11 the Holy Communion in the form of bread and the Precious
12 Blood, as we call it, in the form of wine. It is not
13 necessary to receive the Precious Blood. It's receiving the
14 host or the wafer -- it is the Body of Christ -- that is
15 sufficient for a Catholic.

16 So, we discontinued that so there would be no
17 misunderstanding on the part of anybody that they could
18 contract any kind of germs.

19 Q You mentioned about at the end, there's a sending forth
20 and people leave the church.

21 Could you talk briefly about any protocols that were
22 put in place to make sure that people were safely entering and
23 existing the churches?

24 A Yes. We opened the doors of the church, all the doors,
25 so that they could go out the various exits. We encourage

1 them not to the congregate outside as they would do
2 pre-pandemic so that the people could leave and go home as
3 soon as possible.

4 Q And are you familiar with what the State of New York and
5 Governor Cuomo have referred to as the "cluster initiative"?

6 A I'm not familiar with that.

7 Q I can be more specific.

8 Are you aware that as part of a recent regulation,
9 the Governor has issued an executive order that would limit
10 in-person church attendance in certain geographic areas to 10
11 or 25 people?

12 A You're referring to the orange zones and the red zones;
13 you're referring to that?

14 Q Yes.

15 A I am familiar with that, of course. Yes, the orange
16 zones with a limited capacity and the red zones with an even
17 more limited capacity. Yes, I'm very familiar with that.

18 Q And how does that restriction impact the Diocese?

19 A Oh, a tremendous, tremendous impact. This is the hardest
20 thing that we are dealing with is the fact that our people
21 were coming back to Mass after that long period of absence,
22 they had just started to get used to the idea of coming back
23 and that it was safe because we made it safe, we made the
24 environment safe, and then to have this come upon us was very
25 difficult because it seems like we're going backwards instead

1 of going forwards.

2 Q And Bishop Chappetto, is there anything else that you'd
3 like to tell the Court about the why the Diocese's churches
4 should be permitted to reopen this Sunday for Mass subject, of
5 course, to a 25 percent capacity cap and any other safety
6 measures that the Diocese has implemented and agreed to
7 implement?

8 A I think that the essential nature of the worship of our
9 people, people need to worship, people need to be present for
10 the reception of the Eucharist, people need to be present
11 because they belong to a community of faith. And to deny them
12 that is not very, very easy to swallow.

13 We need to have our people in church. We need to
14 have our people receiving the Eucharist. People want to be
15 there and we have done everything that we could possibly do,
16 to my knowledge, to make the environment safe for them so that
17 when they do come into the church they are safe. And we will
18 continue to do that as much as possible.

19 Q Thank you very much, Bishop Chappetto.

20 MR. MOCCIA: Your Honor, I have nothing further for
21 the witness at this point.

22 THE COURT: All right. Thank you.

23 Mr. Farber, do you have any questions for the
24 witness?

25 MR. FARBER: Thank you, your Honor. I have a very

1 brief cross, if I might.

2 THE COURT: All right. Please introduce yourself to
3 Bishop Chappetto.

4 MR. FARBER: Yes. Good afternoon, Bishop. My name
5 is Seth Farber. I'm with the Attorney General's Office, and I
6 represent Governor Cuomo today.

7 BISHOP CHAPPETTO: Thank you.

8 MR. FARBER: Thank you, sir.

9 CROSS-EXAMINATION

10 BY MR. FARBER:

11 Q In your declaration, you state that -- I'm referring to
12 Paragraph 15 of the -- which is on Page 6 of Document 5, the
13 first declaration you gave in this case, you state that you
14 have a reporting structure and you would know whether there
15 have been any instances of COVID-19 spread in your churches;
16 correct?

17 A That's correct.

18 Q And it's fair to say that you know this based on what
19 parishioners report to either their parish priest or other
20 church officials, correct?

21 A That's correct.

22 Q So if, for example, a parishioner were asymptomatic and
23 didn't even know they were COVID positive, of course they
24 couldn't report that to their parish priest or church
25 officials, correct?

1 A If they don't know they have it, then they couldn't
2 report it, you're right.

3 Q Okay. And my understanding is in your protocol, there's
4 no particular requirement that parishioners show a negative
5 COVID test before attending church service; is there?

6 A No, we do not have that provision in the protocols.

7 Q Okay. And similarly, if a parishioner actually had
8 symptoms of COVID but for whatever reason failed to report
9 that to a parish priest or a church official, you wouldn't
10 know that either, correct?

11 A If they failed to report it, we would not know it.

12 Q Thank you very much, Bishop.

13 MR. FARBER: Nothing further from me.

14 THE COURT: All right. Thank you.

15 Anything else from Plaintiff's counsel?

16 MR. MOCCIA: Your Honor, just a very quick redirect,
17 if I might.

18 THE COURT: Please.

19 REDIRECT EXAMINATION

20 BY MR. MOCCIA:

21 Q Bishop Chappetto, Mr. Farber asked you about people who
22 might come to church and not be aware or might not have
23 disclosed that they are COVID positive.

24 I just want the record to be clear if any such
25 person attended Mass, am I correct that they would be

1 physically distanced from anyone else attending the Mass?

2 A Well, we've told people very clearly if you are sick, if
3 you have any symptoms, stay home. That's part of the
4 protocol. So, we've discouraged them from coming. If they
5 felt sick or had any symptoms, we've made it very clear that
6 they were not to come to the Mass.

7 Q Understood. So, my question then is even assuming
8 Mr. Farber's hypothetical scenario where one actor disregards
9 that instruction, that person would still be attending Mass
10 subject to all the distancing and the no receipt of the
11 Precious Blood and everything else we discussed a short time
12 ago; is that correct?

13 A Absolutely, yes, that's correct.

14 Q And then I guess the other question is about the
15 reporting structure.

16 So, am I correct that in addition to just any
17 informal word of an individual parishioner telling you that
18 there's an issue, is there also a formal reporting structure
19 within the Diocese by which the pastors would be directed to
20 contact someone, either yourself or someone else higher up
21 within the Diocese, about the situation?

22 A Yes. At beginning of the pandemic, there were numerous
23 calls made to me because of the outbreak. And you know, we
24 waited for that 15-day period to be sure and we received
25 several calls at the beginning. But we're talking now at the

1 middle of March.

2 So, at that time, yes, we did get calls, but then
3 since then we've done so much and so much time has passed.
4 Mass, you know, closing the churches, we helped to flatten the
5 curve. We helped to bring the numbers down. We were working
6 to do that, conscientiously to do that, to make those numbers
7 come down. We succeeded in helping and doing our part.

8 Q And then you've now largely touched on that with this
9 answer, but I just want to clarify. Mr. Farber read a portion
10 of Paragraph 15 of your declaration. That paragraph also
11 says, "To my knowledge, since our churches reopened in July
12 for Mass and other religious ceremonies subject to our safety
13 protocols, there has not been any COVID-19 outbreak or spread
14 in any of our churches --"

15 MR. FARBER: I'm going to object, your Honor.

16 THE COURT: Overruled.

17 You can go ahead.

18 Q Bishop Chappetto, is that statement correct?

19 A Yes, that's correct.

20 Q And just to reiterate, anyone attending Mass would be not
21 just physically distanced from the other parishioners but also
22 would be wearing a mask; is that correct?

23 A Yes, they must wear the mask, that's correct.

24 MR. MOCCIA: Thank you very much.

25 Nothing further, your Honor.

Proceedings

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1 THE COURT: Anything else, Mr. Farber?

2 MR. FARBER: No, your Honor, no recross.

3 THE COURT: Thank you very much.

4 Thank you very much, Bishop. You're excused.

5 And I'll ask the Plaintiff to call their next

6 witness.

7 You have to turn on your microphone, please, Mr.

8 Mastro.

9 Not yet.

10 MR. SHAPIRO: I can take over.

11 THE COURT: I wanted to see if Mr. Mastro can do

12 this.

13 (Pause in proceedings.)

14 THE COURT: All right. We'll give him some time.

15 I'm sure he'll have something to say later.

16 Just identify yourself. Everyone when they speak

17 should identify themselves for the court reporter.

18 So, go ahead.

19 MR. SHAPIRO: Akiva Shapiro, A-K-I-V-A, from Gibson

20 Dunn, counsel for the Plaintiff.

21 I will be calling Joseph J. Esposito.

22 THE COURT: All right, Mr. Esposito?

23 MR. ESPOSITO: Good afternoon, your Honor.

24 THE COURT: Please swear in the witness.

25 THE COURTROOM DEPUTY: Sir, please raise your right

1 hand.

2 Do you solemnly swear the testimony you shall give
3 to the Court will be the truth, the whole truth, and nothing
4 but the truth, so help you God?

5 MR. ESPOSITO: I do.

6 THE COURTROOM DEPUTY: Thank you.

7 THE COURT: You may proceed.

8 MR. SHAPIRO: Thank you, your Honor.

9 **JOSEPH J. ESPOSITO,**

10 called by the Plaintiff, having been
11 first duly sworn, was examined and testified
12 as follows:

13 DIRECT EXAMINATION

14 BY MR. SHAPIRO:

15 Q And good afternoon, Commissioner Esposito. Thank you for
16 taking the time to be with us.

17 If we just start out, if you could give the Court a
18 little bit of a background, a brief overview of your
19 professional background?

20 A Sure. I started in New York City Police Department in
21 1968 as a police trainee. I rose through the ranks during the
22 next 45 years, ultimately became the chief of the department.
23 The chief of the department is the highest-ranking uniformed
24 member of the NYPD. I held that position for almost 13 years.

25 After my mandatory retirement at age 63, I was hired

1 as the Commissioner for New York City Emergency Management,
2 where I served from 2014 to 2019.

3 THE COURT: Before you go any further, the Court is
4 very familiar with Commissioner Esposito from his service as
5 the head of the Office of Emergency Management and also his
6 tenure in the police department and has the greatest respect
7 for his accomplishments serving the New York City community.

8 So, let's go on.

9 THE WITNESS: Thank you, your Honor.

10 MR. MASTRO: Can you hear me now?

11 THE COURT: Yes, I can. Thank you, Mr. Mastro.

12 MR. MASTRO: I'm back. Thank you.

13 THE COURT: Let's proceed.

14 MR. SHAPIRO: Certainly, your Honor. I'm going to
15 ask only one more question about background just because it
16 ties in directly to the substance of what we're talking about.

17 Q As Commissioner of New York City Emergency Management,
18 were you involved in preparing for infectious disease
19 outbreaks or pandemics?

20 A Sure. I mean, in my role in the NYPD also, we managed
21 emergencies and prepared for emergencies. But as my role as
22 Commissioner of Emergency Management, that was one of our
23 primary responsibilities: To train people, to look at plans,
24 to help City agencies make plans, and actually have tabletop
25 exercises where we would deal with certain disasters. And on

1 a number of occasions, we would deal with pandemic in New
2 York.

3 Q Thank you. I'll move on past background now.

4 Do you have in front of you a document titled,
5 "Declaration of Joseph J. Esposito in support of Plaintiff's
6 application for a temporary restraining order and preliminary
7 injunction"?

8 A Yes, I have it in front of me.

9 Q Okay. And that document is titled or marked Document 6
10 at the top, the front page?

11 A Yes, it is.

12 Q Great. I'm going to call that document your declaration.

13 Did you review your declaration before signing it on
14 the last page?

15 A Yes.

16 Q And at that time of signing it, you certified, affirmed,
17 that it was true under penalty of perjury; is that right?

18 A Yes.

19 Q Great. And to the best of your knowledge, are the
20 content of your declaration true and correct?

21 A Yes, they are.

22 Q Okay. And have you re-read your declaration since you
23 signed it?

24 A Yes.

25 Q And is there anything that you'd like to modify or

1 correct?

2 A No.

3 Q Okay. Now I'm going turn your attention to the Diocese's
4 response to the COVID-19 pandemic. And just so we're all on
5 the same page, as far as my colleague Mr. Moccia, when I refer
6 to "the Diocese," I'm referring to the Roman Catholic Church
7 of Brooklyn, New York, which is the Plaintiff in this action.

8 How did you come to be involved -- did you come at
9 some point in time to be involved in the Diocese's response to
10 the COVID-19 pandemic?

11 A Yes, I was.

12 Q How did you come to be involved in it and what was your
13 role?

14 A Well, I'm a practicing Catholic in Brooklyn. I'm well
15 known to the Diocese; members of the Diocese, bishops,
16 monsignors, a lot of the local priests. I've actively served
17 on a committee since 2013. I'm the chair of a committee,
18 voluntary work, where I investigate misconduct by clergy. So,
19 in that role, I became very familiar with the Bishop and the
20 staff of the Diocese.

21 So, and, again, when Corona hit, I was asked to come
22 onboard and help with the opening of the churches in a safe
23 manner.

24 Q And, so, what did the church do or the Diocese do to --
25 in response to the coronavirus?

1 A Well, we formed a committee, as the Bishop had stated.
2 We met on a regular basis. We looked at the federal, state,
3 and city guidelines, we made sure that we used them as our
4 guidelines to open up the churches. Multiple, multiple
5 meetings, communications back and forth with the pastors of
6 the churches, getting their feedback on our plans that they
7 developed. Ultimately, the plans were okayed.

8 Again, we spoke to medical professionals. We had
9 people on the committee who were planners, who had planned
10 major events in the NYPD.

11 As a result, we come up with these guidelines. I
12 believe it's your Exhibit A. Those were the final plans that
13 went out to the parishes. And we went out and put those plans
14 in effect.

15 MR. SHAPIRO: And just for the record, that's
16 Exhibit A to Commissioner Esposito's declaration.

17 Q Okay. And when you made the various protocol
18 recommendations, safety recommendations, were those all made
19 or done in consultation with medical professionals?

20 A Yes, yes, I spoke to a number of medical people to get
21 their input, especially on the Communion issue, receiving
22 Communion.

23 The other restrictions, again, we complied with the
24 federal, state, and city restrictions, but we also talked with
25 medical experts for their input if they thought we had

1 anything we could modify the plans or add to them. But they
2 were really concerned with the part of receiving Communion.

3 Q And the Bishop has covered the changes that were made to
4 the Holy Communion, so I won't walk through that again, it's
5 in the record.

6 But if you could, just summarize the other changes
7 that were made or the other protocols that were put in place
8 for the churches in the Diocese to ensure the safety.

9 A Sure. I'd just like to re-stress what the Bishop said
10 about receiving Communion.

11 Receiving Communion is a very, very important part
12 of the Mass service. There are people that feel they haven't
13 really gone to Mass and done their responsibility if they
14 haven't received. So, that was a real big sore point for a
15 lot of the parishioners, especially the older parishioners.
16 It's a very, very important piece to keep in mind.

17 Things that we did: The churches should be
18 sanitized following protocols based on federal, state, and
19 city; social distancing measures; pews, we knocked off a --
20 every other pew was closed to ensure that social distancing of
21 the six feet. All the pews were marked six feet apart, so
22 that we had stickers or tape or some kind of marker that
23 people would stay six feet apart. Unless you were a family
24 member and you lived together with the family, then you could
25 sit together.

1 Occupancy was limited. Again, everyone had to wear
2 a face mask. We encouraged gloves also, if you had them, to
3 wear gloves.

4 Well-ventilated. We made sure that the churches
5 kept the windows open a lot of time so that the air could come
6 through.

7 Hand sanitizer was provided.

8 We encouraged the at-risk population, people with
9 prior medical conditions, we asked them it might be best to
10 stay away.

11 We reinforced all the hygiene protocols, hand
12 washing. We closed the bathrooms. Many of the churches have
13 restrooms; we closed the restrooms.

14 Things of that nature.

15 Q And how about the entrances and exits and the way that
16 people came in and out of the church?

17 A You know, I'll just mention Saint Athanasius. I'm very
18 familiar with Saint Athanasius. That's my own personal
19 parish.

20 They have at least five entrances. On a normal
21 Sunday, the parishioners enter and leave from that main
22 entrance because they would have the priest who conducted that
23 Mass be generally at the door of the church or on the
24 sidewalk. And he greets the people; he'll shake their hand,
25 he'll bless an object if they brought for the kids, they sign

1 papers to show that the kids were at church.

2 So, we eliminated that. There's no more proceeding
3 into the church, and the priest comes on the altar from the
4 sanctuary door. And, again, he doesn't greet the people at
5 all.

6 And again, Saint Athanasius has five doors. On a
7 normal Sunday, the main door is used, the side door, we're
8 making people go out another two doors to really get the back
9 of the church. We encourage, a lot, not congregating in front
10 of the church the way they normally would do.

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12 (Continued on the following page.)

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1 BY MR. SHAPIRO: (Continuing)

2 Q And to your knowledge, is that representative of the
3 changes that other churches within the Diocese have made in
4 the way that they enter and exit?

5 A Oh, yes, sure. I visited a number of churches as a
6 result of this, St. Athanasius in Williamsburg, Mount Carmel
7 in Greenpoint, and more churches in Queens, and all of the
8 protocols we've put in place, I've seen them being used in all
9 of the churches that I've been to.

10 Q And you had mentioned limiting the occupancy. Was there
11 any specific cap or percentage that you were limiting
12 occupancy to?

13 A Yes, the 25 percent.

14 Q Okay. Great. And that was for all the churches in the
15 Diocese, is that right?

16 A Yes. And then some of the churches had to modify their
17 schedule. Some added masses. Some removed masses. We
18 adapted. Just even the scheduling of the masses was, was
19 restructured to help with the, with the problem.

20 Q And were there any changes made or steps taken with
21 respect to additional employees or individuals in the
22 churches, inside the churches to ensure compliance?

23 A Sure. We go back to the original opening. We opened up
24 originally just for prayer on a Monday to Friday basis where
25 people go into the church, say a prayer and leave. And then

Esposito - direct - Shapiro

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1 after that, we went to a Monday to Friday mass where we have a
2 mass Monday to Friday, a daily mass. Then, ultimately, we
3 went to the masses on the weekend, Sundays, and we limited
4 those folks and we had ushers, some churches hired security
5 guards. I know at St. Dominic's, they had a security guard
6 and he would make sure that everyone wore a mask, social
7 distancing. The numbers were kept to the acceptable level.

8 So, yes, every church did something. Either they
9 organized, as the Bishop had mentioned, different groups to
10 sanitize the churches, but they all added ushers or people.

11 Q And to your knowledge, were the protocols that your group
12 put together, the commission put together communicated to
13 individual churches in the Diocese?

14 A All of them.

15 Q And I don't know if I asked before. What was your role
16 in the commission that the Diocese put together?

17 A The chairperson.

18 Q And to your knowledge, have the protocols that your
19 commission put together been adopted by all the churches in
20 the Diocese?

21 A They were mandated to accept it. If you know anything
22 about the Catholic church, when the Bishop says something, the
23 parishes listen.

24 Q And, in fact, in your, from what you saw with your own
25 eyes, they did, in fact, listen, right?

1 A Without a doubt.

2 Q And I guess, you know, I mean, I imagine the parishioners
3 and the priests throughout the Diocese have the utmost respect
4 for the Bishop and would certainly follow any directive that
5 he put out, any mandate that he put out?

6 A Yes. As a matter of fact, I was, I went to
7 St. Athanasius. I guess it was ten days ago or so, Bishop?
8 We had the confirmation. We had a double session
9 confirmation.

10 We had to split the ceremony to accommodate the
11 crowd. We probably had 120, maybe 150 kids receiving
12 confirmation, and we had to use strict regulations because
13 it's a very, very important sacrament to receive and usually
14 you bring your whole family. We limited it. You only had the
15 sponsor and mother and father and it was very, very -- it
16 wasn't easy to do. We had people at the church trying to get
17 in with more and more people. We had to stop them. So, yes,
18 they complied but when they don't, we have ushers there to
19 make sure they comply.

20 THE COURT: I'm sorry. Where did this event take
21 place?

22 THE WITNESS: The confirmation?

23 THE COURT: Yes.

24 THE WITNESS: This was at St. Athanasius. And I
25 guess it was about 10 days ago, Bishop? I think it was last

1 Tuesday, I believe.

2 THE COURT: All right. Thank you. Go ahead.

3 Q And did the Diocese, to your knowledge, have any protocol
4 or instructions in place for priests to report on any COVID-19
5 instances that they become aware of coming out of church
6 services?

7 A Yes. They've been instructed -- the priests will
8 instruct the parishioners to stay home if they're sick and if
9 they do feel sick and they were at church there, we've asked
10 them to report it to their local parish.

11 Q And would you be told, would you be informed if there had
12 been any reported outbreaks or cases that were reported of
13 that structure?

14 A I would have been notified, yes.

15 Q And are you aware of any outbreaks of COVID-19 or spread
16 in any of the Diocese churches or parishes since the
17 reopening?

18 A Not to my knowledge.

19 Q Just a couple final questions and I'll wrap up.

20 You're familiar with the order, the executive order
21 from the Governor that this proceeding is about which, in
22 practice, limits attendance at churches and the Diocese to a
23 fixed cap of 10 or 25 people regardless of the size of the
24 church, right?

25 A Yes.

1 Q Since that order came out about a week and a half ago,
2 what has the effect been on the churches of the Diocese in
3 your experience?

4 A We've been devastated. We've been devastated. I was at
5 church on Sunday just to help communicate that St. Athanasius
6 was closed. There were people at the front door of churches
7 crying because they can't go to church. They showed with
8 their entire family, they want to come in and celebrate the
9 mass. We had to turn them away. It's very, very
10 disheartening especially because, really, talking about
11 Brooklyn and Queens, would have complied, we've gone above and
12 beyond what the regulations have asked us to do and I think
13 it's just unfair the way they've done this, with a blanket
14 statement: Close all the houses of worship.

15 I think what would be a better way of doing this, if
16 you want my opinion, is the Health Department has thousands of
17 people working for them and they have a multitude of
18 inspectors. Well, get a hundred, get 200 inspectors and go
19 out and visit on a Friday, visit a mosque. That's their big
20 prayer day. On a Saturday, visit the synagogues. That's
21 their big prayer day. On a Sunday, go to the Catholic
22 churches, Christian churches, all churches. And if you find
23 that house of worship was in violation, well, then you give a
24 warning, you close them down, take some kind of action against
25 them, but to do a blanket statement where you're closing all

1 houses of worship, those that have been complying, ones that
2 are doing what they can to do the right thing, to close them,
3 you're really defeating the purpose. You're smacking the
4 people that are listening to you. A better way would be smack
5 the people that aren't listening to us.

6 Q Thank you for that.

7 Based on your experience in emergency management,
8 NYPD and information you've obtained chairing the Diocese
9 COVID-19 commission, do you believe that it's safe for the
10 churches and the Diocese to stay open as long as they comply
11 with the 25 percent capacity cap and all of the safety
12 protocols the Diocese has instituted?

13 A Without a doubt. Without a doubt. I've been there.
14 I've been in church every Sunday. I've been at a number of
15 special events, weddings and funerals, Communion,
16 Confirmations. They have been, they have been abiding by the
17 rules to the umpteenth percent and to criticize them or to,
18 you know, make them close as a result of them doing the good
19 thing is just counterproductive.

20 Q And last question. Is there anything else that you'd
21 like to tell the Court about why the Diocese churches should
22 be permitted to reopen Sunday for mass, Sunday, subject to the
23 25 percent cap and the all the other safety measures? Any
24 other additional thoughts you want to give the Court?

25 A Well, I think I've articulated it but, again, I just want

1 to tell you how important it is for the parishioners to go to
2 church on a Sunday. They want to meet their fellow
3 parishioners. They want to relate to them and talk to them.

4 It's been very, very stressful. You know, I talk to
5 so many people and they're stressed out to the max. They need
6 communication with their co-parishioners. You know, you watch
7 it on Facebook. They do a great job, the Diocese is doing
8 great, putting the masses out, but there's nothing to replace
9 going to church, seeing your fellow parishioners, seeing your
10 local, you know, your local religious leader, shaking his
11 hand, getting a blessing from him on a Sunday. There's
12 nothing better than that and we're missing that every Sunday.
13 And, again, doing it virtually, it helps us but it doesn't
14 replace being there.

15 MR. SHAPIRO: No further questions on direct,
16 Your Honor.

17 THE COURT: Thank you very much.

18 Mr. Farber, any question?

19 MR. FARBER: Very brief, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. FARBER:

22 Q Good afternoon, Mr. Esposito.

23 A Good afternoon.

24 Q My name is Seth Farber. I'm with the Attorney General's
25 Office. I'm representing the defendant Governor Cuomo today.

1 In brief, sir, you've acknowledged that social
2 interaction is a big part of the experience of going to
3 church. Is that fair to say?

4 A Yes.

5 Q Okay. Is it fair to say, sir, you have no training in
6 epidemiology or infectious disease?

7 A The only training I have is the tabletops that I would
8 conduct at Emergency Management. No, no official medical
9 training.

10 Q Okay. All right. Thank you, sir.

11 THE COURT: Anything else from plaintiff?

12 MR. SHAPIRO: Yes, very briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. SHAPIRO:

15 Q Commissioner Esposito, Mr. Farber was asking you about
16 social interactions, but all social interactions that occur in
17 churches since they have reopened have been subject to the
18 protocols that you and your commission put in place, right?

19 A Yes. There's one thing that wasn't mentioned. You know,
20 during the mass, we greet one another. You know, we'll say,
21 you know, "Peace be with you," and people will shake hands,
22 they'll hug, they'll do a cheek kiss. That has been
23 eliminated also. When you say, "Peace be with you," the most
24 you are going to get is you turn around, wave at your fellow
25 parishioners and say, "Peace be with you." So that social --

1 and we've modified the way we're doing mass.

2 Q And just to be clear, nobody is shaking the priest's hand
3 nowadays?

4 A No contact.

5 Q And everyone is social distanced 6 feet or more apart
6 both during mass and afterwards?

7 A Yes.

8 Q Okay. And everyone's wearing a mask the entire time that
9 they're in the church except for the brief moment when they've
10 stepped to the side and take from the Holy Communion?

11 A No mask, no mass. That's been our slogan.

12 Q And so the parishioners know that the socializing that
13 they are doing in church is not like any kind of socializing
14 they would have done in the old days before COVID, right?

15 A That's correct.

16 Q And everyone is very careful to maintain all of the
17 requirements that the Bishop has put in place and mandated
18 that everyone comply with?

19 A Very much so. And if they don't do it by themselves, we
20 have enough additional ushers and security to mandate that
21 they do. We, we -- a fellow was giving us a bit of a hard
22 time the other day about putting a mask on. I had to go over
23 and tell him, "No mask, you can't come in." He ultimately put
24 on a mask and came in.

25 Q But to your knowledge, even that kind of brief

1 intransigences happen very infrequently, right?

2 A Yes. Well he was there for a Confirmation. He was not a
3 regular churchgoer, I could tell, so he wanted to be a little
4 defiant and we put him in check.

5 Q Very good.

6 And the, the social interaction that people are
7 really coming to church for nowadays is to be, to gather as a
8 spiritual community and celebrate mass together under the very
9 strict guidelines that the church has put in place, fair to
10 say?

11 A Without a doubt. Without a doubt.

12 Look, I mean a lot of these folks, they want to be
13 in that building. They want to be in that church. They want
14 to go up to the front. They want to kneel down and pray in
15 front of the holy statutes. They want to be in that church.
16 We don't even have Holy Water. Another thing. We've
17 eliminated the Holy Water. The fountains are empty. We've
18 gone above and beyond. I'm telling you.

19 Q Okay. Great. Thank you, Commissioner Esposito. I
20 appreciate the time.

21 MR. SHAPIRO: No further questions from us,
22 Your Honor.

23 THE COURT: Anything further from you, Mr. Farber?

24 MR. FARBER: No, Your Honor.

25 THE COURT: All right. Does the plaintiff have any

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1 other witnesses? Mr. Mastro?

2 MR. MASTRO: No, Your Honor.

3 THE COURT: Thank you.

4 All right. At this point, Mr. Farber, do you want
5 to call your witness?

6 MR. FARBER: I do. I would call Bryon Backenson. I
7 believe he is on.

8 THE COURT: Yes, he is here on video.

9 MR. FARBER: Okay.

10 THE COURT: So let's swear in the witness.

11 (The witness is duly sworn/affirmed by the Clerk of
12 the Court under penalties of perjury.)

13 THE COURT: You may proceed, Mr. Farber.

14 MR. FARBER: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. FARBER:

17 Q Mr. Backenson, what is your current position?

18 A I'm a research scientist 5 with the New York State
19 Department of Health. I'm the Deputy Director of the Bureau
20 of Communicable Disease Control for the State Department of
21 Health. I'm an Assistant Professor of Epidemiology and
22 Biostatistics at the University at Albany School of Public
23 Health.

24 Q And how long have you been with the State Department of
25 Health?

1 A Twenty-four years. I've been with the Department
2 consecutively now since 2000.

3 Q Can you describe your educational background for the
4 court?

5 A I have an undergraduate degree from Drew University in
6 Madison, New Jersey, a Master of Science in epidemiology and
7 biostatistics from the University of Albany.

8 Q As a general matter, you are familiar with
9 epidemiological issues, is that correct?

10 A I am.

11 Q Can you tell the Court who is Debra Blog?

12 A Debra Blog is the director of the Division of
13 Epidemiology in New York State. She's also the State
14 epidemiologist. There is one designated for each state. Deb
15 Blog is the State epidemiologist for New York. She -- my
16 bureau, the Bureau of Communicable Disease Control, falls
17 under Deb Blog.

18 Q Okay. And do you work with Ms. Blog, Dr. Blog?

19 A I do.

20 Q And in what capacity? What is your relationship with
21 Dr. Blog?

22 A So my group, the bureau of communicable disease control
23 is one of 5 bureaus that work under Dr. Blog. There are about
24 75 or so different diseases in New York State, infectious
25 diseases, that are mandated to be reported to New York State

1 and county health departments and our group basically
2 investigates those as well as other issues that come up that
3 require investigation that may not have made that list quite
4 yet. Basically, what we do is we look, we investigate
5 individual cases of disease and clusters of cases of disease,
6 depending on the pathogen or the disease involved.

7 Q Are you aware that Dr. Blog has filed a declaration in
8 this case?

9 A I am.

10 Q Have you had a chance to review that declaration?

11 A I have.

12 Q Have you had a chance to review the exhibits to that
13 declaration?

14 A I have.

15 Q All right. Is there anything in that declaration that
16 contain any statements that you disagree with?

17 MR. MASTRO: Objection, Your Honor. May I please be
18 heard?

19 THE COURT: Yes, Mr. Mastro.

20 MR. FARBER: I can rephrase.

21 MR. MASTRO: It's not a question of rephrasing. The
22 questioner is leading his own witness, but this witness, you
23 know, he's not in a position, he's not qualified as an expert
24 in the way that the State presented Dr. Blog. He said he's
25 generally familiar with epidemiology and he is now going to be

1 asked to adopt opinions given by Dr. Blog that were really
2 general conclusions that other courts in this state and
3 recently in Washington, D.C. found were conclusory and not
4 based on a sufficient record under Daubert.

5 This is actually trying to not have the real witness
6 here who might actually have been qualified to give an
7 opinion, although challenge it. We have a subordinate who is
8 not a doctor, not a Ph.D., and who's now being asked to adopt
9 in its entirety an affidavit or a declaration over 90
10 paragraphs, 37 exhibits, and he's simply not qualified to give
11 the opinions that are given in the declaration and it is, you
12 know, at its core, putting words in the witness' mouth when
13 the other person should have been here.

14 So, Your Honor, I don't mean belabor the point but
15 we would have objected to opinions being rendered in this
16 conclusory fashion just as the Northern Division of New York
17 rejected the Commissioner of Health doing the same thing in a
18 case in August and a DC district court just did last Friday,
19 but this witness isn't even qualified to give those conclusory
20 results. He read her declaration. Now he's going to say I
21 agree with everything in it? I don't think that's proper
22 testimony, Your Honor, certainly not proper expert testimony.

23 THE COURT: Mr. Farber, you're not providing this
24 witness as an expert on the issues that would require
25 expertise of the type that Dr. Blog may or may not have, are

1 you?

2 MR. FARBER: I'm not offering the witness for
3 Dr. Blog's expertise, Your Honor. I'm offering the witness on
4 the background of this policy, public health practices and
5 other matters with which he is eminently familiar since he
6 works in that area and has worked in that area for many years.

7 MR. MASTRO: Your Honor, may I talk, please?

8 THE COURT: Wait, Mr. Mastro.

9 In that case, why don't you ask him specific
10 questions which relate to his responsibility in his position
11 and leave Dr. Blog's declaration as a separate matter that can
12 be argued about. Dr. Blog did not, is not being presented as
13 a witness and the Court may or may not take her declaration
14 into account in reaching the determination, but I think this
15 witness certainly can speak to certain issues. I have a few
16 questions myself so why don't we go ahead with some specific
17 questions as to issues or --

18 MR. FARBER: Right.

19 THE COURT: -- facts that he has specific knowledge
20 of and then we'll move on from there.

21 MR. FARBER: I will move on, Your Honor.

22 MR. MASTRO: Thank you, Your Honor.

23 THE COURT: Okay.

24 Q Mr. Backenson, can you tell the court what your role in
25 your position with the Department of Health is and New York

1 State's response to the COVID-19 pandemic?

2 A So I over -- in my role, I oversee our case investigation
3 of communicable diseases in New York State. I've been doing
4 that since 2009. I investigate outbreaks and direct
5 individuals to investigate outbreaks across New York State. I
6 am the, I'm the person who people call at 2 in the morning
7 when a physician has a question about a case that they don't
8 know what to do with with regards to reporting that.

9 My first instance with regards to COVID was in
10 January when I wound up getting phone calls with regards to
11 individuals who had recently returned from China and I've
12 worked with other members of the Department ever since in
13 order to help develop some of the surveillance techniques in
14 order to, in order to identify cases, some of the policies
15 involved in trying to address issues when it comes to
16 isolation and quarantine and so forth with regards to this.
17 I've also been directly involved in contact tracing and
18 contact elucidation with all the counties of New York State.

19 Q Okay. And what is the role of your particular section of
20 the division of epidemiology, is it infectious diseases?

21 A It's communicable disease, right. It's the Bureau of
22 Communicable Disease Control and we investigate outbreaks and
23 we try and implement public health measures to help mitigate
24 spread of outbreaks.

25 Q Okay. And what is the role of the Division of

1 Epidemiology in response to the COVID pandemic?

2 A The Division of Epidemiology encompasses five different
3 groups. Ours is kind of general communicable disease. There
4 is a group that deals with hospital-acquired infections.
5 There's a group that deals with tuberculosis. There's a group
6 that deals with communicable disease data. So we're basically
7 broken up by individual subject matter fields, if you will.

8 Q Okay. To your knowledge, how is the SARS-CoV-2 virus
9 transmitted?

10 A It's a respiratory virus. It is transmitted primarily by
11 inhaling particles that have, that are infected with the
12 virus, be them aerosols or be they droplets. They are --
13 again, that's primarily how this happens. There is some
14 indication that there may be some transmission of this through
15 picking up the virus on surfaces and then, you know, wiping it
16 into a mucous membrane like a mouth or an eye. It appears the
17 vast majority of transmission is via the respiratory route.

18 MR. MASTRO: Your Honor, I have to object because it
19 was represented that he wasn't going to try to solicit expert
20 opinion from the witness and he just elicited the witness',
21 you know, opinion about how the virus is transmitted.

22 Your Honor, I didn't hear the witness say and I'm happy to
23 voir dire him on it, I didn't hear him say he considers
24 himself to be an expert on COVID-19. I didn't hear that at
25 all. So he's being called to give testimony about, really in

1 the nature of expert testimony about how the virus --

2 THE COURT: Well, your point is well taken but
3 anyone who's listened over the last eight months to Dr. Fauci
4 has become an expert on how COVID-19 is transmitted. It's a
5 generally understood situation, it would seem, and I'm not
6 taking his statement as an expert statement. It just
7 reinforces what we have been, we have come to understand about
8 the pandemic. There are millions of Americans who are now
9 experts on how COVID-19 is transmitted and then there are a
10 few who have no idea whatsoever.

11 So let's just move ahead. Your point is well taken.
12 I am not going to rely on this witness on that particular
13 issue.

14 MR. MASTRO: Thank you, Your Honor. Let's move on.

15 THE COURT: Yes. Let's move on, please. I'd like
16 to hear more about the specifics of this particular executive
17 order and how it came about, 202.68 which imposed new
18 restrictions in certain neighborhoods in Queens and Brooklyn
19 which is the subject of this application.

20 Okay. Let's go ahead, Mr. Farber.

21 MR. FARBER: Sure.

22 Q Mr. Backenson, can you tell the Court what a COVID
23 cluster is?

24 A Yes. A cluster of COVID is a group of cases that are all
25 related in one way or another. It could be related through an

1 occupational exposure, it could be related through a home
2 exposure, it could be related through some sort of gathering
3 but, basically, it's a link between a number of people who are
4 positive and it's basically, it's, you know -- typically it's
5 assumed to be three or more individuals who are all linked
6 together.

7 Q Can you tell the court what a superspreader event is?

8 A A super spreader event is something where one particular
9 infected individual disproportionately infects a number of
10 other individuals. It is something that we've seen in
11 multiple circumstances with regards to COVID and other
12 illnesses for that matter but, typically, that can be from
13 when one particular individual is in a position where they may
14 be sharing more virus particles than they would, than another
15 individual might, particularly a situation that they might be
16 placed in where people are close together and there are a
17 number of people who may be susceptible to becoming infected
18 but, in general, again, it is one individual
19 disproportionately infecting a number of others.

20 Q Is there a relationship to your knowledge between houses
21 of worship and superspreader events?

22 MR. MASTRO: Objection, Your Honor. Foundation and
23 he's asking him for, again, expert testimony.

24 THE COURT: Sustained.

25 Q Okay. Superspreader events take place, as you just said,

1 when there are large groups of people present, is that fair to
2 say?

3 A Yes.

4 MR. MASTRO: Leading the witness, Your Honor.

5 THE COURT: Go ahead.

6 Q Can you describe the data that was relied on by the State
7 of New York in determining that there were COVID clusters?

8 A These would be the data on human cases as well as the
9 proportion of tests that are testing positive so the number of
10 people getting tested and the number of percentage of those
11 tests that are returning positive within a different time
12 period.

13 Q Are you familiar with what the State is calling the
14 cluster initiative?

15 A I am.

16 Q Can you tell the Court what the cluster initiative is?

17 A So the cluster initiative is a, it's -- first of all,
18 it's an identification of areas of increased incidents of
19 cases in a particular area, particularly compared to other
20 locations, and it's basically a targeted return to some of the
21 techniques that were done when New York went on pause back in
22 March. It's limiting businesses, it's limiting movement, it's
23 basically trying to reduce density in areas where there are
24 large or larger proportions of people who are testing
25 positive.

1 Q Are you familiar with the Governor's executive order
2 number 202.68?

3 A Yes.

4 Q Okay. Are you familiar with the terms "red zone,"
5 "orange zone" and "yellow zone" as set forth in that executive
6 order?

7 A Yes.

8 Q Okay. And briefly, can you say what the red zone and
9 orange zone and yellow zone are?

10 A So these zones are basically ways that, they're -- the
11 individual zones have been set up so that the red zone is an
12 area that has the highest incident of new cases in an area
13 that go through the highest proportion of tests being, coming
14 back positive. Orange is less than that and yellow then is
15 less than that.

16 In each of those, there are a number of different
17 mitigation measures that are taking place. They are
18 temporary. They're there to try and help reduce the spread
19 that had been increasing in those particular areas.

20 They include limits on gatherings from none in the
21 red to 10 in the orange to 25 in the yellow to business just
22 being essential, just essential businesses being open in the
23 red zone to some closing of high risk businesses in the orange
24 zone to all businesses being open in the yellow zone. There
25 are restaurant restrictions from takeout only in the red zone

1 to outdoor dining limited to four at a table only in the
2 orange zone to indoor and outdoor dining limited to four at a
3 table in that yellow zone. Schools are closed in both the red
4 and the orange zones. They're open in the yellow zones but
5 with required testing. And churches are limited in the red
6 zones to 25 percent or 10 -- 25 percent capacity or 10
7 individuals whichever is smaller, the orange zone is
8 33 percent capacity or 25 individuals, whichever is smaller,
9 and in the yellow, it's listed to 50 percent capacity.

10 Q Are you aware of the data that was used in creating these
11 zones?

12 A The data that was used for these was a combination of
13 case data as well as testing data.

14 Q All right. As far as you're aware, the red zones, do the
15 red zones represent, you know, the highest concentration of
16 COVID cases, the orange zones the less highest and the yellow
17 zones the less highest, is that fair to say?

18 A Having looked at the data --

19 MR. MASTRO: Objection, Your Honor.

20 THE COURT: I'm allowing the answer.

21 Go ahead.

22 A Having looked at the data, the zones certainly correspond
23 to the highest incidence rates and the highest testing rates.

24 THE COURT: Let me just ask this. Excuse me,
25 Mr. Farber, if I may.

1 Is your office the office that collects this data
2 and examines and interprets this data? Is that what you do?

3 THE WITNESS: Our office and other offices in the
4 Department of Health collect data. We do analyze data. We do
5 try and clean data to make sure that the data that's being
6 used is, is appropriate and, you know, placed in the right
7 locations and so forth. So, yes, that is what our office
8 does.

9 THE COURT: And in establishing the zones, is it
10 your office that established these zones when they became
11 necessary when the positive test results reached a certain
12 level of positivity, of testing?

13 THE WITNESS: No, Your Honor, my office was not
14 involved in the creation of a threshold for a particular zone
15 if that's what you're asking.

16 THE COURT: Well, then, if not your office, who's
17 office calculates the level of positivity and what needs to be
18 done with a zone a community needs to be placed in?

19 THE WITNESS: These, as I understand it, the
20 creation of the zones were done by the executive office.

21 THE COURT: I know what we're talking about. You
22 mean, the Governor's office, the defendant's office, right?

23 THE WITNESS: Correct.

24 THE COURT: And Mr. Farber, the question is, and I'm
25 sure that you'll asking it eventually on cross-examination,

1 but my question is you're not, you're not providing any
2 witness to elucidate that a certain level of positivity
3 requires a certain level of limiting community activity;
4 that's not why, why this witness is here, I take it?

5 MR. FARBER: That's correct, Your Honor. This
6 witness is going to, you know, testify about the general
7 policy, its reasonableness as a matter of sound
8 epidemiological and public health practice, but he did not,
9 you know, create the specific policy of, you know, X percent
10 do this, X minus Y percent do that. That's not this witness.

11 THE COURT: And he's not an epidemiologist. In
12 other words, he's not the person or group of persons who are
13 being consulted by the Governor as to establishing these,
14 these standards or cutoffs for red zones and orange zones and
15 the yellow zones, correct?

16 MR. FARBER: He's in the group that is. I can't say
17 that he personally is part of that.

18 THE COURT: Well, let me cut to the chase here for a
19 minute. I think that in Dr. Blog's declaration, there was,
20 and correct me if I'm wrong, Mr. Farber, a representation that
21 the red zone consists of a positivity rate of at least
22 8 percent. Is that your understanding?

23 MR. FARBER: That is, that is my understanding. I
24 think that, I think that's an approximation and I think
25 that's --

1 THE COURT: Okay.

2 MR. FARBER: -- that's an average but I think that's
3 correct. I think that's correct.

4 THE COURT: Well, it was brought to my attention
5 this afternoon that the Governor held a press conference at
6 11:30 this morning at which he indicated that the numbers show
7 that there are, the positivity rate in the red zone is
8 4.84 percent at present. Are you are of this?

9 Do you have a witness who can talk about what's
10 going on with the positivity rate and how that might affect
11 this litigation?

12 MR. FARBER: I, you know, I am not, I am not aware
13 of that, Your Honor. And the witness I, you know, the witness
14 I have today is, you know, can address it if he knows.

15 I can tell the Court that Dr. Blog herself
16 unfortunately had a medical issue. I don't know, you know,
17 her availability, for example, for tomorrow but, you know,
18 that's what I have. Unfortunately, Your Honor, we're in
19 difficult circumstances, you know, as we indicated in our
20 letter so, you know, we're, we're all, you know, in a
21 difficult position. You know, we are dealing with this.

22 THE COURT: Mr. Farber. Mr. Farber.

23 MR. FARBER: Yes.

24 THE COURT: This was scheduled -- this hearing was
25 scheduled over the weekend. All right.

1 MR. FARBER: Yes, Your Honor.

2 THE COURT: And the Governor is giving, is giving a
3 press conference this morning and the numbers that he
4 apparently, you can correct it, I'm not saying this is, this
5 is just hearsay on my part, but it's valuable here since we're
6 trying to figure out what to do here. He's now saying that
7 the red zone is now under 5 percent and that's what I'm,
8 that's what I'm understanding from this press conference that
9 he had.

10 This is a court. I don't go to press conferences.
11 So, you know, I think it is important for your client to be
12 able to tell you what the latest move is so that we can have
13 an up to date understanding of what's going on with regard to
14 this COVID outbreak which I do not minimize in any way, shape
15 or form, you understand. I'm just trying to get the latest
16 picture that is available so that if it is useful, if it is
17 useful in what we are doing, at least we will have it and be
18 able to consider it.

19 So I'm going to let you go ahead.

20 MR. FARBER: Okay.

21 THE COURT: I just point that out to you and ask you
22 to provide any additional information by tomorrow morning at
23 9 o'clock --

24 MR. FARBER: Yes, Your Honor.

25 THE COURT: -- on this subject and possibly some

1 sort of declaration by someone who is crunching the numbers as
2 to how this might affect all these zones that have been
3 created and affect the rights of the plaintiff in this case
4 and the parishioners of the Roman Catholic Diocese of
5 Brooklyn.

6 So having said all that, you can go back to your
7 questioning of the witness. Thank you.

8 MR. FARBER: Thank you, Your Honor.

9 Q Backenson, are you familiar with the term "nonessential
10 gatherings"?

11 A Yes.

12 Q Okay. And are you familiar with how Executive Order
13 202.68 treats nonessential gatherings in the red and orange
14 zones?

15 A Yes.

16 Q How does it treat them?

17 A Gatherings are -- there are no nonessential gatherings in
18 the red zone and gatherings are limited to ten or less in the
19 orange zone.

20 Q Okay. And are you familiar with the term "essential
21 business"?

22 A Yes.

23 Q All right. And can you please describe that term in the
24 context of Executive Order 202.68?

25 A Essential businesses have been defined earlier, in

1 earlier executive orders as businesses that are, that are
2 allowed to remain open because they provide essential services
3 to the State and to New Yorkers. And with regards to those,
4 and this particular executive order, essential businesses are
5 allowed to stay open when in the red zone, other businesses
6 must close; in the orange zone, they are open, there are
7 personal care and other high risk businesses that are, that
8 should be closed; and in the yellow zone, there's no
9 restrictions.

10 Q Okay. The plaintiff has offered us, the plaintiff
11 offered evidence that the church officials are not aware of
12 COVID outbreaks from its churches in red and yellow zones and
13 that the church has imposed its own hygiene, social
14 distancing, masking mitigation measures.

15 In your view as a epidemiologist with New York
16 State, is that, in your view, an adequate public health
17 measure?

18 MR. MASTRO: Objection, Your Honor. And it's
19 also --

20 THE COURT: No. I'm allowing it. Go ahead.

21 A So the measures that have been undertaken were, are
22 certainly appropriate with regards to the phased entry that
23 has happened starting in mid May. What we're trying to do now
24 is trying to have a targeted approach to try and address areas
25 that have extraordinarily high rates of positivity. It may --

1 in situations like this, taking additional steps in order to
2 try and minimize spread and minimize risk to other individuals
3 and potentially trying to stop spread from catching hold in
4 certain areas is appropriate.

5 Q All right. And plaintiff, plaintiff argues that it
6 actually has lower capacity than the State requires in its
7 churches. It's at a maximum of 25 percent capacity and when
8 in cases, the State permits 33 or even higher.

9 Why, again, as an epidemiologist with the State of
10 New York, would it be of concern if the churches in the red
11 and orange zone continue to operate at 25 percent capacity?

12 MR. MASTRO: Same objection, Your Honor.

13 THE COURT: Your objection is noted.

14 You may answer.

15 A It is -- I mean, I think the main concern again is not
16 what actions the church has taken, but the actions that are
17 around the church and the individual, the increasing rate of
18 positivity in the communities surrounding it. It's a concern
19 about then potential spread inside, inside this particular
20 church, potential spread to other people outside the
21 community.

22 The goal of COVID mitigation is to try and keep
23 COVID numbers as small as possible because as we've seen in a
24 number of situations in New York and nationally and
25 internationally for that matter, this is a disease that can

1 spread very, very quickly both in terms of time and a place.

2 Q Are you familiar with the CDC's guidance for community
3 mitigation where there are high positive, positivity COVID
4 rates in a given area?

5 A Yes.

6 Q And can you describe what the CDC's guidance is for such
7 community mitigation?

8 A In short, the CDC takes escalating steps as they're
9 increasing rates of number of cases and of incidence rates in
10 particular areas. So if incidence rates or positivity rates
11 or a combination of both as we're doing here increases in a
12 particular area, CDC would recommend that additional steps get
13 taken in order to try and prevent future spread, particularly
14 in areas of high density.

15 Q Okay. And I'm nearly, nearly done here.

16 Can you explain what you meant concerning density?

17 A Sure. So density is a -- one of the main concerns about
18 the spread, transmission of COVID involves density. The main
19 concern that we have is when there are a number of people
20 present, that it's much easier for one person to infect more
21 than one individual.

22 What we want to do as epidemiologists, as public
23 health professionals is try and, whenever there is a case, we
24 want to have fewer than one case, have that person transmit to
25 fewer than one individual. That's a term called the

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1 reproductive rate. And so one of the things that we -- one of
2 the best ways to do that is to limit the number of people that
3 a positive individual is --

4 THE COURT: Hold on. Hold on a minute.

5 There is someone who's on a telephone call in the
6 middle of this proceeding and it's very distracting. So
7 either hang up the phone or terminate your involvement in this
8 proceeding.

9 THE CLERK: Judge, I can mute everybody but I was
10 just going to wait.

11 THE COURT: Thank you very much.

12 I'm sorry to interrupt, sir. Please complete your
13 statement.

14 THE WITNESS: Certainly.

15 A So density is important, basically, in trying to limit
16 the number of people that one individual can potentially
17 transmit to. It's why we went on pause back in March. It is
18 why we are, we recommend masking and social distancing. It's
19 why we have certain limits for gatherings, why we have
20 staggered workplaces, why we have staggered school settings,
21 why we have no fans in stadiums. It basically is trying to
22 prevent events where one or two positive individuals who may
23 or may not know that they are ill or positive can potentially
24 give this to many, many other people at once.

25 Q Okay. Thank you, Mr. Backenson.

CMH

OCR

RMR

CRR

FCRR

1 MR. FARBER: That actually concludes my direct.

2 THE COURT: All right. Thank you, Mr. Farber.

3 Cross-examination?

4 MR. MASTRO: Yes, Your Honor. Thank you,

5 Your Honor.

6 THE COURT: Introduce yourself to the witness.

7 MR. MASTRO: Yes.

8 CROSS-EXAMINATION

9 BY MR. MASTRO:

10 Q Mr. Backenson, I have a few questions. I look forward to
11 doing this as quickly as possible. First --

12 THE COURT: This is Mr. Mastro.

13 MR. MASTRO: Yes.

14 THE COURT: All right. Go ahead, Mr. Mastro. I
15 introduced you to the witness.

16 MR. MASTRO: Thank you. I'm sorry.

17 Q Mr. Backenson, I did see you went to Drew University. I
18 hope you took my father's course, Dr. Julius Mastro?

19 A Unfortunately, I spent all my time in biology classes but
20 I am familiar with your father, yes.

21 Q Well, God rest his soul. He was a great, great professor
22 and a great father.

23 So, Mr. Backenson, just to clarify, you didn't speak
24 to the Governor about the executive order that's at issue in
25 this litigation, did you, sir?

1 A I did not.

2 Q You didn't speak to the Executive Office about what that
3 particular executive order should say, did you, sir?

4 A Before it was created?

5 Q Yes.

6 A I wasn't.

7 Q So you were not consulted in any way on what that
8 executive order should say, the parameters that were defined;
9 you had nothing to do with that, correct?

10 A I did not.

11 Q You had nothing to do with what geographic areas
12 qualified as red zones, did you, sir?

13 A I did not.

14 Q Or orange zones or yellow zones for that matter, correct?

15 A No, sir.

16 Q And you had no role in defining how this executive order
17 restricted houses of worship in those zones, correct, sir?

18 A Correct.

19 Q And you said the, those decisions about which areas
20 qualified for which zones, they were made in the Governor's
21 office, correct?

22 A To my knowledge.

23 Q And, sir, who in the Governor's office, the Governor's
24 office specifically, is, in fact, an epidemiologist? Is there
25 is any?

1 A I do not know, sir.

2 Q Who in the Governor's office is a doctor or a scientist
3 who specializes in infectious disease, do you know, sir?

4 A I do not know, sir.

5 Q Is it typical in your experience that -- strike that.
6 Strike that.

7 Are you aware that the Governor announced today that
8 the test results as of yesterday for red zones are down to
9 4.84 percent positivity? Are you aware of that, sir?

10 A I heard it earlier in this, here.

11 Q But you said your job is tracking trends and rates,
12 right? Didn't you say that earlier?

13 A The role of our unit is, yes.

14 Q So are you aware that the test results reported yesterday
15 for red zones are down to 4.84 percent positivity? You're
16 aware of that?

17 A I'm aware that the rates have lowered. I was not aware
18 of the specific number for this specific region in, in -- I'm
19 unsure if the term you're talking about is for all the red
20 zones or just one in particular.

21 Q Sir, I want to ask you a few questions.

22 You said this executive order, they put this
23 together in the Governor's office, right?

24 A That is my, that's my, that is my understanding.

25 Q Yes. Thank you. I want to ask you the following

1 questions.

2 Are you aware that the Governor has said publicly
3 that his latest, that as to his latest executive order, "The
4 issue is with the ultra-Orthodox community"? Are you aware
5 the Governor said that publicly, sir?

6 A I am not.

7 Q Do you agree with the Governor that "the issue is with
8 the ultra-Orthodox community"? Sir, do you agree that's the
9 issue? Yes or no.

10 A The, the issue, I believe, is more so with a --

11 Q Yes or no, sir. Yes or no, please.

12 THE COURT: I'll allow him to answer.

13 MR. FARBER: I'm going to object -- okay.

14 THE COURT: I'm going to allow him to answer.

15 We'll take your answer on that, please, sir.

16 A No.

17 Q Am I correct that the cluster that you're referring to in
18 these red zones is, as the Governor has said, predominantly an
19 ultra-Orthodox cluster"? Do you agree with that?

20 A These are areas that have a high population of Orthodox
21 population.

22 Q So you agree with that, correct?

23 A These zones are --

24 THE COURT: I'm sorry. You can finish your answer.

25 Go ahead.

1 A These areas are areas that do have a high proportion of
2 the Orthodox population.

3 Q And do you agree, sir, that the ultra-Orthodox community
4 in these neighborhoods is an insular community?

5 MR. FARBER: Objection.

6 THE COURT: Sustained.

7 Q Do you agree, sir, that the ultra-Orthodox community in
8 these neighborhoods tends not to interact with its neighbors?

9 MR. FARBER: Objection.

10 THE COURT: Sustained.

11 Q Sir, you said in your testimony that one of the things
12 that you do is contact tracing, right?

13 A Correct.

14 Q Have you attempted to do any contact -- contract -- have
15 you attempted to do any contact tracing work in connection
16 with these clusters in these red zones in Brooklyn?

17 A I have not. That's the jurisdiction, that's the
18 jurisdiction of the New York City Health Department.

19 Q Am I correct, sir, that the New York State Health
20 Department has jurisdiction to enforce the government's
21 executive orders?

22 MR. FARBER: Objection.

23 THE COURT: No, whether he knows. If he knows.

24 MR. FARBER: Okay.

25 THE COURT: Do you know?

1 THE WITNESS: Yes.

2 A Yes.

3 Q Sir, do you know whether the Department of Health, the
4 State Department of Health has taken any steps to enforce the
5 Governor's executive order at issue here in relation to COVID
6 cluster in the ultra-Orthodox community in these Brooklyn red
7 zone neighborhoods? Do you know whether the Health Department
8 has done that?

9 A I do not.

10 Q Now, sir, I want to also ask you the following.

11 You were here listening to the testimony of
12 Bishop Chappetto and Commissioner Esposito, correct?

13 A Correct.

14 Q And you heard Commissioner Esposito say that to his
15 knowledge, there have not been any outbreaks of COVID-19
16 stemming from any Catholic church or congregation in New York
17 City including Brooklyn or Queens.

18 Did you hear his testimony on that score, sir?

19 A I did.

20 Q And as far as you know, that's true and correct
21 testimony, right, sir?

22 A Clusters in, outbreaks in New York City are the
23 jurisdiction of the New York City Department of Health. There
24 may be ones that I am not privy to.

25 (Continued on the following page.)

1 CROSS EXAMINATION

2 BY MR. MASTRO: (Continuing.)

3 Q And as far as you know, that's true and correct
4 testimony; right, sir?

5 A Clusters in -- outbreaks in New York City are the
6 jurisdiction of the New York City Department of Health.

7 There may be ones that I'm not privy to.

8 Q Sir, a simple question. Commissioner Esposito said that
9 to his knowledge there hasn't been any outbreak or spread of
10 COVID 19 in any of these catholic churches in Brooklyn or
11 Queens. As far as you know, he's correct, there hasn't been
12 any spread or outbreak of COVID-19 in any of the diocese's
13 churches; correct?

14 A To the best of my knowledge, there have been no outbreaks
15 specifically originating in a church in this particular
16 diocese, however, that is the jurisdiction of New York City
17 Department of Health for investigation.

18 Q But it's the State, the Governor who imposed this
19 executive order; right, sir?

20 A Correct.

21 Q Now, sir, you mentioned the CDC --

22 MR. MASTRO: Your Honor, I'm having such a good
23 time. I see my battery is running low and I need my experts
24 to help me make sure I get it plugged in and that's my wife.
25 Can I please have a very brief break so I make sure she plugs

1 in the batteries so I do not lose power here.

2 THE COURT: All right. Let's take a two-minute
3 break to plug in Mr. Mastro's battery.

4 MR. MASTRO: Thank you, Your Honor, much
5 appreciated. My technical skills are lacking.

6 THE COURT: That's apparent.

7 (Brief recess.)

8 MR. SHAPIRO: Mr. Mastro just called me.

9 THE COURT: I'm sorry.

10 MR. SHAPIRO: He is trying to get back on.

11 THE COURT: I don't know what we are getting right
12 now.

13 MR. SHAPIRO: Your Honor, Mr. Mastro called me and
14 his computer had died, so he is trying to get back on as
15 quickly as possible. He said in a few more minutes, I
16 apologize.

17 THE COURT: That's all right. We will know when he
18 is back.

19 Everyone should remain muted except the speaker.

20 Is there any word from Mr. Mastro?

21 MR. SHAPIRO: I'll try calling him again, Your
22 Honor.

23 THE COURT: Mr. Farber, you are still there, I take
24 it? Mr. Farber?

25 MR. SHAPIRO: If there is a way for Mr. Mastro to

1 continue the cross by phone, he would do that.

2 THE COURT: That would be fine. I will be happy
3 take his cross by phone, but I'm also looking for Mr. Farber.

4 MR. SHAPIRO: Is there a number that he should use,
5 Mr. Reccoppa, for calling so that he can speak?

6 THE COURTROOM DEPUTY: 571-353-2300. Then he enters
7 798200928. That's the dial in number.

8 MR. FARBER: Can you hear me?

9 THE COURT: Mr. Farber?

10 MR. FARBER: Yes, Your Honor.

11 THE COURT: I'm glad you are back. We are still
12 waiting. Mr. Mastro is going to call in because he is having
13 trouble with his computer.

14 MR. FARBER: He has my sympathies.

15 THE COURT: Yes, I understand that. Thank you for
16 your patience, everyone.

17 MR. MASTRO: Am I back?

18 THE COURT: You are back. Please sit down.

19 MR. MASTRO: My perfuse apologies to the witness
20 and, Your Honor.

21 THE COURT: All right. You have to promise me you
22 will have a heart-to-heart conversation with the IT department
23 at Gibson Dunn before you do another one of these.

24 MR. MASTRO: I promise, Your Honor. I'm still using
25 a Blackberry.

1 THE COURT: Some people say that's the way to go.
2 Okay.

3 MR. MASTRO: Thank you, Your Honor.

4 THE COURT: Let's finish up with this witness,
5 please. Try to get it done.

6 MR. MASTRO: I will, Your Honor. I don't have that
7 much longer, Your Honor.

8 BY MR. MASTRO:

9 Q Sir, you were asked questions about CDC policies --

10 THE COURT: I hate to do this, but I see the sun
11 light coming through.

12 THE WITNESS: Wrong window.

13 THE COURT: I don't know if that's the sunlight or
14 someone up speaking to you, sir.

15 That's better. Thank you very much, sir. Go ahead,
16 Mr. Mastro.

17 MR. MASTRO: Thank you. Thank you, Your Honor.

18 Q Sir, you were asked some questions earlier about your
19 familiarity with the CDC's recommendations. Do you remember
20 that testimony?

21 A I do.

22 Q And, sir, you know that the CDC recommends keeping,
23 quote, at least six feet away from other people, end quote, as
24 one of their recommendations in connection with COVID;
25 correct?

1 A Correct.

2 Q And the diocese's churches are doing just that; correct?

3 A From their testimony, it appears that way.

4 Q Thank you.

5 And you're aware that the CDC recommends that social
6 distancing, quote, is one of the best tools we have to avoid
7 being exposed to the virus and slowing its spread locally, end
8 quote? You are aware of that, sir?

9 A Yes.

10 Q And that's exactly what the diocese's churches are doing,
11 social distancing?

12 MR. FARBER: Objection.

13 THE COURT: Sustained. Let's move on. It's been
14 asked and answered.

15 Q Sir, are you also aware that the CDC put out expressed
16 guidance as to considerations in connection with communities
17 of faith?

18 A Yes.

19 Q And that's attached as Exhibit BB to the Blog
20 declaration; correct?

21 A Yes.

22 Q You are aware that the CDC expressly says that, quote,
23 its guidance is not intended to infringe upon rights protected
24 by the First Amendment to the U.S. Constitution; correct?

25 MR. FARBER: Objection.

1 THE COURT: You may answer.

2 A I believe that is -- I believe that's what the guidance
3 says.

4 Q And that, quote, No faith community should be asked to
5 adopt any mitigation strategies that are more stringent than
6 the mitigation strategies as to similarly-situated entities or
7 activities, end quote, you are aware of that; correct?

8 A That is what it says. Correct.

9 Q Now, sir, I want to ask you about some of the other
10 activities from the other businesses and services that are in
11 red and orange zones that aren't restricted in any way.

12 Mr. Farber asked you about what has been categorized
13 as essential businesses or services, and you said you were
14 familiar with those; correct, sir?

15 A Correct.

16 Q And I'm referring you specifically to Mastro declaration,
17 Exhibit 5, and from the State entitled "Guidance for
18 determining whether a business enterprise is subject to
19 workforce reduction under recent executive orders."

20 Sir, you'll see there on the first page it describe
21 essential businesses or entities; correct?

22 A I'm actually trying to find it. Supplemental declaration
23 five?

24 Q No, my first declaration, declaration of Randy Mastro,
25 Exhibit No. 5.

1 A Okay. I'm sorry.

2 Q I'm referring you specifically, sir, to page 4, essential
3 retail.

4 Now, essential retail, that means even in the red
5 zones, they're not subject to any restrictions at all;
6 correct?

7 A They are. They are subject to restrictions. They are --
8 masking and social distancing is part of that. They are not
9 subject to --

10 Q There is no --

11 THE COURT: Do not over speak the witness.

12 Go ahead, sir.

13 A They are not subject to -- to density restrictions, yes.

14 Q So among those essential retail businesses are grocery
15 stores, including all food and beverage stores; correct, sir?

16 A Correct.

17 Q Does that mean liquor stores too, sir?

18 A Liquor stores have been considered to be essential,
19 correct.

20 Q Liquor stores.

21 How about convenience stores? They're also
22 considered essential?

23 A Correct.

24 Q Hardware, appliance, and building material stores;
25 correct, sir?

1 A Correct.

2 Q Pet food; correct?

3 A Correct.

4 Q Sir, you are aware that there is a Target store in one of
5 these red zones in Brooklyn; correct?

6 A Correct.

7 Q And that's an essential business? They sell food and
8 other related items? Target is an essential business;
9 correct?

10 A Correct.

11 Q And Target is a big box store, very large; correct?

12 A Correct. I'm not familiar with the square footage of
13 this particular one, but I know compared to other Targets,
14 yes.

15 Q So that Target store can literally have hundreds of
16 people shopping there on any given day, there's no capacity
17 restriction; correct?

18 A Correct.

19 Q Staples, Staples is a hardware store; right?

20 A No. Staples is a stationery store.

21 Q Staples also has hardware materials, appliances, things
22 like that. Staples would be considered an essential business;
23 correct?

24 A To be honest, I believe it would. But to be honest, I'm
25 trying to remember if the Staples by me was closed during the

1 unessential business period.

2 Q So, sir, you wouldn't be surprised to learn that the
3 Staples in one of these Brooklyn red zone neighborhood is open
4 today for business; right?

5 A I would not.

6 Q And operating without any capacity restriction; correct?

7 MR. FARBER: I'm going to object to this line.

8 THE COURT: Overruled. You may continue.

9 A Correct.

10 Q Staples is a big box store with hundreds of customers at
11 a time; correct?

12 A Correct.

13 Q Now, sir, I want to ask you, flip to the next page,
14 because it describes financial institutions as essential, and
15 listed there are banks, insurance, payroll, accounting, even
16 services related to financial markets, like your broker,
17 right? They are considered essential businesses?

18 A Correct.

19 Q And they've stayed open; correct? No restriction on
20 capacity?

21 A Correct.

22 Q And there you have staff working in close quarters,
23 sometimes even confined spaces, members of the public going
24 there for those services in confined spaces; correct?

25 A Depending on the institution.

1 Q Correct, right?

2 A Correct.

3 Q Now, sir, once again I am going to ask you about
4 something the Governor said. Would you agree that this
5 executive order restricting services in all houses of worship
6 in these red and orange zones is, quote, Not a highly nuanced,
7 sophisticated response, end quote? Do you agree with that?

8 A So -- I'm sorry, can you repeat the question.

9 Q Sure. Do you agree with the statement that the
10 Governor's executive order restricting services of all houses
11 of worships in certain geographic zones is, quote, Not a
12 highly nuanced, sophisticated response, end quote?

13 A I'm sorry, do I -- do I need to know who the -- who the
14 quote is?

15 Q It's a quota attributed to the Governor on October 6,
16 2020.

17 A Okay. I would argue that -- I'm sorry.

18 Q Pardon? Please, go ahead.

19 A Was there an objection made or something like that? I'm
20 sorry?

21 THE COURT: You can't ask your lawyer to make an
22 objection. That's not.

23 THE WITNESS: I wasn't sure. I just heard cross
24 talking.

25 THE COURT: Just answer the question, if you can.

1 That's all.

2 THE WITNESS: I just heard cross talk. I wasn't
3 sure.

4 A So I think I would disagree. I mean, I think this has
5 been a targeted approach to -- to areas that have had high
6 incidence rates. It is intended to be targeted and intended
7 to be temporary.

8 Q Would you agree with the statement attributed to the
9 Governor that this is not a policy being written by a scalpel,
10 this is a policy being cut by a hatchet, end quote? Would you
11 agree with that?

12 A I would not.

13 Q Would you agree with the statement attributed to the
14 Governor that if we can get the numbers down in the zip codes,
15 the anxiety comes down and we can have a smarter, more
16 tailored approach"? Do you agree with that?

17 A There's a lot to unpack there.

18 In general, I mean, I think the goal here is to
19 reduce the rates, the incidence rates, the percent positive
20 test rates in the zones that have been identified so that we
21 can remain open.

22 The point here is I think that this is a targeted
23 temporary action that is being put into place in order to try
24 and prevent spread before this -- before the infection kind of
25 takes hold again in certain areas of the state.

1 Q And, sir, it's your testimony that -- strike that.

2 You would agree that what the diocese has done
3 voluntarily, limiting its church masses to 25 percent of
4 capacity, wearing masks, social distancing at least six feet
5 apart, having extra precautions taken around the holy
6 communion, extra steps taken about entering and exiting to
7 promote social distancing during -- before and after the mass,
8 you would agree that all of those things are things that those
9 catholic churches should be doing; correct?

10 A Correct.

11 Q You would also agree, would you not, that the offer, in
12 the context of this preliminary injunction application, to not
13 have congregations singing and to make sure that the cantor is
14 always 12 feet away from anyone else, that that also is
15 something that promotes safety in the catholic churches;
16 correct?

17 A Eliminating risky behaviors always helps, correct.

18 Q And, again, you personally are not aware of any evidence
19 of any spread of COVID in any of the catholic churches in this
20 diocese; correct, sir?

21 A In this diocese, in catholic churches, correct.

22 Q And would it be fair to say based on the things that this
23 diocese has been doing in its churches and has offered to do
24 going forward, that its doing all the right things to prevent
25 the spread of COVID in its churches? Would that be fair to

1 say?

2 A I think they are doing things to try to prevent spread
3 among congregants who come to the churches, yes.

4 Q And they're succeeding, for the past three months, no
5 incidents of COVID; correct?

6 A I don't know of no incidents of COVID. We know of no
7 outbreak, but it certainly does not mean that there may not be
8 people who have tested positive.

9 Q Since there has been no outbreak or spread, even if there
10 had been a congregant who tested positive that necessarily
11 means that the measures that have been taken protected the
12 rest of the congregation from outbreak or spread; correct,
13 sir?

14 MR. FARBER: I'm going to object.

15 THE COURT: Sustained.

16 MR. MASTRO: Your Honor, I don't have any further
17 questions of this witness at this time. Thank you.

18 THE COURT: Mr. Farber, anything else from you?

19 MR. FARBER: I have a brief recross, Your Honor.

20 THE COURT: Please go forward.

21 MR. FARBER: Thank you, Your Honor.

22 THE COURT: I'm sorry. That's a redirect, right?

23 MR. FARBER: Yes. Redirect. I'm sorry, Your Honor.

24 I forgot where I am.

25 THE COURT: Okay, go ahead.

1 MR. FARBER: A few redirect questions. My
2 apologies.

3 REDIRECT EXAMINATION

4 BY MR. FARBER:

5 Q Mr. Backenson, Mr. Mastro just asked you -- he described
6 for you a number of measures taken by churches in the diocese,
7 social distancing, masking, reduced singing, changes to the
8 service.

9 In the context of an area undergoing an increase in
10 COVID cases, are the measures Mr. Mastro described sufficient
11 in your view as an epidemiologist?

12 A The measures described are the measures -- I'm sorry.

13 MR. MASTRO: Your Honor, I object.

14 THE COURT: He may answer.

15 A The measures described are measures that have been
16 recommended to churches throughout New York State and many, if
17 not all churches, are -- many of them are implementing them.

18 Having -- in an area of increased risk, the same --
19 you know, additional measures may be needed in order to try to
20 minimize spread from the community, throughout the community.

21 Q Okay. Now, Mr. Mastro asked you about a variety of
22 stores. He has Target, Staples, and some other ones in there.

23 As an epidemiological matter, are those situations
24 the same as a church service in your view?

25 A In many cases --

1 MR. MASTRO: Objection, Your Honor. Objection this
2 is not even --

3 THE COURT: Overruled. You can ask on recross. Go
4 ahead.

5 A In many instances, they may not be. The retail
6 establishments are often go in, pick something up, leave.
7 Being in, you know, one of these establishments for a very
8 short period of time, oftentimes with -- where people are not
9 doing things like, you know, talking, singing, chanting,
10 things of that nature. So in some ways they are very
11 different.

12 THE COURT: Sir, have you ever been in a Trader
13 Joe's?

14 THE WITNESS: I have.

15 THE COURT: Go ahead.

16 THE WITNESS: Right. I can't -- I will not say that
17 all of them will be. But, you know, going in a Trader Joe's
18 is certainly different than going into, you know, my local
19 Staples or my local hardware store. You know, they're
20 definitely -- the Trader Joe's where I live still has a line
21 around the block because they are restricting entry and
22 limiting the number of people that are inside at any given
23 time.

24 THE COURT: But for Trader Joe's the State isn't
25 doing an inspection as to the circulation of air in the Trader

1 Joe's, with lots of people coming and going even if there is a
2 certain restriction of the number, there is not a restriction
3 on how long they can stay inside and how many aisles they can
4 go in, and so forth. The Trader Joe's, for instance -- and
5 that's not about a big supermarket -- will have a certain
6 amount of activity over a long period of time by any given
7 individual and there are the epidemiological issues having to
8 do with the circulation of air and the circulation of people,
9 and there's no regulation of that in the state, right?

10 THE WITNESS: Correct, because it's been deemed an
11 essential business. Risk and -- I'm sorry?

12 THE COURT: Right. And so you enter one of these
13 facilities at your own risk, basically?

14 THE WITNESS: Correct. And risk is typically a
15 function of distance and time. So it's a function of your
16 distance to somebody who is positive to be able to be exposed
17 to that air and/or how long you are exposed to that particular
18 individual as well. It's how we define contact through a
19 particular case.

20 THE COURT: Does the State have any rules regarding
21 providing early shopping for senior citizens in some of these
22 more crowded venues that are not subject to other rules? In
23 other words, from just to 7:00 a.m., if you are a senior
24 citizen, you can go in and do your shopping to the exclusion
25 of other people so that you maintain social distancing and

1 limit the number of people in the facility, does the State
2 have rules about that?

3 THE WITNESS: To the best of my knowledge that is
4 something that is voluntarily being implemented by stores
5 themselves as opposed to there being a specific suggestion or
6 regulation from the State.

7 And the other thing, with grocery stores it's -- my
8 particular grocery store that I go to, for example, has all
9 sorts of arrows on the ground and they say that put it in a
10 layout of how people are supposed to flow through the store,
11 but they clearly do not. So sometimes what businesses say is
12 being done in order to try, you know, prevent spread may not
13 necessarily be followed by their customers no matter what the
14 business or industry may be.

15 THE COURT: These are steps that are implemented by
16 the store voluntarily to help maintain social distancing, but
17 it's not something that the State has mandated?

18 THE WITNESS: There definitely are suggestions that
19 are put in in terms of the right way in terms of people flow,
20 and so forth. But it's not -- I don't think there's a
21 mandate, enforcement of any of that.

22 THE COURT: All right. Thank you.

23 Do you have more, Mr. Farber?

24 MR. FARBER: Very brief, Your Honor.

25 THE COURT: Go ahead.

1 BY MR. FARBER:

2 Q Mr. Mastro asked you about alleged prior outbreaks or
3 prior infections at the churches in the diocese. I believe
4 this concerned the three or four months prior to the discovery
5 of the COVID clusters. Are you aware of that?

6 A I believe so. I think the -- the identification of the
7 most recent clusters of the zones, is that what you're getting
8 at?

9 Q Yes. When was the most recent timing of the most recent
10 clusters?

11 A I'm sorry. I'm not understanding your question.

12 Q I'm sorry. My fault.

13 Do you recall when the clusters that resulted in the
14 cluster initiative were identified?

15 A Yeah. These were based on rolling averages of -- I
16 believe it's seven days of data. So, seven previous days of
17 increasing rate -- of increasing incidents and rates of
18 positive test results.

19 Q Do you recall in what month these clusters were
20 discovered?

21 A September.

22 Q What were the State's overall positivity rates in the
23 three months before that, in June, July, August?

24 A Approximately one percent. On some days it was as low as
25 .6 or .7 percent.

1 Q So, in fact, it would be -- so during that period, it
2 would not be particularly surprising to you if a number of
3 churches or a great number of churches did not report
4 outbreaks of COVID-19?

5 A Correct. It seemed that there was less virus circulating
6 in the community at that point in time as well.

7 Q And, in fact, is the fact that there were no prior
8 outbreaks relevant with respect to a situation where clusters
9 do develop in these given areas?

10 A It is more difficult to -- it's less likely to have an
11 outbreak or a cluster if there's less virus circulating in the
12 community.

13 Q So in your view, if there's more virus circulating in the
14 community, there is more likelihood of an outbreak? Is that
15 fair to say?

16 A Correct.

17 Q Okay. And as far as you know, the areas designated red,
18 orange, yellow, do, to the best of your knowledge, reflect
19 data points showing higher incidents of COVID-19; is that
20 correct?

21 MR. MASTRO: Objection to form. Leading his own
22 witness.

23 THE COURT: You may answer.

24 A From the data I've seen, the clusters reflect the
25 geographic distribution of higher incidence rates.

1 THE COURT: Have you ever heard of micro clusters,
2 sir?

3 THE WITNESS: Sure.

4 THE COURT: Now, apparently, the Governor takes the
5 position that the orthodox community is not following red zone
6 rules, and that, for the most part, they never followed
7 general rules, even though the orthodox community is trying to
8 be cooperative according to the Governor.

9 Is that your understanding of what's going on in the
10 orthodox community?

11 THE WITNESS: I've had experience with the orthodox
12 community in the past and they can be a very difficult
13 community to deal with. I think our main concern here is
14 trying to prevent, you know -- if there is illness circulating
15 in a portion of a community, I think our concern is trying to
16 prevent it from spreading into other areas of the community.

17 THE COURT: I see.

18 THE WITNESS: We've seen this in other parts of the
19 State where we have had, you know -- I'm working on outbreaks
20 now in the southern tier of New York where we had clusters
21 associated one with a church, one with a bar and that have
22 basically led to broad non-cluster community outbreaks across
23 the entirety of three counties. That's what we're trying to
24 prevent here. We're trying to prevent a small group of people
25 that are all connected to one another to turning into a large

1 group of people that may be not as connected with one another.
2 That's where the virus sort of gets a foothold in a particular
3 area and it's sort of difficult to sort of squash it back out
4 again.

5 I'm a little concerned that that has happened in
6 some cases in parts of the southern tier already, and part of
7 these rules are to try and see if there is a way to minimize
8 that here in portions of New York State.

9 THE COURT: I see. Well, take these numbers and
10 tell me what you think, according to the information that I
11 have from the Governor's press conference today, as I
12 mentioned earlier, it is recorded that 4.84 percent positivity
13 rate in the red zone overall, .99 outside the red zone, and an
14 overall aggregate of 1.09 percent, if that's the case, would
15 you be recommending an adjustment of the limitation based upon
16 what appear to be a reduction from eight percent of positivity
17 in the red zone? Is this something that you would recommend
18 or might recommend to your superiors to recommend to the
19 Governor?

20 THE WITNESS: I think -- so hearing that data, it
21 makes me think that some of -- since this has gone on for
22 approximately 10 days or so now, it makes me think that some
23 of the targeted steps in red zones areas may be having an
24 impact and that the steps that were taken to reduce density,
25 to try and keep people from being in as much contact with one

1 another as they were maybe 15 days ago is supposed to
2 potentially having an impact.

3 It does show that there still remains a problem in
4 this particular area. The fact that we can look outside this
5 particular area and see that, you know, roughly one percent
6 rate that we've seen pretty consistently for the past several
7 months, what we would like is we would like this community to
8 go back to that one percent rate that we're seeing in areas
9 sort of outside the red zone.

10 So I think the goal of all this was to try to have
11 it be something targeted so that it disrupted the least amount
12 of people but large enough so that you can actually make an
13 important impact to try and reduce that incidence rate.

14 THE COURT: I had one other question. You said at
15 the beginning of your testimony that the first time you
16 learned about -- I didn't write it down, but let me ask you
17 about it. You said something about the first time that you
18 learned about someone who was positive for COVID had come from
19 China to New York; is that right? That was in January?

20 THE WITNESS: Yeah, what happens is we have a system
21 in place where physicians can call us any time day or night if
22 they suspect an urgent emerging disease, I'm at the top of
23 that list to get those phone calls. The first call I got was
24 January 22nd, and I got five of them that night because that
25 was Washington State had reported their first positive case

1 that day.

2 So we obviously had a number of physicians seeing
3 people from China in emergency rooms in New York State making
4 phone calls and saying hey, might this be that particular
5 disease, how can I get a person tested. So that's what I am
6 referring to.

7 The first real case that we wound up seeing in New
8 York, I think as we all know, was just about March -- it was
9 like February 29, March 1 or so.

10 THE COURT: Was there any contact tracing to
11 indicate where that person had come from?

12 THE WITNESS: So the very first case that we saw in
13 New York State was somebody from New York City who had
14 traveled to -- I want to say it was Iran. But the second
15 case, which was the one in New Rochelle, which led to the
16 much, much larger outbreak, there was a lot of contact tracing
17 there. We know that was a superspreader event that happened
18 in association with what appeared to be a religious
19 celebration, you know, there were people who were not part of
20 the community but were there doing things like catering, so
21 forth and so on, all tested positive.

22 THE COURT: But the contact tracing didn't indicate
23 where that originated, whether it was Iran or China, or
24 somewhere else?

25 THE WITNESS: Correct. Right. At that point in

1 time I don't know -- I'm sorry?

2 THE COURT: Go ahead.

3 THE WITNESS: So I don't believe that there --
4 sometimes it feels like forever ago at this point. So I don't
5 recall that we have been able to, you know, identify where
6 that very first case in New Rochelle -- you know -- what their
7 link was or how they were exposed.

8 THE COURT: And when was the time that you had a
9 case that was reported to you that originated in Europe, if
10 you remember?

11 THE WITNESS: Oh, boy. I can't tell you that it
12 would be the very first one, but I definitely remember a
13 person from Ulster County who had recently returned to the
14 United States. We found him -- we didn't find him. That's
15 the wrong way to say it. He presented symptomatic after
16 spending two weeks in France. I'm sure there were others
17 before that, but that was -- that's the first recollection I
18 have of one that I personally worked on with the individual.

19 THE COURT: Thank you very much.

20 Anything else, Mr. Farber?

21 MR. FARBER: Not from me, Your Honor. Thank you.

22 THE COURT: Okay. I hate to ask, Mr. Mastro, do you
23 have anything else?

24 MR. MASTRO: Well, if Your Honor would indulge me
25 for just a few minutes, I promise to be very brief.

1 THE COURT: Go ahead.

2 MR. MASTRO: Thank you.

3 RE-CROSS-EXAMINATION

4 BY MR. MASTRO:

5 Q Sir, am I correct that you are aware of spread of COVID
6 within the ultra orthodox community in Brooklyn; correct?

7 A That's been well reported, yes.

8 Q But you are not aware of any evidence of the spread of
9 COVID from the ultra orthodox community to the diocese's
10 churches in Brooklyn and Queens; correct?

11 A I am not privy to the contact tracing that's been being
12 done by the New York City Health Department, so I don't know
13 if there are New York City residents who may go to these
14 churches who may have, you know, worked with someone in the
15 orthodox community or something like that, so I can't answer
16 that.

17 Q Sir, a simple question: You're not aware of any evidence
18 of spread of COVID from the ultra orthodox community to the
19 diocese's churches in Brooklyn; correct?

20 MR. FARBER: Objection.

21 THE COURT: He may answer. Go ahead.

22 A I'm not aware, but it doesn't mean it doesn't exist.

23 Q Now, sir, you said -- you talked about some important
24 factors in connection with enterprises, businesses, essential
25 businesses that are allowed to stay open without any capacity

1 restriction. You talked about the time that someone spends in
2 a store. Do you remember that, sir?

3 A I do. Yes.

4 Q And I respectfully suggest to you that in forming the
5 question, but my wife is going to be part of these
6 proceedings, that there are people who go to Target and spend
7 hours, they shop, they clothes shop, they food shop, they do
8 all sorts of stuff at Target, and they spend hours?

9 MR. FARBER: Objection.

10 THE COURT: I'm sorry, the Court will take judicial
11 notice of the fact that people who go shopping at big box
12 stores sometimes browse through the store for a long period of
13 time. It's a form of recreation for some people and sometimes
14 don't even buy anything. So let's move on.

15 Q Sir, the catholic churches and the dioceses have actually
16 limited the time of the mass so that parishioners spend less
17 time in the churches. You are aware of that; right?

18 A From earlier testimony.

19 Q And you talked about your concern about singing and
20 chanting. Are you aware that the diocese is prepared to
21 eliminate choirs and parishioners singing and having the
22 cantor removed at least 12 feet from anyone else in the
23 cathedral? You heard that testimony; right, sir?

24 A I heard that about singing. I was born and raised a
25 catholic as well. I mean, I know that there are many times in

1 the mass where the -- where parishioners are reciting prayers
2 out loud. I don't know if that has been changed or not.

3 Q And then they have been limiting the time in church,
4 according to the testimony you heard earlier; correct, sir?

5 A Correct.

6 Q You talked about arrows on the ground at certain of these
7 big box stores. You know that the catholic church is doing
8 that to make sure of social distancing, sitting every other
9 row, and sitting at least six feet apart in a row, and arrows
10 on the ground? You heard that testimony earlier; right, sir?

11 A I did.

12 Q And, sir, isn't it the case that you know in the catholic
13 churches they are rigorously enforcing the mask requirement
14 and social distancing? And you heard the testimony that
15 people have to leave if they don't? And you heard that
16 testimony; correct?

17 A I did hear that testimony.

18 Q Now, sir, you talked about how long somebody is in a
19 place. Well, all of those businesses, likes the banks and the
20 accounting firms and the brokers, the employees in confined
21 spaces are going to work 8:00, 9:00 in the morning until 5
22 o'clock in the afternoon, and customers are coming out and
23 into their offices in that confined space over the course of
24 that eight-or nine-hour day; isn't that right, sir?

25 A It is. I mean, to the -- you know -- I'm sure there are

1 some working virtually. I'm sure there are some who may be in
2 the office working full shifts.

3 Q And there is no restriction on capacity in any of those
4 places; right?

5 A Correct.

6 Q And they are essential services; right?

7 A Correct.

8 Q Are you aware any COVID spike or outbreak in any house of
9 worship in a red zone in Brooklyn besides the ultra orthodox
10 community, yes or no?

11 A I'm not aware of any at this particular point in time.
12 New York City may have additional information.

13 MR. MASTRO: Thank you. I have no further
14 questions, Your Honor.

15 THE COURT: Anything else from you, Mr. Farber?

16 MR. FARBER: I'm sorry, I'm getting some weird
17 sound. No, Your Honor, nothing further from me.

18 THE COURT: Okay. All right. Mr. Backenson, thank
19 you very much. You are excused.

20 THE WITNESS: Thank you.

21 THE COURT: Does the defense have any other
22 witnesses?

23 MR. FARBER: I do not at this time, Your Honor.
24 Your Honor has asked for a declaration to be filed by tomorrow
25 morning.

1 THE COURT: Yes, please.

2 I don't want to take comments that are attributed to
3 the Governor at a press conference as accurate and without
4 some further delineation in a declaration and I would not want
5 to rely on it without clarification. That is why I have asked
6 for a declaration as to current state of the positivity rate
7 in the red zone and in the yellow zones. So you understand
8 that we're just trying to be careful not to assume or conclude
9 anything that may not be current evidence.

10 MR. FARBER: Yes, Your Honor.

11 THE COURT: Now, the next step, Mr. Mastro has asked
12 to make a brief closing, and I'm really not sure whether Mr.
13 Mastro wants to do that or make a submission between now and
14 tomorrow morning, but I'm happy to take your comments now.

15 We've had a substantial amount of written
16 submissions and some of these issues depend on the state of
17 the law at the present time.

18 Let me just say this, it's not clear to me what the
19 state of the law will be this month because it is all subject
20 to consideration by the appellate courts, consideration by the
21 appellate courts as to whether a situation like the
22 plaintiff's situation is subject to strict scrutiny analysis.
23 And at present, it would seem that the Supreme Court has
24 basically indicated in *South Bay* by a five to four vote that
25 that a strict scrutiny should not be applied to a free

1 exercise claim here. But I don't know what will be the case
2 if this case -- whatever I decide -- goes up to the Second
3 Circuit, and potentially some case goes to the Supreme Court
4 in the next month or two. So I'm just a little concerned that
5 whatever I do is going to be the subject of appellate review
6 and the rules may change depending on the composition of a
7 panel on the Circuit Court or the composition of the Supreme
8 Court.

9 So, Mr. Mastro, I would want to hear from you
10 whatever you have to say now briefly. But I would also say to
11 the State that if the circumstances have improved, I would ask
12 to know whether the State is planning to revise the parameters
13 of the limitations that it has placed on religious worship in
14 the zones, the red, the orange, and yellow zones. I would
15 like to know that as well from the State. If the State's
16 position is it's going to continue with those restrictions,
17 you can put that in your declaration tomorrow morning as well,
18 so at least we know where we are as of now.

19 The defense witness indicated that the current rules
20 for these hot zones, if you will, were predicated on what
21 happened last month. It appears that the situation has
22 improved, but whether it has improved sufficiently to permit a
23 revision of the rules is something that I would like the State
24 to opine on between now and tomorrow morning.

25 Do you understand that, Mr. Farber?

1 Mr. Farber? Mr. Farber?

2 THE COURTROOM DEPUTY: We lost him, Judge.

3 THE COURT: When did we lose him?

4 THE COURTROOM DEPUTY: We lost him a couple of
5 minutes ago.

6 THE COURT: At what point in my statement and to the
7 parties did we lose him?

8 THE COURTROOM DEPUTY: It was right at the end,
9 Judge. I saw him.

10 THE COURT: Let's wait for him to come back and then
11 I will repeat the request.

12

13 (Pause in proceedings.)

14 (Continued on the following page.)

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1 (Continuing)

2 MR. FARBER: Your Honor?

3 THE COURT: Yes, Mr. Farber, how are you?

4 MR. FARBER: I apologize. For some reason, I am
5 muted. I still hear the Court but the Court doesn't hear me.

6 THE COURT: Did you hear my request regarding any
7 changes that might be under consideration for the rules
8 regarding these three zones?

9 MR. FARBER: I did, your Honor, and we will include
10 that in our submission.

11 THE COURT: All right. Could you give me that by
12 10 a.m. tomorrow morning?

13 MR. FARBER: 10 a.m.

14 THE COURT: 10 a.m. would be fine. And, of course,
15 upon receiving that, the Plaintiff can make a submission, a
16 brief submission, if it wishes, by 1 p.m. tomorrow.

17 I'm sorry, I didn't hear you, Mr. Mastro.

18 THE COURTROOM DEPUTY: You're on mute.

19 THE COURT: I'm reading lips. I think he said yes.

20 (Pause in proceedings.)

21 MR. MASTRO: Can you hear me now, your Honor?

22 THE COURT: Yes, indeed, sir.

23 MR. MASTRO: Thank you so much. Thank you, your
24 Honor, we appreciate that opportunity to comment on what the
25 State submits.

1 I will be really brief now, but I really wanted to
2 address two points your Honor made.

3 THE COURT: Please. Go ahead.

4 MR. MASTRO: First, your Honor's observation about
5 *South Bay*.

6 Respectfully, I don't think *South Bay* affects the
7 issues that exist at this time at all. We are seven months
8 into the period where states have gone through litigation
9 measures and the like. *South Bay* concerned an issue of an
10 extraordinary writ of injunction. That's what the Supreme
11 Court grants sparingly and only in the most critical and
12 exigent circumstances when rights are indisputably clear.

13 And it was at the beginning of the pandemic, a
14 five-to-four decision, and Justice Roberts explained some of
15 the rationale of his concurrence. But I don't have any idea
16 how the Court would break down on these issues today with a
17 track record in place. In fact, many courts have said that
18 you have to base these decisions when you're infringing upon
19 religious rights on the circumstances as they exist and
20 subsequently develop.

21 Early on in the pandemic, the Court was not willing
22 to take up an extraordinary writ of injunction, which is
23 something the Court only does when a TR0 has been denied and
24 it's trying to decide whether it's so exigent a circumstance
25 that it should under those circumstances and the Court simply

1 does not do it absent clear error. It's almost like a
2 mandamus situation. Early on in the pandemic, the Court five
3 to four ruled the way it did.

4 But that case and subsequent cases, including the
5 *Elrod* case in the Seventh Circuit, said circumstances change
6 over time. So, what a Court is willing to do at the beginning
7 of the pandemic isn't necessarily what a Court should do
8 today, religious infringement, particularly in a case like
9 this.

10 I refer your Honor specifically to the Sixth
11 Circuit's decision in *Roberts v. Neace*, in which they ruled on
12 more of a record. They ruled that, quote, "While the law may
13 take periodic naps during a pandemic, Courts will not let it
14 sleep through one."

15 And they ruled that the Baptist church there could
16 reopen; with social distancing and mitigation measures, should
17 be allowed to reopen and that its First Amendment free
18 expression rights were being violated.

19 The *Soos* case in the Northern District of New York
20 as well supports this motion. And most recently -- their
21 finding strict scrutiny applies in those cases. And most
22 recently the *Capitol Hill Baptist* case, decided just last week
23 by a District Court in D.C., found strict scrutiny applied and
24 that that Baptist church should be allowed to reopen by
25 implementing the social distancing measures.

1 I respectfully submit to your Honor this testimony
2 today has been elucidating because whether you apply strict
3 scrutiny or rational basis, there is no rational basis for
4 restricting the religious exercise of the Catholic churches in
5 the Diocese as this record is bereft of any evidence, any
6 evidence, that there has been any spread, surge, outbreak of
7 COVID in any of the Catholic churches in the Diocese.

8 The only evidence is of spread and outbreak in a
9 certain community, the ultra-Orthodox Jewish community, and
10 there's no evidence of any spread beyond that community into
11 the Catholic churches. And that's a track record over three
12 plus months and includes September and early October, before
13 the Governor imposed this order.

14 Your Honor, whether you're applying strict scrutiny
15 or rational basis, what is the rational basis for restricting
16 the Catholic churches who have done everything right and had
17 no outbreak and had no surge in COVID from their free
18 exercise?

19 They have been doing everything right. And even the
20 State's witness said that all the things they're doing are the
21 right things for them to do and candidly admitted he and the
22 State is not aware of any evidence, any evidence, of spread
23 into any of the Catholic churches.

24 And your Honor, what is the height of irrationality?
25 The health department didn't write this executive order. The

1 health department didn't decide the cutoffs. The health
2 department didn't decide the hatchet that was put to all
3 houses of worship. It was done in the Governor's office,
4 where there isn't any epidemiologist, scientist, or M.D.
5 involved in the drafting. That's the height of irrationality.

6 First Amendment requires more, your Honor. It
7 requires strict scrutiny. And even if your Honor were to find
8 that that's an open question, I respectfully submit there's no
9 rational basis for this.

10 The Governor's own admissions about the origins of
11 things, who is responsible, and how he approached the problem,
12 writing the executive order himself, no epidemiologist, he
13 took a blunt instrument when you're not allowed to do such a
14 blunderbuss approach when it comes to restricting religious
15 exercise.

16 So, I respectfully submit the hearing has
17 established the record that Judge Komitee said we should have
18 at a preliminary injunction. We have more fully developed the
19 record. We have heard from the State's witness. The State
20 has no evidence to support the restrictions on the Catholic
21 Church. We've heard admissions that it's conceded the
22 Catholic Church is doing everything right and hasn't had any
23 outbreak of COVID in these red and orange zones.

24 And we have heard the words of the Governor himself.
25 There's nothing tailored about this. This is a problem in one

1 community and he's sweeping too broad a brush. And we have
2 heard the Governor in quite graphic terms basically admit a
3 First Amendment violation.

4 So, I respectfully submit, your Honor, and I'll
5 close with this, I know the Attorney General answers to the
6 Governor, and I'm answering to a higher authority. And I am
7 referring to you, your Honor, and referring to a higher
8 religious authority.

9 I am reminded of the immortal words of John Belushi
10 in the Blues Brothers movie, "We're on a mission from God."
11 These people, these Catholics in the Diocese, have done
12 everything right. The City admits that they've done
13 everything right. And the State admits they have had no COVID
14 outbreaks or spread. They simply cannot sweep so broadly
15 under such circumstances under the First Amendment.

16 And even if your Honor thought it was a close
17 question on whether ultimately strict scrutiny were likely to
18 succeed or we met and we have stated a substantial question, I
19 respectfully submit to you that irreparable harm is presumed
20 for the constitutional law, the *Elrod* case, on whether you are
21 infringing on religious freedoms.

22 And on balance of equities, I respectfully submit to
23 you my clients, the Diocese, supported by the Archdiocese and
24 these Catholic churches and parishioners, your Honor, this is
25 vital to their life, their spirit, their soul, to be able to

1 go to Mass.

2 And the government doesn't have an interest in doing
3 something that's unconstitutional. And when it does something
4 to infringe on religious liberties, it better have a
5 compelling interest and evidence to show that anything that is
6 happening in those Catholic churches needs to be addressed
7 because of that compelling interest.

8 I respectfully submit this hearing established
9 beyond question that the State cannot possibly meet that
10 burden. And it is ultimately the State's burden. But on a
11 preliminary injunction, our burden, the balance of equities is
12 decidedly in our favor.

13 I will end with this: The Bishop -- I know the
14 Governor cares about people, but nobody cares more about the
15 safety of his parishioners in his Diocese than this bishop and
16 the bishop who testified here today. They have done
17 everything to protect their parishioners; they closed down
18 before the State required them to, they imposed stricter
19 restrictions on themselves than the State required of them.

20 But this is a bridge too far. The Governor has gone
21 too far by not recognizing that he should be enforcing and
22 using the health department's enforcement mechanism that this
23 witness admitted they have to go after the real problem. He's
24 painted with too broad a brush. Can't do that to these
25 churches. You can't do that to all houses of worship when

1 there's no evidence of a problem there and they're doing all
2 the things the right way. Whether it's strict scrutiny or
3 rational basis, there was none for what the Governor did here.

4 And we implore you, we pray, that our clients will
5 be able to go back to Mass this Sunday.

6 Thank you, your Honor.

7 THE COURT: Thank you.

8 Mr. Farber?

9 MR. FARBER: Thank you, your Honor.

10 Your Honor, this very proceeding that we are
11 proceeding, you know, by Zoom demonstrates that we are in very
12 fraught times. New York, through the heroic measures of first
13 responders, emergency service personnel, medical personnel,
14 government officials, and, most importantly, the people of the
15 State, have successfully brought down COVID-19 infections in
16 the State to a low level, hovering around one percent or less
17 most of the time.

18 The price of liberty and the price of maintaining
19 COVID is eternal vigilance. There are outbreaks in particular
20 geographic regions. Whether or not those outbreaks can be
21 attributed as a fault matter to a given community is
22 irrelevant here. The virus doesn't care whose fault it is.
23 The virus cares that there are people around capable of
24 spreading the virus.

25 And if Catholic churches are in a neighborhood with

1 a high incidence of virus, basically what the Plaintiff is
2 asking here is to be permitted to bring -- I think their
3 evidence is some of their churches hold well over a thousand
4 people -- hundreds of people together, whether or not they are
5 spread out with masks, whether or not there are other
6 measures.

7 This is risk mitigation. And, so, the question from
8 the community standpoint is, is a temporary measure -- the
9 executive order itself runs to November 2, there's language in
10 there it will be reconsidered within a couple of weeks -- is a
11 temporary measure under these circumstances appropriate here?

12 Under the *Jacobsen* standard, there is no question.
13 As the Supreme Court said, the community has the right to
14 protect itself against an epidemic of disease which threatens
15 its members. And in such times, judicial scrutiny is reserved
16 for measure that has no real or substantial relation to the
17 object of protecting the public or is beyond question of
18 plain, palpable invasion of rights secured by the fundamental
19 law.

20 There is no question that the objective of Executive
21 Order 202.68 is to protect the public, to hopefully stop this
22 cluster and spread, to get the statewide cases down again.
23 That's what this is about.

24 It simply does not matter that some people are
25 behaving in riskier manners than others. Basically, this is a

1 legislative judgment and the State is imposing a reasonable
2 health measure. The fact is, the measure is temporary, it's
3 confined to limited areas; as the witness testified to, that
4 he recognized as those areas containing the higher COVID
5 rates.

6 So, you know, this law has been the law of the land
7 between *Jacobsen* in 2020 through *South Bay* at the end of May
8 of this year. I might add that *South Bay* was decided several
9 weeks after the *Roberts* case that Mr. Mastro was referring to.
10 I might add also that the *Capitol Hill* case he was referring
11 to was an RFRA case, not applicable here.

12 But, in any event, that long line of cases, all the
13 way through a case called *Agudath Israel*, in which Judge
14 Matsumoto, of this court, applied the *Jacobsen* standard to the
15 very executive order here because we understand no one is
16 disputing the importance of the right -- the First Amendment
17 rights and the free exercise rights here. But in this case,
18 the risk to the community of permitting the size of the
19 gathering that the Plaintiff is seeking presents a risk that
20 the State is undertaking mitigation.

21 As we argued in our papers -- I'm not going to
22 belabor that point, but in this case, comparable secular
23 conduct is not treated more harshly. In fact, in the red
24 zones, all other gatherings except in the essential businesses
25 are banned. So, admittedly, 10 or 25 people is a small

1 gathering, but religion and religious activities are not being
2 discriminated against.

3 Further, the lines were drawn narrowly to reflect
4 where the outbreaks are. We would argue, as we argued in
5 papers -- again, I'm not going to belabor that -- even if
6 strict scrutiny applies, Plaintiff's claims would still fail.

7 But, again, this is an injunction application by
8 Plaintiff. It's a mandatory injunction against the
9 government. They have to prove probability of success on the
10 merits, they have to prove irreparable harm, they have to
11 prove balance of the equities, and that the public interest
12 favors this release all by a heightened standard. And the
13 fact of the matter is they haven't.

14 The fact is what they are proposing, to reopen
15 churches in the middle of hot spots in a pandemic zone, taking
16 hundreds of people, presents an unreasonable risk in the view
17 of the government as a matter of public health and safety.
18 The government is acting here.

19 So, the question, as I understand, there will be a
20 disruption in people's religious practices. The
21 counterbalance to that is the health and safety of the
22 community. And, you know, as we've learned too tragically
23 from earlier this year, this disease, if it gets a foothold,
24 can spread rapidly and throughout the state. That's what
25 we're trying to avoid. That is the Governor's interest here.

1 Thank you, your Honor.

2 THE COURT: Thank you.

3 Apparently, the Governor said today that the
4 Orthodox community is not following the red zone rules. And
5 I'm wondering at what point the balance will shift from the
6 general rule that you articulate regarding the responsibility
7 of the government to protect the public health to a situation
8 where if a particular part of the community doesn't follow the
9 rules, whether -- I'm going to say a victim of another's
10 negligence or misconduct is forced to have their
11 constitutional right of free exercise of religion restricted
12 by the fact that there's another part of the community that is
13 not following the rules and apparently the government is not
14 able to force that part of the community to follow the rules.

15 There has to be a tipping point here where you can
16 enter a church under these restrictive procedures in a
17 neighborhood where others are not following the rules. I'm
18 wondering when that point is reached and who is going to
19 enforce the rules in such a way that the Plaintiff here can
20 restore activities in these churches if the Court finds for
21 the State. And that's a problem that I don't think we've had
22 an opportunity to talk about here today.

23 Mr. Mastro would like to say something, then I'll
24 get one more comment from Mr. Farber, and we'll wind it up.

25 Mr. Mastro, briefly.

1 MR. MASTRO: Thank you, your Honor.

2 You went right to the heart of it. The State's
3 witness testified that the State has the authority to enforce,
4 it knows where the problem is in the ultra-Orthodox community,
5 and, yet, he said he's not aware of any efforts to have
6 enforced in that community. That's where the government
7 should be focusing its attention.

8 And, of course, under strict scrutiny, its
9 blunderbuss approach of all houses of worship is the
10 antithesis of a narrowly tailored approach in enforcement.

11 But your Honor, I have to address this because
12 Mr. Farber keeps misstating the holding in *Jacobsen*. The
13 holding in *Jacobsen* was that a state has discretion to protect
14 public health and safety but, but, quote, "subject, of course,
15 to the condition that no rule prescribed by a state shall
16 contravene the Constitution of the United States nor infringe
17 any right granted or secured by that instrument," end quote.
18 That's on Page 25 of *Jacobsen*. He always leaves that out.

19 This is that case. This is that case where the
20 State isn't enforcing where it should be and painted with too
21 broad a brush. And it's entirely irrational to invade the
22 religious liberties of the Catholic Church.

23 And this isn't -- and I have to correct Mr.
24 Farber -- this isn't a mandatory injunction, this isn't a
25 heightened standard. It's a prohibitory injunction. The

1 Governor and the State shouldn't be enforcing those twelve
2 words that go too far.

3 Yes, the Catholic Church will do the 25 percent it
4 has been doing. We'll do that even in orange and yellow
5 zones. That's what it's been doing even though it could be
6 substantially more. It's that it is only 10 and only 25 in a
7 red and orange zone. In a Catholic church, that's basically
8 shutting the door. What's the priest supposed to do, say
9 after the ninth parishioner, "No one else can come in and
10 enjoy the Holy Sacrament and the Mass"?

11 Your Honor, without any evidence of any problem in
12 any of those churches in all this time and the churches doing
13 everything right, as the State admits, I come back to where I
14 started, which is it doesn't help them. And this is already
15 the circumstance where the State hasn't exercised its
16 authority properly and it hasn't enforced where it should be
17 enforcing. And the Governor is still to this day talking
18 about the real problem as the Orthodox community.

19 Well, where's the enforcement there? Where's the
20 enforcement? Where are the fines?

21 On the face of the executive order, it says \$15,000
22 an offense. Go in there with your --

23 THE COURT: I hate to do this, Mr. Mastro.

24 MR. MASTRO: Sorry, your Honor.

25 THE COURT: There's an article in today's Wall

1 Street Journal entitled, "Cuomo threatens to withhold funds
2 from New York City, other COVID-19 hot spots," and there is a
3 paragraph in here that indicates that, quote, "Last weekend,
4 New York City authorities gave out more than 100 summonses in
5 State-designated restricted zones for a variety of violations,
6 including holding mass gatherings. Officials said they issued
7 more than \$150,000 in fines," end quote.

8 So, efforts are being made according to this
9 article, which I take notice of just in connection with what
10 you just said.

11 MR. MASTRO: Yes.

12 THE COURT: But the question is, my question is,
13 whether a \$15,000 fine is going to cause people to change
14 their behavior in large groups. That remains to be seen. But
15 I appreciate you're mentioning that.

16 MR. MASTRO: I appreciate that, your Honor. And I
17 wasn't suggesting there hasn't been any enforcement at all.

18 It happens to have happened after this latest
19 executive order for the first time. By the City, not by the
20 State. It should have happened before this executive order
21 and it's what should have been done repeatedly in weeks of
22 September leading into October if they're trying to address
23 the problem where it really occurs.

24 It doesn't change, your Honor --

25 THE COURT: I understand your point.

1 MR. MASTRO: The Catholic churches have done
2 everything right and they don't have any outbreak or spread.
3 They don't. And they didn't into early October. Zero.

4 So, how do you punish them for what's happening in
5 another community when there's no evidence of spread from that
6 one community into these other churches?

7 It's not right. The First Amendment says you
8 shouldn't do it, whether it's strict scrutiny or rational
9 basis.

10 Thank you, your Honor.

11 THE COURT: Thank you.

12 Mr. Farber, anything to close this out?

13 MR. FARBER: Your Honor, this is not about
14 punishment, this is not about fault finding. This is about a
15 relentless little virus who really doesn't care whose fault it
16 is. This is about protecting the entire public, the over
17 19 million people in the State of New York, many of whom are
18 parishioners of the Diocese.

19 The fact is this is a public health measure. It is
20 temporary, it is narrowly drawn, it will be revisited by its
21 own terms based on the data. If the State is successful in
22 crushing this cluster, then it will be modified sooner. If
23 things develop the other way, then other methods will be taken
24 by the government to protect the public health. There's a
25 long line of authority that the State can do that.

1 Thank you, your Honor.

2 THE COURT: You will concede, sir, that if the
3 Orthodox community had followed the same protocols as the
4 Diocese of Brooklyn followed in terms of holding its services
5 and following the protocols that have been described by the
6 two witnesses for Plaintiff that we wouldn't be here having
7 this discussion probably, would we?

8 MR. FARBER: Probably, your Honor? You know, again,
9 I don't know.

10 It is well established that these are where the
11 clusters are. You know, we assume that some people are
12 engaging in riskier behaviors in large numbers in these
13 communities. But, again, whether -- regardless, again, as I
14 say, regardless of fault or not fault or just happenstance,
15 whether it is or not, the Government's interest is in
16 protecting the entire community. Sometimes in a case like
17 this, maybe it has to protect them as a result of some
18 people's actions. That's not unprecedented. But that's what
19 the government is doing here.

20 So, you know, with respect to the long line of
21 *Jacobsen* cases, the government is entitled to a rational basis
22 review, and what the government is doing here is rational.

23 Thank you, your Honor.

24 THE COURT: All right, everybody, thank you very
25 much for your attention today. The Court reserves decision

1 and will await the additional materials that it has requested
2 for tomorrow.

3 Have a good evening, everyone. Good to see you all.

4 (A chorus of thank yous.)

5 MR. MASTRO: I really, really appreciate all the
6 time and consideration. Thank you, thank you, thank you.

7 MR. FARBER: Good night. Thank you.

8 THE COURT: Good night, everybody. Stay safe.

9

10 (Matter concluded.)

11

12

13 *We certify that the foregoing is a correct transcript from*
14 *the record of proceedings in the above-entitled matter.*

14

15 /s/ Linda A. Marino
LINDA A. MARINO

October 16, 2020
Date

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EXHIBIT E
(Dist. Ct. Dkt. No. 15)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

THE ROMAN CATHOLIC DIOCESE OF
BROOKLYN, NEW YORK,

Plaintiff,

MEMORANDUM & ORDER
20-cv-4844 (NGG) (CLP)

-against-

GOVERNOR ANDREW M. CUOMO in his
official capacity,

Defendant.

-----x

ERIC KOMITEE, United States District Judge:

The Plaintiff in this case, the Roman Catholic Diocese of Brooklyn, seeks a temporary restraining order and preliminary injunction against Governor Cuomo’s Executive Order No. 202.68 (“Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency”) (hereinafter the “Emergency Order”). The Emergency Order significantly restricts attendance at “houses of worship” in certain parts of New York, in response to a large uptick in COVID-19 infection rates.¹ Plaintiff contends that the Order, as applied to it, violates the Free Exercise Clause of the First Amendment.

¹ This case is assigned to the Honorable Nicholas G. Garaufis. Because Judge Garaufis was unavailable to hear the case on an expedited basis, the undersigned (as the assigned Miscellaneous Judge) heard oral argument, and issued this Order shortly thereafter. The case will revert to Judge Garaufis for all purposes going forward.

Under Supreme Court precedent, the right to freely exercise one's religion does not exempt worshippers from compliance with "neutral, generally applicable regulatory law[s]." *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 880 (1990). But where laws single out acts of worship for "distinctive treatment," courts must apply the "most rigorous of scrutiny." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). "When the government makes a value judgment in favor of secular motivations but not religious motivations, the government's actions must survive heightened scrutiny." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999). The challenge here is to determine whether this case is more like *Smith* – that is, a neutral law that incidentally burdens religion – or more like *Lukumi* and *Fraternal Order*, where religious worship was being singled out for disfavored treatment.

On its face, the Executive Order applies differently to religious exercise: it regulates houses of worship explicitly, and applies a capacity limit unique to them. See Emergency Order at 2 ("[H]ouses of worship shall be subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer . . ."). There are entities treated better than religious institutions in the "red zone" – namely, entities deemed "Essential Businesses" – but other entities treated more

restrictively, such as restaurants and even schools, which are closed entirely (for in-person activities). *Id.* at 2.

This is a difficult decision for two reasons. First, this case is different from previous COVID-related Free Exercise challenges in this Circuit, which involved the application of facially neutral executive orders that nonetheless burdened religion. See *Ass'n of Jewish Camp Operators v. Cuomo*, No. 20-CV-0687, 2020 WL 3766496 (N.D.N.Y. July 6, 2020) (Free Exercise challenge to executive order regarding summer camp attendance); *Soos v. Cuomo*, No. 20-CV-0651, 2020 WL 3488742 (N.D.N.Y. June 26, 2020) (Free Exercise challenge to executive order banning gatherings of fifty people or more). This Emergency Order, as noted above, contains provisions made expressly applicable to houses of worship. Second, the Governor of New York made remarkably clear that this Order was intended to target a different set of religious institutions. See "Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jimmy Sciutto," October 9, 2020, <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-cnn-newsroom-poppy-harlow-and-jim-sciutto> ("[T]he cluster is a predominantly ultra-Orthodox [Hasidic] community. . . . [T]he issue is with that ultra-Orthodox community."). Plaintiff appears to have been swept up in that effort despite having been mostly spared, so far at least, from the problem at hand.

Nevertheless, the government is afforded wide latitude in managing the spread of deadly diseases under the Supreme Court's precedent. See *Jacobson v. Massachusetts*, 197 U.S. 11, 27, 31 (1905) ("[A] community has the right to protect itself against an epidemic of disease which threatens its members," and judicial scrutiny should be limited to laws that have "no real or substantial relation to" that purpose). For this reason, courts have rejected similar claims under the Free Exercise Clause. In *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344 (7th Cir. 2020), for example, the Court of Appeals denied a similar injunction, holding that "[w]orship services do not seem comparable to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods." Likewise, in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), a majority of the justices declined to enjoin a California Executive Order limiting attendance at religious institutions in light of COVID-19. Relying on *Jacobson*, Chief Justice Roberts noted that the "Constitution principally entrusts the safety and health of the people to the politically accountable officials of the States to guard and protect." *Id.* at 1614 (cleaned up). On that basis, he concluded that it was "quite improbable" that restrictions like the one at issue here would be found unconstitutional. *Id.*

Relying on these cases, among others, another judge in this District today upheld the Executive Order at issue here. See *Agudath Israel of America v. Cuomo*, No. 20-cv-4834 (E.D.N.Y.) (Order of Judge Kiyoo Matsumoto dated October 9, 2020). There are cases that have gone the other way in response to similar provisions. See, e.g., *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *Soos v. Cuomo*, 2020 WL 3488742 (N.D.N.Y. June 26, 2020). But in light of *Jacobson* and the Supreme Court's recent decision in *South Bay*, it cannot be said that the Plaintiff has established a likelihood of success on the merits. See, e.g., *Able v. United States*, 44 F.3d 128, 130 (2d Cir. 1995). And given the severity and complexity of the pandemic, it cannot be said, on this record, that the balance of equities favors the Plaintiff. *Winter v. Nat. Res. Def. Coun., Inc.*, 555 U.S. 7, 20 (2008) (2008).

Accordingly, Plaintiff's motion for a temporary restraining order is denied. Plaintiff may apply to Judge

Garaufis for a preliminary injunction, as the record may be developed more fully.

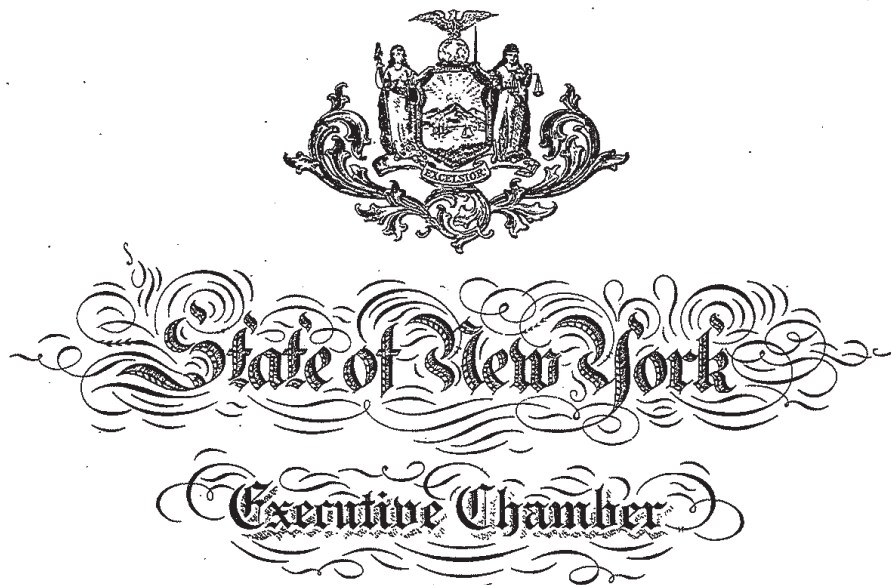
SO ORDERED.

/s Eric Komitee
ERIC KOMITEE
United States District Judge

Dated: October 9, 2020
Brooklyn, New York

EXHIBIT F
(Dist. Ct. Dkt. No. 12-1)

EXHIBIT 1



No. 202.68

EXECUTIVE ORDER

**Continuing Temporary Suspension and Modification of Laws
Relating to the Disaster Emergency**

WHEREAS, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue;

NOW THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive contained in Executive Orders 202.31, 202.41, 202.42, 202.43, 202.51, 202.52, 202.56, as contained in Executive Order 202.63, and Executive Orders 202.61 and 202.62 for another thirty days through November 5, 2020, and I hereby temporarily suspend or modify the following from the date of this Executive Order through November 5, 2020:

- Sections 12 and 206 of the Public Health Law, to the extent necessary to, notwithstanding any other provision of this Executive Order, provide that any individual who encourages, promotes or organizes a non-essential gathering as set forth in Department of Health regulation, shall be liable for a civil penalty not to exceed \$15,000 per day; and
- Sections 12-a and 206(4) of the Public Health Law, to the extent necessary to authorize, at the direction of the Commissioner of Health or the Commissioner's representative, any local government official to assess, and the local government to retain, a civil penalty for violations of Executive Orders issued pursuant to Section 29-A of the Executive Law, or any regulations of the Department of Health, that impose requirements pertaining to maintaining social distance and wearing of face coverings, for the duration of this disaster emergency, and to conduct any hearing related to such penalties. Such penalties, if assessed on an individual basis, shall not exceed \$1,000 per violation, except as otherwise provided herein.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I do hereby issue the following directives through November 5, 2020:

- The Department of Health shall determine areas in the State that require enhanced public health restrictions based upon cluster-based cases of COVID-19 at a level that compromises the State's containment of the virus. Certain activities shall be restricted and any permitted activities, in all three zones below, shall be conducted in strict adherence to Department of Health guidance.

- Based upon the severity of the cluster activity, the Department of Health shall adopt in the most severe, or “red zones,” the following mitigation measures:
 - Non-essential gatherings of any size shall be postponed or cancelled; all non-essential businesses, as determined by the Empire State Development Corporation based upon published guidance, shall reduce in-person workforce by 100%; houses of worship shall be subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer; any restaurant or tavern shall cease serving patrons food or beverage on-premises and may be open for takeout or delivery only; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.
- In moderate severity warning areas or “orange zones” the following mitigation measures:
 - Non-essential gatherings shall be limited to 10 people; certain non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus, including gyms, fitness centers or classes, barbers, hair salons, spas, tattoo or piercing parlors, nail technicians and nail salons, cosmetologists, estheticians, the provision of laser hair removal and electrolysis, and all other personal care services shall reduce in-person workforce by 100%; houses of worship shall be subject to a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer; any restaurant or tavern shall cease serving patrons food or beverage inside on-premises but may provide outdoor service, and may be open for takeout or delivery, provided however, any one seated group or party shall not exceed 4 people; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.
- In precautionary or “yellow zones,” the following mitigation measures:
 - Non-essential gatherings shall be limited to no more than 25 people; houses of worship shall be subject to a capacity limit of 50% of its maximum occupancy and shall adhere to Department of Health guidance; any restaurant or tavern must limit any one seated group or party size to 4 people; and the Department of Health shall issue guidance by October 9, 2020 regarding mandatory testing of students and school personnel, and schools shall adhere to such guidance.
- The above directive shall be effective immediately, and at such time as notice is provided to such affected areas, may be enforced and shall be enforced no later than Friday, October 9, 2020, as determined by the county in which the red zones, orange zones, and yellow zones are located.



GIVEN under my hand and the Privy Seal of the
State in the City of Albany this sixth
day of October in the year two
thousand twenty.

BY THE GOVERNOR

A handwritten signature in black ink, appearing to be "Mr. C" followed by a long, sweeping horizontal stroke.

Secretary to the Governor

A handwritten signature in black ink, appearing to be "Andrew Cuomo" written in a cursive style.

EXHIBIT G
(Dist. Ct. Dkt. No. 7-5)

EXHIBIT 5

October 7, 2020 | 2:16 pm

Information on Novel Coronavirus

Coronavirus is still active in New York. We have to be smart. Wear a mask, maintain six feet distance in public and download the official New York State exposure notification app, COVID Alert NY.

GET THE FACTS >

(<https://coronavirus.health.ny.gov/home>)

Empire State Development

(<https://esd.ny.gov>)

[HOME \(/\)](#) / GUIDANCE ON EXECUTIVE ORDER 202.6

GUIDANCE FOR DETERMINING WHETHER A BUSINESS ENTERPRISE IS SUBJECT TO A WORKFORCE REDUCTION UNDER RECENT EXECUTIVE ORDERS

(enacted to address the COVID-19 Outbreak)

FOR GUIDANCE RELATED TO DETERMINING WHETHER A BUSINESS ENTERPRISE IS SUBJECT TO A WORKFORCE REDUCTION UNDER EXECUTIVE ORDER 202. 68, RELATED TO NEW YORK'S CLUSTER ACTION INITIATIVE TO ADDRESS COVID-19 HOTSPOTS, [CLICK HERE](#) (<https://esd.ny.gov/ny-cluster-action-initiative-guidance>).

Please review our [Frequently Asked Questions here](#) (</sites/default/files/ESD-EssentialEmployerFAQ-070720.pdf>).

UPDATED: September 25, 2020 at 3:16 PM

ESSENTIAL BUSINESSES OR ENTITIES, including any for-profit or non-profit, regardless of the nature of the service, the function they perform, or its corporate or entity structure, are not subject to the in-person restriction. *Essential Businesses must continue to comply with directives for maintaining a clean and safe work environment issued by the Department of Health (DOH) and every business, even if essential, is strongly urged to maintain social distancing measures to the extent possible.*

This guidance is issued by the New York State Department of Economic Development d/b/a Empire State Development (ESD) and applies to each business location individually and is intended to assist businesses in determining whether they are an essential business. With respect to business or entities that operate or provide both essential and non-essential services, supplies or support, only those lines and/or business operations that are necessary to support the essential services, supplies, or support are exempt from the workforce reduction restrictions.

State and local governments, including municipalities, authorities, and school districts, are exempt from these essential business reductions, but are subject to other provisions that restrict non-essential, in-person workforce and other operations under [Executive Order 202](#) (<https://www.governor.ny.gov/executiveorders>).

On April 26, 2020, Governor Cuomo [announced](https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-phased-plan-re-open-new-york-starting) a phased approach to reopen industries and businesses in New York in phases based upon a data-driven, regional analysis. On May 4, 2020, the Governor [provided](https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-additional-guidelines-when-regions-can) that the regional analysis would consider several public health factors, including new COVID-19 infections, as well as health care system, diagnostic testing, and contact tracing capacity. On May 11, 2020, Governor Cuomo [announced](https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo)

announces three regions (New York State Ready), that the first phase of reopening would begin on May 18, 2020 in several regions of New York, based upon available regional metrics and indicators. This essential business guidance shall remain in effect for the regions and industries that are not yet within the reopening phases.

For purposes of Executive Order 202.6, “Essential Business,” shall mean businesses operating in or as:

1. Essential health care operations including

- research and laboratory services
- hospitals
- walk-in-care health clinics and facilities
- veterinary and livestock medical services
- senior/elder care
- medical wholesale and distribution
- home health care workers or aides for the elderly
- doctors and doctors’ offices
- dentists and dental practices
- nursing homes, residential health care facilities, or congregate care facilities
- medical supplies and equipment manufacturers and providers
- licensed mental health providers
- licensed substance abuse treatment providers
- medical billing support personnel
- speech pathologists and speech therapy
- chiropractic services
- acupuncture
- physical therapy

[Why New York State?](#)



[Doing Business in NY](#)



[Industries \(/industries\)](#)

2. Essential infrastructure including

[Regions \(/regions\)](#)

- public and private utilities including but not limited to power generation, fuel supply, and transmission

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- public water and wastewater



[ESD Media Center](#)

telecommunications and data centers



- airlines/airports
- commercial shipping vessels/ports and seaports
- transportation infrastructure such as bus, rail, for-hire vehicles, garages
- hotels, and other places of accommodation, including campgrounds. Campgrounds must take precautions to ensure campers maintain appropriate social distancing and adhere to proper cleaning and disinfecting protocols, including but not limited to maintaining six feet of distance between campers, unless wearing an acceptable face covering, excluding persons from the same household who are camping together.

3. Essential manufacturing including

- food processing, manufacturing agents including all foods and beverages
- chemicals
- medical equipment/instruments
- pharmaceuticals
- sanitary products including personal care products regulated by the Food and Drug Administration (FDA)
- telecommunications
- microelectronics/semi-conductor
- food-producing agriculture/farms
- household paper products
- defense industry and the transportation infrastructure
- automobiles
- any parts or components necessary for essential products that are referenced within this guidance

4. Essential retail including

- grocery stores including all food and beverage stores
- pharmacies
- convenience stores
- farmer’s markets
- gas stations
- restaurants/bars (but only for take-out/delivery)
- hardware, appliance, and building material stores
- pet food
- telecommunications to service existing customers and accounts

[Why New York State?](#)

- in regions that are not yet within the first phase of the state's regional reopening plan, delivery for orders placed remotely via phone or online at non-essential retail establishments; provided, however, that only one employee is physically present at the business location to fulfill orders

[Doing Business in NY](#)

[Industries \(/industries\).](#)

[Regions \(/regions\).](#)

5. Essential services including

[About Us](#)

[ESD 2020 Center](#) operations and activities

- trash and recycling collection, processing, and disposal
- mail and shipping services
- laundromats and other clothing/fabric cleaning services
- building cleaning and maintenance
- child care services
- bicycle repair
- auto repair and maintenance
- automotive sales conducted remotely or electronically, with in-person vehicle showing, return, and delivery by appointment only
- warehouse/distribution and fulfillment
- funeral homes, crematoriums and cemeteries

- storage for essential businesses
- maintenance for the infrastructure of the facility or to maintain or safeguard materials or products therein
- animal shelters and animal care including dog walking, animal boarding and pet grooming but only to the extent necessary to ensure animal health
- landscaping, gardening and horticulture
- designing, printing, publishing and signage companies to the extent that they support essential businesses or services
- remote instruction or streaming of classes from public or private schools or health/fitness centers; provided, however, that no in-person congregate classes are permitted

6. News media

7. Financial Institutions including

- banks or lending institution
- insurance
- payroll
- accounting
- services related to financial markets, except debt collection

8. Providers of basic necessities to economically disadvantaged populations including

- homeless shelters and congregate care facilities
- food banks

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Providers whose function includes the direct care of patients in state-licensed or funded voluntary programs; the care, protection, custody and oversight of individuals both in the community and in state-licensed residential facilities; those operating community shelters and other critical human services agencies providing direct care or support



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9. Construction
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All non-essential construction is limited to only staging activities in regions that are not yet within the first phase of the state's reopening plan, except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone, but only to the point that it is safe to suspend work).

Essential construction includes:

- construction for, or your business provides necessary support for construction projects involving, roads, bridges, transit facilities, utilities, hospitals or healthcare facilities, homeless shelters, or public or private schools;
- construction for affordable housing, as defined as construction work where either (i) a minimum of 20% of the residential units are or will be deemed affordable and are or will be subject to a regulatory agreement and/or a declaration from a local, state, or federal government agency or (ii) where the project is being undertaken by, or on behalf of, a public housing authority;
- construction necessary to protect the health and safety of occupants of a structure;

- construction necessary to continue a project if allowing the project to remain undone would be unsafe, provided that the construction must be shut down when it is safe to do so;
- construction for existing (i.e. currently underway) projects of an essential business; or
- construction work that is being completed by a single worker who is the sole employee/worker on the job site.

At every site, it is required that the personnel working on the site maintain an appropriate social distance, including for purposes of elevators/meals/entry and exits. Sites that cannot maintain appropriate social distancing, as well as cleaning/disinfecting protocols must close. Enforcement will be conducted by state and local governments, including fines up to \$10,000 per violation.

Construction may continue solely with respect to those employees that must be present at the business location/construction site in support of essential business activities. No other employees/personnel shall be permitted to work in-person at the business location/construction site. For staging activities, an in-person workforce may be present on-site to:

- Clean, sanitize, and/or disinfect common and work areas;
- Test run hoists, elevators, cranes, and other equipment;
- Establish new and multiple entrances/exits to control the movement of personnel and allow for health screening, including temperature taking;
- Install hand hygiene/wash stations or retrofit existing ones with touchless faucets and dispensers;
- Install health screening stations or devices at entrances;
- Affix social distancing, hygiene, and cleaning/disinfection signage, including posters, markers, and directional arrows;
- Deliver and stockpile personal protective equipment (e.g. face coverings, face shields, gloves); and
- Order, unload, and rough set materials that specialty contractors or subcontractors need to perform work (e.g. structural supports, piping, conduits, drywall).

As noted above, local governments, including municipalities and school districts, are allowed to continue construction projects at this time as government entities are exempt from these essential business restrictions. However, to the greatest extent possible, local governments should postpone any non-essential projects and only proceed with essential projects when they can implement appropriate social distancing and cleaning/disinfecting protocols. Essential projects should be considered those that have a nexus to health and safety of the building occupants or to support the broader essential services that are required to fulfill the critical operations of government or the emergency response to the COVID-19 public health crisis.

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[10. Defense](#) ✓
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[ESD Media Center](#) International security-related operations supporting the U.S. Government or a contractor to the US government ✓

11. Essential services necessary to maintain the safety, sanitation and essential operations of residences or other businesses including

- law enforcement, including corrections and community supervision
- fire prevention and response
- building code enforcement
- security
- emergency management and response, EMS and 911 dispatch
- building cleaners or janitors

- general and specialized maintenance whether employed by the entity directly or a vendor, including but not limited to heating, ventilation, and air conditioning (HVAC) and pool maintenance
- automotive repair
- cleaning, disinfection, and sanitation services
- occupational safety and health professionals
- residential and commercial moving services

12. Vendors that provide essential services or products, including logistics and technology support, child care and services including but not limited to:

- logistics
- technology support for online services
- child care programs and services
- government owned or leased buildings
- essential government services
- any personnel necessary for online or distance learning or classes delivered via remote means

13. Recreation

- Parks and other open public spaces, including playgrounds and other areas of congregation within the discretion of the state or local government so long as appropriate social distancing of at least six feet among individuals can be abided, acceptable face coverings are worn by individuals who are over the age of two and able to medically tolerate such coverings, and frequent cleaning/disinfection measures are in place for hard surfaces and objects frequently touched by multiple people (e.g., handrails, benches)

Why New York State? recreational activities are permitted so long as social distancing and cleaning/disinfecting measures are in place: ✓

- tennis;
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- non-motorized boat use and rentals, such as row boats, kayaks, canoes;

Industries (and activities) ranges, except miniature (mini) golf, with food and retail services subject to the restrictions that are currently in effect within the region;

- Regions (/regions)
- racket games, such as badminton, pickleball, racquetball;

About Us less/bowl games, such horseshoes, bocce, bean bag toss, croquet; ✓

- flying disc games, such as disc golf and frisbee;
- ESD Media Center ✓
- shuffleboard;
 - aerial rope courses or zip lining;
 - rope courses including aerial rope courses;
 - batting cages;
 - shooting ranges; and
 - swim classes and swim instruction.


- Drive-in movie theaters so long as social distancing and cleaning/disinfecting measures are in place
- Marinas, boatyards, and recreational marine manufacturers, for ongoing marina operations and boat repair/maintenance, where such facilities adhere to strict social distancing and sanitization protocols. In regions that are not within the first phase of the state's regional reopening plan, use of such sites for the purposes of personal use or operation of boats or other watercraft is permissible, provided

14. Professional services with extensive restrictions

- Lawyers may continue to perform all work necessary for any service so long as it is performed remotely. Any in-person work presence shall be limited to work only in support of essential businesses or services; however, even work in support of an essential business or service should be conducted as remotely as possible.
- Real estate services shall be conducted remotely for all transactions, including but not limited to title searches, appraisals, permitting, inspections, and the recordation, legal, financial and other services necessary to complete a transfer of real property; provided, however, that any services and parts therein may be conducted in-person only to the extent legally necessary and in accordance with appropriate social distancing and cleaning/disinfecting protocols; and nothing within this provision should be construed to allow brokerage and branch offices to remain open to the general public (i.e. not clients).

Pursuant to Executive Order [202.42](https://www.governor.ny.gov/news/no-20242-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency#:~:text=No.,202.42%3A%20Continuing%20Temporary%20Suspension%20and%20Modification%20of,Relating%20to%20the%20Di) (<https://www.governor.ny.gov/news/no-20242-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency#:~:text=No.,202.42%3A%20Continuing%20Temporary%20Suspension%20and%20Modification%20of,Relating%20to%20the%20Di>) and [202.45](https://www.governor.ny.gov/news/no-20245-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency) (<https://www.governor.ny.gov/news/no-20245-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>), all non-essential gatherings of individuals of any size for any reasons (e.g., parties, celebrations, or other social events) are limited to no more than twenty-five (25) or fewer people in regions that have reached Phase Three of reopening, and no more than fifty (50) people in regions that have reached Phase Four of reopening, so long as appropriate social distancing and face covering requirements are followed. Under Executive Order 202.41, any region that has not yet entered Phase Three of reopening, non-essential gatherings cannot exceed ten (10) people, and social distancing and face covering requirements must be adhered to.

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[Doing Business in NY](#) If the function of your business is listed above, you do not need to request any special designation or approval to operate. 

[Industries \(/industries\)](#) Pursuant to this guidance and require additional assistance in determining whether or not your business is permitted to operate on-site, you may consult the New York Forward Business Reopening Lookup Tool [here](#)
[Regions \(/regions\)](#)
(<https://www.businessexpress.ny.gov/app/nyforward>).

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Restrictions on requesting designation as an essential business:

Pursuant to the Governor's Executive Orders, the following businesses are specifically enumerated as non-essential and are, therefore, unable to request a designation, but should continue to monitor the New York Forward [website](https://forward.ny.gov/) (<https://forward.ny.gov/>) for additional developments:

- Any large gathering or event venues, including but not limited to establishments that host concerts, conferences, or other in-person performances or presentations in front of an in-person audience, except as otherwise permitted below;
- Any movie theater, except drive-ins; and
- All places of public amusement, whether indoors or outdoors, including but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, arcades, fairs, children's play centers, funplexes, theme parks, bowling alleys, family and children's

attractions;

Certain businesses and places of arts and entertainment, including but not limited to multi-disciplinary event venues and theater spaces, may reopen to the public only for the limited purpose of conducting activities and operations that have been permitted as a part of the State's phased reopening (e.g., low-risk indoor arts and entertainment, media production). Please consult the specific [New York Forward \(https://forward.ny.gov/\)](https://forward.ny.gov/) guidance as it applies to the currently permitted activities and operations.

For more information on New York's response to COVID-19 and guidance on cleaning and disinfection of facilities, please refer to the New York State Department of Health's webpage at: <https://coronavirus.health.ny.gov/home> (<https://coronavirus.health.ny.gov/home>).

Additional information from the United States Centers for Disease Control and Prevention can be found at: <https://www.cdc.gov/coronavirus/2019-ncov/> (<https://www.cdc.gov/coronavirus/2019-ncov/>).

Frequently Asked Questions

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Business Reopening Lookup Tool



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The NY Forward Business Reopening Lookup tool will help determine whether your business is able to reopen and the public health and safety standards with which your business must comply.



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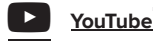
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EXHIBIT H
(Dist. Ct. Dkt. No. 22-4)

EXHIBIT 4



OCTOBER 6, 2020 Albany, NY

Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces New Cluster Action Initiative

Initiative Developed in Consultation with Leading National Public Health Experts—Dr. Noam Ross of EcoHealth Alliance, Dr. Michael Osterholm of the University of Minnesota and Former CDC Director Dr. Tom Frieden

New Initiative Maps Clusters by Density of Cases to Address COVID Hot Spots in Brooklyn, Queens, and Broome, Orange and Rockland Counties

Fines for Sponsors of Mass Gatherings Increased to \$15,000

New Rules and Restrictions in Effect for Minimum of 14 Days

Governor Cuomo: "First, identify the cluster. You can identify the cluster because we do so much testing and we have so much data. We can tell you where there is a cluster by the actual number of cases. We have the addresses of people who are COVID-positive. So we have mapping software where you can see exactly where the cluster is. That's the highest density of cases. That's where you have to take the most dramatic action."

Cuomo: "We're increasing the fines for sponsors of mass gatherings to \$15,000. We are going to be providing the local governments with the maps that we did in their areas. We'll be

consulting with them. These were done specifically from the actual case numbers themselves. If there's some peculiarity, local governments have a comment, we'll do that today. The rules can go into effect as soon as tomorrow, that's up to the local government, but no later than Friday. If local government says we want time to get adjusted, fine. Today is Tuesday, get adjusted no later than Friday."

Earlier today, Governor Andrew M. Cuomo announced a new cluster action initiative to address COVID-19 hot spots that have cropped up in Brooklyn, Queens, and Broome, Orange and Rockland Counties. Working with the top public health experts, New York State developed a science-based approach to attack these clusters and stop any further spread of the virus, including new rules and restrictions directly targeted to areas with the highest concentration of COVID cases and the surrounding communities. The new rules will be in effect for a minimum of 14 days.

The plan was developed in consultation with national public health experts including Dr. Noam Ross of EcoHealth Alliance, Dr. Michael Osterholm of the University of Minnesota and former CDC Director Dr. Tom Frieden.

VIDEO of the Governor's remarks is available on YouTube [here](#) and in TV quality (h.264, mp4) format [here](#).

AUDIO of today's remarks is available [here](#).

PHOTOS are available on the Governor's Flickr [page](#).

A rush transcript of the Governor's remarks is available below:

Good afternoon. To my right, we have the esteemed secretary to the governor Melissa DeRosa. To her left, the esteemed budget director Robert Mujica. Thank you all for being here. Appropriately social distanced.

Today is day 220, believe it or not. The fall is here. What happens in the fall? Leaves come down, Jimmy Vielkind spends a lot of time with the foliage up north. What else happens in the

fall? The virus goes up. The leaves come down, the virus goes up. They've been talking about this for a long time. They predicted this and on this prediction they happen to be right. You see the virus increasing across the country, you see it increasing across the globe, you see countries that had it under control are now struggling again.

In New York, statewide, we are doing very well on the numbers. We have what I call a COVID cluster problem. But a cluster problem is serious because a cluster problem can grow. The virus spreads in mass gatherings. We know this from our own experience, from what we've seen, and from what every expert tells us, right. The outbreaks, which is when the virus is spreading out of control, it starts with a mass gathering and then it expands from there, especially indoors. We've seen it in colleges, state colleges, private colleges, you have that congregate mass gathering indoors or frequenting a bar in the case of colleges, and it take off. We've seen it in factory settings around the country, we've seen it in produce plants, apple plants, in New York. We've seen it in a single restaurant, can be a mass gathering. We've seen it at July 4th parties, we've seen it at Labor Day parties. We've seen it in the Rose Garden. That was a mass gathering, outdoor, by the way, and we've seen it. You see that growing list of all the people who were infected from that mass gathering.

We see it in places of worship. We've seen one church infect people, we've seen synagogues infect people, we've seen mosques infect people. We had the first hot spot cluster in the United States of America. New Rochelle, a super spreader who attended a temple service and then attended a wedding, and that was it. We were off to the races. So, it's to be taken very seriously. A mass gathering causes infections. Infections cause a cluster. A cluster causes community spread. That is the natural evolution of things unless we intervene and we stop the cycle. If you just let the cycle run, that is what's going to happen.

We see clusters now across the state, colleges upstate. We have a cluster in Binghamton, Orange Rockland, Queens, Brooklyn, Nassau. The cluster is just that, it's a cluster of cases, a high density of cases. And it seeps, it grows from that cluster almost in concentric circles. Drop a pebble into the pond, pebble goes in, then there's one ring, two rings, three rings, and the rings continue across the pond. That's how the virus spreads. When you see the cluster, you have to stop it at that point. What's our strategy? Crush the cluster and stop the spread.

And we're announcing a special initiative to do just that, the Cluster Action Initiative. Catchy name.

Step one, you take the most dramatic action within the cluster itself, where you have the highest density of cases. Understanding that the people in that cluster interface with the surrounding communities, take additional action in the communities surrounding the cluster, and then on a precautionary measure, take action in the communities that are out line that area, so three steps.

First, identify the cluster. You can identify the cluster because we do so much testing and we have so much data. We can tell you where there is a cluster by the actual number of cases. We have the addresses of people who are COVID-positive. So we have mapping software where you can see exactly where the cluster is. That's the highest density of cases. That's where you have to take the most dramatic action. The surrounding area is where that cluster is going to seep. Why? Because that's where people interact in the grocery store. That's where they interact at the bus stop. That's where they interact in the local recreational areas. So cluster, the area around the cluster, and then as a precautionary measure, the area around that's. That's how you attack a cluster. Most intense action on the cluster itself and then precautionary action as you pull back.

Clusters, all of these areas, you can look at them exactly by the cases. It's not by zip code, it's not by census tract, it's not by any political metric, it's only by the number of cases. So for example, Brooklyn New York - we have one area. This is an actual map of Brooklyn. The cluster is the red area. That is the area in, this is basically south Brooklyn, that has the highest number of cases by actual data. The surrounding area, orange, that is the second ring. That's the warning area because the people who are in that cluster, they're going to the same store, they're going to the same church, they're going to the same bus stop as people in that surrounding area. These are there are no walls here. The third area is the yellowish area around the perimeter from that line straight line down. That we call a precautionary area because they may very well also be coming in contact with the people in the cluster. Or, the people in the middle of that cluster may have infected somebody in the orange zone who may be in contact with someone in the yellow zone. It goes red is the cluster, orange is surrounding the cluster, yellow is the periphery. So that's the actual south Brooklyn map.

Queens, there are two areas that will be mapped just the way Brooklyn is mapped but same concept. There's a central cluster, there's a surrounding area and there's a precautionary area surrounding that. Two smaller areas in Queens. The Brooklyn area is larger than either of the two Queens areas. Binghamton we have a cluster.

Binghamton we're declaring a yellow zone which is the precautionary zone which is a less intense action plan than in a red zone. Why? Because there's just fewer number of cases in Binghamton. The density is less, the cluster is less, but it still requires precaution.

Orange County, we have an intense cluster and then what we call a precautionary zone around that cluster.

Rockland County, same thing. We have an intense cluster and then we're establishing a precautionary zone around that cluster.

These are relatively small areas geographically. Maybe a cluster is one mile in diameter. Maybe with the orange warning area it's a mile and a half. Maybe with the precaution area it's about 2 miles. These are geographically circumscribed, relatively small but that's why they're clusters. The trick is to keep it small. Keep the infection from spreading. Small, but intense targeted efforts in that area. We have new rules for red, orange or yellow communities.

The red, which is the most impacted area, houses of worship will be 25 percent capacity up to 10 people maximum. If it's a church or a mosque or a temple, there will be a maximum of 25 percent capacity or 10 people. No mass gatherings, only essential businesses open, only take out dining and schools are closed.

In the orange areas - that's the second ring - houses of worship 33 percent capacity, 25 people maximum. Mass gatherings, ten people maximum, indoor or outdoor. Businesses, we closed high-risk, non-essential businesses. High risk are defined businesses like gyms, personal care, et cetera. Dining, no indoor dining, outdoor dining only. Four people to a table.

Yellow, which is the precautionary zone, 50 percent capacity in a house of worship. Mass gatherings, 25 people. Businesses are open; dining indoor and outdoor, but 4 people maximum per table. Also, the schools in yellow areas, public or private, must do mandatory weekly testing.

The students are people who are very likely to interact with people within that community. We saw this in New Rochelle. All the kids go to different schools, I know, but they meet at the playground or they're on the little league team or they're on the hockey team or they went to somebody's birthday party and they interacted. The schools are important because you will very often see the schools be a place of transmission. If two students interact at a birthday party on a Friday night and then go to school, they then bring it home to their parents and now we're off to the races again.

We're increasing the fines for sponsors of mass gatherings to \$15,000. We are going to be providing the local governments with the maps that we did in their areas. We'll be consulting with them. These were done specifically from the actual case numbers themselves. If there's some peculiarity, local governments have a comment, we'll do that today. The rules can go into effect as soon as tomorrow, that's up to the local government, but no later than Friday. If local government says we want time to get adjusted, fine. Today is Tuesday, get adjusted no later than Friday.

Testing for schools in the yellow zones starts next week. I am more and more concerned about schools with the more experience we have. The more we get into this the more important I think it is that schools do random testing. Well, students are young and they're resilient. First of all, we don't really know that. What do we know about this virus? And not only do you have young people in schools, you have teachers. We all think we're young, I think I'm young, you have teachers and I want to make sure we're protecting all lives. So the schools in those yellow zones must do weekly testing. The Department of Health will set a sample number. We want to make sure it's statistically representative and they'll set that sample by Friday. If a school needs additional testing equipment, they should contact us - we can to help them. If they want to do pool testing, they should contact us, we can help them. These rules will be in effect for 14 days, and then we'll see where we are and we'll see the numbers and we'll adjust from there.

We've gone through this evolving situation with some of the best people on the globe who have been advising us and I want to thank them very much for their help. Local governments most enforce the law. I know I've said this several times. But we can sit here all day long and come up with laws and rules - they are only as good as their enforcement. And a lack of

enforcement has contributed to this problem. There is no one who say they didn't see this coming. We've had concerts in the Hamptons that should have never happened. We've had bars that have attracted crowds over and over again that should have never happened. We've had college parties that have happened offsite that should have never happened. We have had religious gatherings that have been circulated on social media for weeks and action was not taken. There can be no surprise - the rules are only as good as their enforcement. "Well we have COVID fatigue. We're tired of wearing masks." COVID isn't tired. The virus isn't tired. The virus - still energetic to strong enough to kill you. It's no time to be fatigued. We don't have the luxury of fatigue.

And I understand it's a politically difficult situations - I've tried everything with local governments. I said that I would fine local governments if failed to enforce the law because these are laws that they're enforcing. A law doesn't work if you're too incompetent or too politically frightened to enforce it, period, said A.J. Parkinson. I also said to local governments, "Blame me." I understand these are difficult acts to enforce. These are state laws. Blame me. I have no problem with that.

Moving forward, I'm not going to pass more laws that are not enforced. This is a government that is competent, this is a government that is capable, this is a government that has helped the people of the state through this horrendous situation. We'll continue to do it - we do it because we're effective, that's why. Local governments need to assign people to a State Enforcement Task Force, because I want to make sure that that is happening. New York City must provide 400 personnel to the New York State Task Force. I want to thank our government partners in this Cluster Initiative. I've spoken to many of them myself today. But we have in Binghamton, Broome, Jason Garner has been very helpful, Steven Neuhaus in Orange, Ed Day in Rockland County, we spoke through some issues today - I want to thank him very much for his cooperation. New York City we've been working with, Laura Curran in Nassau we've been working with. Together we're going to get this done - it's not easy. But we know where the cases and we know what we have to do.

So, government has to do its job, but individuals have to do their job also. And organizations have to do their job also. We're all citizens, and it's not government's job to catch you. It's citizen's obligation to do the right thing, right? You don't speed on the road, not just because

you're afraid to get a ticket, because you don't want to kill anyone. Right? You act responsibly with COVID because you want to protect yourself, you want to protect your family, you want to protect other people. And organizations have to do the same thing. I am informing all houses of worship today. Obviously these new rules are most impactful on houses of worship because this virus is not coming from nonessential businesses. That's not what this is about. It may be spread by nonessential business. It's not starting in schools; it may be spread by schools. This is about mass gatherings. And one of the prime places of mass gatherings are houses of worship. I understand it's a sensitive topic but that is the truth. You want to solve the problem? Acknowledged the problem. Deny the problem, look at a red herring, and then the problem gets worse. The problem is mass gatherings and houses of worship, colleges and some miscellaneous foolish behavior in bars, outdoor venues, etc.

I spoke to members of the Orthodox Jewish community today. I spoke to the leaders myself this morning. We had a very good conversation. These rules will apply to all houses of worship. Many of these communities have a large Orthodox population. I have been very close to the Orthodox community for many years. I understand the imposition this is going to place on them, and I said to them I need their cooperation. I need their partnership. They're very cohesive communities. And I asked for them to work with me to follow these guidelines and that was positively received. I said to them that I'm doing this for a very simple reason because I have such respect and love for the Orthodox community. I have been friends with them all my life and my father before me by the way. We go way back and it's out of respect and it's out of love and it's because I want to protect them. In Jewish teaching, one of the most precious principles is saving a life. To save a life. The Torah speaks about how certain religious obligations can be excused, if you are going to save a life. This is about saving a life. That's what this is. No large gatherings in synagogues to save a life. You look at where the infection rate is, you look at those clusters, people will die in those clusters and this is about protecting people and saving lives. And I felt very good about my conversation with the Orthodox community and I thank them for their help in their cooperation. Seasons change, circumstances change, and we change with it. That's what we do. This is not a New York State phenomenon. If you look at what's happening in our region of the country, New York is about 1.2 percent; Pennsylvania's up at about 8 percent; New Jersey is about 2.4 percent; Connecticut - which God bless Governor Ned Lamont has always had a lower incident rate than we have, but there are still facts in life: one plus one equals two; night follows day, the

world is round. These are facts, OK? There's another fact: if the rules are not complied with, and enforcement is not done, then the infection rate will increase. If the infection rate increases, we will be forced to close down. We know that. We've been here. This is déjà vu. So, let's do what we have to do in these clusters, let's save lives, and let's continue the economic advancement that we're making.

Today's specific numbers — top 20 zip codes — we're doing two types of testing now. We're testing in the hotspots and then we're doing the normal testing statewide. In the testing just in the hotspots, the infection rate is about 5.5. Statewide the testing is about 1.2. If you roll the hotspots into the state numbers, which now oversamples the hotspots, you're at 1.4 percent. Nine New Yorkers passed away. They're in our thoughts and prayers. 705 hospitalized, ICU 158, intubation 72.

We're going to do this the way we've done it all along because we are New York tough, smart united, disciplined, loving.

Last point is I'd like to make a comment about the President, what he's been saying. We wished him well when we heard about his diagnosis with COVID and we wished the First Lady well. We sent them a great New York special care package, and I hope he's back to 100 percent as quickly as possible. I think the President has an opportunity that he is missing and I think he has an opportunity to do a public service and I think he's right now doing the public a disservice. To say to the people of this country, "Look at me! Don't worry about COVID. Look how well I'm doing!" First of all, this is a funny disease. We hope you're doing well, but the disease still has not run its course and it's a little premature to say "I'm doing great," right? You're not really doing great until you test negative and then, by the way — there are people who test negative and have consequences that continue for weeks and months and months. This is a frightening virus. But the President is not analogous to the average person in this country, right? The average person gets COVID, they don't get flown by helicopter to Walter Reed Hospital, and have a team of 20 doctors, millions of dollars of medical talent attend to their needs, receive experimental drugs that haven't been available to the public and are administered just to the President under Compassionate Care, right? So, there's no analogy there. From the public service point of view, 210,000 people died. More people die in this country than countries around the world that were doing much worse than we were. From a

public service point of view, "Don't be afraid of COVID?" No. Be afraid of COVID. It can kill you. Don't be cavalier. You This is just more denial. This is where it started and you know, the President — God bless him — he tells you where he's going. We know that when COVID started, he knew how bad it was going to be and he just lied about it. We know that he had the White House memo done by Peter Navarro that said millions of people could get infected and he just lied about it. Woodward's book, he actually has him on tape saying, "I know how bad it's going to be, but I don't want to tell the American people." Yeah, that cost this nation, and that confusion cost this nation, many unnecessary lives and expense and pain and hardship. I was saying at that time, "Take it seriously." The President was saying when it started, "It's a hoax. It will be gone by Easter. It's going to disappear like a miracle." Yeah, none of that was true. None of it was true. He knew it wasn't true and it's not true now to say, "Don't be afraid of COVID."

Denial doesn't work. It never does in life. It never does. "I don't have a drinking problem. I don't have a substance abuse problem. I don't have a gambling problem." Denial never works. Acknowledge the problem: it's a frightening virus. Be smart, be careful. Don't hide under your bed. We're reopening, go about your business, but do it smartly and that's what the President should be saying.



**Contact us
by phone:**

Albany: (518) 474 - 8418

New York City: (212) 681 - 4640



**Contact us
by email:**

Press.Office@exec.ny.gov

EXHIBIT I
(Dist. Ct. Dkt. No. 12-2)

EXHIBIT 2

Transcription of Relevant Excerpts from Governor Andrew Cuomo’s October 9, 2020 Interview on “CNN Newsroom with Poppy Harlow and Jim Sciutto”¹

Jim Sciutto: As you know, an Orthodox Jewish advocacy group and a Roman Catholic Diocese of Brooklyn actually filed two separate federal lawsuits against you over these new restrictions on religious gatherings. What is your response to those lawsuits?

Governor Cuomo: Yeah, the cluster is a predominantly ultra-Orthodox cluster. The Catholic schools are closed because they happen to be in that cluster. But the issue is with that ultra-Orthodox community. This is not a matter of religious freedom, right? I don't care if you're a Roman Catholic, you're Jewish, you're Muslim, you're an atheist, you have to follow the rules of the state, the laws of the state. And I understand the beliefs of the ultra-Orthodox. I've been very close to them all my life. I'm a big supporter of theirs, but they have to follow the rules, Jim. Because we're seeing the truth. And the truth is, if you don't follow the rules, the infection rate spreads, people get sick, and then you make others sick. We're talking about Brooklyn. We're not talking about a hermetically sealed community in a rural area. This is in the middle of Brooklyn. They will make other people sick.

¹ The underlying footage from Governor Cuomo’s interview is available at <https://mms.tveyes.com/Transcript.asp?StationID=100&DateTime=10%2F9%2F2020+10%3A37%3A03+AM&Term=Catholic+Diocese+of+Brooklyn&PlayClip=TRUE>.

EXHIBIT J
(Dist. Ct. Dkt. No. 22)

5. Attached hereto as Exhibit 4 is a true and correct copy of the transcript from Governor Cuomo's press conference on October 6, 2020.

6. The Governor's Executive Order does not apply to "*essential*" businesses in the Red Zone. Based on a review of records and other research conducted by individuals under my supervision, Target, located within the Red Zone at 1598 Flatbush Avenue, Brooklyn, New York 11210 is open and operating without capacity limits. Attached hereto as Exhibit 5 is a true and correct copy of an article from The New York Times dated September 2, 2008 describing the Target as 225,000 square feet in size. Staples, located within the Red Zone at 1800 Coney Island Avenue, Brooklyn, New York 11230, is also open and operating without capacity limits. In addition, the Dollar Tree, located at 1726 McDonald Ave, Brooklyn, New York 11230 is on the border between the Red Zone and Orange Zone, and is open and operating without capacity limits.

7. Attached hereto as Exhibit 6 is a true and correct copy of a press release, dated October 8, 2020, from the Archdiocese of New York in support of the Diocese of Brooklyn's lawsuit.

8. Attached hereto as Exhibit 7 is a true and correct article from CNN titled "How coronavirus spread to 87% of the singers at a Washington choir practice," dated May 13, 2020, describing a COVID outbreak at a Washington choir practice where "most people were probably not yet aware of" social distancing guidelines, chairs were spaced only 6 to 10 inches apart, and choir members "congregated around a chair rack" and had a "snack break."

9. Attached hereto as Exhibit 8 is a true and correct copy of a public statement from Cardinal Timothy Dolan, issued today, October 14, 2020, and entitled, "Why are Churches Being Singled Out."

10. The following link is a true and correct video clip from Fox 5 News reporting on the impact of church closures in the Diocese of Brooklyn.

<https://mms.tveyes.com/MediaCenterPlayer.aspx?u=aHR0cDovL211ZGhhY2VudGVyLnR2ZXllcy5jb20vZG93bmxvYWRnYXRld2F5LmFzcHg%2FVXNlck1EPTg0NjI3MSZNR1E1EPTeZOTE5MTUxJk1EU2VIZD05NjAyJIR5cGU9TWVkaWE%3D>

11. The following link is a true and correct video clip from Fox 5 News of an interview on October 14, 2020 with Governor Cuomo regarding the church closures in the Diocese of Brooklyn. Governor Cuomo states,

“[The hot spots are] primarily in the ultra-Orthodox community, where you have pictures of hundreds of people in a synagogue. It’s not even close. Our rule was 50% of capacity for a synagogue or church or any gathering place. 50% of the seated capacity. They have hundreds of people packed into a synagogue, and you know what’s going to happen. So yes, we’re enforcing those rules. The Catholic Church is upset in those areas because the Diocese of Brooklyn says, ‘We are following the rules. Why did you limit our capacity because we were already following the rules.’ I understand that also. But it works -- the virus spreads in a geographic area, right? The virus doesn’t say, ‘Oh, that’s a synagogue, I’m going to go in there but that’s a church, I’m not going to go in there.’ The virus doesn’t understand religious distinctions, so from a public health point of view you operate on a geographic basis.”

<https://mms.tveyes.com/MediaCenterPlayer.aspx?u=aHR0cDovL211ZGhhY2VudGVyLnR2ZXllcy5jb20vZG93bmxvYWRnYXRld2F5LmFzcHg%2FVXNlck1EPTg0NjI3MSZNR1E1EPTeZOTM1MDgzJk1EU2VIZD04OTA0JIR5cGU9TWVkaWE%3D>

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on October 14, 2020 in New York, New York.

/s/ Randy M. Mastro
Randy M. Mastro

EXHIBIT K
(Dist. Ct. Dkt. No. 28)

anxiety comes down, and we can have a smarter, more tailored approach, . . . and then we can have a more intelligent, sophisticated policy."

3. The complaint contains the following link to an audio clip of that conversation, in which the Governor can be heard saying those words, entitled, "Exclusive Full Recording: Jewish Leaders Say They Were 'Stabbed in the Back' by Cuomo, HaModia online, and dated October 12, 2020:

<https://hamodia.com/2020/10/12/exclusive-recording-jewish-leaders-say-stabbed-back-cuomo/>.

4. The complaint contains a transcription of certain of Governor Cuomo's remarks that appears below here and the Governor can be heard saying on the audio clip:

I don't disagree with you, uh, and look, I'm a hundred percent frank and candid. Uh, *this is not a highly nuanced, sophisticated response. This is a fear driven response. You know, this is not a policy being written by a scalpel, this is a policy being cut by a hatchet*, it's just a *very blunt*, uh, I didn't propose this, you know, it was proposed by the mayor [Blasio] uh in the city. I'm trying to uh sharpen it and make it better, but it's out of fear, people see the numbers going up, uh close everything! *Close everything! It's not the best way to do it, but it is a fear drive response, the virus scares people, hopefully we get the numbers down in the zip codes, the anxiety comes down, and then we can have a smarter, more tailored approach.* Your point is right, why close every school? Why don't you test the schools and close the ones that have a problem? I know, but, first, I don't know that we have the resources to do that now, but I can tell you honestly, uh, the [] fear is too high, to do anything other than uh. Let's do everything we can to get the infection rate down now, close the doors, close the windows, that's where we are. Uh [Health] commissioner do you want add anything?

You could say there's a better way to do this. I know. But we're dealing with emotion and fear as much as anything. And I'll tell you, its New York City, we have a real problem with fear and anxiety, and people losing confidence in the City, and who's moving out, uh and who's afraid . . . so *it is a blunt policy, I agree with you*, uh but at this point uh I don't think that we can do anything more sophisticated. Hopefully we get it under control, *it's a few weeks, people take a deep breath, and then we can have a more intelligent, sophisticated policy.*

5. One of my colleagues has listened to the full audio and confirmed (1) the accuracy of the transcription and (2) recognizable voice of Governor Cuomo as the speaker.

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct.

Executed on October 15, 2020 in New York, New York.

/s/ Randy M. Mastro

EXHIBIT L
(Dist. Ct. Dkt. No. 5)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X	:
THE ROMAN CATHOLIC DIOCESE OF	:
BROOKLYN, NEW YORK,	:
	:
<i>Plaintiff,</i>	:
	:
v.	:
	:
GOVERNOR ANDREW M. CUOMO in his	:
official capacity,	:
	:
<i>Defendant.</i>	:
-----X	:

**DECLARATION OF BISHOP RAYMOND F. CHAPPETTO IN SUPPORT OF
PLAINTIFF’S APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

I, Bishop Raymond F. Chappetto, Vicar General for The Roman Catholic Diocese of Brooklyn, New York, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746, and state as follows:

1. I submit this declaration in support of Plaintiff’s application for a temporary restraining order and preliminary injunction in order to explain how The Roman Catholic Diocese of Brooklyn, New York has successfully implemented comprehensive protocols to prevent the spread of COVID-19 in our churches, and to further explain how Governor Cuomo’s COVID-19 order capping in-person attendance at houses of worship in designated “orange” and “red” zones in Brooklyn and Queens to no more than 25 and 10 people, respectively, is wholly unwarranted as applied to the Catholic churches in these zones. Indeed, all of these churches have been operating safely for months now, and the strict attendance caps imposed by the COVID-19 order would grossly infringe on the liberties of those in our faith community for no

legitimate reason, let alone the compelling interest necessary to justify violating our First Amendment rights.

Background

2. Since 2013, I have served as the Vicar General for The Roman Catholic Diocese of Brooklyn, New York, which serves Brooklyn and Queens. The Vicar General is effectively the Vice President—both legally and canonically—and assists with the governance of the 186 different parishes in the Diocese of Brooklyn. I routinely consult with and advise the Bishop of Brooklyn, Nicholas DiMarzio, on decisions ranging from the clergy, to administrative concerns, to church finances.

3. I was initially ordained on May 29, 1971. After my Ordination, I completed priestly assignments at various parishes throughout the Diocese of Brooklyn, including St. Camillus, Rockaway Beach (1971-75), St. Pius V, Jamaica (1975-76), Incarnation, Queens Village (1976- 81), and St. Helen, Howard Beach (1981-83). I have served as pastor at Our Lady of Miracles in Canarsie, Our Lady of the Snows in Floral Park, and most recently at St. Kevin in Flushing. I was ordained a Bishop on July 11, 2012.

4. Before being named Vicar General, I was named Vicar for Clergy and Consecrated Life in 2009, a position which I hold to this day. In that capacity, I serve as the liaison between the Bishop of Brooklyn and all the priests in the Diocese.

5. In all, I have spent nearly 50 years as a pastor and Bishop in Brooklyn and Queens. As a result, I am intimately familiar with the spiritual and material needs and concerns of the Catholic Diocese of Brooklyn and the faith community it serves.

The Diocese of Brooklyn Developed a Comprehensive Response to COVID-19

6. The Diocese of Brooklyn has closely monitored the ongoing COVID-19 pandemic and has consistently taken responsible, affirmative actions to help limit the spread of

the virus and protect our parishioners. In the early days of the pandemic, we assisted parishes throughout the Diocese by drafting and circulating memoranda with up-to-date safety protocols and instructions.

7. On March 16, 2020, we elected to cancel all public Masses in the Diocese until further notice. This decision pre-dated the government-mandated closures that followed later that month. Public Masses did not resume in the Diocese until the weekend of July 4, 2020. During this period of closure, numerous weddings, funerals, and baptisms were either canceled or, as the government-imposed restrictions eased in May and June, were limited to 10 people. This was an extremely painful period for our faith community, not only because of the physical and emotional toll that the pandemic took on parishioners, but also because in-person Mass is of critical spiritual importance in our faith tradition, as is the opportunity to participate in lifecycle events of religious significance—such as baptisms, weddings, and funerals—in church and amidst a full complement of family, friends, clergy, and other members of the faith community. Nevertheless, we imposed and abided by these severe restrictions because it was the right thing to do for the health and welfare of our parishioners.

8. During the roughly four-month period when churches in Brooklyn and Queens were largely closed, the Diocese formed an internal commission to ensure that, when the time came, we would be able to safely welcome members of our faith community back to church. The commission was chaired by Joseph Esposito, the former Commissioner of New York City Emergency Management and former Chief of Department of the New York City Police Department, and included a mix of different stakeholders from our community. The commission regularly consulted with a mental health expert.

9. Over the course of numerous meetings in May and June, our commission developed protocols to ensure the safe reopening of churches within the Diocese. These protocols were updated weekly, and were memorialized in various memoranda that we circulated to each of our parishes. Examples of these memoranda are attached to this Declaration. *See* Exhibit A. We also engaged a media company to help distribute communications about these protocols to the public, including on the Diocese’s public website and through social media. *See* Diocese of Brooklyn, Coronavirus Updates, *available at* dioceseofbrooklyn.org/coronavirus-updates/.

10. During the reopening process, the Diocese relied on the advice of its internal commission and waited an extra week to resume services at the 25% capacity limit imposed by the State. In other words, even though limited-capacity church services could have resumed in Brooklyn and Queens in late June, we elected to wait another week to ensure all proper safety protocols had been communicated to and implemented by each of our parishes. To that end, we assisted our parishes in obtaining all of the supplies they needed to safely reopen, such as masks, disinfectants, fogging machines, and hand sanitizer. We also elected to re-open over the July 4 holiday weekend, which we believed would allow for an even “softer” resumption of the services that had been suspended for nearly four months, as many parishioners had left New York City for the holiday weekend. For those parishes that needed additional time to implement the various COVID-related protocols, their churches opened even later, after the July 4 soft reopening.

11. Prior to reopening, all churches were thoroughly sanitized, either by outside companies or with equipment recommended by Rocklyn Assets Corp., the property office for the Diocese. Parishes that chose to sanitize their churches without outside assistance received

guidance from a comprehensive video assembled by Rocklyn Assets that demonstrated the proper techniques for sanitizing.

12. The church services that resumed in early July and continue to this day bear little resemblance to pre-pandemic church services. In addition to limiting attendance to 25% of each church's capacity, we have required that all parishioners wear masks and only sit in designated areas that ensure proper social distancing. Hand sanitizer is readily available in all churches, and parishioners are encouraged to sanitize whenever appropriate. Additionally, pastors throughout the Diocese have been instructed on all relevant safety protocols, which they take seriously.

13. Additionally, to ensure the safety of parishioners, the Diocese has altered certain fundamental church practices, most notably the giving and receiving of the sacrament of Holy Communion. Holy Communion is one of the most central and sacred acts in the Catholic Church. Catholics believe that, upon consecration, the substance of the bread becomes the Body of Christ and the substance of the wine becomes the Blood of Christ. Ordinarily, parishioners are provided a wafer either in their hand or on their tongue, and at many churches those parishioners are also provided with the option of receiving wine, all of which has spiritual significance. However, in response to the pandemic and to ensure the safety of both parishioners and the surrounding community, Holy Communion can no longer be taken on the tongue, and wine is no longer distributed during Communion at all. These are significant restrictions of core religious practices, but ones that our Diocese has adopted to ensure a proper balance between religious exercise and public safety.

The Protocols Implemented By the Diocese of Brooklyn Have Ensured Safe Worship for the Past Three Months Without Any COVID-19 Outbreak or Spread in Our Churches

14. In the three months since the Diocese reopened its doors, pastors throughout Brooklyn and Queens have informed me that they have seen a steady increase in the number of

people who seek to attend Mass or visit the church to pray. In fact, certain parishes have had to rely on overflow rooms for parishioners attending Mass to ensure that attendance within the church remains below the 25% threshold. These overflow rooms are subject to the same social distancing protocols that apply to the actual churches.

15. The safety protocols that we developed prior to reopening, and then implemented upon reopening, have been successful. Since March, any pastor with a COVID-related question or concern has been encouraged to raise such concerns directly with me, and been directed to report any COVID-related incidents to me as well. Through this reporting structure, I would know whether there have been any instances of COVID-19 spread in our churches. To my knowledge, since our churches reopened in July for Mass and other religious ceremonies subject to our safety protocols, there has not been *any* COVID-19 outbreak or spread in *any* of our churches.

16. As a result of this success, in recent weeks, I had been working with others to develop plans to expand capacity at churches within the Diocese to 33% (as we were permitted to do under the previously applicable government regulations). If not for our proven ability to limit the spread of COVID-19 in our communities, I would not have felt confident planning and preparing for an expansion of church capacity.

**Governor Cuomo’s Order Would Devastate the Diocese of Brooklyn and
Our Community of Faith**

17. Pursuant to Governor Cuomo’s order, all houses of worship in a “red” zone would be limited to the lesser of 25% capacity or a maximum of 10 congregants. The order also requires that all houses of worship in an “orange” zone limit capacity to the lesser of 33% or a maximum of 25 congregants.

18. It is my understanding, based on a review of information promulgated by the Governor's Office, that there are 24 different churches in our Diocese that would fall into either the red or the orange zone. There are 13 churches in the red zone, including St. Athanasius, Holy Spirit, Our Lady Help of Christians, St. Francis de Chantal, St. Thomas Aquinas (Flatlands), St. Edmund, Good Shepherd, St. Rose of Lima, St. Brendan, Our Lady of Grace, Queen of Peace, Our Lady of the Angelus, and St. Mary Star of Sea. And there are 11 additional churches in the orange zone: Our Lady of Refuge, Immaculate Heart of Mary, St. Vincent Ferrer, St. Rosalia – Regina Pacis, St. Simon and Jude, Resurrection (Gerritsen Beach), Guardian Angel, St. Mark, Our Lady Queen of Martyrs, St. Gertrude, and St. Nicholas of Tolentine.

19. All of the churches in the red zone, and all but one of the churches in the orange zone, can accommodate 500 or more people (the one other church in the orange zone seats 200). Indeed, 12 of these churches—including four in the red zone—can accommodate 750 or more people, and two churches in the orange zone seat over 1,000. Given the size of these churches, the percentage caps are meaningless, because even the smallest church will be limited by the 10 or 25 person cap to well below 25% capacity.

20. By capping capacity at either 10 or 25 parishioners, in churches with seating capacities of between 500 and 1,200, the Governor's order would effectively close these churches: only a miniscule percentage of parishioners would be able to attend services, and it would generally not be feasible to conduct public Mass for 10 or 25 people at a time. These closures would be forced on us, notwithstanding the success of the Diocese's measured and carefully orchestrated reopening efforts to date.

21. The cap on attendance and effective closure of these churches would be excruciatingly painful for parishioners. As a community of faith, assembly in the Church is

extremely important. Physical attendance demonstrates that we belong to a single community: when we gather in person, we show our support for each other and for our faith. For months, our faith community had to sit at home and watch Mass on television, foregoing the sacrament of Holy Communion and in-person worship. As noted above, this was devastating and spiritually harmful, but necessary at the time due to the reality of the pandemic. The consistent but controlled increase in church attendance since we reopened our doors in early July—even though remote Mass is still available—reflects how our faith community needs in-person services for their spiritual lives now more than ever.

22. Yet it is not just Mass that would be affected and infringed upon by the Governor's order. Baptisms, weddings, and funerals are religiously and spiritually important lifecycle ceremonies in which in-person, in-church participation is key to our faith and community. The period of time during which these in-person services were not available to our community members—when our priests had to preside over drive-by funerals—was extremely difficult. We only recently began to reschedule many of the cancelled baptisms that had been planned before the pandemic-related closure in March. The Governor's latest reversal, going back to the dark period in which gatherings in churches were effectively prohibited, would cause irreparable harm to our parishioners and, without justification in our case, deny them their constitution right to express their faith at Mass this Sunday.

23. That the Governor's order would allow for 10 in a "red" zone or 25 people in an "orange" zone to enter a church is little consolation. There is simply no way for a priest to select such a small group of parishioners from his congregation to attend Sunday Mass. Indeed, many parishioners have only recently returned to their churches, and that many of the affected churches could comfortably accommodate many more people while still adhering to strict social

distancing policies. In any event, we will continue to abide by the 25% capacity limitation that the Governor previously imposed and which we have assiduously adhered to in the churches within our Diocese.

24. I want nothing more than for those in my religious community to be safe and well. And I want the same for other religious communities as well. My heart goes out to those who have seen spikes in the number of COVID-19 cases in their religious community. If there were a spike in the number of COVID-19 cases in our community, I would be the first to call for caution, just as the Diocese of Brooklyn voluntarily cancelled in-person services before the State required us to do so in March. But that is not our community. Indeed, the Diocese of Brooklyn has invested tremendous time and resources into ensuring that, once we received the go-ahead this past July to reopen our church doors, those doors would remain open. And we have succeeded in ensuring the safety of our parishioners ever since. It would therefore be a tragedy to once again have to close those doors to our religious community when we have been doing everything right, followed the Governor's orders, made safety our priority, and succeeded in keeping COVID-19 at bay within our churches.

+ Raymond F. Chappetto
Most Rev. Raymond F. Chappetto, DD, VG, VE

EXHIBIT M
(Dist. Ct. Dkt. No. 5-1)

EXHIBIT A

Printed by: **Vicar Generals Office**
Title: **Suspension of the Distribution of Holy Communion Under Both Fo...**

Friday, March 06, 2020 10:07:23 AM
Page 1 of 1



Vicar General

Fri, Jan 31, 2020 12:05 PM

From:  **Vicar Generals Office**

To:  Vicar General

Bcc:  Weekly Bulletins

Subject: Suspension of the Distribution of Holy Communion Under Both Forms

Dear Pastors and Administrators:

Aware of the intense media coverage concerning the new strand of the coronavirus from China and mindful of the ever-widening extent of the Flu Season here in the New York Area the Bishop, out of an abundance of caution, is suspending the distribution of Holy Communion under Both Forms within the Diocese until further notice. Upon his decision offering Holy Communion under Both Forms in the Diocese will resume with his notification.

The distribution of Holy Communion in the hand, while not being mandated, is highly recommended at this time. Pastors are asked to have parishioners consider this option with proper explanation and catechesis, again, reminding everyone that these measures and recommendations are taken out of an abundance of caution.

Thank you.

Sincerely,
Office of the Vicar General
Diocese of Brooklyn
310 Prospect Park West
Brooklyn, NY 11215
Tel: 718.399.5995
Fax: 718.399.5965

**OFFICE OF THE VICAR GENERAL
DIOCESE OF BROOKLYN**

310 Prospect Park West • Brooklyn, New York 11215 • 718.399.5995 • FAX: 718.399.5965

To: Pastors & Administrators
From: Most Reverend Raymond F. Chappetto
Re: Cautions and Preventative Measures Regarding Coronavirus
Date: March 4, 2020

In light of the increasing threat of the spread of the coronavirus, as well as the continuing flu season, Bishop DiMarzio would like to reaffirm the cautions and preventative measures that should be taken at liturgies in the Diocese of Brooklyn.

There is no place for fear or division in the celebration of a liturgy and so, desiring to keep our communities together and united, these directives, previously issued, are now being reissued with a **greater urgency**.

-It is VERY STRONGLY suggested that Holy Communion be received in the hand as long as this threat continues. Pastors should advise the faithful that this is for the protection of all the faithful who receive (not just the communicant) and the priest, deacon or extraordinary minister who is distributing Holy Communion. Pastors could take the opportunity to instruct the faithful on the correct and reverent way to receive the Eucharist in the hand.

-The distribution of the Precious Blood to the faithful has been suspended during this time.

-Extraordinary ministers of Holy Communion and indeed all involved in the liturgy should disinfect their hands before the distribution of Holy Communion.

-The Roman Missal's rubrics state that the priest or deacon should ask the faithful to exchange the sign of peace "if appropriate." Prudence suggests that this time is not, in fact, an appropriate time to do so. Therefore, for the time being, after the general greeting "The peace of the Lord be with you," the liturgy should continue with the "Agnus Dei."

-Holy water fonts should be emptied and cleaned on a regular basis. No one should feel obligated to use holy water upon entering or leaving church nor should anyone feel obligated to greet the celebrant (or one another) before or after Mass with a handshake.

Pastors are asked to inform their parishioners of these safety practices and explain why they are being taken at this time in an over abundance of caution perhaps through the bulletin or announcements at Mass.

OFFICIAL STATEMENT FROM THE DIOCESE OF BROOKLYN

CHURCHES & LITURGY

In an effort to be proactive in our response to the spread of the Covid 19 Virus, Bishop DiMarzio has dispensed the faithful from the obligation to attend Sunday Mass until further notice.

Public Masses will be celebrated; however the faithful are urged to exercise caution and try to limit the numbers of persons gathered. This is in an effort to be in compliance with the State's regulations about large public gatherings. This dispensation remains in effect until further notice.

Weekday Masses, too, will continue as usual with the normal precautions people should take when gathering in public places. Other celebrations (such as weddings and funerals) may take place but attendance should be limited. Celebrations such as Confirmations, First Penance, etc. may take place but attendance should be strictly limited, perhaps including only family members. There is an option for an Order for Confirmation without Mass, if this is desired. In these extremely difficult and challenging times, our primary duty is to keep the faithful safe and healthy.

When gathering, the faithful are urged to take the necessary precautions including hand washing, remaining at a safe distance from others and other safe practices, such as the reception of Holy Communion in the hand.

SCHOOLS

The elementary Catholic Academies and Parish Schools in the Diocese of Brooklyn will close next week, Monday, March 16 to Friday, March 20. Monday will be used as a professional day for teachers to develop their distance learning plans. We anticipate that beginning Tuesday, children in the Diocese of Brooklyn's Academies and Schools will have access to online learning.

In addition, the leadership of all Catholic Academies and Parish Schools are committed to following CDC guidelines regarding deep cleaning and sanitization of buildings.

This decision is being made out of an abundance of caution due to the rapidly changing situation and after consultation with city and state agencies. Please continue to monitor your Catholic Academy and Parish School websites next week for further updates.

RELIGIOUS EDUCATION PROGRAMS

All in-person parish religious education classes, all youth ministry classes and group meetings (including all CYO activities) and all adult faith formation sessions (including RENEW and other small faith sharing groups) will be cancelled until further notice. As previously stated, all Secretariat for Evangelization and Catechesis classes, events, workshops, and other gatherings are also canceled during this period.

The health of all the faithful of the Diocese is of utmost concern, so let us continue to pray to the Lord Who is a healer to protect us and bring about quickly an end to this present crisis.

Praying at Mass While Being Smart about the Novel Coronavirus (COVID-19). Some things you should be aware of or you might notice are a little different these days at church.

BEFORE LEAVING HOME

1. **Ask yourself how are you feeling?** Use common sense, if you are not feeling well you should not come to Mass. If you are genuinely sick you are not obligated to participate in the Sunday Celebration of Mass. You should stay home and rest so as not to risk getting yourself even sicker or spreading germs to others in the church. If you are sick you also should not go out to a mall or movie theatre.

2. **Wash your hands.** Health care professionals are insistent that washing one’s hands is the best practice during flu season as well as this period of concern about the Novel Coronavirus.

Wash your hands often with soap and water for at least 20 seconds, especially after going to the bathroom; before eating; and after blowing your nose, coughing, or sneezing.

If soap and water are not readily available, use an alcohol-based hand sanitizer with at least 60% alcohol. Always wash hands with soap and water if hands are visibly dirty.

ARRIVING AT CHURCH

1. **The smell of disinfectant might be more prevalent especially by the doors of the church.** Parishes have been asked to be more attentive to cleaning the

doors and door handles of the parish buildings. Some doors might even be left open that normally are closed to diminish hand contact.

2. **The Holy Water fonts might be empty.** Parishes have been instructed that Holy Water fonts should be emptied and cleaned on a regular basis. No one should feel obligated to use Holy Water upon entering or leaving church. A mindful recognition of entering the Lord’s Eucharistic Presence is most important.

3. **People might not extend their hands in greeting.** No one should feel obligated to greet the celebrant (or one another) before or after Mass with a handshake. Eye contact and a simple smile can be even more welcoming than a hurried handshake.

AT MASS

1. **Pay attention to where you place your hands.** Many people place their folded hands on their face or cover their eyes while praying in church. The Centers for Disease Control and Prevention instructs that you should avoid touching your eyes, nose, and mouth. This holds true at church as well as in other public spaces.

2. **The exchange of the Sign of Peace among the faithful is being discontinued.** The rubric of the Mass states that the priest or deacon should invite the faithful to exchange the sign of peace “if appropriate.” At this time, in light of the Novel Coronavirus, the Diocesan Bishop has determined it is not an appropriate time to do so. Therefore, for the time being, after the general greeting “The peace of

the Lord be with you always,” and response “And with your spirit” the liturgy should continue with the Breaking of Bread and the “Lamb of God (Agnus Dei).”

3. **Before Holy Communion the ministers might leave the church.** All ministers involved in the distribution of Holy Communion should disinfect their hands before the distribution of Holy Communion with vigorous handwashing with soap for 20 seconds or by using an alcohol-based hand sanitizer with at least 60% alcohol.
4. **The Precious Blood is not being offered.** The distribution of the Precious Blood from the chalice to the faithful has been suspended within the Diocese during this time.
5. **Everyone is receiving the Host at Holy Communion in the Hand.** It is very strongly encouraged at this time that Holy Communion be received in the hand. Please do not ask the minister to place it directly onto the tongue. This common-sense adoption is to prevent the minister from coming into contact with the individual’s mouth and then potentially contaminating the other Communion Hosts. Reverence of the Sacrament is still maintained as the Communicant approaches the Sacrament and bows before receiving the Host.
6. **After Holy Communion the ministers might leave the church.** All ministers involved in the distribution of Holy Communion should disinfect their hands after the distribution of Holy Communion with vigorous handwashing with soap for 20 seconds or by using an alcohol-based hand sanitizer with at least 60% alcohol.

AFTER MASS

1. **The Celebrant and others might not extend their hands in greeting.** Mindful of yours and his well-being, the celebrant might not extend his hand in saying good bye as you leave church. No one should feel obligated to greet the celebrant (or one another) before or after Mass with a handshake. Eye contact and a simple smile can be even more beneficial than a hurried handshake.

VIEWING MASS ON NET-TV

1. **For those who are not attending Mass at this time, you can watch Mass from the Diocese of Brooklyn on NET-TV.**
2. **The Mass schedule on NET-TV is as follows:**
Saturday – 6pm Vigil Pre-recorded from Immaculate Conception Church in Jamaica **(English)**
Sunday – 11am Live from St. James Cathedral in Downtown Brooklyn **(English)**
Sunday – 1:30pm Pre-recorded from Co-Cathedral of St. Joseph in Prospect Heights **(Spanish)**
NET-TV can be seen in the New York City area on Spectrum (Channel 97), Optimum (Channel 30), and FIOS (Channel 48). Viewers can also tune in online at www.netny.tv.



**OFFICE OF THE VICAR GENERAL
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URGENT UPDATE FROM THE DIOCESE OF BROOKLYN

Given the continuing and growing concern about the spread of the COVID-19 virus, Bishop DiMarzio has determined that all public masses be cancelled in the Diocese of Brooklyn beginning Monday, March 16th, until further notice. This includes weekday masses as well as Sunday. Funerals and Weddings will be permitted but should be limited to family members only. Parish baptism celebrations should be limited to family only, if they cannot be postponed. Confirmations should be celebrated with the Rite of Confirmation without Mass, if need be, and in consultation with the Bishop scheduled to celebrate the Confirmation.

The faithful of the diocese are reminded that the Bishop has already issued a dispensation from the obligation to attend Mass on Sunday. The obligation to keep the Lord's Day holy can be fulfilled by maintaining a prayerful attitude and through personal and family prayer.

The faithful are urged to watch the celebration of the Eucharist on TV, as well.

The celebrations are scheduled as follows:

Saturday at 6 pm: Vigil pre-recorded from Immaculate Conception in Jamaica (English)

Sunday at 11 am: Live from St. James Cathedral in Downtown Brooklyn (English)

Sunday at 1:30 pm: Pre-recorded from Co-Cathedral of St. Joseph in Prospect Heights (Spanish)

NET-TV can be seen in the New York City are on Spectrum (Channel 97), Optimum (Channel 30) and FIOS (Channel 48). Viewers can also tune in online at www.netny.tv.

In light of the continuing crisis, the situation is being monitored carefully and updates will follow. Let us continue to pray, especially through the intercession of Our Lady of Guadalupe, for those who are sick, for medical personnel and for all people as we confront this challenge.



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**CORONAVIRUS UPDATE FOR PASTORS
March 17, 2020**

Bishop DiMarzio has requested that the following be provided to all Pastors and Administrators for your information and for the benefit and safety of your parishioners.

OUTREACH TO PARISHIONERS

During this unprecedented time in the life of our Diocese, where all public Masses are suspended, it is critical that we continue to pray for the faithful and stay in contact with them where possible. The Church is concerned for their physical and spiritual well-being. Pastors should actively call parishioners during the week to see how they are, especially those with needs or those who may be isolated. Our Churches are open so that parishioners can spend time with the Lord, but they may wish to speak with a priest, and priests should be available to speak with individuals. Parishes might also email and use social media to stay in contact with the faithful perhaps with reflections on the daily readings. Parishioners should be encouraged to call their priests for spiritual guidance.

FINANCIAL CONSIDERATIONS

In order to assist Pastors and Administrators in managing their parish finances, and to provide temporary relief, the Diocese will be delaying the St. John Vianney and the Good Shepherd invoices that are normally sent to parishes at Easter. Parishes must continue to pay the invoices for the Group Medical Insurance Trust and all other invoices.

The Catholic Foundation is available to assist with on-line giving and if parishes should request assistance. In addition, Pastors and Administrators can contact the Catholic Foundation to request distribution of excess funds that were raised above the parish goal. Parishes should look at ways to responsibly reduce and/or limit expenses. The Human Resource Department is available to provide options and provide guidance. In addition, the Office of Fiscal Management continues to be available to provide assistance. Lastly, Pastors and Administrators should keep all receipts, invoices, and paid checks for any expenses that they incur for cleaning of church and/or school buildings in case funds become available.

FUTURE UPDATES

More information will be forthcoming in the near future regarding parishes. Please know that we are aware of your many concerns during this unprecedented time. Pastors are encouraged to be in regular contact with their local Dean, and they are always able to contact the Vicar General at 718.965.7300 ext.1070.

The Diocesan Offices will be closed as of Wednesday, March 18, 2020 but employees will be available to you for questions and concerns. All are working remotely, so we thank you for your understanding and patience as we travel these uncharted waters together. A listing of Diocesan departments will be sent to parishes.

Let us continue to pray for healing, strength and courage as we continue to serve God's people in Brooklyn and Queens during this crisis. May Our Lady intercede for us.



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**CORONAVIRUS UPDATE FOR PASTORS
March 19, 2020**

The situation is changing rapidly and daily, if not more quickly, please continue to be attentive to all the memos that are sent. Each memo contains information which may be new. Please share this information with all the priests in your rectory, as well.

Bishop DiMarzio has requested that the following be provided to all Pastors and Administrators for your information and for the benefit and safety of your parishioners. Please read it carefully and know that we are monitoring the situation closely and will present updates and clarifications as needed.

Today, Bishop DiMarzio had conference calls with all the deans in the Dioceses. The following information is a result of discussion with the deans.

CHURCHES: NEW MANDATES!

- Because of the ongoing danger of groups gathering and the possibility of the virus spreading in this way, we are **MANDATING** churches to **remain closed**. Some parishes have already found it necessary to do this and, in light of the proximity of our parishes to each other, it is thought best to have a **consistent policy in the entire diocese. THIS IS EFFECTIVE AS OF MARCH 20, 2020 at NOON.**
- At this time, too, we are **MANDATING** parish offices to close for business in an attempt to keep people in their homes as much as possible for their own health and wellbeing. Most parish office business can be conducted by telephone. Those who can work from home should do so. **THIS IS EFFECTIVE AS OF MARCH 20, 2020 at NOON.**

PASTORAL CONCERNS

- Bishop DiMarzio has granted all the faithful of the Diocese of Brooklyn a **dispensation from the law of abstinence for the Fridays of Lent for this year**. This is being done to assist people who may have difficulties in shopping for food or other reasons which would make this practice difficult at this time. Please remind parishioners that the Fridays of Lent (and indeed all year) remain days of penance and prayer and that this is needed now more than ever.
- Out of an abundance of caution especially the most vulnerable, Funerals and weddings **will not** be permitted in church. This is because limiting the funerals and weddings to 10 people is proving not to be feasible. If absolutely necessary, a **graveside service**, maintaining the recommendations of the CDC regarding social distancing, could be done, at the discretion of the cemetery administration. A memorial Mass for the deceased should be celebrated later. Weddings should be postponed.
- We are attaching a flyer which you can adapt for your needs with the suggestion that they can be attached to your church doors. The first page is for your own personalization and there are choices for a second page. Both pages could be posted side by side.

- We must also remind pastors and administrators of the precautions that should be taken when hearing confessions. These should be limited to emergencies only and while it is necessary for the confession to be one-on-one and in person, social distancing measures should be observed. A suggestion might be to hear a confession outdoors where the priest and penitent can be at some distance from each other. We also remind priests that spiritual counseling should be given over the phone only. In general we encourage priests to be in contact with their parishioners over the phone or by social media while respecting safe-environment protocols.

CATHOLIC CHARITIES

- **Catholic Charities is available for assistance, if needed. The Call Center number is 718-722-6001, Monday through Friday from 9 am to 6 pm.** Information is available about food pantries and about mental health services. The mental health centers have the capacity to offer counseling over the phone.

COMMUNICATIONS

- Every pastor, priest, and pastoral staff member in the diocese will be migrating from First Class to Microsoft Outlook 365 for our email needs. You will receive information on how to make the change **tomorrow**. Everyone must make this change. It is essential now in order for us to update our email and cell phone number list. Please follow the instructions you will receive from the Office of Information Systems.
- Attached you will also receive a memo of all the extension numbers for all diocesan offices so that you may remain in communication with diocesan personnel as needed.
- **Please read your emails daily for updates.**

FINANCES

- It is suggested that pastors and administrators arrange a conference call with the members of their Finance Councils in order to explain the steps that are being taken to assure the financial health of the parish as well as to obtain their advice.
- There is also the possibility of setting up “Robo-calls” to provide parishioners with information. For assistance please contact the Catholic Foundation of Brooklyn and Queens at 718-965-7375.

We are all committed to serving the Faithful of the Diocese of Brooklyn during this difficult time.

Saint Joseph, Patron of the Universal Church, pray for us!

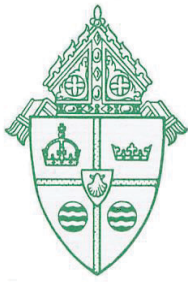
**OFFICE OF THE VICAR GENERAL
DIOCESE OF BROOKLYN**

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To: Pastors & Administrators
From: Most Reverend Raymond F. Chappetto
Re: Official Statements from the Diocese of Brooklyn (March 20 to March 26)
Date: March 26, 2020

Please see enclosed for official diocesan statements from March 20 to March 26 regarding the Coronavirus.

Thank you.



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**CORONAVIRUS UPDATE FOR PASTORS
March 20, 2020**

The following is the information which Bishop DiMarzio has requested be provided today to all Pastors and Administrators for your information and for the benefit and safety of your parishioners. Please read it carefully and know that we are monitoring the situation closely and will present updates and clarifications as needed.

Please know that beginning with this communication, **you will also be receiving attachments to these updates from various diocesan agencies.** This is in an effort to consolidate information and to present it in a unified and manageable way.

EMPLOYMENT ISSUES

Please see the attached communication from the Office of Human Resources for recommendations about various issues concerning parish staffing during the corona virus crisis. For more information about these issues, please contact the Office of Human Resources at 718-965-7362.

PARISH AND SCHOOL BUILDINGS

Please see the attached memo from Rocklyn Assets Corp. regarding the care of parish and school buildings and the possibility of shutting down heating systems for the season as a cost saving measure.

COMMUNICATIONS FROM ROME

The Vatican issued three documents today. This is a summary:

The Congregation of Divine Worship and Discipline of the Sacraments published a decree in the time of Covid-19 concerning Holy Week. In addition to enumerating how the rites would be carried out, it gives priests the faculty to celebrate the Triduum without the participation of the people. Those bound to pray the Divine Office who do not take part in the various celebrations of the Triduum are reminded that they are to celebrate the Liturgy of the Hours that are usually replaced by the Triduum Liturgies: Vespers on Holy Thursday and Good Friday, and the Office of Readings on Easter.

The Apostolic Penitentiary published a decree about special indulgences to the faithful in the current pandemic.

The Apostolic Penitentiary also published a note on the Sacrament of Reconciliation in the current pandemic that affirms “it is always up to the diocesan bishop to determine, in the territory of his own ecclesiastical circumscription and with regard to the level of pandemic contagion, the cases of grave necessity in which it is lawful to impart collective absolution.” In the near future, more guidance will be given.

CATHOLIC SCHOOLS AND ACADEMIES

Please know that the Office of the Superintendent has sent memos to the Principals and the Board Chairs regarding School Building Closures and School and Academy Finances. School Buildings have been closed, without exception, as of 5 PM this evening. You will find attached a memo that was sent to Principals and Board Chairs.

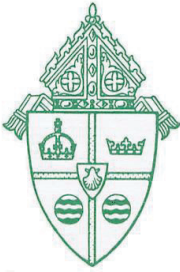
POSSIBLE LEGISLATION TO ASSIST PARISHES AND SCHOOLS

There is the possibility of legislation being passed in Washington which will be beneficial to parishes and school with regard to financial difficulties. This is pending and in development. We will update you as more information becomes available.

IMPORTANT REMINDER CONCERNING OVERNIGHT GUESTS IN RECTORIES

At this time, there should be no overnight guests in rectories. This policy is especially critical during this pandemic event. Under extreme necessity, if a guest must stay in the rectory, you must contact Monsignor Anthony Hernandez for permission prior to the arrival. Violation of this policy may result in canonical sanctions.

Let us continue to pray for healing, strength and courage as we continue to serve God's people in Brooklyn and Queens during this crisis. May Our Lady intercede for us.



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**CORONAVIRUS UPDATE FOR PASTORS
MARCH 24, 2020**

Bishop DiMarzio has requested that the following information be provided today to all Pastors and Administrators so that it may be communicated to parishioners:

Our Holy Father, Pope Francis, has asked all Christians worldwide “to unite their voices toward heaven.”

In order to do this, he has asked all Christians and the heads of all Christian Churches and leaders of all Christian communities the world over to unite in prayer.

To do this, he invited all Christians to join in praying the Lord’s Prayer (the Our Father) at noon in Rome on WEDNESDAY, MARCH 25th, 2020. This is 7 AM (Eastern Daylight Time).

This is the feast of the Annunciation of the Lord. The Holy Father stated, “On the day in which many Christians recall the annunciation to the Virgin Mary of the Incarnation of the Word, may the Lord hear the unanimous prayer of all his disciples who are preparing to celebrate the victory of the Risen Christ.”

On Friday, March 27 at 1 PM (Eastern Daylight Time) the Holy Father will offer prayers and an extraordinary “*Urbi et Orbi*” Blessing. The Holy Father stated, “I invite everyone to participate spiritually through the means of communication.”

Information and broadcast can be found at www.vaticannews.va



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Extraordinary *Urbi et orbi* Blessing

Please communicate the following information to your parishioners.

On Friday, March 27, 2020, the Holy Father, Pope Francis, will impart an extraordinary *Urbi et orbi* blessing ("Blessing to the 'City' and to the World"). This blessing is normally given at Christmas and Easter.

The Blessing carries with it the possibility of the Faithful who are suffering from the Coronavirus and their Caregivers to obtain a plenary indulgence, under the usual conditions, if they listen live to the broadcast by whatever means.

The decree issued by the Apostolic Penitentiary states, in part:

"The *Plenary Indulgence* is granted to the faithful suffering from Coronavirus, who are subject to quarantine by order of the health authority in hospitals or in their own homes if, with a spirit detached from any sin, they unite spiritually through the media to the celebration of Holy Mass, the recitation of the Holy Rosary, to the pious practice of the Way of the Cross or other forms of devotion, or if at least they will recite the Creed, the Lord's Prayer and a pious invocation to the Blessed Virgin Mary, offering this trial in a spirit of faith in God and charity towards their brothers and sisters, with the will to fulfill the usual conditions (sacramental confession, Eucharistic communion and prayer according to the Holy Father's intentions), as soon as possible."

As a reminder, an indulgence is not forgiveness from sin but a remission of the temporal punishment due to sin. The Catechism defines it as follows: *An indulgence is a remission before God of the temporal punishment due to sins whose guilt has already been forgiven, which the faithful Christian who is duly disposed gains under certain prescribed conditions through the action of the Church which, as the minister of redemption, dispenses and applies with authority the treasury of the satisfactions of Christ and the saints.*

An indulgence is partial or plenary according as it removes either part or all of the temporal punishment due to sin. Indulgences may be applied to the living or the dead. (Catechism 1471)

With regard to sacramental confession, it is important to remember that there should only be emergency confessions, which take place maintaining the safeguards recommended by the civic authorities concerning social distancing. The conditions for General Absolution do not exist in the Diocese except in cases such as emergency rooms or hospital wards where priest chaplains are present. The usual conditions for general absolution apply.

The Holy Father has stated that if someone is in need of forgiveness for sin and cannot approach a confessor personally, that person need simply turn to the Merciful Father and ask pardon for sin, with true contrition in his or her heart.

THE URBI ET ORBI BLESSING WILL TAKE PLACE AT 1 PM (EDT). Live coverage will begin at 12:45 pm when Bishop DiMarzio will speak and can be seen on NET-TV on SPECTRUM channel 97, OPTIMUM channel 30 and FIOS channel 48.

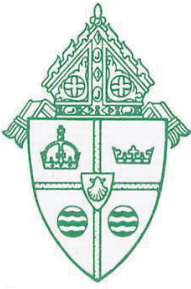
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To: Pastors & Administrators
From: Most Reverend Raymond F. Chappetto
Re: Special Notice for Reporting Coronavirus Confirmed Cases
Date: March 27, 2020

If your church or another parish building has been exposed to Coronavirus by a confirmed case of an employee, parishioner or someone using the building, please immediately contact Bishop Raymond Chappetto, Vicar General, at (718) 965-7300 ext.1070.

Thank you.



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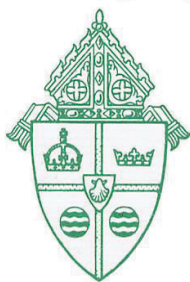
MEMO TO DIOCESAN CHAPLAINS

Bishop DiMarzio has asked that the following information and directives be shared with all diocesan chaplains, including hospital chaplains, nursing home chaplains, and prison chaplains.

In an effort to assist in the enforcement of social distancing norms, we ask that all chaplains be aware of the need to take necessary precautions when attending to the sick, the elderly or whomever they are serving.

1. **Chaplains must follow the guidelines set by the institution they are serving. If a nursing home or hospital is limiting entry or banning it altogether or if there are limitations as to areas the chaplain may enter, this MUST be strictly observed by chaplains.**
2. If entry is permitted, chaplains **MUST** wear protective gear per the institution's directives. This may include masks, gloves or other protective clothing. Chaplains must observe the proper protocol for discarding these items when finished.
3. Anointings may take place; however, the following precautions **must be observed**.
 - a. The holy oil may be placed on a cotton ball **BEFORE** entering the room. The oil stock should remain outside the room to prevent contamination.
 - b. Aside from the obvious necessity of drawing close to the patient when anointing, the chaplain should maintain social distancing norms.
 - c. The anointing may take place using the cotton ball as the canons permit an "instrument" to be used in grave necessity.
 - d. The anointing should be celebrated as quickly as possible maintaining a pastoral spirit. (Short forms of prayers in emergency should be used).
 - e. After the anointing, the cotton ball should be contained (in plastic) until it can be reverently and properly disposed of (by burning or burying).
 - f. The Apostolic Blessing should be given, especially if absolution cannot be given. This carries with it a plenary indulgence with perfect contrition on the part of the patient.
4. Confessions may be by General Absolution. This may be carried out in a ward or emergency room by priest hospital chaplains where all those desiring absolution will be able to hear.
 - a. The Bishop must be informed of the General Absolution.
 - b. The rite in the Ritual is to be followed as well as possible, given the circumstances.
5. **Other confessional situations must be for emergencies only**, maintaining the proper social distancing norms. The faithful should be reminded that a perfect Act of Contrition and doing acts of penance with trust in the mercy of God will suffice during this challenging time.

Our chaplains are in our prayers as they battle on the front lines. Their health and well-being are of utmost concern to the Bishop. In all circumstances, safety is a top priority for the patients and for the chaplains, while striving to be as pastorally present as possible.



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Bishop DiMarzio has asked that the following information be sent to all priests living in the Diocese of Brooklyn:

BELLS OF HOPE

As we approach the Easter Season, in which we celebrate the Resurrection of our Lord from the dead, which is the reason for our hope, the Bishop of Brooklyn is strongly encouraging that, during this COVID-19 pandemic, every parish in Brooklyn and Queens that has outdoor bells should ring them at 3 PM daily, beginning Friday, April 3 and continuing until further notice, commemorating the hour of the death of the Lord and of Divine Mercy. The faithful should be encouraged to pray in silence at that time.

This initiative, which is called “Bells of Hope” is meant to be a symbol of solidarity with the faithful, as well as with all who are suffering during this crisis, especially those who have died and the first responders who put their lives at risk on a daily basis.

THE WELL-BEING OF PRIESTS DURING THE PANDEMIC

The COVID-19 pandemic has affected us all in many ways. Some priests are sick, some are living with people who are sick and all of us have felt the frustration of not being able to be present to our people the way priests ought to be.

A major concern is the health and well-being of the priests in the diocese during the pandemic. It is of utmost importance that priests take good care of themselves in order for them to be able to serve the people of God.

What follows are some thoughts for priests to consider at this time. Remember that taking care of yourself is ultimately the best way to be in a position to take care of the faithful.

DEFINITIONS

The following, from Johns Hopkins University, is helpful in understanding definitions and parameters:

“People who have been exposed to the new coronavirus and who are at risk for coming down with COVID-19 might practice **self-quarantine**. Health experts recommend that self-quarantine lasts 14 days. Two weeks provides enough time for them to know whether or not they will become ill and be contagious to other people.

Self-quarantine involves:

- Using standard hygiene and washing hands frequently
- Not sharing things like towels and utensils
- Staying at home
- Not having visitors
- Staying at least 6 feet away from other people in your household

For people who are confirmed to have COVID-19, **isolation** is appropriate. Isolation is a health care term that means keeping people who are infected with a contagious illness away from those who are not infected. Isolation can take place at home or at a hospital or care facility. Special personal protective equipment will be used to care for these patients in health care settings.”

MAINTAINING GOOD HEALTH IN RECTORIES

Most, if not all, priests have already been exposed to COVID-19 given the very fact of our ministry to the faithful. Those who knowingly have had **direct exposure** to someone with COVID-19 **must** enter quarantine, adhering to the directives of the Centers for Disease Control and governmental agencies. This is to see if they develop symptoms. If they do develop symptoms, they must contact their doctor immediately.

Because of the likelihood that many priests have had some exposure, we all should engage in good practices limiting our time out of the rectory.

Priest who are ill **must** isolate. This means that, if they are in the rectory, they **must remain in their private quarters**. Food must be brought to them (left outside their doors), their utensils must be washed carefully or disposable utensils should be used, and anyone who interacts with them must maintain social distancing and wear a mask and gloves.

We are looking into how priests might be able to get tested for COVID-19 if need be. More information on this will follow.

SOCIAL INTERACTION & MENTAL HEALTH

Priests are asked to be especially careful if they must go out. This is because many priests live with other priests and there are risks not just to himself but to those with whom he lives. As difficult as it may be, priests are being asked to stay in as much as possible. While this may be a sacrifice, it is something we must do, setting an example for others and doing what we must do to safeguard our health.

In rectories, priests are asked to practice proper hygiene and cleaning for everyone’s benefit. This includes being attentive to our mental health. While we are living through stressful times, we must all remember that we are here for each other and must look out for one another. The rectory community is important now, more than ever! At a time when we are limited in what we can do in ministry, we must rely on each other all the more. It is not healthy to completely isolate oneself (except in the medical sense) from those with whom we are living.

A walk outside (with proper precautions and social distancing) is a good thing. Meals together, prayer together, conversations, and even watching a movie together are some ways of being there for one another. Phone calls, emails, and text messages to other priests, neighbors and friends, are helpful.

Priests who live alone must consider their situations during this period of crisis. Others should remember to check in on them. It may even be possible for a priest living alone to move into another rectory for a period of time, with the permission of the Bishop.

The following information has been provided by Saint Luke's Institute:

- Mental Health Helpline for Clergy & Religious: Call 301-273-4519, M-F, 10 am-7:00 pm (ET)
- Free Resources are available from SLI Connect, (www.sliconnect.org), the education ministry of Saint Luke Institute (www.sli.org).
-
- Managing Coronavirus Anxiety: (Practical strategies for managing the psychological impact of the coronavirus pandemic. <https://www.sliconnect.org/managing-coronavirus-anxiety/>)
- Resiliency in Times of Crisis: FREE resources for building resiliency and managing emotional and spiritual health. www.SLIconnect.org/resiliency

Please remember in your prayers our brother priests who are sick at home or in hospitals.

SPIRITUAL HEALTH

The following information is from **The Sacred Heart Institute for the Ongoing Formation of Clergy**. A new initiative called "A Shepherd's Care" has been started with the goal of attending to our spiritual and human needs. Presentations include issues of current concern by various presenters. Log on to <https://cor-jesu.org/a-shepherds-care/>

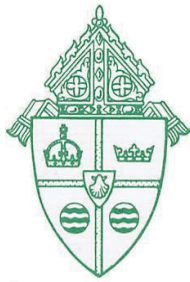
Sacred Heart Institute Website: www.cor-jesu.org

Two virtual retreats will be presented next week as well. Msgr. Thomas Caserta has presentations for Monday, Tuesday and Wednesday of Holy Week and Msgr. David Toups, Rector of St. Vincent de Paul Seminary, will offer reflections for the days of the Triduum. They are recorded and can be viewed at any time.

LITURGICAL NOTES

Attached are two liturgical resources from the Holy See. The first resource is an additional text for the General Intercessions of Good Friday. It becomes the tenth (X) intercession and the usual tenth (X) intercession becomes the final one. This intercession supersedes the one given previously to you from the USCCB. The second resource is proper readings and texts for a Mass in Time of Pandemic. Please note that this Mass can be celebrated this week April 2, 3, 4 and then not again until April 20, 2020.

Please note, too, that the liturgical attachments are lengthy (over 20 pages) and include texts in English, Spanish and Latin. Use these at your discretion and print what you will need.



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**BISHOP'S ADDRESS TO PRIESTS ON HOLY THURSDAY
SCHEDULED FOR APRIL 9, 2020**

Bishop DiMarzio will record an address to the priests of the Diocese of Brooklyn which will be available on Holy Thursday. All priests are asked to watch this video presentation for an important message from our Bishop. Information will be sent to you by text message.

**PRAYING THE LITANY OF THE SACRED HEART OF JESUS
ON GOOD FRIDAY AT NOON
PLENARY INDULGENCE**

By a special grant from the Apostolic Penitentiary of the Holy See for those who pray for the end of the pandemic, a plenary indulgence is available for those who join Archbishop Gomez (the President of the USCCB) in praying the Litany of the Sacred Heart on Good Friday at NOON. A plenary Indulgence removes all of the temporal punishment due to sins and may be applied to oneself or to the souls of the deceased [*Catechism of the Catholic Church*, no. 1471].

To receive this indulgence, a member of the faithful would need to

1. pray the Litany of the Sacred Heart on Good Friday
2. be truly repentant of any sins they have committed and receive the Sacrament of Reconciliation (at the earliest opportunity)
3. pray for the Holy Father's intentions.

As an aid to this call to prayer, please find at the following links a prayer card of the Litany of the Sacred Heart of Jesus, as well as a promotional flyer for the occasion:

Spanish: <https://lacatholics.org/wp-content/uploads/2020/04/Litany-of-the-Sacred-Heart-Spanish.pdf>

English: <https://lacatholics.org/wp-content/uploads/2020/04/Litany-of-the-Sacred-Heart-English.pdf>

Flyer (English): https://lacatholics.org/wp-content/uploads/2020/04/AnnoucementGraphic_USCCB_English.png

REMINDER ABOUT "BELLS OF HOPE"

Please remember that we are ringing our church bells every day at 3 pm (**including Good Friday**) as a reminder to people to pray during this time for those who are suffering from the effects of the pandemic: the sick, those who care for them and all first responders and for an end to the pandemic.

Thank you for making this known to parishioners who may join in a moment of prayer, even if they do not hear the bells. Brooklyn and Queens are at the epicenter of the crisis in New York City so this is an important initiative for uniting the faithful in prayer.

WEDDINGS IN GRAVE NECESSITY

If a wedding cannot be postponed, for the gravest of reasons, it could be celebrated with the necessary precautions (social distancing, proper hygiene, avoidance of crowds etc.) Present at the wedding should be ONLY the officiant (priest or deacon), the couple, the witnesses and possibly the parents. Please note, however, that the marriage license office, as of the date of issuing this memo, is closed. These directives are **only** for a wedding which must take place and cannot be postponed.

BISHOP DIMARZIO'S MESSAGE FOR DIVINE MERCY SUNDAY

Bishop DiMarzio will be sending out an email to the faithful of the Diocese of Brooklyn for Divine Mercy Sunday. Please look for it in your inbox.

FINANCIAL INFORMATION AND UPDATES

Services provided by Grassi from the Engagement Letter for Consulting Services:

Deliverables: Necessary documentation and advice and counsel through final application and loan forgiveness claim submission by Parishes.

Oversee the Paycheck Protection Program loan application process through approval and funding:

- Grassi provided a webinar on Tuesday March 31, 2020 describing the PPP. Engagement letters were subsequently submitted to all parishes.
- Grassi assigned a staff person as the liaison with the Parish.
- Grassi assisted the Parish in consulting on accumulating supporting documentation.
- Grassi prepared financial analysis and advise on loan amount.
- Each Pastor applied for the loan
- The Pastor communicates with the bank through the approval and deposit of funds process. Grassi is available to answer questions that come up through the Pastor-Bank steps.

Application and overseeing loan forgiveness submission by Parish

- For Parishes engaged with Grassi, over the next two weeks Grassi will provide a webinar that will provide an overview of the process to submit an application for debt forgiveness. It will include information on the documentation that will be required.
- Grassi will advise on the accumulation of Parish's loan forgiveness documentation for claim requests after measurement period.
- Grassi will monitor government regulations and will advise each Parish.
- Grassi will consult with the Parish as each parish submits forgiveness claim submission.

The Office of Fiscal Management (OFM) is continuing to assist parishes during the Covid-19. Parishes that have questions and need additional assistance are requested to contact the Office of Fiscal Management. Representatives from OFM continue to email and call parishes during this time.

COVID-19 PASTOR PORTAL

A website has been developed to contain all the information (past and present) to the pastors and administrators of the diocese regarding the Coronavirus pandemic and its effects. The goal of creating this website is to give pastors easy access to all information and to provide one place to see all the information provided to you from all sources in the diocese. The site will prioritize information for you and will be accessible even from mobile devices.

You are invited to log in to the website by entering the following address into your browser:
<https://covid-19.dioceseofbrooklyn.org/>

The site will not require a password, so please be aware that any highly sensitive information will still be emailed to pastors and administrators.

CATHOLIC CHARITIES RESOURCES

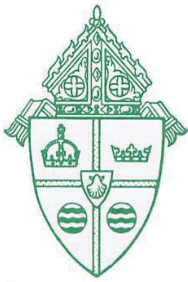
Catholic Charities Brooklyn and Queens continues to operate during Covid-19. Parishes are advised to have individuals needing help to direct them to the Catholic Charities website www.ccbq.org for more information and locations. In addition, individuals can call the Catholic Charities Call Center (718) 722-6001 for help.

- On Friday April 17th, Catholic Charities Brooklyn and Queens had Emergency Pop-Up Food Pantry on Friday April 17th at Our Lady of Sorrows Church in Corona, Queens, and distributed **9,000 plus meals worth of food** in Corona.
- Last week Catholic Charities Brooklyn and Queens distributed **7,000 meals worth of food** at another Pop-Up Emergency Food Pantry.
- The existing Catholic Charities food pantries are distributing nearly **100,000 meals worth of food** and have seen a dramatic increase in demand.
- In addition, Catholic Charities is delivering **8,000 hot meals** to seniors.

ADDITIONAL HEALTH RESOURCE

The following information from Saint John Vianney Center is provided for your continued physical and emotional health and well-being.

See: <https://www.sjvcenter.org/covid-19-resources/>



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Anril 24.

**Diocesan Directives for the Time of Pandemic
Regarding Sacraments and Church Procedures**

According to the New York City Department of Health, as of April 22nd, there were 81,388 cases of Covid-19 in Brooklyn and Queens, which represents nearly 60% of all cases in New York City. During this time of the COVID-19 Pandemic, we must take direction from public health authorities in order to limit the spread of disease and to protect the health of the faithful of the Diocese of Brooklyn as well as that of the clergy.

The Diocese finds itself at the epicenter of the crisis, with Brooklyn and Queens being the center of the outbreak in the New York City. The fact is that we must try to do all we can to serve the People of God while also protecting as much as possible their physical health. While it is true that we all realize that we are preparing for eternity, we also realize that it is irresponsible to risk the gift of life that God gives us.

For this reason, the following directives are in place for parishes in Brooklyn and Queens during the time of the pandemic and until the Diocese of Brooklyn, using the guidance of medical experts, amends these temporary policies.

Celebration of the Eucharist and Reception of Holy Communion: Mass is being celebrated in seven languages on NET – TV and in numerous livestream and recorded broadcasts in the Diocese. While these are all laudable efforts, we must also be cognizant of the effect they might have on people. We cannot, in other words, become too comfortable with it. While these celebrations should probably continue even after the restrictions on gathering are lifted, we must continue to emphasize to the faithful the importance and necessity of gathering as a community when we finally are able to do so.

When we are, we will undoubtedly be asked to maintain social distancing rules. To that end, it would be beneficial now to understand the numbers our churches can accommodate with these parameters: six feet of distance between persons in a pew with every other pew being utilized. Perhaps these spaces could be marked off in some way so that we can get an idea of where we would stand when we can gather.

At this point, and until further notice, no public celebrations of the Eucharist are permitted.

The churches in Brooklyn and Queens are to remain closed, even for private and individual visits. While the Diocese is unique in this directive in New York State, it is a necessary directive since we are at the epicenter of the crisis. It proved impossible at the beginning of the shutdown to maintain small crowds in our churches, especially in the areas of the Diocese which later proved to be at the heart of the spread of COVID-19. This directive is to protect people's health and while it is painful, to say the least, to see a closed church, it is necessary. The Diocese will continue to monitor the situation and will be updating pastors in a timely fashion.

Baptisms: Baptisms should be postponed. While the current thinking is that it might be possible to begin scheduling them sometime in the summer, it is too early to tell. Again, the directives of state and city officials regarding gatherings will be observed. Obviously, emergency baptisms (usually in hospitals) take place with the necessary precautions.

RCIA: Ideally, we could look towards Pentecost as a good time for the reception of the sacraments of initiation to take place. However, it might be later. Once again, this will depend on Diocese of Brooklyn, and based on recommendations of health professionals. We must maintain unity in this, maintaining diocesan guidelines so that one parish is not put into competition with another.

Confessions: Emergency confessions can take place with the proper safety measures being observed. There should not be regular confession times in parishes. This will draw crowds. It must be emphasized that while there is no replacement for sacramental confession, God's mercy is not bound by anything, including the celebration of sacraments.

General Absolution is permitted in hospitals and nursing homes, if needed, with the proper distancing being observed.

Anointing of the Sick: Persons who need the Anointing of the Sick may be anointed. Safety measures must be observed, that is, masks must be worn as well as gloves; the anointing should be done with a cotton ball (to be disposed of properly afterwards); cross contamination needs to be avoided.

Again, it is important to remind people that God's grace is not limited. While the grace of the sacrament is irreplaceable, it must be remembered that the Apostolic Pardon and its accompanying indulgence is available as well.

Confirmation: It is not possible at this time to offer possible dates for confirmation. Even when it is possible to gather, it will most certainly be with a smaller number of people. The bishops are willing to celebrate the sacrament when we are permitted to gather but this may be in combined ceremonies. Another option may be to delegate priests to confirm on Pentecost. These options are all available and decisions will be made later.

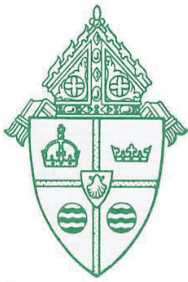
Marriages: New York State is issuing marriage licenses on-line and even allowing live-streamed weddings. While the licenses are valid, we cannot witness marriages in that way. Our weddings must be live and in-person and so, at times, a wedding which must take place and not be postponed could be done, maintaining proper social distancing, with just the church's minister, the couple and the two witnesses.

Pre-Cana: Pre-Cana sessions and classes are available on-line and information on those programs is available from the School of Evangelization of the Diocese.

Funerals: Funeral Masses are not be celebrated because of the same reasons given above for the celebrations of the Eucharist. One solution which may be of comfort to grieving families is that the funeral hearse can pass the church where a priest could offer some prayers from a distance and bless the body of the deceased on the way to the cemetery.

A suggestion is that when public Masses are allowed, one or two Masses offered for all those who have passed from the coronavirus could be celebrated, depending on realities of individual parishes. There will most likely be a Mass for deceased priests and deacons in September, if possible.

For those who are having financial difficulties at the time of the death of a family member, the Vincentian Charities of Brooklyn has a program for the burial of the poor. Inquiries should be made through the Catholic Cemeteries Office.



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April 25, 2020

Bishop DiMarzio has asked that the following information be made available to all Pastors and Administrators and asks that pertinent information be passed on to all priests in the rectory, as well.

CALL TO SENATOR SCHUMER

A conference call regarding issues related to the pandemic is scheduled for Monday, April 27, 2020 at 11:15 am to take place via Zoom Conference. It will be coordinated between Senator Schumer's Office and DeSales Media. **All clergy are invited to be part of this call.** The participants will all have access to video but will be muted by the host. The chat function, however, will be enabled and available for use. If questions do arise from participants they can be forwarded to Martin Brennan (from the Senator's staff) on the call for a written response. Questions from the Diocese will be submitted in advance to the Senator to be responded to in his opening remarks.

Please see the email sent to you separately with the information on how to participate in the call.

**NOMINATION OF JOSEPH ESPOSITO AS
COORDINATOR OF REOPENING PROGRAM**

Bishop DiMarzio is pleased to announce the nomination of Joseph J. Esposito as **Coordinator of the Reopening Program for Parishes in the Diocese of Brooklyn.** In this capacity, Mr. Esposito will oversee the gradual reopening of the parishes and offices of the Diocese. This will be in conjunction with civic and health officials and directives.

Mr. Esposito brings with him to this position a wealth of knowledge and experience which will prove exceedingly valuable to us during the difficult process of reopening.

Joseph J. Esposito was the Commissioner of the New York City Office of Emergency Management from 2014 until 2018. Prior to that role he was the Chief of Department of the NYPD from 2000 until his retirement in 2013. He is also chair of the Diocesan Review Board.

TESTING FOR PRIESTS

A COVID-19 testing site **for priests** has been established. For information about an appointment please email VGENERAL@DIOBROOK.ORG.

This testing site should be used for priests only. Other testing sites will become available for the faithful at a later date.

RESUMPTION OF THE PAYCHECK PROTECTION PROGRAM

The Small Business Administration will resume accepting PPP loan applications on Monday, April 27. Pastors and Administrators are highly encourage to actively work with, and communicate with, the financial institution that they submitted their PPP applications, and if they were previously were unable to upload their application, to be ready to do so, once their financial institution's online portal opens and begins accepting applications. Lastly, Pastors and Administrators are highly encouraged to regularly check their email during this process and to respond in a timely fashion all request.

GRASSI & CO. WEBINAR

Many parishes have engaged Grassi and Co. to assist them with the PPP. Grassi & Co. will be holding a webinar on Tuesday April 28 at 3:00pm. Pastors and Administrators will receive an email from the Vicar General on Monday April 27th which shall contain the link for the webinar.

CONSECRATION TO THE BLESSED VIRGIN MARY

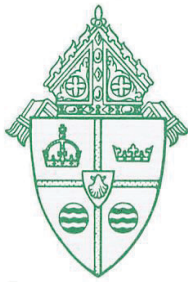
As the world continues to face the ongoing effects of the global pandemic of the coronavirus, Archbishop José H. Gomez of Los Angeles and president of the U.S. Conference of Catholic Bishops (USCCB) has announced that the U.S. bishops will join the Canadian Conference of Catholic Bishops on May 1 in renewing the consecrations of the two nations to the care of our Blessed Mother.

Through a collective dedication or entrustment of a nation to Mary, an act of consecration is meant to be a reminder to the faithful of the Blessed Mother's witness to the Gospel and to ask for her effective intercession before her Son on behalf of those in need. Bishop John Carroll of Baltimore, the first bishop of the United States, promoted devotion to Mary, the Mother of God, and placed the United States under her protection in a pastoral letter of 1792. The twenty-one bishops attending the Sixth Provincial Council of Baltimore in 1846 determined to name the Blessed Virgin Mary, under the title of the Immaculate Conception, as the Patroness of the United States, and Pope Pius XI approved this decision the following year. More recently, the dedication of the National Shrine of the Immaculate Conception in Washington, D.C. in 1959 was the opportunity for the bishops to once again consecrate the nation to the Blessed Mother. Several popes have likewise consecrated the world to Mary on various occasions.

The consecration on May 1 follows a similar action of the bishops' conference of Latin America and the Caribbean (CELAM) who consecrated their nations to Our Lady of Guadalupe on Easter Sunday. The renewal of consecration planned in this country for May 1 does not change the designation of Mary as the Patroness of the United States under the title of the Immaculate Conception. Rather, this prayer reaffirms and renews previous Marian entrustments, and unites us in solidarity with our Holy Father, who recently established the Memorial of the Blessed Virgin Mary, Mother of the Church, as a source of protection and strength.

"This will give the Church the occasion to pray for Our Lady's continued protection of the vulnerable, healing of the unwell, and wisdom for those who work to cure this terrible virus," said Archbishop Gomez in a letter to the U.S. bishops. Each year, the Church seeks the special intercession of the Mother of God during the month of May. "This year, we seek the assistance of Our Lady all the more earnestly as we face together the effects of the global pandemic," he continued.

Archbishop Gomez will lead a brief liturgy with the prayer of re-consecration on Friday, May 1 at 3:00 pm EDT and has invited the bishops to join in from their respective dioceses and asked them to extend the invitation to the faithful in their dioceses for their participation. A liturgy guide will be available to assist the faithful who may join in by tuning into the USCCB's social media platforms: Facebook, Twitter, and Instagram.



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310 Prospect Park West, Brooklyn, New York 11215
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May 8, 2020

Bishop DiMarzio has asked that the following information be made available to all Pastors and Administrators and asks that this information be passed on to all priests in the rectory, as well.

COVID-19 ANTIBODY TESTING FOR PRIESTS

A COVID-19 antibody testing site **for priests** has been established. For information or to request an appointment please email VGENERAL@DIOBROOK.ORG.

Beginning on Wednesday, May 13, the Diocese will now be offering to all priests the opportunity to be tested for COVID Antibodies at the Immaculate Conception Center in Douglaston. As you know, this test was not previously available and therefore, was not initially offered to you.

Dr. Murtezani, who is the on-site ICC physician is now in position to undertake this testing, too. Please be advised that it will require him to draw one vial of blood. If you have not been tested for active COVID, you can also request the nasal swab at that time too. Please indicate in your email to the Vicar General's Office which test you wish to receive. You will receive an email with the date and time of your appointment.



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May 13, 2020

Bishop DiMarzio has asked that the following information be made available to all Pastors and Administrators and asks that pertinent information be passed on to all priests in the rectory, as well.

Policy on Sacramental Celebrations

At the start of the lockdown for the pandemic, May 15th was offered as a possible “re-opening” or “restarting” date. That date is now proven to be unrealistic and premature.

Therefore, at this time the following directives on the sacraments must be observed.

First Communion and Confirmations: At this time it is necessary to state that the celebrations of First Holy Communion and Confirmation are to be **postponed** with no future date for celebrations to be given at this time.

Baptism: Baptisms, too, **should be postponed** until further notice. Emergency baptisms should, naturally, occur with proper precautions being taken.

RCIA Sacraments: No date may be offered for the celebration of these sacraments at this time.

Weddings: In general, **weddings are to be postponed.** There is no reopening date as yet; therefore, it is imprudent to fix a date in the future. That being said, a wedding that is absolutely necessary at this time may be celebrated since the City is issuing marriage licenses. These weddings should be weddings that cannot be postponed for some reason. The wedding should take place in either the church or the rectory, whichever allows for better social distancing and they should be Weddings outside of Mass, not Nuptial Masses. There may be no more than 10 people present and all other social distancing directives must be observed. These celebrations are to be private and without unnecessary publicity.

Confessions: Confessions should take place only when they are **absolutely necessary**, that is, when someone is conscious of mortal sin or in an emergency situation. Social distancing must be observed and so the choice of location for the confessions is critical. Parishioners are to be reminded of the value of a sincere Act of Contrition.

Anointing of the Sick: Anointing should take place in emergency situations only and with proper precautions, i.e. gloves, masks and the use of cotton balls for anointing.

Eucharist: There are to be **no public Masses** until further notice in the diocese and the churches will remain closed.

While there is universal agreement that these restrictions are difficult and burdensome, it is also important to recognize the need to preserve public health and respect life in this way.

Payroll Protection Program (PPP) Loan Approved

If your Parish or School/Academy were notified that it was approved for a PPP loan, please inform the Office of Fiscal Management. Send an email to jmitchell@diobrook.org with the following information:

1. Loan amount
2. Date Approved
3. Bank.

Testing for Antibodies

Beginning on Wednesday, May 13, the Diocese will now be offering to all priests the opportunity to be tested for COVID Antibodies at the Immaculate Conception Center in Douglaston. As you know, this test was not previously available and therefore, was not initially offered to you.

Dr. Murtezani, who is the on-site ICC physician is now in position to undertake this testing too. Please be advised that it will require him to draw one vial of blood, it is not the finger prick test which has been deemed unreliable. If you have not been tested for active COVID, you can also request the nasal swab at that time too. Please indicate in your email to the Vicar General's Office which test you wish to receive. You will receive an email with the date and time of your appointment.

To make reservations please email VGENERAL@DIOBROOK.ORG

Preparing for Reopening

In an effort to prepare for reopening of our churches, it would be helpful to start to measure out the churches' seating areas.

Therefore, to minimize risk, we must delineate "safe" areas in our churches for people to sit. This means we measure out a distance of at least 6 feet between people in a pew. This may mean only 3 or 4 persons per pew. Family members and households may sit together, in which case it would mean at least six feet between those groupings.

This will also apply for the space between pews which practically speaking, might mean 2 pews blocked off between the occupied pews or perhaps to skip one pew but stagger the numbers of people in the occupied pew (in other words maybe 4 people in pew one starting at the ends and 3 in row three starting 6 feet in from the aisle). This depends on the church's particular configuration.

The areas will need to be marked off in some way (perhaps tape or signage). This will also give you an idea about whether a Mass or two might need to be added. However, some of that will depend on the numbers of people returning at the beginning and the gradual increase of the numbers.

Note that this is being asked in preparation for eventual reopening. As of now the churches remain closed.



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May 21, 2020

PLAN FOR THE REOPENING OF OUR CHURCHES

Bishop Nicholas DiMarzio is pleased to announce the Diocese of Brooklyn will slowly work towards going back to normal by opening the doors of the churches on May 26, 2020 for private prayer and devotion as well as for funerals and limited celebrations of baptisms and weddings. The following directives will apply in general and individual churches should prepare further directions which the faithful must adhere to when visiting a church.

PLEASE NOTE THAT THE CHURCHES **MAY** OPEN THEIR DOORS ON MAY 26TH. IF A PARISH IS NOT PREPARED TO DO SO ON THAT DATE, PASTORS OR ADMINISTRATORS MUST EMAIL THE DATES THAT THEY WILL BE ABLE TO REOPEN. Please email Adriana Rodriguez at arodriguez@desalesmedia.org.

REOPENING SCHEDULE

- Stage 1: Opening of Churches for private prayer and devotion, Funerals, Baptisms and Weddings (May 26th) **Please see pages 3 & 4 for details.**
- Stage 2: Limited Celebrations of Daily Mass (No date has been set yet)
- Stage 3: Limited Celebrations of Sunday Mass (No date has been set yet)
- Stage 4: Celebration of First Holy Communion and Confirmation (No date has been set yet)

The commencement dates of these stages (numbers 2,3, and 4) will be announced.

CHURCHES

- Before opening pastors and administrators may be interested in sanitizing the church. According to the CDC, the virus can only live on surfaces for a limited time (ranging from hours to days depending on the type of surface). Since churches have been closed for over two months, it may be something to consider, for the purpose of reassuring parishioners. If you would like this procedure done and for information, please email Greg Roach at groach@rocklynasset.org for approved contractors and schedules.
- After the churches reopen for private prayer and devotion, the full reopening of the churches for liturgical celebrations will begin after the order for reopening of large gatherings has been given. This is important because of the danger of gathered crowds and the possible spread of the virus.

- With respect to the dates of the opening and use of churches, the above stages will be followed.
- One door should be opened for entrance into the church. However, all doors should be available for egress in emergencies.
- The church should be marked off with painter's tape to show areas that adhere to social distancing guidelines. Pastors or administrators who may need assistance in creating social distance seating plans for the church may reach out to Greg Roach (groach@rocklynasset.org) and/or Rob Dadona (rdadona@rocklynasset.org) for assistance.
- The elderly and all who are health-compromised **MUST** be advised to stay home. Communications to parishioners should tell them that anyone who feels sick in any way **must** stay home. Parishioners should be asked to take their temperatures before leaving their home and should stay home if the temperature is over 100 degrees.
- The church will have been measured and marked off, respecting social distancing norms.
- There is to be NO holy water in the fonts.
- Crying rooms and other rooms aside from the main church **must** be kept closed and locked.
- Hymnals, missalettes and any other worship aids **must** be removed from the pews and stored away.
- Bulletins **must** not be distributed, nor should there be any literature available for people to take. Bulletins could be uploaded to parish websites.
- Parishioners **must** be advised of the requirement to wear masks, which they will bring on their own from home. No one should be in church without a mask.
- Hand sanitizer should be available at the entrance to church but parishioners are to be encouraged to bring their own from home, as well.
- Restrooms should be open and available but used by one person at a time and must be cleaned regularly.
- It is advisable that churches be cleaned after each opening.
- For the foreseeable future, parishes may not schedule any events which will draw crowds and make social distancing difficult.

PRIVATE PRAYER AND DEVOTION

- The church will be open for a limited time period each day. Pastors will decide on these hours of opening based on the needs of the community. The church should remain open for no more than 4 hours each day. **These hours should not coincide with the time a Mass is celebrated in the church.**
- There is to be no congregating of people (e.g. gathering to say a rosary together). There should not be more than ten (10) people in the church and there cannot be a group gathered.
- The faithful **must** be instructed not to touch statues or other devotional objects in the church.
- Two ushers or other volunteers **MUST** be present in the church to assure that social distancing rules are observed and to determine whether the church is getting too crowded.

Again, these rules will vary depending on the individual church's needs and configuration. Parishioners should be made aware of these rules before the May 26th opening and by way of signage in the church itself.

Please note that some churches in high population density areas will not be able to open on the May 26th as they may have to set a different timeline. Please ask your parishioners to be respectful of the decisions pastors and administrators will make based on the requirements of their individual communities.

FUNERALS

The directives indicated above apply for funerals as well.

Funeral services will be permitted but are to be strictly limited to 10 people. The funeral service must be the **Funeral Outside of Mass** (the liturgy that is used for funerals during the Paschal Triduum). Holy Communion should not be distributed at these services.

Persons attending the funeral **must** be seated using social distancing norms (Six [6] feet apart) except for members of the same household and everyone must wear a mask or face covering. Funerals should begin with the casket in place in front of the sanctuary and with the participants seated. There is to be no procession into or out of the church. No worship aids should be distributed or used.

BAPTISMS

Baptisms will take place with social distancing guidelines being enforced and limited to 10 or fewer participants. The water **must** be changed for each baptism. Baptisms can be celebrated only with prior consultation with the Office of the Chancellor. Please email saguggia@diobrook.org.

WEDDINGS

Weddings will take place with social distancing guidelines being enforced and, at first, limited to 10 or fewer participants. Weddings should be celebrated with the Rite of Marriage Outside of Mass. No Nuptial Masses should be celebrated at this time. Holy Communion should not be distributed at this time. Weddings can be celebrated only with prior consultation with the Office of the Chancellor. Please email saguggia@diobrook.org.

OUTDOOR SERVICES

Although the possibility for this may be limited in Brooklyn and Queens, some parishes may be capable of conducting services outdoors in parking lots or similar spaces, perhaps using a tent or having people remain in cars. Please be aware that social distancing norms and hygiene guidelines must be observed. **At this point, too, please note that no gatherings of more than ten (10) persons is permitted. If you are contemplating an outdoor services, please submit your written plan to vgeneral@diobrook.org for approval before implementation.**

ANOINTING OF THE SICK

Anointings will be celebrated with the usual safety measures in place. Priests will wear mask and gloves and the anointing will take place with the use of a cotton ball which is to be reverently disposed of after each anointing. Any guidelines that are in place in hospitals or other institutions must be respected. There are to be no celebrations of communal anointings in church.

CONFESSIONS

Confessions will take place with the priest and penitent both wearing masks and remaining at least six (6) feet distant from one another. A space other than a traditional confessional might need to be used. A larger space will be needed. A barrier system could be devised. **Care must be taken to assure that no lines or groups form for confessions.**

OBTAINING CLEANING SUPPLIES FROM ICS

Pastors and administrators should take note to this link to Institutional Commodities Services (ICS) where sanitizing supplies (such as hand sanitizer and cleaning supplies) can be obtained:

<https://nyics.org/hand-sanitizer-cleaning-supplies>

QUESTIONS?

Questions about any of the above guidelines or about particular situations may be addressed to the Vicar General's Office vgeneral@diobrook.org.



**OFFICE OF THE VICAR GENERAL
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CHURCH SANITIZING/CLEANING BEST PRACTICES

A) GENERAL:

- Provide hand sanitizer spray stations as they become available.
 - For both workers and parishioners to use as frequently as needed.
 - ICS does have these products for order now. (See attached brochure)
- Emphasize the benefits of masks and hand/face proper hygiene to all. Cannot wash hands enough.

B) VENTILATION:

- Where possible, provide ventilation before using chemicals to disinfect surfaces.
 - Run any available exhaust fans
 - Open doors and windows when practical to do so
 - Run any existing HVAC system that uses fresh air

C) PPE (Personal Protective Equipment):

- All must always wear masks or face shields
- Wear disposable gloves when cleaning and disinfecting surfaces.
- Gloves should be discarded after each cleaning.

D) DISINFECTING:

- If surfaces require actual cleaning, they should be cleaned using detergent or soap and water prior to disinfection.
- For disinfection, the most common EPA-registered household disinfectants, and diluted household bleach solutions, are effective.
- ICS also carries a selection of sanitizing products (see attached)
- Disinfecting solutions and/or sprays like Lysol brand and disinfectant wipes can be used throughout. Spray or wipe on for surfaces to appear moist. Let sit several minutes, then follow up dry wiping with clean rags to remove excess moisture if needed.

E) FREQUENCY:

- Disinfecting weekly should be considered a minimum.
 - At least common areas and high touch points throughout
 - Available pews as needed
- Routine sanitizing of common area high touch surfaces should be performed frequently (i.e. doorknobs, light switches, handrails, main aisle pews, bathrooms, faucets, sinks, etc.)
- After each mass can be considered (Keep in mind NYC sanitizes each subway car once nightly, not every trip) Hygiene again is important..
- Sanitizing of all pews needs to be based on use.
- For the 10-person max period I suggest limiting seating to an area or two in each church easily maintaining 6' spacing. If further disinfection becomes warranted, the entire Church has not been affected
- As populations are allowed to increase, the areas and frequency to be disinfected may increase as well.

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To: Deans
From: Most Reverend Raymond F. Chappetto
Re: Compliance with Diocesan Directives
Date: June 16, 2020

It has come to our attention that some of the pastors are not following the Diocesan directives regarding the reopening of our churches. It has been reported to us that some pastors/priests are celebrating Masses either in their churches or outdoors.

The purpose of this memo is to ask each Dean to personally contact the pastors in each Deanery by this Friday, June 19, 2020, to remind them that we are still in Stage One of our reopening plan. Please remind them that Stage One allows for **ten people** to be gathered for:

- Baptism Ceremonies (**limited to 10 people**)
- Wedding Ceremonies (**limited to 10 people**)
- Funeral Services without a Mass (**limited to 10 people**)
- Private Prayer (**limited to 10 people**)

As soon as we are able to announce the dates for the beginning of Stages Two and Three, we will send those dates out to all the pastors/priests. In the meantime, if you hear of any violations of the directives, we ask you to remind the pastors that they are being asked to follow the directives issued by the Bishop of Brooklyn.

Thank you very much for your help in this matter.



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June 18, 2020

**REOPENING THE CHURCHES FOR LITURGICAL CELEBRATIONS
IMPORTANT UPDATE**

**PLEASE SEE BELOW FOR IMPORTANT UPDATES ON THE
OPENING DATES FOR STAGE 2 & STAGE 3**

Stage 1 was the reopening of the churches for private prayer and devotion. At that Stage we learned the best practices of good hygiene and social distancing. Those lessons will be important as we move to Stages 2, 3, and 4.

**Stage 2: Limited (25% Capacity) Celebrations of Daily Mass
MONDAY, JUNE 29, 2020**

**Stage 3: Limited (25% Capacity) Celebrations of Sunday Mass
SATURDAY EVENING, JULY 4, 2020 and SUNDAY, JULY 5, 2020**

Stage 4: Celebration of First Holy Communion and Confirmation (No date has been set yet)

NOTE: The City of New York is scheduled to enter its Phase 2 on Monday, June 22nd. Bishop DiMarzio has determined that the parishes in Brooklyn and Queens can open for daily Mass on June 29, 2020 and Sunday Masses on the weekend of July 4-5, 2020. This is to provide ample opportunity for Pastors & Administrators to ready their churches and their parishioners for their welcome back.

Below are guidelines to be followed as each stage is introduced. Please read them over carefully.

STAGES 2 & 3: (LIMITED 25% CAPACITY) CELEBRATIONS OF MASS

THE DIRECTIVES GIVEN FOR STAGE 1 REOPENING OF CHURCHES REMAIN IN EFFECT FOR STAGES 2 & 3. This includes all the measures taken to ensure good hygiene and cleaning of the church, including the disinfection of hands, the wearing of masks and social distancing.

The announcement of the opening dates in advance will provide ample opportunity to allow Pastors and Administrators to ready the churches for the reopening. If anyone needs help, please contact Greg Roach at Rocklyn Asset for assistance (groach@rocklynasset.org).

Pastors and Administrators are encouraged to resume their normal schedules in order to ensure social distancing and not exceed the 25% capacity. Sunday Mass schedules may need to be adjusted according to the needs of the community (increased number of Masses or decreased number of Masses). Please adapt the directives according to the particular needs of the parish, while maintaining the important guidelines outlined here. Some of the suggestions offered could be amended to fit particular circumstances.

NOTE: A PARISH MAY NOT BE READY TO BEGIN THE PUBLIC CELEBRATION OF MASS ON THE INDICATED DATES. IF THAT IS THE CASE, PLEASE DETERMINE THE MOST APPROPRIATE

DATES AND TIMES FOR YOUR COMMUNITY. Please let Adriana Rodriguez from the Press Office know (arodriguez@desalesmedia.org).

THE PUBLIC CELEBRATION OF MASS

(These guidelines will apply for the eventual public celebration of daily Mass in Stage 2 and the eventual celebration of Sunday Mass in Stage 3)

- Pastors and Administrators must devise a system of ensuring the limit on the number of people in the church. This number is based on the current guidelines.
- Priests who are ill or otherwise in a compromised state should not celebrate Mass publicly.
- All ministers for the Mass (celebrant, deacon, lector) **must** sanitize their hands before Mass begins.
- For the daily celebration of Mass, please limit the number of ministers for Mass. There should be only one (1) lector and no altar servers.
 - *Suggestion: A lectern could be set for the Celebrant to use for the Collect and the Prayer after Communion.*
 - *Suggestion: A separate podium or lectern should be set up for the lector while the priest will use the pulpit or ambo. The lector should not carry in a Gospel Book and the lectionary should be set and opened to the correct page for the Mass.*
- There should be no entrance procession for all Masses, Sunday and weekday. Celebrants should not wear a mask or gloves at this time.
- Music ministry should be limited to the organist and a cantor using social distancing. The cantor should not sing from the same place from which the lector reads. Choirs should not be used at this time since social distancing will be impossible for them.
- There should be no missals or worship aids available.
 - *Suggestion: The Mass itself and homilies could be shortened where possible to allow Mass to be celebrated in an abbreviated time, allowing for extra time to clean the church after Mass.*
- There is no exchange of peace and no holding of hands at the Lord's Prayer.
 - *Suggestion: A single offertory basket can be placed in a secure location in church for people to place their donations. Parishioners are to be encouraged strongly to use e-giving services.*
- Concelebrating priests should receive Holy Communion by **intinction**. Consecrated Hosts are to be left on the paten for each concelebrant to take and intinct. Hosts to be consecrated at the Mass for distribution to the people should be kept to the side of the altar, away from the Host consecrated for the priests' use, on a separate corporal. Alternatively, each concelebrant could have a separate chalice reserved for his own use.
- Holy Communion is to be distributed by the celebrant, concelebrating priests, and/or extraordinary minister of Holy Communion who will not wear gloves but should wear masks. Extraordinary Ministers of Holy Communion should only be used if there are not enough priests in the parish to assist. The Host should be allowed to "fall" (reverently) into the communicant's hand to avoid any physical contact. The hands should be disinfected before distribution of Holy Communion. Hand disinfectant should be available nearby those distributing Holy Communion.

- *Suggestion: The communicant should come before the Minister of Communion with the mask on for the dialogue (“The Body of Christ. Amen.”) and then, moving to the side, lower the mask and consume the Eucharist and replace the mask.*
- If Extraordinary Ministers of Holy Communion are used, they must be diligently instructed on the procedures for giving Communion to the faithful. They must follow the same guidelines the priests and deacons will follow.
- The Precious Blood is not to be distributed to the faithful.
- People should come for Communion in the normal way, observing at least 6 feet of distance between them as they approach.
- **IT IS VERY STRONGLY RECOMMENDED THAT THE FAITHFUL RECEIVE HOLY COMMUNION IN THE HAND. Pastors and Administrators must strongly suggest this to the people emphasizing that this is for the safety of those receiving Holy Communion and of the minister of Holy Communion.** While this may be difficult for some people, they must be reminded of the reverent way to receive in the hand. **IF PEOPLE WISH TO RECEIVE ON THE TONGUE, THEY SHOULD COME FORWARD AT THE END OF THE COMMUNION LINE, SO THAT THEY ARE THE LAST ONES RECEIVING,** so that the Communion ministers can disinfect their hands if need be after each person receives.
- When the communicants receive the Sacred Host, they should move to the side and consume It immediately.
- If the minister distributing Holy Communion has unintentional contact with someone’s hand, the minister is to stop and disinfect the hands before continuing. An ablution cup and hand sanitizer should be set near the Ministers of Holy Communion to purify their fingers before using the hand sanitizer.
- **After distribution of Holy Communion, the ministers’ hands should be sanitized.**
- There is to be no recessional procession. There should be no stopping to greet parishioners as they depart the church.
- If pastors or administrators are considering outdoor celebrations of Mass, whether in a tent, parking lot or other open space, social distancing regarding seating, and all other directives pertaining to churches and the celebration of Mass must be observed.

CELEBRATIONS OF FIRST HOLY COMMUNIONS AND CONFIRMATIONS

First Communions can be celebrated at an appropriate time following all of the guidelines for the celebration of the Eucharist.

Confirmations will be rescheduled at an appropriate time. Please consult with the Bishop assigned to your parish for Confirmation and follow the guidelines that will be issued later for the celebration of Confirmation.

These celebrations apply in Stage 4 (see above).

QUESTIONS?

Questions about any of the above guidelines or about particular situations may be addressed to the Vicar General’s Office (vgeneral@diobrook.org).



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June 19, 2020

SUMMER MINISTRY

Many parishes in the Diocese have plans regarding “Non-Incardinated clergy doing short-term ministry in the Diocese of Brooklyn during the summer” Most of these clergy are Non-Incardinated Priests who come to the United States with either a Religious Worker Visa (R-1) or the priest is Lawful Permanent Resident (Green Card holder). Due to the Covid-19 pandemic, there are now a series of variables that parishes need to consider. The following information may provide some guidance; however, for more information or specific questions, please refer to the Office for Clergy personnel and Deacon Julio C. Barreneche (jbarreneche@diobrook.org)

Pastors and Administrators are reminded that a Non-Incardinated Priest seeking to minister in the Diocese of Brooklyn, MUST BE CLEARED by the Office of the Chancellor prior to the Non-Incardinated Priest coming to the Diocese. A Non-Incardinated Priest must have an updated certified Letter of Good Standing on file with the Office of the Chancellor and can only minister once after the Office of the Chancellor has provided ministerial faculties.

Financial Constraints:

Pastors and Administrators must assess their own financial situations to determine whether or not having summer assistance will be possible given the current financial situation of the parish;

- If it is determined that summer assistance will be financially impossible this year, this should be made known to the Office for Clergy Personnel and to the Non-Incardinated Priest as soon as possible.
- If it is determined that summer assistance is possible, and the Non-Incardinated Priest is able to come for the summer months, the Non-Incardinated Priest must follow the guidelines of U.S. government and health authorities regarding possible quarantine periods after their arrival; for more information on a possible quarantine, please see below.

Travel Constraints:

A Non-Incardinated Priest who is scheduled to come to the United States for summer ministry may or may not be able to do so, due to a variety of factors including: his ability to obtain a visa, travel restrictions, and his ability to get a flight to the United States.

If a Non-Incardinated Priest is not a Lawful Permanent Resident, or if he does not already have a Religious Worker Visa in his passport, there is an extremely high probability that he will be unable to obtain one in time for this summer. USCIS only began to process Religious Worker Visa on June 8th, after they had been temporarily suspended since March. In addition, once a Non-Incardinated Priest receives an approval notice, the priest is still required to make an appointment at the Embassy, or U.S. Consulate, that was noted in the application.

To find specific information about the COVID-19 situation and any additional restrictions in a particular country overseas:

- Please visit [Embassy webpages on COVID-19](#) for information on conditions in each country or jurisdiction.
- You may also visit www.coronavirus.gov for more information.

The President issued Proclamations 9984, 9992, and 9993, which suspends entry to nearly all foreign nationals who have been in China, Iran, and certain European countries (Schengen Zone of the European Union) at any point during the 14 days prior to their scheduled travel to the U.S. These European countries, include: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. In addition, the Center for Disease Control (CDC) requires all travelers, including U.S. citizens and legal permanent residents, who have been in certain European countries (Schengen Zone of the European Union), or any CDC Level 3 country, in the last 14 days to self-quarantine for 14 days.

- Travelers should visit www.coronavirus.gov for more information.

Pastors and Administrators should be prepared for the possible cancellations by their summer assistants because of many factors beyond their control. They should, therefore, be prepared for the possibility of having no summer assistance.

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To: Pastors & Administrators
From: Most Reverend Raymond F. Chappetto
Re: Returning to Mass Video from Bishop DiMarzio
Date: June 26, 2020

Below you will find link to a video message from Bishop DiMarzio regarding Returning to Mass, in various languages.

Please add these videos to your websites and social media platforms.

Returning to Mass

<https://vimeo.com/430806908>

Regresando a Misa (Spanish)

<https://vimeo.com/430805591>

Tornando alla Santa Messa (Italian)

<https://vimeo.com/432197185>

Powrót mszy św. z udziałem wiernych (Polish)

<https://vimeo.com/432283449>

弥撒回归 (Chinese)

<https://vimeo.com/432835015>

Retounen nan Mès (Creole)

<https://vimeo.com/432497004>

미사재개 (Korean)

<https://vimeo.com/432836681>

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To: Pastors & Administrators
CC: Parish Deacons
From: Most Reverend Raymond F. Chappetto, D.D., V.G., V.E.
Re: Deacons at Liturgies
Date: July 8, 2020

During this time of the COVID-19 pandemic, many directives regarding changes in the way the liturgy is celebrated have been issued. There has been a limitation on the service of liturgical ministers at Mass, including lectors, extraordinary ministers of Holy Communion, Cantors and Altar Servers.

Please note that as ordained clergy, the deacons have a proper role and place at the celebration of the Mass and there is no reason to restrict that service at this time. Deacons have been made aware of the procedures and guidelines to be followed (see attachment).

Naturally, if a deacon has problems with health or other factors which may make him uncomfortable to participate as he normally would, this should be taken into account.

As always, if there are any particular concerns or questions, please do not hesitate to contact the Office of the Vicar for Clergy vgeneral@diobrook.org, the Chancellor saguggia@diobrook.org, or the Liturgy Office joconnor@diobrook.org.



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June 19, 2020

Guidelines for Deacons serving at Liturgies during the Pandemic

The COVID-19 Pandemic has caused everyone to make adjustments in many areas of their lives. This is no less true in the liturgical life of the Church.

Several changes are taking place to ensure safety at Mass and other liturgical celebrations. Deacons may participate in these liturgies and so it is important that they are mindful of the guidelines and best practices which concern them.

- ✓ Deacons and all liturgical ministers in the sanctuary area (and indeed, everywhere in the church) must maintain the social distancing guidelines and keep six feet of space between themselves and others to the best degree possible in what might be somewhat tight areas.
- ✓ Close contact generally is considered to be less than six feet of distance between persons as well as a span of time that exceeds 15 minutes. In general, a deacon would not be so close to a priest for a greater amount of time.
- ✓ Deacons should not wear a mask while assisting at the altar but must wear one while distributing Holy Communion which is to be distributed in the same manner that a priest would do so (see the Guidelines sent to Pastors on the Opening of Churches).
- ✓ Deacons should disinfect their hands before and after Mass as well as before and after distributing Holy Communion.
- ✓ Deacons should not hold the Missal for the Priest to read the prayers from. A stand should be used instead.
- ✓ When proclaiming the Gospel, Deacons should read from the Pulpit or Ambo which would be a separate lectern from the one used by the lector.
- ✓ As there will be no Altar Servers for the time being, Deacons should be aware that they will need to assist with those functions. When arranging the altar, they should space out the ciboria with hosts for the people away from the Priest's host on separate corporals.
- ✓ There is no "Exchange of Peace," so the Deacon will not invite the faithful to do so.
- ✓ Deacons should receive Holy Communion under the form of bread only and in the hand. They should not receive by intinction as it would require them to receive on the tongue.



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July 8, 2020

**STAGE 4: CELEBRATIONS OF FIRST HOLY COMMUNION &
CONFIRMATION**

1. FIRST HOLY COMMUNION CELEBRATIONS

Celebrations of First Holy Communion may take place at any Mass (Sunday or Weekday) to accommodate for proper social distancing and observing the applicable occupancy norms in church. This may necessitate celebrations at multiple Masses.

The usual guidelines for the celebration of the Eucharist, already in place, must be observed. Please make particular note of the fact that the children must be instructed on the proper way to receive Holy Communion with the particular hygienic guidelines being observed.

2. CELEBRATIONS OF SPRING PARISH CONFIRMATIONS

Due to the Coronavirus Pandemic which caused so much upheaval in parish life, most of the regularly scheduled celebrations of Confirmations by the Bishops of the Diocese were postponed. There are two options for pastors and administrators for these celebrations.

1. Contact the Bishop who was scheduled for the Confirmation to reschedule the celebration at a mutually convenient time

OR

2. Bishop DiMarzio has granted an **indult to all pastors and administrators** to confirm those candidates whose Confirmations were postponed due to the pandemic. This indult is in effect for the months of July, August and September 2020. This indult does not apply to Confirmations scheduled for the Fall of 2020.
 - **When this faculty has been used by the Pastor or Administrator, he is asked to inform the Chancellor of**
 - **the date and time of the Mass at which it was used,**
 - **the number confirmed**
 - **and by whom it was used (Pastor/Administrator or one to whom it was subdelegated).**
 - **Please inform the Chancellor's Office at SAGUGGIA@DIOBROOK.ORG.** When entering the fact of the Confirmation in the parish sacramental register, the following should be included for the minister of Confirmation:

Reverend *NAME OF PRIEST*, delegated, c. 884 §1.

There will be some changes in the celebrations when they take place which it is important to take note of now:

- While the Confirmations to be celebrated by the pastors and administrators may be celebrated during a Mass, the Confirmations done by the Bishops will not take place during the celebration of Mass, as they usually do, but instead, using the ritual for “Confirmations Outside of Mass,” which is essentially a Liturgy of the Word. Questions about using this particular ritual can be directed to the Liturgy Office at joconnor@diobrook.org.
- The anointing with Chrism will take place using an “instrument,” as is permitted in Canon Law and by clarification from Rome. This means that the celebrant will use a cotton ball which will be reverently disposed of after the ceremony. It will be necessary for the parish to have these available for the ceremony.
- There will be no handshake at the Exchange of Peace with the confirmandi or their sponsors. Instead the simple verbal exchange: “Peace be with you” and “And with your spirit” will be offered with no accompanying gesture.
- Masks will be worn by the celebrant and the confirmandi and sponsor at the time of the anointing.
- After the ceremony, there will not be group photos taken, nor will there be individual photos with the Bishop. Pastors and administrators may want to consider having one photographer to be positioned at the side while the Bishop is confirming.

3. CELEBRATING THE SACRAMENTS OF INITIATION FOR CATECHUMENS AND CANDIDATES

As we were unable to welcome our candidates and catechumens into Full Communion at this year’s Easter Vigil as is our custom, Bishop DiMarzio is pleased to issue these guidelines allowing for these celebrations. These confirmations, which can be administered by a priest, can be celebrated at any time, using the applicable social distancing guidelines.

Priests with the faculties of the Diocese may administer the sacrament of Confirmation to those who are unbaptized and are being fully initiated or to baptized non-Catholics who are being fully initiated into Full Communion with the Catholic Church.

Please note: This does not include those previously baptized in the Catholic Church who have not completed their initiation (that is, did not receive Confirmation and/or Eucharist). For these, the Bishop is issuing an indult to confirm (see below).

The celebrations of the RCIA sacraments **must** take place during a celebration of Mass because they involve the reception of Holy Communion. While it is most fitting, given the Paschal character of the celebration, that this be at a Sunday Mass, it may take place on another day.

- All social distancing norms must be observed as per the guidelines previously given for the opening of churches for the celebration of Mass, that is, occupancy in Church according to civil directives and the particular requirements of the church itself, the wearing of masks/face coverings, etc.
- In particular *for these celebrations*, please note:
 - Water must be changed between baptisms or, if this is difficult, it could be poured from one basin over the head of the person being baptized and into a new receptacle for each person.

- A cotton ball should be used for anointings and priests must disinfect their hands after each anointing
- Guidelines for the reception of Holy Communion must be observed carefully

Please note: Depending on the amount of people involved, these celebrations might necessarily take place at more than one Mass.

4. CELEBRATING CONFIRMATION FOR THOSE PREVIOUSLY BAPTIZED

Those who have been baptized in the Catholic Church but were previously uncatechized and who have participated in the RCIA program may be confirmed with an **indult** given by the Diocesan Bishop and following specific guidelines and directives. (Note that these celebrations are the ones that normally take place at Pentecost.)

Bishop Nicholas DiMarzio has delegated all Pastors and Administrators the faculty to celebrate the Sacrament of Confirmation within their own parishes on any day of July 2020, August 2020, or September 2020.

- Please note that while a celebration of Confirmation fittingly is celebrated on Sunday, this faculty may be used at another Mass during the week, especially to allow for proper social distancing at the Mass.
- The usual candidates for this celebration of Confirmation are those who have been baptized but not catechized, are of high school age and older and have simply never been confirmed.
- This faculty is not granted to all priests. For a serious reason, a Pastor or Administrator may subdelegate another priest to confirm. However, no further subdelegation is permitted. A serious reason may be a special language need or the health of the Pastor. This may require the use of the indult at an additional Mass.
- **When this faculty has been used by the Pastor or Administrator, he is asked to inform the Chancellor of**
 - **the date and time of the Mass at which it was used,**
 - **the number confirmed**
 - **and by whom it was used (Pastor/Administrator or one to whom it was subdelegated).**
- Please inform the Chancellor's Office at saguggia@diobrook.org.
- When entering the fact of the Confirmation in the parish sacramental register, the following should be included for the minister of Confirmation:

Reverend *NAME OF PRIEST*, delegated, c. 884 §1.

QUESTIONS?

As always, please do not hesitate to contact the **Vicar General** vgeneral@diobrook.org

or the **Chancellor's Office** curia@diobrook.org

or the **Liturgy Office** joconnor@diobrook.org for assistance or with questions.



**OFFICE OF THE VICAR GENERAL
DIOCESE OF BROOKLYN**

310 Prospect Park West, Brooklyn, New York 11215
718.399.5995 • FAX: 718.399.5965

**Update on Best Practices for Sacramental Celebrations
During the COVID-19 Pandemic**

Now that several weeks have passed since the opening of our churches for the celebration of Mass, Pastors and Administrators have certainly had an opportunity to evaluate how it has been going in terms of people coming to church and receiving the sacraments.

By way of reviewing some of the more important points and aware that every parish and every church is different, we would like to present the following thoughts for your consideration.

CELEBRATION OF MASS

1. There should be no processions in or out of the church. This is to avoid having to move through the people gathered. There should be no carrying of the Cross or Gospel Book.
2. There should be no Altar Servers at this point in time. Most of them are too young to grasp what “social distancing” means on a practical level. Also, considering the limited space in most sanctuaries, it will cut down on the number of people gathered there.
3. Missals should be either on the Altar or on a podium in front of the celebrant in order to prevent too many people from touching it.
4. If a lector is used, he or she should not be reading from the same ambo as the priest when he proclaims the Gospel and preaches.
5. A deacon should remain 6 feet from the celebrant (except for the short period of the Doxology when he holds the Chalice).
6. The bread and wine should be well spaced on the Altar with the people’s host being off to the side, on a separate corporal, and not directly in front of the priest.
7. Face coverings must be worn by the celebrant if he is within 6 feet from anyone in the sanctuary and certainly for Holy Communion. The mask should be put on before the hands are disinfected and removed before they are disinfected again after distribution.

CELEBRATIONS OF BAPTISMS

1. Limit the number of children and guests at any one given celebration to no more than 25% occupancy with social distancing of at least 6 feet between individuals or households.
2. Wear face coverings when in close proximity to the children or families.

3. Use cotton for the anointing with Chrism and eliminate the anointing with the Oil of Catechumens.
4. Use new water for each child. Alternatively, use a pitcher for the water, avoiding splashing.

CELEBRATION OF MARRIAGE

1. Weddings must respect social distancing norms, limitations of numbers of guests to respect occupancy of no more than 25% and face covering rules.
2. The procession must take place with at least 6 feet of space between people. There should not be “couples” walking together unless they are already a household unit.
3. The celebrant should remain at least 6 feet from the couple.
4. While a wedding ceremony is recommended, if a nuptial Mass is celebrated, all regulations about the celebration of Mass must be observed, including the guidelines about the distribution of Holy Communion.

CELEBRATION OF FUNERAL LITURGIES

1. The casket, covered with the pall, should be in place before the Mass begins.
2. Families and guest should be seated before the Funeral begins, avoiding gathering in the aisles. It is also the best time to explain the procedures for receiving Holy Communion.
3. The normal guidelines for the celebration of Mass must be observed.
4. At the end of the Mass, the family and the guests should file out, keeping 6 feet from one another before the pall bearers bring out the casket.
5. A Funeral without Mass is permitted. Perhaps this might be considered as an option for some families.

In all of these scenarios hand sanitizer should be used before entering the Church and before distributing and receiving Holy Communion.

There should be no gathering after the ceremonies for greeting people and care must be taken when pictures are taken to avoid groups.

Thank you for being aware of these guidelines and putting them into practice in your parishes. Please be ready to adapt them as needed while still respecting the importance of the directives for the health and well-being of parishioners.

QUESTIONS?

As always, for any questions or concerns, please feel free to contact:

Vicar General (Bishop Raymond Chappetto) vgeneral@diobrook.org
Chancery (Msgr. Steven Aguggia) saguggia@diobrook.org
Liturgy Office (Fr. John O'Connor) jocconnor@diobrook.org

**OFFICE OF THE VICAR GENERAL
DIOCESE OF BROOKLYN**

310 Prospect Park West • Brooklyn, New York 11215 • 718.399.5995 • FAX: 718.399.5965

To: Pastors & Administrators
From: Most Reverend Raymond F. Chappetto
Re: NYC Makes Masks Available to Houses of Worship
Date: July 31, 2020

New York City is offering masks to houses of worship. Please fill out the information requested in the [link here](#). Feel free to pass this information on to other houses of worship.

Please click the link and fill in the information ASAP as the **deadline is today, Friday, July 31st**.



**OFFICE OF THE VICAR GENERAL
DIOCESE OF BROOKLYN**

310 Prospect Park West, Brooklyn, New York 11215
718.399.5995 • FAX: 718.399.5965

AUGUST 2020

**GUIDELINES FOR FUNERAL DIRECTORS FOR CATHOLIC FUNERALS
DURING THE COVID-19 PANDEMIC**

The following are guidelines which we hope you will find helpful as you assist people in planning funerals for their loved ones. As you know, there are restrictions already in place in our churches for the public celebration of Mass, including funeral Masses. These general instructions apply to all public celebration which take place in our churches. There are some specific guidelines we would like to offer for funerals which we hope will be of help to you and which will keep our people, your staff and our clergy healthy and safe.

1. We ask funeral directors to be aware of the guidelines regarding quarantining for family and guests who may wish to come to NY from other states. The parishes are asked to respect these guidelines. So families must be made aware that out-of-town visitors may be asked to quarantine themselves for two weeks after their arrival. If the funeral is to take place within that time, they will not be permitted to be in church.
2. For all Masses and public celebrations, masks are required in our churches. There are no exceptions to this rule. The priest celebrating the Mass will not be wearing a mask as long as he is in the sanctuary and away from anyone else. He will put on a face covering when he distributes Holy Communion.
3. Please become familiar with the entrances and exits the church has indicated for the church. The particular church may have them separated so that people do not enter and exit from the same doors.
4. The family and other guests should be seated in the church ahead of the start of the Mass. The casket should be placed in the center aisle before the start of the Mass. (This also applies for cremains). There is no procession into church following the casket. The pall may be placed at the appropriate time in the liturgy.
5. Guests must observe the places set up for seating by the church.
6. Once the family is seated it may be an appropriate time to remind them on the procedures for the reception of Holy Communion. They should be told that they must maintain six feet of distance from anyone in front of them on line and that they must approach the priest for Communion with their hands extended to receive the Host. Once they have received in the hand they should move to the side (at least six feet), lower their mask and consume the Eucharist. Then, replacing the mask, they return to their seat.
7. There may be a lector for Mass (a particular parish may or may not allow for it). There should be a separate podium (separate from the main pulpit) for the lector to read from. The lector should have his or her own copy of the reading and retain it.
8. If there is a eulogy, limited to one, it must be read from a separate podium and not from the main pulpit.
9. The Mass will conclude with the normal rites but there will be no procession out of the church with the casket. The casket should be carried out first, followed by the family and guests. This is to avoid crowding at the exit. They should not gather outside the church.
10. Some funerals may take place at a liturgy other than Mass (like the ones we use during Holy Week). If that is the case, the same rules regarding social distancing will apply but the parish should be consulted about any other adaptations.

Thank you for your cooperation and assistance in this important matter. While there will be adaptations in various places because of individual needs, these general guidelines can assist us in trying to keep everyone safe and healthy.



**OFFICE OF THE VICAR GENERAL
DIOCESE OF BROOKLYN**

310 Prospect Park West, Brooklyn, New York 11215
718.399.5995 • FAX: 718.399.5965

August 26, 2020

Bishop DiMarzio has asked that the following information be made available to all Pastors and Administrators and asks that pertinent information be passed on to all priests in the rectory, as well.

**UPDATES ON PROCEDURES AND POLICIES FOR THE TIME OF
COVID-19 PANDEMIC**

RELIGIOUS EDUCATION, FAITH FORMATION & PRE-CANA

Very Reverend Joseph Gibino, the Vicar for Evangelization and Catechesis has issued these guidelines for all Religious Education Programs in the Diocese of Brooklyn:

In the midst of the global coronavirus crisis, we have consistently sought to protect the health, safety, and overall well-being of all our constituents. With so much uncertainty about the impact and scope of COVID-19, we have created faith formation options which take into consideration both short- and long-term consequences which we believe to be in the best interest of our religious education and family programs and the broader community. Since March 2020, all in-person youth and adolescent catechesis programs, Holy Spirit Institute courses, Leading and Living by Faith development opportunities and Pre-Cana experiences have been postponed or virtually presented. The Secretariat for Evangelization and Catechesis has developed opportunities and resources that foster the witness of faith formation and evangelization.

Because of the demands the ongoing pandemic places on our parish resources, for the good of God's people, out of an abundance of caution it has been decided that **all parish religious education programs, all faith formation programs, Pre-Cana experiences will be held virtually. The time period for this mandate is September, 2020 until January 1, 2021.** It must be noted that this situation is extremely fluid and there is the possibility that this mandate will be extended into the Spring of 2021.

YOUTH MINISTRY

Parishes will have the option of having their youth ministry gatherings in parish buildings **other than the school/academy building**, outside, or virtually. If in-person gatherings occur within the parish, please continue to use the CDC regulations when planning to ensure everyone's safety. Policies and procedures such as social distancing, the use of face masks, no refreshments being served, and ensuring there are no more than 50 people gathered in the same space must remain in place. If you have any further questions, please contact Lucia Morales at lmorales@diobrook.org.

CYO AND PARISH SPORTS PROGRAMS

Mr. Robert Caldera, Executive Director of the Catholic Youth Organization in the Diocese of Brooklyn has issued these directives and guidelines:

As part of the CYO Return to Play Safely and Smartly, CYO events will be operated with enhanced and strictly enforced health and safety guidelines and protocols. These protocols will be continually updated in accordance with guidelines from the CDC, local, state and diocesan officials. The CYO Return to Play Safely Guidelines, Protocols and Procedures document was distributed to all parish athletic representatives and is available on the CYO website (www.cyodob.org)

Following the guidance and direction of the diocese as our schools and academies prepare for a safe reopening, **CYO Indoor Activities, Events and Games will not be permitted in any of our parish facilities, schools and academies during the remaining days of August through December.** This includes but is not limited to:

- Team practice or workouts
- Scrimmage games, Tournament games, League games
- Intramurals or Instructional Programs
- Team meetings or in-person registration/sign ups
- Any outside sports organizations

We strongly recommend all CYO parish programs use an online registration process. The CYO office will gladly assist any program in the need of setting up an online registration program. Email CYO Director, Rob Caldera (rcaldera@diobrook.org).

The goal is to permit CYO Indoor Practices and Games beginning the week of January 4, 2021. The CYO Administration will communicate with the parish athletic representatives the adjusted start dates for regional league games for indoor sports (basketball and volleyball).

Currently the CYO is preparing for its Return to Play Safely with Outdoor activities and sports. The CYO will continue to step up our efforts, continuing to offer a level of play that is competitive but also enjoyable for families to exercise temperance and balance participation with a quality of family life. Our sport system will continue to include these important values; child-centered, affordable, focus on bringing Christ into practice and competition, and teaching character through athletic participation.

PARISH AND LITURGICAL GUIDELINES

As more people begin to come back to the celebrations of Mass in our parishes, it is wise to remind parishioners of the safety measure which are already in place in the Diocese with regard to hygiene and social distancing. Especially important is a reminder that the preferred method of receiving Holy Communion is in the hand and that those who insist on receiving on the tongue, should wait to the end of the communion line to receive in order to limit the possibilities of spreading infection. A review of how to receive in the hand properly and reverently may be in order.

EXTRAORDINARY MINISTERS OF HOLY COMMUNION, LECTORS, CHOIRS & ALTAR SERVERS

Parishes may begin to use liturgical ministers if proper social distancing and hygiene requirements are met.

- **Lectors** must read from opened lectionaries. (There is no procession with Gospel Books). They must read from lecterns separate from the ambo or pulpit from which the Gospel is read or the homily preached. The lector must wear a face covering until he or she begins the reading and replace it immediately upon finishing. The lector must stand as far from the microphone as possible. The lector must not be seated in the sanctuary area of the church before or after the readings.
- **Extraordinary Ministers of Holy Communion** must be properly instructed in how to distribute the Eucharist safely, the method of purifying hands before and after distribution, and the wearing of a mask. These procedures are the same for an Extraordinary as they are for priests and deacons. Please remind parishioners who receive on the tongue to wait for the end of the Communion line and Extraordinary Ministers to disinfect hands after distribution, especially if Communion was given on the tongue (which must be after each person receives in that way)
- **Choirs** may begin to practice and sing at liturgies with special care taken to assure social distancing and good hygiene. Masks should be worn. Although this is obviously a hindrance to good singing, the wearing of a mask is necessary at this time to prevent the transfer of aerosols. At least 6-feet of distance should separate the choir members from each other. If this distancing is not possible because of space limitations, it may not, in fact, be possible for a particular choir to sing at this point in time. Choir members must each have their own printed materials and not share them or leave them in the church.
- It is not recommended at this time to have **Altar Servers** at liturgies. The generally limited space in sanctuaries will make it impossible to maintain proper social distancing, therefore, are not to be anyone aside from priest(s) and deacon(s) in the sanctuary area during the liturgies.

Please note that it is not required that the ministries described above be started in parishes. Pastors and Administrators should only restart them if they feel they are ready and can comply with all directives for safety. Any minister who is uncomfortable with returning to his or her ministry should refrain at this time.

PARISH MEETINGS

Parish meetings such as prayer groups, Bible studies, AA meetings, etc. may take place. However all hygiene, sanitizing and social distancing norms must be observed.

- Be aware of the maximum number of people permitted based on the total occupancy of the room (usually at about 25% of the total occupancy)
- Have hand sanitizer available in the room
- Masks/Face Coverings must be worn
- Seat people at least six feet from each other
- It is best practice not to have refreshments because of the shared utensils and risk of gathering in close proximity

**GUIDELINES FOR LONG-TERM AND SHORT-TERM MINISTRY AND HOSPITALITY FOR
PRIESTS COMING FROM OUTSIDE THE DIOCESE OF BROOKLYN DURING THE
EXTENDED COVID-19 PERIOD**

With the possibility of priests traveling from overseas or from other dioceses in the United States to do ministry in the Diocese of Brooklyn, or coming for hospitality for a long or short period of time, during the pandemic time, pastors/administrators **must** comply with the following guidelines:

1. Notify the Office of the Chancellor and the Office for Clergy Personnel of any visiting priests that will be with you for ministry or hospitality, in writing, or via email.
2. If possible, notify in advance the Office for Clergy Personnel once you know when the priest will arrive.
3. As soon as the priest arrives, the priest must take a Covid-19 test and must be in quarantine until the test results are received.
4. If the test results are negative, the priest can begin ministry immediately; if the results are positive, the priest must be in quarantine for two weeks, following the current guidelines for a priest with a positive result; after the quarantine the priest must take the test again before he is allowed to do public ministry.
5. If the priest will be ministering in the parish, salary must be paid from the time of his arrival.
6. Notify the Chancellor and the Office for Clergy Personnel of the priest departure date in writing or via email.

QUESTIONS?

As always, please do not hesitate to contact the following for any clarification, assistance or inquiry:

Vicar General's Office	Most Reverend Raymond Chappetto (vgeneral@diobrook.org)
Chancellor's Office	Msgr. Steven Aguggia (saguggia@diobrook.org)
Liturgy Office	Rev. John O'Connor (jconnor@diobrook.org)
Clergy Personnel Office	Deacon Julio Barreneche (jbarreneche@diobrook.org)



**OFFICE OF THE VICAR GENERAL
DIOCESE OF BROOKLYN**

310 Prospect Park West, Brooklyn, New York 11215
718.399.5995 • FAX: 718.399.5965

SEPTEMBER 8, 2020

In preparation for the Pastor's Meeting tomorrow, Sept. 9th and Thursday, Sept. 10th, please review the following **REVISED** guidelines:

Bishop DiMarzio has asked that the following information be made available to all Pastors and Administrators and asks that pertinent information be passed on to all priests in the rectory, as well.

**REVISED PROCEDURES & POLICIES FOR THE TIME OF COVID-19 PANDEMIC
RELIGIOUS EDUCATION, FAITH FORMATION & PRE-CANA**

Very Reverend Joseph Gibino, the Vicar for Evangelization and Catechesis has issued these guidelines for all Religious Education Programs in the Diocese of Brooklyn:

In the midst of the global coronavirus crisis, we have consistently sought to protect the health, safety, and overall well-being of all our constituents. With so much uncertainty about the impact and scope of COVID-19, we have created faith formation options which take into consideration both short- and long-term consequences which we believe to be in the best interest of our religious education and family programs and the broader community. Since March 2020, all in-person youth and adolescent catechesis programs, Holy Spirit Institute courses, Leading and Living by Faith development opportunities and Pre-Cana experiences have been postponed or virtually presented. The Secretariat for Evangelization and Catechesis has developed opportunities and resources that foster the witness of faith formation and evangelization.

Because of the demands the ongoing pandemic places on our parish resources, for the good of God's people, out of an abundance of caution it has been decided that **all parish religious education programs which share space within an academy/school or building leased to the Department of Education experiences will be held virtually. The time period for this mandate is September 2020 until January 1, 2021.**

Those parishes which have independent buildings that are used exclusively for religious education may hold in-person instruction. The following procedures must be followed:

I: Before program Protocols:

- a. All classrooms must be measured to allow for six feet social distancing between desks
- b. All classrooms, lavatories, and shared spaces must be sanitized after the use of a population
- c. These spaces must be sanitized before they may be used by a new population

d. Proper ventilation following the City of New York's regulations for ventilation must be in place before the opening of programs

- a. Exhaust fans in each room**
- b. Air conditioning for each room**
- c. Windows open at all times**

2. Only the DRE, Catechist, and student population may enter the Building

3. Before the DRE, Catechist, and student population may enter the building:

a. A health report must be completed; this report must ask:

1. Have you tested positive for COVID-19 (either by saliva or nasal or throat swab), in the past 14 days? (Follow self-isolation process)

- Yes - Do not report to religious education program
- No

2. Do you have a Fever (temperature of 100.4 or greater) without having taken any fever reducing medications or have you had symptoms of a fever in the past 24 hours such as chills, sweats, felt "feverish"?

- Yes - Do not report to religious education program
- No

3. Select any of the following COVID-19 related symptoms that you have had in the past 14 days.

- Fever (temperature of 100.4 or greater)
- Changing Cough
- Shortness of Breath
- Difficulty Breathing
- Change or Loss of Taste
- Loss of Smell

4. Did you select any of the symptoms in Question 3?

- Yes - Do not report to religious education program
- No

5. Have you been in close or proximate contact (within 6 feet for at least 10 minutes) with someone with a confirmed or suspected COVID-19 case in the past 14 days?

- Yes - Do not report to religious education program
- No

6. Have you traveled in the past 14 days to a country or state who has been on Level Three Travel Health Notice or under the NYS Travel Advisory?

- Yes - Specify Country or State in Question 7 and do not report to the work
- No - Report to religious education program

7. If answer yes to question 6, please enter the country or state that you traveled to.

- ii. Temperature must be taken and recorded before entry
- iii. Temperature must be taken every time the DRE, Catechist or student leaves and re-enters the building.

4. If one student tests positive for covid -19:

- a. the class may not reassemble until 15 days of quarantine is maintained
- b. if one student and one Catechist OR two students or more test positive for covid-19 the program may not reassemble until 15 days of quarantine is maintained
- c. the period of quarantine begins each time there is a new report of a DRE, Catechist, or student testing positive for covid-19
- d. each sibling of a student who has tested positive must be quarantined
- e. each positive case must be reported to the Vicar General's Office, the Secretariat for Evangelization, and the School which the student attends.

Please Note: Any family choosing a virtual option has the right to do so given the current state of the pandemic. If the home parish is not able or willing to provide such a program, the family may enroll in a religious education program with a virtual option.

QUESTIONS?

As always, please do not hesitate to contact the following for any clarification, assistance or inquiry:

Vicar General's Office
 Chancellor's Office
 Secretariat for Evangelization
 and Catechesis

Most Rev. Raymond Chappetto, vgeneral@diobrook.org
 Rev. Msgr. Steven Aguggia, saguggia@diobrook.org
 Very Rev. Joseph R. Gibino, jgibino@diobrook.org

EXHIBIT N
(Dist. Ct. Dkt. No. 21)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

		x
THE ROMAN CATHOLIC DIOCESE OF	:	
BROOKLYN, NEW YORK	:	
	:	
Plaintiff,	:	No. 1:20-CV-4844-NGG-CLP
	:	
v.	:	
	:	
GOVERNOR ANDREW M. CUOMO, in his	:	
official capacity,	:	
	:	
Defendant.	:	
-----		x

**SUPPLEMENTAL DECLARATION OF BISHOP RAYMOND F. CHAPPETTO IN
FURTHER SUPPORT OF PLAINTIFF’S APPLICATION FOR A
PRELIMINARY INJUNCTION**

I, Bishop Raymond F. Chappetto, Vicar General for The Roman Catholic Diocese of Brooklyn, New York, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746, and state as follows:

1. I submit this supplemental declaration in further support of Plaintiff’s application for a preliminary injunction in order to provide an update regarding which churches in The Roman Catholic Diocese of Brooklyn, New York have been affected by Governor Cuomo’s October 6, 2020 COVID-19 order (the “Emergency Order”), to further explain how the Emergency Order has burdened and will continue to burden the Diocese and its parishioners, and to elaborate on voluntary efforts that the Diocese has adopted—above and beyond those measures required by city and state government—to prevent the spread of the virus in our churches.

Churches Affected by the Governor's Emergency Order

2. Since executing my initial declaration on October 8, 2020, I have learned from a new, interactive map published by local government officials that the Emergency Order affects more churches in the Diocese than we initially believed.

3. Specifically, there is one additional church in the red zone, St. Catharine of Alexandria. That church has a seating capacity of 700 people, but is currently limited to 10 parishioners pursuant to the Emergency Order.

4. In the orange zone, there are three additional churches subject to the 25-person capacity limits: Mary Queen of Heaven (which has a seating capacity of 600 people), St. Agatha (which has a seating capacity of 800 people), and St. Columba (which has a seating capacity of 400 people). St. Mark and Immaculate Heart of Mary, two churches that we previously understood fell within the orange zone, fall outside that zone.

5. With the addition of these four new churches and removal of the two previously included churches, the total number of churches in the Diocese subject to either 10- or 25-person capacity limits stands at 26 churches.

Burden Imposed by the Emergency Order

6. In my initial declaration, I explained that the Emergency Order would effectively close the doors of all Diocesan churches in the red and orange zones, which would be devastating for our spiritual community. Remote Mass is generally only offered to accommodate the elderly or, as was the case this past spring, as a public health necessity in order to ensure the safety of our parishioners and the surrounding community. It is no substitute for in-person Mass, which is the way our parishioners express their religious faith.

7. Over the course of my nearly 50 years as a pastor and Bishop in Brooklyn and Queens, I have observed firsthand how important in-person attendance at both Mass and lifecycle events of religious importance (such as baptisms, weddings, and funerals) is for our spiritual community. The ability for parishioners to worship and affirm their religious convictions among other members of their faith who share their beliefs—as well as to receive the sacrament of Holy Communion—cannot be replicated by remote Mass. These in-person gatherings are also a cornerstone of our faith, and have been so for millennia.

8. As I explained in my initial declaration, the period of closure this past spring, which began when the Diocese voluntarily closed the doors of its churches to help stem the spread of the pandemic (before being ordered to do so by the government), only further highlighted the importance of in-person attendance at Mass and other church ceremonies. Members of our community have reported that the inability to worship and affirm their faith in person led to feelings of depression, alienation, and spiritual deprivation. It therefore has not been surprising that, even though remote Mass remains an option for some, and even though the current version of Mass being offered is attendance-limited (to 25% capacity), socially distanced (leaving every other row empty and seating spaced six feet apart within a row), mask-wearing (with sanitizer also made available), and service-altered (with Communion offered in a more limited way for safety reasons), many of our parishioners have returned to our pews since our carefully controlled and safe reopening.

9. In short, the inability to offer in-person Mass amounts to a meaningful burden on the Diocese's ability to care for its parishioners' spiritual well-being, and impedes an important function of our religious ministry.

Voluntary Safety Efforts—Singing in Church

10. Finally, in addition to the other COVID-19 protocols discussed in my initial declaration, the Diocese of Brooklyn has implemented measures specifically designed to address singing, which I understand has been identified by the Governor’s counsel as a potential source of viral transmission.

11. When churches across the Diocese reopened for in-person Mass in early July, the Diocese took specific steps to limit singing. Among other things, we prohibited choirs, and removed all physical hymnals from the pews. Removing the hymnals in particular ensured two things. First, by not having access to the physical hymnals, parishioners could not transmit germs to each other via those objects. Second, without access to the hymnals, the congregation could not participate in the vast majority of hymns and songs—apart from a limited number that are particularly well-known—thus minimizing the risk of singing-based viral transmission.

12. As a result, since reopening, singing has largely been limited to the cantor and the organist (which, for some churches, is the same person). The cantor and organist are socially distanced from each other when they are two distinct people and, in most churches, actually perform their function from a physically separate space. In every church in the Diocese, the cantor and organist are physically separated from parishioners by at least 10 feet, and—as I explained in my initial declaration—all parishioners are required to wear a mask at all times. To the extent any of our congregants sing notwithstanding the absence of hymnals, they do so while facing forward in their socially distanced seats, with the row in front of them empty, not in groups or circles. We have seen no evidence of the limited singing described above leading to any COVID-19 cases or spread.

13. On August 26, 2020, the Diocese lifted the prohibition on choirs, on the strict condition that choirs in churches would be socially distanced and wear masks. As a result, in recent weeks, certain churches have reintroduced socially distanced and mask-wearing choirs back into their services. The Diocese has not seen any evidence that the recent reintroduction of choirs in some congregations has led to any COVID-19 cases or spread—again, the choir members are set off from each other and the rest of the congregation, who, regardless, are all wearing masks. Nevertheless, as a condition to injunctive relief from the 10- and 25-person capacity restrictions, the Diocese would be willing to eliminate choirs again, and it would also be willing to prohibit singing by the congregation, thus limiting singing of any kind to the physically separated cantor and/or organist. Further, the Diocese would be willing to mandate that the cantor and organist be physically separated from parishioners by at least 12 feet, instead of the currently applicable 10-foot separation.

Executed on October 14, 2020, in Brooklyn, New York.

+Raymond F. Chappetto

Most Rev. Raymond F. Chappetto, DD, VG, VE

EXHIBIT O
(Dist. Ct. Dkt. No. 30)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE ROMAN CATHOLIC DIOCESE OF
BROOKLYN, NEW YORK

Plaintiff,

v.

GOVERNOR ANDREW M. CUOMO, in his
official capacity,

Defendant.

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**SECOND SUPPLEMENTAL DECLARATION OF BISHOP RAYMOND F.
CHAPPELLO IN FURTHER SUPPORT OF PLAINTIFF’S APPLICATION FOR A
PRELIMINARY INJUNCTION**

I, Bishop Raymond F. Chappetto, Vicar General for The Roman Catholic Diocese of Brooklyn, New York, hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I submit this supplemental declaration in further support of Plaintiff’s application for a preliminary injunction. In light of the exchanges I heard during yesterday’s hearing, I wanted to clarify how long Sunday Mass typically was in the Diocese’s churches even before the pandemic, as well as how much shorter it is today under the safety protocols we’ve implemented.

2. Even before the pandemic, Catholic Masses were relatively short—about an hour or less in duration—compared to the religious services conducted by some other faith traditions. The Masses over which I personally presided prior to the pandemic were typically 55 minutes in length. And of course, weekday Masses, pre-pandemic, were typically even shorter.

3. Since churches in the Diocese of Brooklyn reopened for Sunday Mass in early July, the average length of Mass has decreased substantially, in part as a result of the COVID-19 protocols promulgated by the Diocese. For instance, we have eliminated the Sign of Peace, no longer offer the Precious Blood (in the form of wine) during Holy Communion, and eliminated the priest's procession into and out of the church—all of which have reduced the duration of the Mass. Some bishops and priests, myself included, have taken additional steps to expedite the celebration, including by shortening our “homilies” (sermons given following the readings from Sacred Scripture).

4. As a result, clergy in the Diocese have reported reductions of 10–20 minutes in the duration of Sunday Masses since our reopening. The Sunday Masses over which I have presided since our reopening have typically been 45 minutes or less in length.

5. We have made these and other changes to ensure the safety of our parishioners, and we have succeeded. I heard the DOH witness say yesterday that time matters. Our changes have further reduced the times of our Masses, which were relatively short to begin with. I heard him say masks and social distancing are the “most important” ways to prevent the spread of COVID-19. We insist upon both in order for parishioners to enter *and* remain in our churches. We offer sanitizer to parishioners, and sanitize the entire space with top-to-bottom cleanings before and after Mass. These and the other measures about which I have testified previously, in writing and at yesterday's hearing, have worked. We have not had any COVID outbreaks in any of our Diocese's churches since reopening for Sunday Mass in early July through early October 2020. Thus, the strict mitigation measures we have implemented have worked to prevent *any* spread of COVID, even if someone exposed to COVID happened to attend a Mass, because there has not been any spread of COVID whatsoever in our churches over the past three months.

Executed on October 16, 2020, in Brooklyn, New York.

+ Raymond F. Chappetto
Most Rev. Raymond F. Chappetto, DD, VG, VE

EXHIBIT P
(Dist. Ct. Dkt. No. 6)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROMAN CATHOLIC DIOCESE OF	:
BROOKLYN, NEW YORK,	:
	:
<i>Plaintiff,</i>	:
	:
vs.	:
	:
GOVERNOR ANDREW M. CUOMO in his	:
official capacity,	:
	:
<i>Defendants.</i>	:
-----X	:

**DECLARATION OF JOSEPH J. ESPOSITO IN SUPPORT OF PLAINTIFF’S
APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

I, Joseph J. Esposito, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746, and state as follows:

1. I submit this declaration in support of Plaintiff’s application for a temporary restraining order and preliminary injunction in order to explain the rigorous protocols and practices that the Catholic Church has implemented in Brooklyn and Queens to prevent the spread of COVID-19 during Church services, under my guidance as the former Chief of Department of the New York City Police Department and the former Commissioner of New York City Emergency Management. These protocols, which at all times followed the guidance of City, State, and Federal authorities, include limited attendance, limiting the number of services, requiring social distancing and masking, blocking off sections of seating, monitoring foot traffic flow, keeping all doors open so that worshipers may enter and exit in a socially distant manner, and even altering the way Holy Communion is taken. These protocols have been communicated by email to all members of the Church, posted on signage at each church, and

compliance is actively monitored by Church-appointed ushers at each church. To my knowledge, there have not been any outbreaks of COVID-19 stemming from any Catholic church or congregation in New York City, including in Brooklyn or Queens.

Professional Background

2. I served with the New York City Police Department and New York City Emergency Management for over 50 years, including as NYPD Chief of Department and Commissioner of New York City Emergency Management, before retiring in 2019.

3. I entered the New York Police Department in August 1968 as a Police Trainee. In April 1971, I was appointed a Patrolman, and began my career on patrol in the 77th Precinct in Brooklyn. I was promoted to Detective in May 1983, Sergeant in September 1983, Lieutenant in February 1986, Captain in June 1989, Deputy Inspector in August 1993, Inspector in August 1994, Deputy Chief in September 1996, and Assistant Chief in December 1997.

4. On August 25, 2000, I was promoted to the position of Chief of Department. As Chief of Department, I directed and controlled the daily operations of the five major enforcement Bureaus (Patrol Services, Detectives, Transit, Housing, and Organized Crime Control) within the NYPD. I also coordinated the crime control strategy meetings at which commanders share tactical information and recommend plans of action for realizing crime reduction goals. I served as Chief of Department until March 2013.

5. In the course of my career, I have served in numerous commands of the department, including the 77th, 10th, 83rd, 109th, 34th, 66th, and 83rd Precincts, and in the Narcotics Division and the Detective Bureau. In my last assignment before becoming Chief of Department, I was the Commanding Officer of the Strategic and Tactical Command (S.A.T.COM) Brooklyn North.

6. During my career in the New York Police Department, I earned some of the department's most honored and prestigious awards, including the Combat Cross, the Medal for Valor, and the Exceptional Merit award.

7. After my retirement from the New York Police Department, I served as the Commissioner of New York City Emergency Management from 2014 to 2019. As Commissioner, as well as in my various leadership roles in the New York Police Department, I trained extensively in disaster preparedness, including participating in multiple tabletop exercises for pandemics among other potential disasters. These tabletop exercises included participants from State, City, and local governments and sought to game out, so to speak, how an emergency would occur to test and practice our responses in the moment.

The Church's Efforts To Protect The Health, Safety, And Religious Needs Of The Community In Light of COVID-19

8. I am a parishioner at the St. Athanasius Roman Catholic Church in Brooklyn, and have been since 1983. When I retired from my position as Chief of Department of the New York City Police Department in 2013, I was asked to serve on a Review Board tasked with reviewing allegations of misconduct by clergy within the New York Catholic Church. In that role, I got to know well the bishops and other senior members of the clergy. I personally witnessed their great compassion for their parishioners and the people of New York City at large. They care deeply about the health and safety of the community.

9. When the COVID-19 pandemic hit the United States, New York State and City authorities issued shelter-in-place regulations to regulate the way that persons and groups could convene in a variety of ways. All of the Catholic churches in New York City, including those in Queens and Brooklyn, were closed for any congregation, worship, or mass for several months.

10. Early on, I became involved in the Church's efforts to figure out how the Catholic churches in New York, including in Queens and Brooklyn, could create safe spaces for religious expression and worship for their congregants. Church officials asked me, with my experience in public safety and emergency preparedness, to chair a commission focused on ensuring that their parishioners' spiritual needs could be met while at the same time doing the utmost to protect the community from the ongoing COVID-19 pandemic. The group of individuals working on these efforts provided guidance to the church leadership, including promulgating written plans and recommendations for safely reopening places of worship. In doing so, we based all proposed regulations for the Catholic churches on the guidelines New York Governor Andrew Cuomo and New York City Mayor Bill de Blasio published, as well as all applicable federal, State, City, and local ordinances related to the COVID-19 pandemic. I also consulted closely with medical professionals, as well as several of my prior colleagues in Emergency Management and the New York Police Department as well as leveraged my own experience in emergency management.

11. Starting in late May 2020, the churches opened in a staged approach that has been conducted in accordance with the iterative regulations promulgated by the State of New York and New York City regulations. In doing so, all Catholic Churches in New York City, including those within the Roman Catholic Diocese of Brooklyn, New York (which covers churches in Brooklyn and Queens), adopted our recommendations on how to institute procedures to safely accommodate their congregants' constitutional and spiritual right to worship and engage in Catholic religious practices. To my knowledge, all of the churches have consistently implemented our recommendations. A PowerPoint deck provided to parishes before opening, which summarizes our recommendations to them, is attached as Exhibit A.

12. These procedures are detailed, and included structural and procedural changes to all churches. For instance, the churches have blocked off every other pew so congregants cannot

sit immediately in front of or behind one another, and seats are marked with tape six feet apart from one another within each open pew to ensure appropriate socially distancing. The churches are only open for abridged hours both on weekdays and for weekend masses. They are also keeping multiple doors open for various points of entry and exit, and directing traffic in and out of the church, to ensure that worshipers enter and exit in a socially distant manner. All churches provide hand sanitizer at stations throughout the churches.

13. Pursuant to our protocols, congregants are required to wear a mask to enter any church, and masks must be worn at all times within church premises, except for a brief moment when they are socially distanced while receiving Holy Communion. Communion is no longer taken on the tongue, and wine is no longer distributed during Communion. The churches have, moreover, retained additional ushers and security guards to restrict the number of persons entering any of the churches at any time, direct traffic, ensure that masks are worn by those entering the church, and enforce compliance with all of the procedures and protocols. All churches have also adhered strictly to the 25% capacity limit imposed by the State.

14. In my view and given my experience, these procedures are robust and rigorous and maintain the highest standards of public safety, while still ensuring the Church's parishioners have the opportunity to worship and engage in religious exercise. As a result, to my knowledge, there have not been any outbreaks of COVID-19 stemming from any Catholic church or congregation in New York City, including in Brooklyn or Queens.

Executed this 8th day of October 2020 at New York, New York.


Joseph J. Esposito

EXHIBIT Q
(Dist. Ct. Dkt. No. 6-1)

EXHIBIT A

Church



Re-opening of Churches - Recommendations

- All churches should be sanitized before reopening. (See details below)
- Adopt social distancing measures. Basically, 6' of separation sketched below.
- Close off pews as necessary to maintain a distance of six 6-8' between open pews.
- Keep a distance of 6' seating within active pews. (Except families at their discretion)
- Limit occupancy, based on available seating to maintain distancing guidelines
- All must wear a mouth/nose covering to enter.
 - If possible to procure, have a small quantity available

Re-opening of Churches - Recommendations – Cont-d

- Keep area well ventilated.
 - Run any available exhaust fans
 - Open windows as practical to do so (operable, weather, etc?)
 - Run any existing HVAC system that uses fresh air
 - Replace all existing HVAC air filters if not already replaced this year
- Provide hand sanitizer spray stations as they become commercially available.
- Encourage at risk population to stay home
- Reinforce hygiene practices for all. Wash hands, soap and water frequently, do not touch face, etc...
- Sanitize pews, doorknobs, and other high touch surfaces at least weekly.

Sample signs below

(Before Sunday Mass schedule is recommended at a minimum)

For more information visit the CDC “faith organizations” website at:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/guidance-community-faith-organizations.html>

Disinfecting Protocols

Getting your facility ready

- Routine cleaning of high touch surfaces (i.e doorknobs, light switches, handles, desks, toilets, faucets, sinks, and electronics)

Hard Non-Porous Surfaces

- If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
- For disinfection, most common EPA-registered household disinfectants, and diluted household bleach solutions, are effective.
- Household bleach solution is prepared by mixing:
 - 5 tablespoons (1/3rd cup) bleach per gallon of water or
 - 4 teaspoons bleach per quart of water

Disinfecting Protocols - Cont'd

Soft Porous Surfaces (i.e carpeted floor, rugs, and drapes)

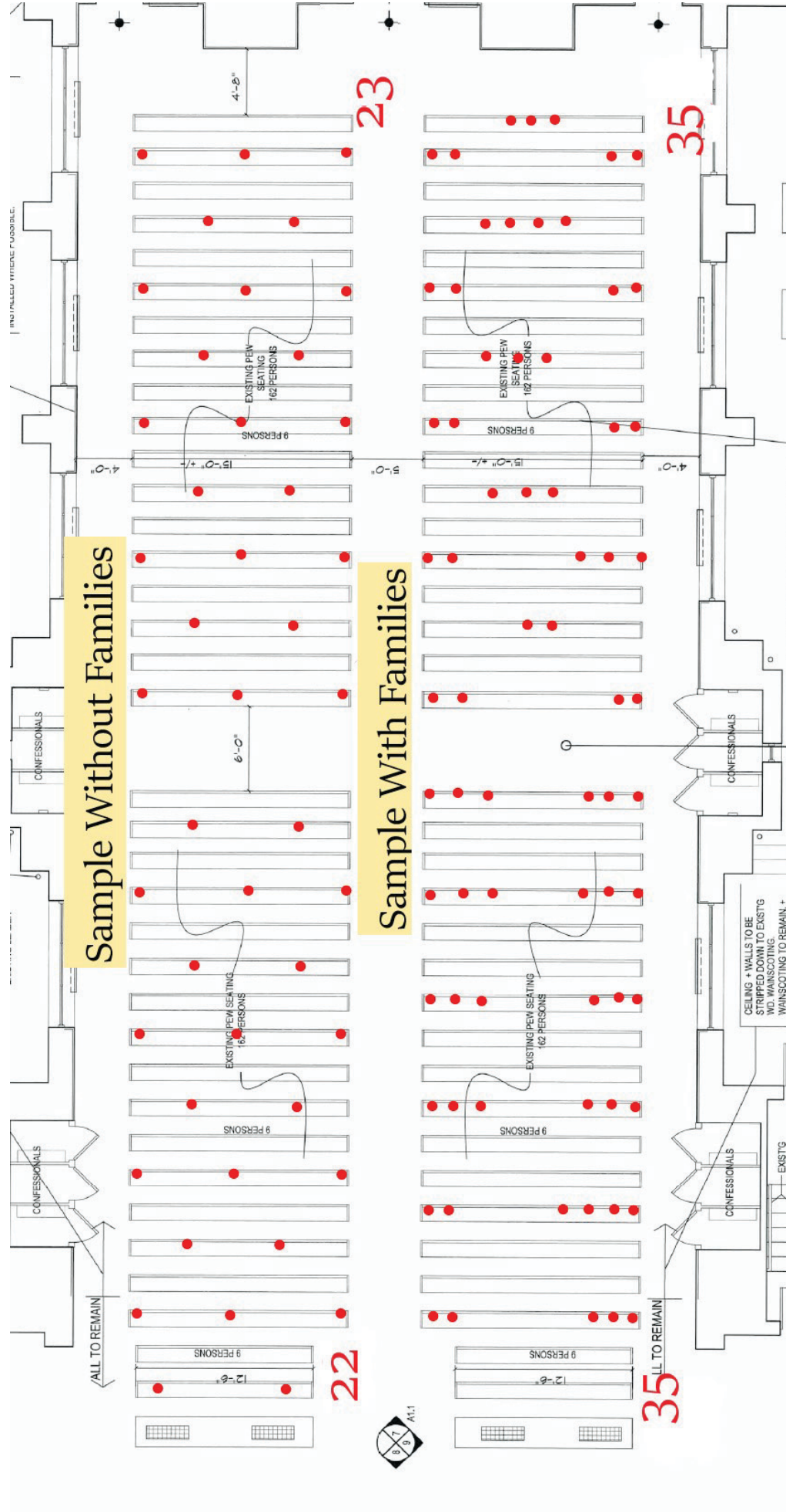
- Launder items as appropriate in accordance with the manufacturer's instructions. If possible, launder items using the warmest appropriate water setting for the items and dry items completely.
- Use EPA approved products for porous surfaces

Other considerations

- Wear disposable gloves when cleaning and disinfecting surfaces.
- Gloves should be discarded after each cleaning.
- If reusable gloves are used, those gloves should be dedicated for cleaning and disinfection of surfaces for COVID-19 and should not be used for other purposes.
- Ensure there is proper ventilation before using chemicals to disinfect surfaces.

Disinfecting Protocols - Cont'd

- Wear disposable gloves when cleaning and disinfecting surfaces.
- Provide COVID-19 prevention supplies at your parish (e.g., soap, hand sanitizer that contains at least 60% alcohol, tissues, trash baskets, availability of a limited qty of disposable face coverings as commercially available)






Feeling Sick?
Stay home when you are sick!



If you feel unwell or have the following symptoms
please leave the building and contact your health care provider.
Then follow-up with your supervisor.

DO NOT ENTER if you have:

-  FEVER
-  COUGH
-  SHORTNESS OF BREATH



[cdc.gov/coronavirus](https://www.cdc.gov/coronavirus)

Stop the Spread of Germs

Help prevent the spread of respiratory diseases like COVID-19.

-  Avoid close contact with people who are sick.
-  Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
-  Clean and disinfect frequently touched objects and surfaces.
-  Wash your hands often with soap and water for at least 20 seconds.
-  Avoid touching your eyes, nose, and mouth.
-  When in public, wear a cloth face covering over your nose and mouth.
-  Stay home when you are sick, except to get medical care.



[cdc.gov/coronavirus](https://www.cdc.gov/coronavirus)

How to Protect Yourself and Others

Know how it spreads

- There is currently no vaccine to prevent coronavirus disease 2019 (COVID-19).
- **The best way to prevent illness is to avoid being exposed to this virus.**
- The virus is thought to spread mainly from person-to-person.
 - » Between people who are in close contact with one another (within about 6 feet).
 - » Through respiratory droplets produced when an infected person coughs, sneezes or talks.
 - » These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.
 - » Some recent studies have suggested that COVID-19 may be spread by people who are not showing symptoms.



Everyone should

Clean your hands often

- **Wash your hands** often with soap and water for at least 20 seconds especially after you have been in a public place, or after blowing your nose, coughing, or sneezing.
- If soap and water are not readily available, **use a hand sanitizer that contains at least 60% alcohol.** Cover all surfaces of your hands and rub them together until they feel dry.
- **Avoid touching your eyes, nose, and mouth** with unwashed hands.



Avoid close contact

- **Avoid close contact** with people who are sick.
- **Stay at home as much as possible.**
- **Put distance between yourself and other people.**
 - » Remember that some people without symptoms may be able to spread virus.
 - » This is especially important for **people who are at higher risk of getting very sick.** www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html



Cover your mouth and nose with a cloth face cover when around others

- You could spread COVID-19 to others even if you do not feel sick.
- **Everyone should wear a cloth face cover when they have to go out in public,** for example to the grocery store or to pick up other necessities.
 - » Cloth face coverings should not be placed on young children under age 2, anyone who has trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the mask without assistance.
- **The cloth face cover is meant to protect other people** in case you are infected.
- Do **NOT** use a facemask meant for a healthcare worker.
- Continue to **keep about 6 feet between yourself and others.** The cloth face cover is not a substitute for social distancing.



Cover coughs and sneezes

- **If you are in a private setting and do not have on your cloth face covering, remember to always cover your mouth and nose** with a tissue when you cough or sneeze or use the inside of your elbow.
- **Throw used tissues** in the trash.
- Immediately **wash your hands** with soap and water for at least 20 seconds. If soap and water are not readily available, clean your hands with a hand sanitizer that contains at least 60% alcohol.



Clean and disinfect

- **Clean AND disinfect frequently touched surfaces** daily. This includes tables, doorknobs, light switches, countertops, handles, desks, phones, keyboards, toilets, faucets, and sinks. www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/disinfecting-your-home.html
- **If surfaces are dirty, clean them:** Use detergent or soap and water prior to disinfection.



01/20/20 04/10/20

cdc.gov/coronavirus

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