No. 20A87

In the

Supreme Court of the United States

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,

Applicant,

v.

GOVERNOR ANDREW M. CUOMO, in his official capacity,

Respondent.

OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION

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PRELIMINARY STATEMENT

The State of New York, along with the rest of world, is grappling with the greatest public health crisis in living memory. Since the first case was confirmed in New York in March 2020, the COVID-19 pandemic has caused more than 26,000 deaths in the State[1]—including over 16,000 in New York City alone—numbers that could have been far greater had the State not taken urgent action to impose restrictions on businesses, social functions, and other activities in order to halt the spread of the virus. Those restrictions proved enormously effective. And the State has been working ever since to ease the restrictions in a measured way that balances the need to continue protecting its residents' lives, health, and safety, with the need to help them return, as much as possible, to their normal lives. This calibrated approach has kept the spread of the virus in the State relatively under control, despite the resurgence that is currently sweeping the nation.

However, by October 2020, the State began observing high concentrations of COVID-19 cases, often referred to as "clusters," in certain communities. In response, Governor Andrew M. Cuomo announced the "Cluster Action Initiative," implemented via the contemporaneously-issued Executive Order 202.68, and associated administrative guidance. Under the initiative, the State's Department of Health examines testing data in order to identify discrete geographic micro-areas

[1] New York State Department of Health, *COVID-19 Tracker: Fatalities*, https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n (last visited Nov. 18, 2020). This figure reflects confirmed fatalities reported by healthcare facilities, and thus undercounts total deaths, which include, among other things, deaths occurring in peoples' homes.

experiencing COVID-19 clusters, and the Governor, with the Health Department's assistance, designates those areas for more-aggressive restrictions designed to contain the clusters and prevent their further expansion.

Like the restrictions that the State imposed soon after the pandemic took hold, as well as those that have remained in place since, the restrictions imposed by Executive Order 202.68 target the settings that most naturally facilitate COVID-19 spread, namely those in which persons tend to gather closely for an extended period of time. Across the board, the restrictions significantly constrain the extent to which gatherings may occur. But, they treat gatherings in houses of worship more favorably than comparable gatherings of a secular nature. For example, within areas designated as "red zones," in which the most troubling COVID-19 spikes are occurring, houses of worship may remain open and host gatherings that do not exceed the lesser of 10 people or 25 percent of maximum occupancy. Comparable secular gatherings, however, such as concerts and other events where attendees arrive simultaneously, congregate for an extended period of time, and leave simultaneously—and possibly mingle with one another throughout—are completely prohibited.

The Roman Catholic Diocese of Brooklyn, New York commenced the litigation underlying the present application by filing a lawsuit in the United States District Court for the Eastern District of New York against Governor Cuomo, alleging that, as applied to its churches, Executive Order 202.68 violates the Free Exercise Clause of the First Amendment to the United States Constitution. Both the district court and the United States Court of Appeals for the Second Circuit denied injunctive relief.

As explained more fully below, this Court should do likewise. The Diocese's application should be denied because it fails to satisfy the demanding requirements for obtaining injunctive relief from this Court in the first instance.

STATEMENT OF THE CASE

A. The COVID-19 Pandemic

COVID-19 is a highly infectious and potentially deadly respiratory illness that spreads easily from person to person. (Respondent's Appendix ["R.A."] 34, 85.) Transmission occurs principally when an infected person coughs, sneezes, or talks, and liquid particles from their mouth or nose—ranging from relatively large respiratory droplets to relatively small aerosols—are launched into the air and land in the mouths or noses, or are inhaled into the lungs, of people within an approximately-six-foot radius. (R.A. 35, 85, 89, 93-94, 105, 109, 138, 200); World Health Organization ("WHO"), *Coronavirus Disease (COVID-19): How Is It Transmitted?* (July 9, 2020; updated Oct. 20, 2020), https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted. Transmission occurs most readily in indoor settings, particularly those with poor ventilation, such as old buildings. (R.A. 138, 200.)

The virus has an incubation period of 14 days, and can be spread by infected persons before they become symptomatic, and even if, as sometimes happens, they never become symptomatic at all. (R.A. 35, 85, 89-92, 138, 165, 215, 251.) Since the first cases were reported in January 2020 in China (R.A. 34, 59), COVID-19 has infected more than 55 million people throughout the world and claimed more than 1.3 million lives. WHO, *Coronavirus Disease (COVID-19) Dashboard*,

http://covid19.who.int (last visited Nov. 18, 2020). The WHO declared COVID-19 a pandemic, and President Donald Trump declared that the spread of COVID-19 within the United States constitutes a national emergency. (R.A. 34, 77-83.) Indeed, as of this writing, the disease has claimed the lived of over 246,000 Americans. United States Centers for Disease Control and Prevention ("CDC"), *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Nov. 18, 2020).

To slow COVID-19's spread, the CDC recommends that people practice "social distancing" by remaining at least six feet away from others, and that they wear a facial covering, whenever they are outside of their homes. (R.A. 35, 109.) The CDC further recommends that, especially when indoors, people avoid gathering in groups—settings in which, among other things, social distancing can be difficult to maintain, and the consequences of failing to maintain it, or failing to mask properly, can be particularly drastic. (R.A. 35, 218.)

Indeed, large indoor gatherings of extended duration present a significant risk of COVID-19 spread. The larger the gathering, the more likely it is that some attendees are already infected and capable of transmitting the virus. (R.A. 46-48, 139, 251.) This is especially true because the virus may be spread by infected persons who are not symptomatic—which research indicates may describe more than 40 percent of all infected persons (R.A. 202)—and thus might not perceive a special need to avoid group settings. Also, the larger the gathering, the more persons that attendees who have the virus may potentially infect, and the more difficult it is for the level of social

distancing critical for preventing virus transmission to be maintained. (R.A. 46-48, 156, 158.) Further, the longer the gathering lasts, the more person-to-person interactions that lead to virus transmission may occur. (R.A. 47-48, 139, 155, 216, 251-253.) Moreover, the transmission that occurs during the event is only the primary spread; when the attendees disperse and go their separate ways, they each present a risk of secondary spread in their respective communities. (R.A. 48, 253.)

Large gatherings of extended duration thus often have "super-spreader" potential. (R.A. 46, 243-244, 251-253.)

B. New York's Necessary—And Effective—Closure

The first case of COVID-19 in the State of New York was confirmed in early March 2020. (R.A. 36.) That number instantly began skyrocketing, and on March 7, 2020, Governor Cuomo declared a state disaster emergency. (R.A. 36, 111.) Within weeks, confirmed cases approached 10,000, with deaths exceeding 150. (R.A. 37.)

Many of the State's early cases were attributable to religious gatherings that served as super-spreader events. In late February 2020, a 50-year-old-man started showing signs of illness but attended a bat mitzvah and funeral at his synagogue in a New York City suburb; his interactions with others at those events gave rise to the State's first coronavirus "cluster": a high concentration of COVID-19 cases occurring within the same geographic area. (R.A. 254, 271.) New York quickly became the "epicenter of the outbreak in the United States," with New York City alone accounting for more than half of the country's COVID-19 infections. Alan Feuer & Brian M.

Rosenthal, *Coronavirus in N.Y.: "Astronomical" Surge Leads to Quarantine Warning*, N.Y. Times, Mar. 24, 2020.

And the situation thereafter got worse. The daily "positivity rate"—the percentage of tests coming back positive, a strong indicator of how widespread infection is in the area (R.A. 52, 212-213)—was approximately 25 percent, and growing. State of New York, *Percentage Positive Results by Region Dashboard*, https://forward.ny.gov/percentage-positive-results-region-dashboard (last visited Nov. 18, 2020). The "reproduction rate" indicated that, on average, every COVID-19-positive person was infecting about 1.25 to 1.50 others, signaling exponential growth. Rt Live, *New York Rt: COVID Reproduction Rate*, https://rt.live/us/NY (last visited Nov. 18, 2020).

By late March 2020, the State's healthcare system was being pushed to its limits and bracing for further devastation. Projections estimated that by the end of May 2020, 110,000 New Yorkers would require hospitalization due to COVID-19, 37,000 of whom would need treatment in intensive care units. Gov. Andrew M. Cuomo, *Governor Cuomo Announces Deployment of 1,000-Bed Hospital Ship "USNS Comfort" to New York Harbor*, at 01:41-02:11 (Mar. 18, 2020), https://www.youtube.com/watch?v=jnEdL8lj-hM. Statewide, however, there were a total of only 53,000 hospital beds, just 3,000 of which were in intensive care units. *Id.* Additionally, medical professionals were experiencing a shortage of personal protective equipment, including surgical masks, gloves, and gowns. Gov. Andrew M. Cuomo, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Accepts*

Recommendation of Army Corps of Engineers for Four Temporary Hospital Sites in New York (Mar. 22, 2020), https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-accepts-recommendation-army-corps-engineers-four; Brian M. Rosenthal et al., *Short on Beds and Ventilators, New York Hospitals Face Surge*, N.Y. Times, Mar. 21, 2020.

Against that backdrop, the State implemented "New York on PAUSE," an initiative designed to slow the virus's spread. As part of New York on PAUSE, persons were ordered to practice social distancing by remaining at least six feet from others in public settings, and to wear facial coverings when social distancing was impracticable. (R.A. 38-39, 233.) "Essential" businesses—"business[es] providing products or services that are required to maintain the health, welfare, and safety of the citizens of New York State," Empire State Development Corporation, *Frequent Asked Questions for Determining Whether a Business Is Subject to a Workforce Reduction under Recent Executive Order Enacted to Address COVID-19 Outbreak*, at 6 (Mar. 22, 2020), https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_032220.pdf, such as hospitals, grocery stores, and banks—were allowed to remain open, provided they complied with masking, social distancing, and other precautionary measures. (R.A. 38; *see* Applicant's Appendix ["A.A."], Ex. G.) All other businesses were directed to cease in-person operations. (R.A. 38.)

All gatherings of individuals not necessary to the conduct of essential business were declared cancelled or indefinitely postponed. (R.A. 38.) This prohibition encompassed gatherings "of any size for any reason," including religious gatherings.

(R.A. 39, 124.) Houses of worship, however, were not ordered closed. They were allowed to remain open for individuals to enter and use, provided no congregate services were held. Gov. Andrew M. Cuomo, *Governor Cuomo Issues Guidance on Essential Services under the "New York State on PAUSE" Executive Order* (Mar. 20, 2020), https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order.

New York on PAUSE succeeded in dramatically curbing the spread of COVID-19 in the State. To be sure, the total number of COVID-19 cases in the State continued to climb, and in April 2020 hit 267,000, with over 13,000 fatalities. (R.A. 37.) But, that month, the number of new cases per day began to steadily decline, as did the total number of hospitalizations. (R.A. 40); State of New York, *Daily Hospitalization Summary by Region Dashboard*, https://forward.ny.gov/daily-hospitalization-summary-region (last visited Nov. 18, 2020). Additionally, the reproduction rate fell below 0.75, indicating that the spread of the virus was no longer undergoing exponential growth. (R.A. 41, 279.)

C. The State's Measured Reopening

Following the success of New York on PAUSE, in late April 2020, Governor Cuomo announced "New York FORWARD," a plan for reopening the sectors of the economy affected by New York on PAUSE. Gov. Andrew M. Cuomo, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Outlines Phased Plan to Re-Open New York Starting with Construction and Manufacturing* (Apr. 26, 2020), https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-

cuomo-outlines-phased-plan-re-open-new-york-starting. Under the reopening plan, the State is divided into geographic regions, and as each region attains certain statistical benchmarks concerning COVID-19 containment it advances through four "phases" in which increasingly more activities are allowed to resume, so long as social distancing and other health protocols are followed. (R.A. 41); *see also* Gov. Andrew M. Cuomo, *NY FORWARD: A Guide to Reopening New York & Building Back Better*, at 43-60 (May 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf.

Additionally, the State began to relax the New York on PAUSE prohibition on gatherings. The first exception made included an allowance for "any religious service or ceremony" of up to 10 people in any region of the State, including regions that had not even reached Phase 1 of the reopening plan. (R.A. 39, 126.) Thereafter, the State authorized gatherings "for any lawful purpose" up to 10 people for regions of the State through Phase 2 of the reopening, up to 25 people for regions in Phase 3, and up to 50 people for regions in Phase 4, with requirements for social distancing, masking, and related precautions still in effect. (R.A. 49, 128-129, 131.) These fixed-number limits do not apply to gatherings in houses of worship, however, which are subject instead to limits based upon their certified maximum occupancy.[2] (R.A. 10; A.A., Ex. L, ¶ 16.) By the end of July 2020, all regions of the State had advanced to Phase 4, where they currently remain. (R.A. 10, 41.)

[2] The Diocese has not challenged these limits below, nor does it challenge them here.

As a result of the State's measured approach to reopening, substantial sectors of the economy have rebounded, while the virus has largely been kept in check. (R.A. 41-42.) Throughout August and September 2020, the positivity rate remained relatively constant at approximately 1 percent—sometimes going lower—and the number of hospitalizations continued to decline. State of New York, *Percentage Positive Results by Region Dashboard*, *supra*. The reproduction rate held relatively steady at just a shade above 1. (R.A. 42, 236, 279.)

By contrast, states that took a less-cautious approach experienced COVID-19 surges. *See, e.g.*, Allison Prang & Tawnell D. Hobbs, *California Orders Rollback of Reopening as Cases Surge*, Wall St. J., July 14, 2020; Lazaro Gamio, *Reopened States Now Lead Surge in Cases*, The Houston Chronicle, July 11, 2020; J. David Goodman & Patricia Mazzei, *Tide Turns as Florida, Not New York, Surges*, N.Y. Times, June 27, 2020; Erin Allday, *Bay Area Reopens Amid Rise in Cases; Experts Wary as Counts Surge to March Levels; Too Much, Too Soon?*, San Francisco Chronicle, June 10, 2020.

D. Executive Order 202.68's "Cluster Action Initiative"

In September 2020, certain areas of New York started to experience an increase in cases. (R.A. 51, 237.) Nevertheless, its measured approach to reopening has kept its statewide positivity rate below 3 percent, while more than 30 other states have seen their positivity rates skyrocket to 10 percent or higher. (R.A. 43, 237-238.)

By October 2020, however, the New York State Department of Health saw COVID-19 clusters emerge within certain areas in the New York City boroughs of Brooklyn and Queens, and three counties outside New York City. (R.A. 51, 221.) The

data were alarming: at a time when the City's overall positivity rate was just 1 percent, the positivity rates in its cluster areas reached as high as 8 percent. (R.A. 51-52, 210-211.)

To address the problem, on October 6, 2020, Governor Cuomo announced the "Cluster Action Initiative," a program implemented by the contemporaneously issued Executive Order 202.68, and associated administrative guidance, that is the subject of the present application. (R.A. 52-53, 225-226.) The purpose of the initiative is to identify COVID-19 clusters, to impose short-term aggressive measures in those areas and their immediate vicinities to prevent the clusters from expanding further, and to monitor progress to determine whether and in what manner any such measures should be lifted or modified.[3] (R.A. 54, 283-284.)

Under this initiative, the State Department of Health begins by identifying the ZIP codes with the highest COVID-19 positivity rates. (R.A. 275, 281-282.) Within each of those ZIP codes, the Health Department then uses geocoded location data to represent the individual positive cases as dots on a map corresponding to the home addresses of infected persons, and then analyzes the dots to identify clusters. (R.A. 282.)

Once a cluster is identified, the Health Department studies the areas containing and surrounding it based upon a variety of quantitative metrics, including

[3] Like any executive order issued pursuant to the Governor's emergency powers, Executive Order 202.68 is reviewed every 30 days. *See* New York State Executive Law § 29-a. It is presently authorized to continue in force until December 3, 2020. However, the zone designations made under the order are reviewed daily by the New York State Department of Health, and are regularly revised to keep pace with the latest COVID-19 infection data. *See infra* pp. 13-14.

positivity rate. (R.A. 280-282.) If the increase in positive cases is sufficiently severe according to pre-set thresholds involving those metrics; if the increase is found to reflect community spread rather than an outbreak confined within a single institution, such as a nursing home or college campus; and if the increase meets certain case-by-case epidemiological criteria, then the Governor, with the Health Department's advice and assistance, can designate the area immediately containing the cluster as a "red zone," the immediately surrounding area as an "orange zone," and the outlying area as a "yellow zone." (R.A. 280-281); Gov. Andrew M. Cuomo, *Governor Cuomo Details COVID-19 Micro-Cluster Metrics* (Oct. 21, 2020), https://www.governor.ny.gov/news/governor-cuomo-details-covid-19-micro-cluster-metrics.

The most restrictive provisions apply in red zones, in which the focus is eliminating gatherings to the maximum extent practicable.[4] Red zones are sometimes referred to as "closure zones," reflecting an intent to curb most opportunities for group activity. (*See* R.A. 279-280.) However, an exception is made for activity in houses of worship. Specifically, in red zones

- All non-essential businesses must cease in-person operations.
- Restaurants may offer takeout and delivery only.
- Schools are closed for in-person instruction, except as otherwise provided by executive order.
- Non-essential gatherings are deemed cancelled or postponed.

[4] As of this writing, there are no longer any red zones in New York City. (R.A. 302.) Accordingly, there is no basis at this time for emergency injunctive relief based on the restrictions applicable in red zones.

- But, gatherings in houses of worship may continue so long as the number of attendees does not exceed the lesser of 10 people or 25 percent of the house of worship's maximum occupancy.

(R.A. 53, 226.)

More modest mitigation measures apply in orange zones, but they too are designed to reduce the potential for large groups of individuals to gather. And they similarly provide an exception for gatherings in houses of worship. In orange zones:

- Non-essential businesses "for which there is a higher risk associated with the transmission of the COVID-19 virus," such as gyms and certain personal-care services, must cease in-person operations.

- In addition to takeout and delivery, restaurants may offer outdoor dining, so long as they do not seat more than 4 persons per table.

- Schools are closed for in-person instruction, except as otherwise provided by executive order.

- Non-essential gatherings are permitted up to 10 people.

- However, gatherings in houses of worship may continue so long as the number of participants does not exceed the lesser of 25 people or 33 percent of the house of worship's maximum capacity.

(R.A. 53, 226.)

And the restrictions in yellow zones, to which the Diocese does not object, among other things, limit non-essential gatherings to 25 people, and houses of worship to "a capacity limit of 50% of its maximum occupancy," with no other limit on the numbers of persons who may gather inside. (R.A. 53-54, 226.)

The Cluster Action Initiative is an iterative process. The Department of Health conducts a daily review of positivity rates and other relevant data in order to determine whether particular cluster areas are improving or worsening. (R.A. 283.)

The Health Department advises the Governor of developments in this regard, and, if the circumstances warrant, zone boundaries are redrawn or zones are re-designated, causing restrictions to be modified accordingly. (R.A. 284.)

Such revisions have already occurred multiple times, including with respect to the zones at issue in this application, as the restrictions have served their purpose of helping control cluster spread. *See infra* pp. 16-17.

E. The Litigation Underlying This Application

1. Proceedings in the District Court

The Roman Catholic Diocese of Brooklyn, New York is an ecclesiastical district that includes 210 churches across both Brooklyn and Queens. (R.A. 8, 30.) On October 8, 2020, the Diocese commenced the litigation underlying this application by filing a complaint in the United States District Court for the Eastern District of New York challenging Executive Order 202.68's red- and orange-zone restrictions only insofar as they impose 10- and 25-person limits, respectively, on the size of gatherings that may take place in Diocese churches, as violative of the First Amendment's Free Exercise Clause. (R.A. 20-22.) The Diocese moved for a temporary restraining order and preliminary injunction prohibiting enforcement of those gathering-size limits against the 26 of its churches that were then subject to them, all of which were located within red and orange zones in Brooklyn and Queens. (R.A. 27-28; A.A., Ex. L, ¶¶ 18-20; A.A., Ex. N, ¶¶ 3-5.) The Diocese proposed allowing its churches to operate at up to 25 percent of maximum occupancy, so long as they adhered to the remainder of the State's health and safety protocols, as well as the additional such protocols the Diocese had instituted voluntarily. (*See* A.A., Ex. L, ¶¶ 6-13.)

The district court denied the request for a temporary restraining order. Case No. 1:20-cv-4844-NGG-CLP, __ F. Supp. 3d __, 2020 WL 5994954 (E.D.N.Y. Oct. 9, 2020). And, after a full evidentiary hearing, the court denied the request for a preliminary injunction, as well. Case No. 1:20-cv-4844-NGG-CLP, __ F. Supp. 3d __, 2020 WL 6120167 (E.D.N.Y. Oct. 16, 2020).

In denying a preliminary injunction, the district court determined that the Diocese failed to establish a likelihood of success on the merits of its free exercise claim. In particular, plaintiffs failed to establish that the order treated religious gatherings less favorably than secular activities with the same infection risk factors, *i.e.*, secular gatherings in which "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." 2020 WL 6120167, at *6, *9. Rather, under the order, religious gatherings, which are merely limited in size, "are treated more favorably than similar gatherings . . . such as public lectures, concerts or theatrical performances . . . which remain closed entirely." *Id.* at *9 (internal quotation marks omitted). Further, "EO 202.68 targets public gatherings based on COVID-19 transmission risk factors," so "although the EO establishes rules specific to religious gatherings, it does so because they are gatherings, not because they are religious." *Id.* at *8. Consequently, the district court found that Executive Order 202.68 was generally applicable and neutral, and therefore implicated rational basis review, which it readily satisfied.

The district court also found injunctive relief inappropriate for the independent reason that it was contraindicated by the balance of the equities and the public interest. The court acknowledged that withholding an injunction could lead to the "unfortunate result" that "26 of the Diocese churches will have experienced extra weeks with severely curtailed in-person ceremonies." 2020 WL 6120167, at *11. However, the court declined to second-guess the State's expert medical and scientific judgment 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," including "the parishioners of the 26 relevant churches." *Id.*

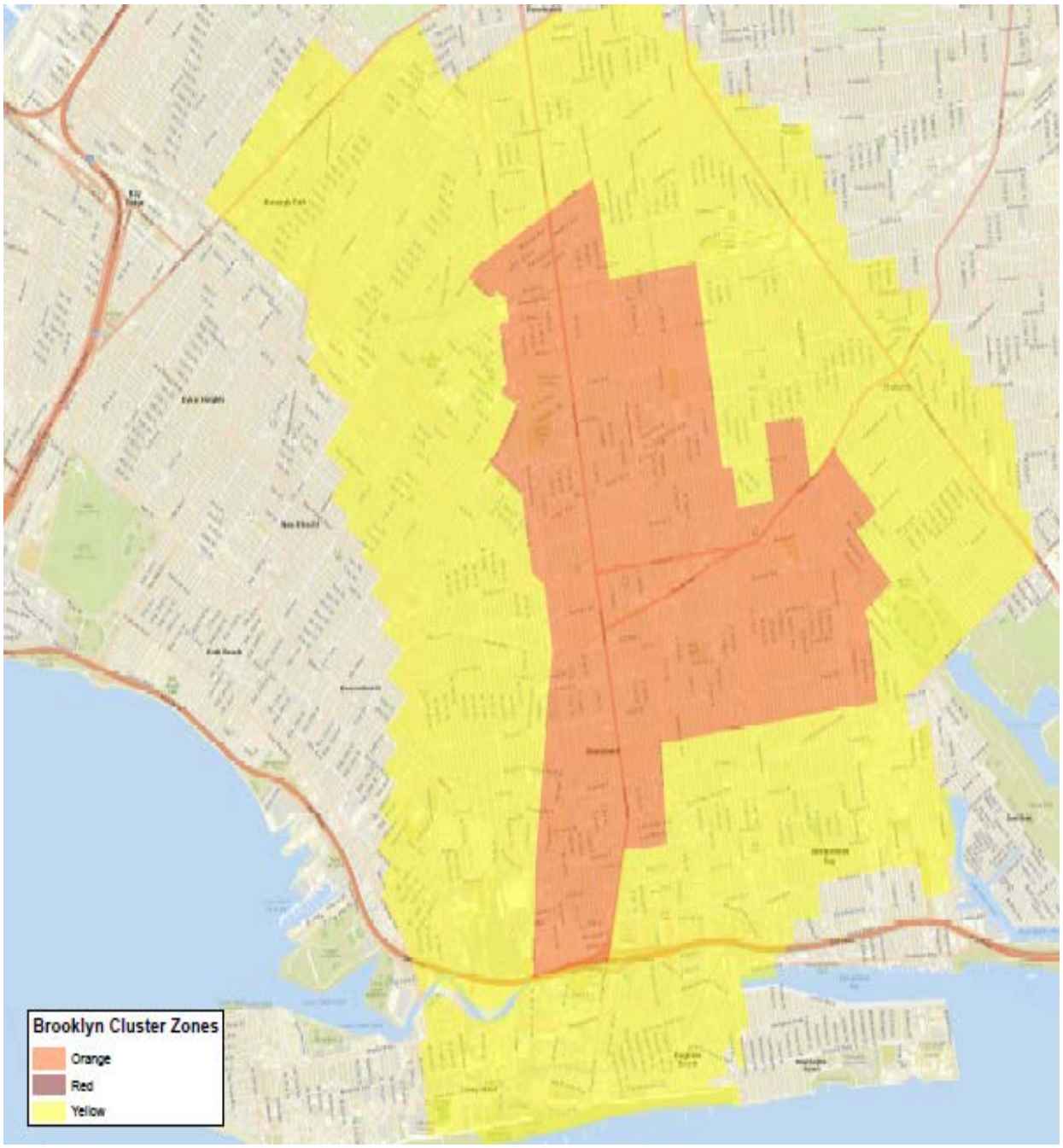
2. Proceedings in the Court of Appeals

The Diocese appealed to the United States Court of Appeals for the Second Circuit and, after unsuccessfully seeking an injunction pending appeal from the district court (A.A., Ex. B), filed a motion in the Second Circuit for an emergency injunction pending appeal. A judge of the Second Circuit denied an administrative stay and scheduled the matter to be heard on an expedited basis by a motions panel. (R.A. 285.) Thereafter, the State Department of Health's iterative review process revealed that the State's focus-zone restrictions were having their intended effect—the positivity rate within Brooklyn's red zone had dropped from 5.9 percent to 3.1 percent. As a result, the red zone was made smaller and its buffer was converted from orange to yellow. (R.A. 288.) Similar improvements in the red and orange zones in Queens caused those zones to be converted fully to yellow. Gov. Cuomo, *Governor Cuomo Details COVID-19 Micro-Cluster*

Metrics, *supra*. Only six of the Diocese's churches, ranging in maximum occupancy from 500 to 950 people, remained affected by the gathering-size-limits challenged. (R.A. 286.)

After briefing and oral argument, the Second Circuit, with one judge dissenting, denied the Diocese's request for an injunction pending appeal. Case No. 20-3590, __ F.3d __, 2020 WL 6559473 (2d Cir. Nov. 9, 2020). The court held that injunctive relief was inappropriate because the Diocese failed to establish a sufficient likelihood of success on the merits of its appeal. The court reasoned that Executive Order 202.68's limits constraining the size of religious gatherings were "similar to, or, indeed, *less severe than* those imposed on comparable secular gatherings." 2020 WL 6559473, at *3. And "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." *Id.* To the contrary, they implicate, and pass, rational basis review. *Id.*

Contemporaneously with the Second Circuit's decision, the Health Department's iterative review process caused relevant zone boundaries to be redrawn once again, causing what remained of the Brooklyn red zone to be downgraded to an orange zone. (R.A. 302.) The micro-area of Brooklyn affected by Executive Order 202.68 now appears as follows:



Gov. Andrew M. Cuomo, *COVID-19 Micro-Cluster Strategy – Maps of Cluster Zones: Brooklyn Cluster*, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/BrooklynZonesOnly_V3.pdf.

This application followed.

ARGUMENT

An injunction from this Court is "extraordinary relief" that "'demands a significantly higher justification [even] 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) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). To obtain such relief, the applicant must show that the "legal rights at issue" in the underlying dispute are "indisputably clear" in its favor, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), such that this Court is reasonably likely to grant certiorari and reverse any judgment adverse to the applicant entered upon the completion of lower-court proceedings. Stephen M. Shapiro et al., *Supreme Court Practice* § 17.13(b) (10th ed. 2013). And, as with injunctive relief generally, the applicant must also satisfy all of the remaining factors relevant for such relief, namely "that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)—the latter two factors merging where, as here, the injunction would run against the government, *see Nken v. Holder*, 556 U.S. 418, 435 (2009).

The Diocese has not met this demanding burden in connection with its application to enjoin the enforcement against its churches of the gathering-size limits

imposed by New York State Executive Order 202.68 to help contain identified COVID-19 clusters. The application should therefore be denied.

I. THE DIOCESE IS UNLIKELY TO SUCCEED ON THE MERITS BECAUSE IT CANNOT ESTABLISH AN "INDISPUTABLY CLEAR" FREE EXERCISE CLAUSE VIOLATION.

The First Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that states "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. If a law intended to further particular governmental interests burdens "conduct motivated by religious belief," but "fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree," then it is "not of general application," implicates strict scrutiny, and thus is invalid unless it is narrowly tailored to advance a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543, 545 (1993). Strict scrutiny also applies if the law's object is "to infringe upon or restrict practices because of their religious motivation," and therefore is "not neutral." *Id.* at 533. But, if the law is both generally applicable and neutral, then rational basis review applies and the law will be upheld so long as it rationally furthers a legitimate governmental interest. *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879 (1990).

The Diocese has not demonstrated with any clarity, let alone indisputable clarity, *see Lux*, 561 U.S. at 1307, that Executive Order 202.68, which targets discrete, emergent COVID-19 hotspots, implicates and fails strict scrutiny. Rather, both the 10-person maximum limit applicable to gatherings in houses of worship

located in red zones, the areas of greatest concern—to which none of the Diocese's churches are presently subject (R.A. 302)—and the 25-person maximum limit applicable to such gatherings in orange zones, are generally applicable and neutral, are assessed using rational basis review, and, as the Diocese in effect concedes, readily satisfy that review.

A. Executive Order 202.68 Is Generally Applicable.

Executive Order 202.68 is generally applicable because its limits on the size of gatherings do not disfavor religious gatherings in houses of worship, as compared with any secular activities that present "a similar or greater degree" of risk of COVID-19 spread. *Church of the Lukumi Babalu Aye*, 508 U.S. at 543. To the contrary, religious gatherings are treated *more* favorably: they are allowed in red and orange zones, subject to restrictions on size, even though congregate services and ceremonies have in recent experience presented an outsized risk of transmitting and retransmitting the virus, whereas the secular activities that present similar risks in those zones are banned entirely. And although the Diocese has voluntarily adopted its own set of COVID-19 prevention protocols for gatherings in its churches, including measures aimed at making the State's non-gathering-size-related health and safety protocols easier for parishioners to follow and at ensuring that they are indeed followed, the principle of general applicability does not therefore require that Diocese churches be treated *more favorably still* by receiving an exemption from the additional protocols, including applicable gathering-size limits, that Executive Order 202.68 imposes.

1. The Order Treats Indoor Religious Gatherings More Favorably than Secular Activities Presenting a Similar "Super-Spreader" Risk—Which It Prohibits Completely.

As the district court accepted, indoor religious gatherings commonly possess "problematic features" from an epidemiological perspective that create an outsized risk of COVID-19 spread. 2020 WL 6120167, at *6. They tend to involve large numbers of people from different households arriving simultaneously; congregating as an audience for an extended period of time to talk, sing, or chant; and then leaving simultaneously—as well as the possibility that participants will mingle in close proximity throughout. (*See* R.A. 51.) Particularly because COVID-19 may be spread by infected individuals who are not yet, or may never become, symptomatic, the aforementioned features combine to generate an unusually high likelihood that infected persons will be present, that they will expel respiratory droplets and aerosols in close proximity to others and infect them, and that those newly-infected persons will further spread the virus after they disperse and go their separate ways. *See supra* pp. 4-5. Religious gatherings thus tend to have "super-spreader" potential. (*See* R.A. 46, 50-51.)

Indeed, there is a documented history of religious gatherings serving as COVID-19 super-spreader events. From the earliest days of the pandemic, they have caused a disproportionately high number of infections internationally, including notable incidents in South Korean (Youjin Shin et al., *How a South Korean Church Helped Fuel the Spread of the Coronavirus*, Wash. Post, Mar. 25, 2020), and India (R.A. 50, 205); across the United States, from California (Ryan Sabalow et al., *After*

Coronavirus Infects Sacramento Church, Religious Leaders Restrict More Services, Sacramento Bee, Mar. 17, 2020) to Maine (R.A. 50, 189-192) and New York (R.A. 254, 271); and many states in between (*see, e.g.*, Alison Kuznitz, *More COVID-19 Deaths Linked to Super-Spreader Event at Charlotte Church*, Charlotte Observer, Nov. 4, 2020).

The State thus would have been justified in prohibiting altogether gatherings in houses of worship located in red and orange zones—areas so designated because they were found to have an above-average prevalence of COVID-19 infections and thus a heightened risk that persons attending religious services in the areas would be infected, and would be infectious to others. (*See* R.A. 280-282); Gov. Cuomo, *Governor Cuomo Details COVID-19 Micro-Cluster Metrics*, *supra*. This is the course the State has taken with respect to "comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for writ of injunction). These activities are "the right comparison group" of secular conduct because, like religious services, each of these activities "puts members of multiple families close to one another for extended periods, while invisible droplets containing the virus may linger in the air," and "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." *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020) (Easterbrook, J.). Each of these activities is completely

banned in red zones and orange zones, and many of these activities have been banned since March 2020, even before the Cluster Zone Initiative was implemented. *See* New York State Department of Health, *Interim Guidance for Movie Theaters During the COVID-19 Public Health Emergency*, at 1 (Oct. 19, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Movie_Theater_Detailed_Guidelines.pdf; New York State Department of Health, *Interim Guidance for Professional Sports Competitions with No Fans During the COVID-19 Public Health Emergency*, at 3 (Sept. 11, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Professional_Sports_Competitions_With_No_Fans_Detailed_Guidelines.pdf; New York State Department of Health, *Interim Guidance for Low-Risk Indoor Arts & Entertainment During the COVID-19 Public Health Emergency*, at 1 (June 23, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Lowriskindoorartsandentertainment-MasterGuidance.pdf.

Instead, in implementing the Cluster Action Initiative, the State opted to treat religion *more* favorably. Specifically, rather than prohibit houses of worship located in red and orange zones from hosting gatherings altogether, Executive Order 202.68 allows such gatherings to occur, subject to limits on their size. The order thus accords *preferential* treatment to religious gatherings in houses of worship, as compared with secular activities that present "a similar or greater degree" of risk of COVID-19 spread. *Church of the Lukumi Babalu Aye*, 508 U.S. at 543.

Not only does Executive Order 202.68 treat religious gatherings more favorably than it treats comparable secular activities, it also treats religious

gatherings more favorably vis-à-vis secular activities than did the California and Nevada COVID-19 orders this Court confronted, and decided not to enjoin, in *South Bay United Pentecostal Church*, 140 S. Ct. 1613, and *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), respectively. Those cases thus do not present "similar constitutional questions," as the Diocese argues. (Application at 21.)

At the outset and as discussed above, *supra* pp. 22-24, unlike the Nevada order, Executive Order 202.68 does not treat indoor religious gatherings worse than "other activities that involve extended, indoor gatherings of large groups of people." *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2605 (Alito, J., dissenting). Among other things, in both red and orange zones, casinos, bowling alleys, arcades, movie theaters, and fitness centers are closed completely. (R.A. 53, 226); *see also* New York State Department of Health, *Interim Guidance for Low-Risk Indoor Arts & Entertainment During the COVID-19 Public Health Emergency*, *supra*, at 1. "Large numbers and close quarters" are not "fine" in those establishments or in houses of worship in red and orange zones. *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2609 (Gorsuch, J., dissenting). But, even in red and orange zones, houses of worship are authorized to admit *larger* numbers than their secular counterparts.

Further, unlike either the Nevada or California orders, the limits imposed by Executive Order 202.68 are not designed to apply statewide or long-term. Rather, they are designed to apply to a specific, acute problem—emergent coronavirus hotspots—and only for the short-term period needed to bring that problem under control.

Geographically, the particular limits of which the Diocese complains apply only to micro-areas designated as red or orange zones based upon the presence of COVID-19 clusters. (R.A. 226, 280-281.) The drawing of zone boundaries is data driven. The Governor and the Department of Health "are not looking at the businesses or entities located within those zones, only the number and grouping of positive cases." (R.A. 282.) And on an absolute scale, the zones are small; the typical red zone is one mile in diameter, with a half-mile-wide orange zone buffer encircling it, and a half-mile-wide yellow zone encircling that. (A.A., Ex. H, at 5.)

And temporally, the limits are lifted—and give way to the less onerous rules and regulations applicable to Phase 4 of the State's reopening plan, to which the Diocese has not objected—when sufficient progress has been made in keeping the clusters under control. (R.A. 283-284.) Indeed, such modification has already occurred multiple times in this very case. When the Diocese filed its complaint in the district court, 26 of its churches were located in red and orange zones in Brooklyn and Queens. (A.A., Ex. L, ¶¶ 18-20; A.A., Ex. N, ¶¶ 3-5.) Shortly after the district court's denial of preliminary injunctive relief went up on appeal to the Second Circuit, the results of the State Health Department's daily ongoing COVID-19 data review indicated that the enhanced restrictions were working: the positivity rates within the cluster areas were decreasing, and other key metrics, such as hospital admissions, were likewise declining. Consequently, relevant zone boundaries were redrawn, leaving only six of the original 26 Diocese churches affected, all in a single, and substantially shrunken, red zone in Brooklyn. (R.A. 286.) And contemporaneously

with the Second Circuit's decision, the Health Department's iterative review process showed further cluster-control progress and caused relevant zone boundaries to be redrawn once again, causing what remained of that Brooklyn red zone to be downgraded to an orange zone. (R.A. 302.)

In sum—and whatever one thinks about the orders at issue in *South Bay United Pentecostal Church* and *Calvary Chapel Dayton Valley*—Executive Order 202.68 is generally applicable. Indeed, it *favors* indoor religious gatherings over comparable secular activities.

There is no merit to the Diocese's argument (Application at 21-25) that Executive Order 202.68 actually *disfavors* religious gatherings relative to similarly situated secular activities and therefore implicates strict scrutiny. The Diocese has not demonstrated that any of the secular businesses or activities it identifies (a) presents the same COVID-19 super-spreader potential as indoor religious gatherings yet (b) is regulated by Executive Order 202.68 in a more-permissive manner. The Diocese has thus failed to establish that the order gives preferential treatment to "a single secular analog." *Calvary Chapel Dayton Valley*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting).

The Diocese offers, as supposed comparators, a variety of retail and office-based businesses: grocery stores, bodegas, hardware stores, big-box stores, as well as banks, brokerages, and other office-based businesses. (Application at 23, 27.) Some of these businesses have been deemed essential, and therefore are not restricted by Executive Order 202.68, regardless of whether they are located in red or orange zones.

And any non-essential businesses on that list that are not considered "high risk," within the meaning of Executive Order 202.68, can continue in-person operations in areas other than red zones.

As the district court found, however, *none* of those businesses present anywhere near the same risk of COVID-19 spread as religious services. They do not ordinarily share religious services' specific risk factors—large numbers of people from different households arriving simultaneously; congregating as an audience for an extended period of time to talk, sing, or chant; and then leaving simultaneously—as well as the possibility that participants will mingle in close proximity throughout. 2020 WL 6120167, at *9. Rather, at businesses like those the Diocese identifies, "people neither congregate in large groups nor remain in close proximity for extended periods of time," let alone while vocalizing in a communal fashion. *South Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). To the contrary, and most clearly in the retail settings that the Diocese emphasizes, customers come and go randomly and do not visit and remain for the purpose of congregating. Those settings thus do not present the risk of mingling—and consequential risk of COVID-19 spread—that events for audiences present.

Additionally, Executive Order 202.68 treats the *non-essential* businesses that the Diocese identifies *less* favorably than houses of worship as far as gatherings—the events at issue in this case—are concerned. This is obvious in red zones: in red zones even low-risk non-essential businesses must cease in-person operations entirely, whereas houses of worship may continue in-person operations and may continue to

host gatherings, subject to applicable size constraints. (R.A. 53, 226.) And in orange zones, low-risk non-essential businesses are still disfavored with respect to the hosting of gatherings. Such businesses are not exempted from, and thus must comply with, the 10-person limit that applies in orange zones to non-essential gatherings generally. (R.A 53, 226.) However, houses of worship, like the Diocese's churches, *are* exempted from that limit. (R.A. 53, 226.) Thus, for example, in an orange zone, a non-essential business cannot hold a 25-person staff meeting, but a house of worship can hold a 25-person service.

Contrary to the Diocese's contention (Application at 26), in-person school instruction, which was permitted to resume in red and orange zones in late October 2020, in both public and private schools, is not a secular analog to religious services. It is more heavily regulated than religious services in several critical respects.

For schools in red and orange zones, only students, teachers, and staff who test negative for COVID-19 are allowed to return to school. New York State Department of Health, *Interim Guidance on COVID-19 Test-Out for Public and Non-Public Schools Located in Areas Designated as "Red or Orange Micro-Cluster Zones" under the New York State Micro-Cluster Action Initiative*, at 2 (Nov. 3, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/11/guidance-for-school-test-out-in-red-and-orange-zones_0.pdf. Once students, teachers, and staff are back at school, they must be subjected to daily intensive symptom and exposure screening. *Id.* at 2. Additionally, a random sample of 25 percent of each school's on-campus population must be re-tested every week, and if the positivity rate ever exceeds a

strict numerical threshold—in New York City, 2 percent—the entire school must close. *Id.*

Religious gatherings in red and orange zones are not subject to *any* of those requirements. Indeed, other than the more-restrictive size limits, religious gatherings in red and orange zones are not subject to any health and safety protocols above and beyond those applicable to such gatherings in the remainder of the State, pursuant to the rules and regulations governing Phase 4 of the reopening plan. *See generally* New York State Department of Health, *Interim Guidance for Religious & Funeral Services During the COVID-19 Public Health Emergency* (June 26, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReligiousandFuneralServicesMasterGuidance.pdf.

2. The Diocese's Voluntary Precautions Do Not Require that *Its* Indoor Religious Gatherings Be Treated More Favorably Still.

The Diocese argues (Application at 26-27) that, whatever may be said of the COVID-19 risk presented by religious services in general, the principle of general applicability requires that *its churches* must be exempted from Executive Order 202.68's gathering-size limits applicable in red and orange zones. The Diocese notes that, since July 2020, it has voluntarily imposed upon its churches its own COVID-19 prevention protocols, and that none of its churches have experienced any outbreaks. The Diocese further observes that its churches are large enough to accommodate gatherings far in excess of 10 or 25 people and still adhere to those protocols, including to the extent they involve social distancing.

As the Governor has said at every step of this litigation, the Diocese should be applauded for its voluntary COVID-19 prevention efforts. *See, e.g.*, Defendant-Appellee's Memorandum of Law in Opposition to Plaintiff-Appellant's Emergency Motion for an Expedited Appeal and an Injunction Pending Appeal at 29, *The Roman Catholic Diocese of Brooklyn, New York v. Cuomo* (2d Cir. Oct. 27, 2020) (Case No. 20-3590). In that regard, the Diocese has served as a leader in the faith community that its peer institutions would be wise to emulate. But laudable as the Diocese's proactive measures are, they do not require that it be exempted from the already-favorable gathering limits that Executive Order 202.68 imposes.

As a factual matter, it is unclear whether the Diocese's voluntary protective protocols are sufficient to stem COVID-19 outbreaks in churches located in red and orange zones—areas where the incidence of infection is unusually high. Because those protocols commendably go above and beyond the measures imposed by New York's phased reopening plan (*see* A.A., Ex. L, ¶¶ 6-13), the Diocese can plausibly claim that, in areas where the more general rules and regulations of the reopening plan still apply, its own efforts may well have prevented outbreaks in its churches. Executive Order 202.68's gathering-size limits that apply in red and orange zones, however, are *more* restrictive than the percentage-of-maximum-occupancy gathering limits the Diocese has adopted voluntarily. And the Diocese, to its credit, has been complying with those limits since the order was issued. As a result, however, the independent efficacy of the Diocese's voluntary health and safety protocols in coronavirus hotspots remains untested in red and orange zones. The State should not

be compelled to exempt the Diocese from Executive Order 202.68's religion-preferring gathering limits on the chance that the Diocese's own protocols *might* provide an adequate substitute. Nor must the State refrain from regulating unless and until and outbreak actually occurs; it must have the ability to institute safety measures prophylactically. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (rejecting constitutional challenge to involuntary civil commitment for certain sex offenders).

As a legal matter, the Diocese points to no authority holding that the First Amendment prevents the State from applying a single set of religion-preferring regulations to *all* houses of worship, uniformly. Accepting the Diocese's argument leads to the untenable approach of requiring the State to negotiate COVID-19 restrictions for each and every house of worship on a building-by-building basis. It would make every church, or synagogue, or mosque "a law unto [it]self," *Smith*, 494 U.S. at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878)), and in so doing could create tension with the Establishment Clause in certain instances, as well, *cf. Locke v. Davey*, 540 U.S. 712, 718-721 (2004).

B. The Order Is Neutral.

The object of Executive Order 202.68 is not "to infringe upon or restrict practices because of their religious motivation," *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, and Governor Cuomo's public statements in connection with its issuance do not show otherwise.

As an initial matter, this Court has never found that a law had an unconstitutional object based solely on the statements of government officials. *Cf.*

Church of the Lukumi Babalu Aye, 508 U.S. at 535 (finding animus based on the law's operation); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1730-1731 (2018). "Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account" for this purpose. *Masterpiece Cakeshop*, 138 S. Ct. at 1730 (considering statements of governmental officials made "by an adjudicatory body deciding a particular case"); *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 558-559 (Scalia, J., concurring in part and concurring in the judgment) (questioning "the business of invalidating laws by reason of the evil motives of their authors" apart from whether the laws "in fact single[] out a religious practice for special burdens").

The particular statement of Governor Cuomo on which the Diocese focuses (*see* Application at 24) falls far of establishing religious animus in any event. To be sure, the Governor recognized at an October 6, 2020, press conference that Executive Order 202.68 would be "most impactful on houses of worship." But in the same press conference, the Governor explained that he did not intend to target religious gatherings on the basis of their beliefs, but rather the documented fact of their COVID-19 super-spreader potential. "This is about mass gatherings," the Governor said. (A.A., Ex. H, at 8.) "And one of the prime places of mass gatherings are houses of worship." (A.A., Ex. H, at 8.)

Indeed, the Governor had taken pains to make that same point at a press conference held just the day before, on October 5, 2020. "We know mass gatherings are the superspreader events," he stated. (R.A. 272.) "We know there have been mass

gatherings going on in concert with religious institutions in these communities [experiencing COVID-19 clusters] for weeks." (R.A. 272.)

The district court's description of Executive Order 202.68 is spot-on: "EO 202.68 targets public gatherings based on COVID-19 transmission risk factors," so "although the EO establishes rules specific to religious gatherings, it does so because they are gatherings, not because they are religious." 2020 WL 6120167, at *8.

Nor does Executive Order 202.68 reflect a lack of neutrality simply because it mentions "houses of worship" in so many words and subjects them to special gathering-size limits. (*See* Application at 22.) Indeed, exactly the opposite is true. The order addresses gatherings held within houses of worship separately not "to infringe upon or restrict" them, *Church of the Lukumi Babalu Aye*, 508 U.S. at 533, but to accommodate them and treat them *more favorably* than their secular comparators. *See supra* pp. 22-24. The Diocese identifies no precedent of this Court or any other court suggesting that a law is not neutral within the meaning of this Court's free exercise jurisprudence where it separately mentions religious activity in order to afford it preferential treatment.

C. The Order Has A Rational Basis.

The Diocese does not dispute, and thereby in effect concedes, that Executive Order 202.68 satisfies rational basis review. Indeed, the rational basis is manifest. The order helps slow the spread of COVID-19 by limiting the occurrence of events in which the virus is most readily transmitted: gatherings where large number of attendees arrive simultaneously, congregate as an audience for an extended period of

time, and leave simultaneously—and possibly mingle with one another throughout—in narrowly-circumscribed areas that are already experiencing an unusually high incidence of COVID-19 infection.[5]

D. The Decisions Below Are Not Certworthy.

Contrary to the Diocese's contention (Application at 29), neither Governor Cuomo's position here nor the holdings of the courts below deepen any circuit split in need of this Court's urgent resolution. This case does not require that the Court decide the question (*see* Application at 30-34) whether, under *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and *South Bay United Pentecostal Church*, 140 S. Ct. 1613, ordinary modes of constitutional scrutiny are "supplanted in the context of an emergency." (*See* Application at 30-34 [internal quotation marks omitted].) As demonstrated above, *supra* pp. 21-35, Executive Order 202.68 passes constitutional muster under the traditional Free Exercise Clause rubric established by *Church of the Lukumi Babalu Aye* and *Smith*.

Nor does this case present the question (Application at 34-36) whether, under the ordinary modes of constitutional scrutiny, rational basis review applies whenever a law treats religious conduct at least as favorably as "a subset of comparable secular gatherings." As shown above, *supra* pp. 22-24, the evidence and argument put forth by the Diocese offer no reason to doubt that the executive order treats religious

[5] Contrary to the Diocese's repeated mischaracterizations (Application at 2, 14, 20, 25), Governor Cuomo did not describe Executive Order 202.68 as a "blunt" policy "being cut by a hatchet." As the Diocese accurately explained below—in the very source material it now cites—the Governor applied that description not to Executive Order 202.68 but to a New York City school-closure policy that had been "proposed by the mayor . . . in the city." (A.A., Ex. K, ¶ 4.) Moreover, as to that policy, the Governor said he was "trying to . . . sharpen it and make it better." (A.A., Ex. K, ¶ 4.)

gatherings as well as—indeed, more favorably than—*all* comparable secular gatherings, not merely a subset thereof.

II. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST DO NOT WEIGH IN FAVOR OF INJUNCTIVE RELIEF.

The application should be denied for the additional reason that the Diocese has not established that the balance of the equities and the public interest—which merge here, because the application seeks to enjoin governmental action, *see Nken*, 556 U.S. at 435—weigh in favor of an injunction. Those factors cut against an injunction, and "alone require[] denial of the requested injunctive relief," notwithstanding the Diocese's likelihood of success on the merits of its Free Exercise Clause claim. *Winter*, 555 U.S. at 23.

The Diocese's interest in holding indoor religious gatherings of potentially hundreds of people in a geographic micro-area that is already experiencing a cluster of COVID-19 infections does not outweigh the need to prevent that cluster from expanding. (*See* R.A. 46-47.) To be sure, withholding injunctive relief could cause parishioners of the six currently-affected churches to experience "extra weeks with severely curtailed in-person ceremonies." 2020 WL 6120167, at *11. At the same time, however, "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," including for "avoidable death on a massive scale like New Yorkers experienced in the Spring." *Id.* The balance of equities and the public interest thus weigh against injunctive relief in light of "the enormity of the potential harm to the entire public, including to the parishioners of the [Diocese's] relevant churches" if

that second wave were to occur. *Id.* at *11; *see Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 730-731 (9th Cir. 2020) (finding a church failed to show that enjoining COVID-19 preventions materially identical to those at issue in *South Bay Pentecostal Church* served the public interest).

The Diocese's argument that its own safety measures are at least as effective as those of Executive Order 202.68 in preventing COVID-19 outbreaks (Application at 38-39) is mistaken. As explained above, *supra* pp. 31-32, the efficacy of the Diocese's voluntary protocols in a hotspot setting in the *absence* of the order's gathering-size limits has not been tested.

What has been tested, however, is the order's gathering limits. And they have been working to reduce positivity rates, as evidenced by the modification over time of the Brooklyn and Queens zones at issue here. (R.A. 288, 302.) The public interest and balance of equities point in favor of allowing the order's limits to keep working until those zones can be lifted altogether, and the area can return to the COVID-19 precaution regime associated with New York's phased reopening plan—to which the Diocese does not object.

CONCLUSION

The Diocese's application for a writ of injunction should be denied.

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