UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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REV. STEVEN SOOS, REV. NICHOLAS STAMOS, DANIEL SCHONBURN, ELCHANAN PERR, and MAYER MAYERFELD,

20-CV-00651

Plaintiffs,

-against-

ANDREW M. CUOMO, Governor of the State of New York, in his official capacity, LETITIA JAMES, Attorney General of the State of New York in her official capacity, and BILL DE BLASIO, Mayor of the City of New York, in his official capacity,

Defendants.

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DEFENDANT BILL DE BLASIO'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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June 15, 2020

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DEFENDANT MAYOR DE BLASIO'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant Mayor Bill de Blasio, submits this memorandum of law in opposition to Plaintiffs' motion for a temporary restraining order/preliminary injunction. In order to establish their entitlement to a preliminary injunction against government action taken in the public interest, Plaintiffs must establish (1) that they will be irreparably injured if the relief sought is not granted; (2) that they are likely to succeed on the merits of their claims; (3) that a balance of the hardships tips decidedly in their favor; and (4) that an injunction would be in the public interest. *See Trump v. Deutsche Bank AG*, 943 F.3d 627, 637-640 (2d Cir. 2019) (citations omitted); *Cent. Rabbinical Cong. of the United States v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 192 (2d. Cir. 2014); *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). *See also Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997).

The Second Circuit has held that "[v]iolations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction," *Bery*, 97 F.3d at 693. "Although a showing of irreparable harm is often considered the 'single most important prerequisite for the issuance of a preliminary injunction,' *Faiveley transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted), '[c]onsideration of the merits is virtually indispensable in the First Amendment context, where the likelihood of success on the merits is the dominant, if not the dispositive, factor.' *N.Y. Progress and Prot. PAC v. Walsh*, 733 F.3d 488 (2d Cir. 2013)." *Geller v. de Blasio*, 2020 U.S. Dist. LEXIS 87405, at *6 (S.D.N.Y May 18, 2020).

Plaintiffs here are unable to succeed on the merits of their claims as they relate to Defendant Mayor de Blasio, asserting that the gathering limitation of more than 10 set forth in New York State Executive Order No. 202.33 and New York City Emergency Executive Order

No. 115 (collectively "the gathering limitation") violates their First Amendment rights (Free Speech and Free Exercise) and their substantive due process rights. Preliminarily, it is important to note there are three New York State Executive Orders that restrict local governments from acting inconsistently with, or without approval of, the state government. New York State Executive Order No. 202.3 states that "[n]o local government or political subdivision shall issue any local emergency order or declaration of emergency or disaster inconsistent with, conflicting with or superseding the foregoing directives, or any other executive order issued under Section 24 of the Executive Law . . . ." *See* Exhibit "1" to the accompanying Declaration of Ellen Parodi, dated June 15, 2020 ("Parodi Dec."). New York State Executive Order No. 202.5 states that "no locality or political subdivision shall issue any local emergency order or executive order with respect to response of COVID-19 without the approval of the State Department of Health." *See id.* New York State Executive Order No. 202.19 states that "[n]o local government official shall take any action that could impede or conflict with any other local government actions, or state actions, with respect to managing the COVID-19 public health emergency." *See id.* Accordingly, it is clear that Plaintiffs challenge the State's actions in responding to the COVID-19 public health emergency, and any actions made by Defendant de Blasio merely follow the New York State Executive Orders.

Furthermore, the City is currently only in Phase 1 of the Governor's phased reopening plan, and thus the portion of the New York State Executive Order authorizing houses of worship to operate at 25% capacity is not in effect in New York City. *See* Exhibit "3" to the Parodi Dec. Only the gathering limitation prohibiting gatherings with more than 10 people (New York State Executive Order No. 202.33 and New York City Emergency Executive Order No. 115) is in effect in New York City.[1] *See* Exhibit "2" to the Parodi Dec. Therefore, Defendant de Blasio does not address Plaintiffs' claims regarding houses of worship operating at 25% capacity.

[1] New York City Emergency Executive Order 115 has recently been renewed and, as of the date of this Memorandum of Law, is in effect in New York City. *See* Exhibit "6" to the Parodi Dec.

A. Plaintiffs' Free Speech Claim Lacks Merit

As early as 1905, the Supreme Court, in the seminal case *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 25 S. Ct. 358, 363 (1905), acknowledged that in matters of public health and safety, deference is due to the state and legislative body. The Court explained that when reviewing a statute "purporting to have been enacted to protect the public health, the public morals or the public safety," that allegedly violates a fundamental right, the statute must not be disturbed unless it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law..." *Jacobson*, 197 U.S. at 31.

Indeed, the Southern District of New York has recently held on two occasions that the emergency gathering limitation does not violate the First Amendment right of freedom of speech and assembly. *See Geller*, 2020 U.S. Dist. LEXIS 87405 (S.D.N.Y May 18, 2020) and *Butler v. City of New York*, 20-cv-4067 (S.D.N.Y. June 5, 2020) annexed to the Parodi Dec. as Exhibit "4." In *Geller*, the plaintiff challenged the emergency gathering limitation in effect at that time which prohibited gatherings of any size.[2] The Geller plaintiff argued that the prohibition of gatherings prohibited her desire to protest in a group in public. The district court in *Geller* found that the gathering limitation (even before it allowed up to 10 people to gather) was content-neutral and passed intermediate scrutiny. The Court in *Geller* explained in relevant part:

> The March 25 Executive Order is content-neutral. It orders "any non-essential gathering of individuals of any size for any reason."

[2] The Emergency Orders at issue are temporary in nature, including the gathering limitation. *See* Ex. "2" to the Parodi Dec. Indeed, as the emergency situation surrounding the COVID-19 public health crisis shifted, the restrictions on non-essential gatherings eased, shifting the prohibition on gatherings of any size, to allowing gatherings of 10 or fewer individuals. *See id.*

> It does not target the contents of the speech itself or the listener's agreement or disagreement with those contents. Instead, it targets the harmful secondary effects of public gathering -- the spread of a novel virus for which there currently is no cure or effective treatment.

Geller, 2020 U.S. Dist. LEXIS 87405 at *10. The Second Circuit recently denied Geller's application for a TRO pending appeal. *See Geller v. de Blasio,* 20-1592 (2d Cir. June 4, 2020) annexed to the Parodi Dec. as Exhibit "5."

In *Butler,* the plaintiffs had been arrested for violating the gathering limitation while protesting in a group of approximately 20 in City Hall Park, and sought to enjoin further enforcement of the executive order, claiming it violated their First Amendment rights. *See Butler,* Exhibit "4." In the midst of the protests and demonstrations in response to the unfortunate circumstances surrounding the death of George Floyd that ensued during the *Butler* plaintiffs' application for a temporary restraining order, and despite Plaintiffs' arguments that the protests demonstrated that the limitation was not content-neutral, the Southern District of New York again upheld the gathering limitation as content-neutral and narrowly tailored. *See Butler,* Exhibit "4" (Transcript at 7-8, 31). These decisions are consistent with decisions in many other cases across the country similarly challenging limitations on gatherings due to COVID-19 on First Amendment free speech and assembly grounds. *See e.g., Antietam Battlefield Koa v. Hogan,* 2020 U.S. Dist. LEXIS 88883 (D. Md. May 20, 2020) (finding that state orders restricting, among other things, gatherings of over 10 people, was content-neutral and passed intermediate scrutiny); *Givens v. Newsom,* 2020 U.S. Dist. LEXIS 81760 (E.D.C.A. May 8, 2020) (finding California's Stay at Home order was content-neutral and did not run afoul of the Free Speech Clause); *see also Amato v. Elicker,* 2020 U.S. Dist. LEXIS 87758 (D. Conn. May 19, 2020); *Open Our Oregon v. Brown,* 2020 U.S. Dist. LEXIS 87942 (D. Or. May 19, 2020).

Plaintiffs have pointed to no case law or basis for this Court to not follow these well-reasoned decisions. Therefore, Plaintiffs are not likely to succeed on the merits of their free speech claim.

B. Plaintiffs' Free Exercise of Religion Claim Fails

While Plaintiffs have also brought a free exercise of religion claim under the First Amendment, which *Geller* and *Butler* did not address, Plaintiffs' are likewise not likely to succeed on the merits of that claim. The Supreme Court long ago decreed that "[t]he right to practice religion freely does not include liberty to expose the community... to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). It is well established that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015)(quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). *See also Cent. Rabbinical Cong. of the United States* 763 F.3d at 198. The plain language of the gathering limitation indicates that it is not targeted at a particular religious practice nor does it discriminate against a religious belief. *See e.g. New Hope Family Servs. v. Poole*, 387 F. Supp. 3d 194, 215 (N.D.N.Y. 2019) ("The plain language of the regulation demonstrates its neutrality, which makes no reference to religion…"). Indeed, the gathering limitation applies to *any* non-essential gathering for *any* purpose. *See* Ex. 2 to the Parodi Dec.

Moreover, several courts across the country have found similar orders to be neutral and generally applicable, and not a violation of the free exercise of religion. *See Cassell v. Snyders*, 2020 U.S. Dist. LEXIS 77512 (N.D. Ill. May 3, 2020) (rejecting a Free Exercise Clause challenge to Illinois' limit on gathering to no more than ten people, as the limit was neutral and generally applicable, even where religious services were listed in the state's order,

and passed rational basis review); *Cross Culture Christian Center v. Newsom*, 2020 U.S. Dist LEXIS 79155 (E.D. Cal.. May 5, 2020) (rejecting a Free Exercise Clause challenge to California's order on mass gatherings, as the order was neutral, generally applicable, and passed rational basis review); *Elim Romanian Pentecostal Church v. Pritzker*, 2020 U.S. Dist LEXIS 84348 (N. D. Ill. May 13, 2020) (rejecting a Free Exercise Clause challenge to Illinois' limit on gatherings to no more than ten people, as the limit was neutral, generally applicable, and passed rational basis review); *see also Antietam Battlefield KOA v. Hogan*, 2020 U.S. Dist. LEXIS 99993 (D. Md. May 20, 2020); *Spell v. Edwards*, 2020 U.S. Dist. LEXIS 85909 (M.D. La. May 15, 2020); *Davis v. Berke*, 2020 U.S. Dist. LEXIS 74057 (E.D. Tenn. April 17, 2020); *Legacy Church, Inc. v. Kunkel*, 2020 U.S. Dist. LEXIS 68415 (D. N.M. April 17, 2020).

In fact, the Supreme Court recently denied an application for injunctive relief regarding an Executive Order issued by the Governor of California restricting social interactions and gatherings. *See South Bay United Pentecostal v. Newsom*, 2020 WL 2813056, 590 U.S. ___ (May 29, 2020). The Supreme Court acknowledged that the California guidelines place restrictions on houses of worship, but found them to be consistent with the Free Exercise Clause of the First Amendment. *Id*. at *1. The Supreme Court further reiterated its view of the limited role the judicial branch should have in deciding when such restrictions should be lifted, explaining:

> 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).[3]

Id at *1.

Plaintiffs' argument that the gathering limitation is not a neutral law of general applicability in light of the purported "exemption" given to the protests in response to the unfortunate circumstances surrounding the death of George Floyd lacks merit. The plain content-neutral language of the gathering limitation has not changed – all gatherings of 10 or more persons in New York City are prohibited. Nor have Plaintiffs demonstrated that the limitation has not been enforced with regard to other *comparable*, secular gatherings.[4] *See Antietam Battlefield KOA v. Hogan*, 2020 U.S. Dist. LEXIS 99993 at *21-22 (D. Md. May 20, 2020) (discussing that the proper comparison is with comparable secular activities and

[3] Consistent with this decision, the declaration of Dr. George Delgado, Plaintiffs' purported expert, should be disregarded by the Court. Additionally, it is worth noting that Dr. Delgado does not claim to have experience in public health or epidemiology, and failed to name the medical practice and hospice that he is affiliated with. Upon information and belief, Dr. Delgado is the medical director of Culture of Life Family Health. *See* "Doctor Claiming to 'Reverse' Abortion Was Told to Stop Using Medical School's Name," The Guardian, July 25, 2019, https://www.theguardian.com/world/2019/jul/25/revealed-doctor-reverse-abortion-trump-administration (last visited June 13, 2020). Finally, because the New York City resident Plaintiffs Daniel Schonburn, Elchanan Perr and Mayer Mayerfeld are not representatives of specific religious institutions, and appear to attend multiple synagogues, it is wholly unclear whether and how they are positioned to ensure the implementation of the necessary safety precautions that Dr. Delgado recommends. *See* Complaint at ¶ 103.

[4] Plaintiffs claim that religious services are comparable to protests as people are standing in close proximity and singing. However, there is one key difference between the two, which is that the vast majority of religious services are held indoors while the protests occur outdoors. It is safe to say that unlike Plaintiffs Rev. Steven Soos' and Rev. Nicholas Stamos' church in the North District, most houses of worship in New York City lack outdoor space, or outdoor space large enough for large groups of worshipers, let alone socially distant worshipers. Moreover, notably Dr. Delgado's safety recommendations do not include that the congregants or clergy wear face coverings.

distinguishing religious services from essential services and retail). *See also South Bay United Pentecostal v. Newsom*, 2020 WL 2813056 at *1, 590 U.S. ___ (2020).

Moreover, while public safety considerations surrounding recent protests in the City have led to a temporary relaxation in enforcement of the gathering limitation, the limitation nevertheless remains in effect. City officials are addressing the ongoing public health crisis as it overlaps with the public safety concerns raised by the protests to the best of their ability, under dynamic and often fraught circumstances. The limitation should not be disturbed simply because public safety considerations factored into decision-making surrounding enforcement. As the District Court of Nevada explained in a recent decision addressing similar claims:

> Outdoor protests involve dynamic large interactions where state officials must also consider the public safety implications of enforcement of social distancing. That is to say that such enforcement could result in greater harm than that sought to be avoided by the Directive. The choice between which regulations or laws shall be enforced in social settings is a choice allocated generally to the executive, *not* the judiciary, absent clear patterns of unconstitutional selective enforcement.

Calvary v. Sisolak, 2020 U.S. Dist. LEXIS 103234 at *12 (D. Nev. June 10, 2020)

Further, it has been noted that health experts and other officials are concerned that the protests in cities all over the U.S. may well lead to another spike in COVID-19 cases.[5]

[5] *See, e.g.*, "How to Protest Safely During the COVID-19 Pandemic," NYC Health, June 8, 2020, https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-safe-protest.pdf (last visited June 14, 2020); "Experts Sound Alarm Over Coronavirus Spread as U.S. Ramps Up Reopening, Prepares for More Protests," The Wall Street Journal, June 6, 2020, https://www.wsj.com/articles/experts-sound-alarm-over-coronavirus-spread-as-u-s-ramps-up-reopening-prepares-for-more-protests-11591395463 (last visited June 13, 2020); "Protests Draw Shoulder-to Shoulder Crowds After Months of Virus Isolation," The New York Times, June 3, 2020, https://www.nytimes.com/2020/06/02/us/coronavirus-protests-george-floyd.html?action=click&module=Spotlight&pgtype=Homepage (last visited June 13, 2020); "Will Protests Set Off a Second Viral Wave?" The New York Times, May 31, 2020 https://www.nytimes.com/2020/05/31/health/protests-coronavirus.html (last visited June 13, 2020); Governor Cuomo "voiced strong concerns that days of crowded and chaotic protests in New York City against racism and deadly police brutality could set off a second wave of coronavirus infections."

Therefore, the fact that the City has temporarily relaxed its enforcement of the gathering limitation in the context of the protests out of a need to balance public safety concerns with public health concerns, does not undermine the neutrality or general applicability of the gathering limitation as a limitation on *all* gatherings of more than 10 people. Therefore, Plaintiffs are not likely to succeed on their free exercise of religion claim.

C. Plaintiffs' Equal Protection and Substantive Due Process Claims Are Not Likely to Succeed

Finally, Plaintiffs' are not likely to succeed on their equal protection claim, as Plaintiffs have failed to demonstrate that the City has not chosen to enforce the gathering limitation toward others that are similarly situated, such as comparable secular activities. *See Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 790 (2d Cir. 2007) (internal citations omitted); *NRA of Am. v. Cuomo*, 2019 U.S. Dist. LEXIS 78958, at *7 (N.D.N.Y. 2019). As noted above, the gathering limitation applies to all non-essential gatherings. *See* Ex. 2 of Parodi Dec.

Moreover, to the extent Plaintiffs allege a violation of substantive due process, such claim is not likely to succeed on the merits as Plaintiffs have failed to demonstrate that they

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"Michigan Lifts a Stay-at-Home Order, and New York Warns that Protests Could Set Off Infections," The New York Times, June 1, 2020, https://www.nytimes.com/2020/06/01/world/coronavirus-world-news.html (last visited June 13, 2020).
In recognition of the current situation, the NYC Department of Health and Mental Hygiene issued the following guidelineson May 30, 2020 for safe protesting:
"Plan to protest? Here are tips to reduce the risk of spreading #COVID19:
✔Wear a face covering
✔Wear eye protection to prevent injury
✔Stay hydrated
✔Use hand sanitizer
✔Don't yell; use signs & noise makers instead
✔Stick to a small group
✔Keep 6 feet from other groups— nychealthy (@nycHealthy) May 30, 2020"

were deprived of a constitutionally-protected liberty or property right. *See Rother v. NYS Dep't of Correction and Community Supervision*, 970 F. Supp. 2d 78, 100 (N.D.N.Y. 2013) (holding that "[b]ecause the claim for substantive due process is subsumed by Plaintiff's' other constitutional claims, it must be dismissed"). Indeed, as recognized by the Second Circuit, in the absence of a viable First Amendment claim, as noted in the seminal public health Supreme Court decision in *Jacobson v. Massachusetts*, 197 U.S. at 26, which rejected a challenge to a Massachusetts mandatory smallpox vaccination law, forecloses a substantive due process challenge by Plaintiffs here. *See Caviezel v. Great Neck Pub. Schools*, 500 Fed. Appx. 16, 19 (2d Cir. 2012). Therefore, Plaintiffs are unlikely to succeed on the merits of their equal protection or substantive due process claims.

D. <u>The Balance of Hardships Tips Decidedly in the City's Favor</u>

Aside from the fact that Plaintiffs are not likely to succeed on the merits of their claims, any harm to Plaintiffs is substantially outweighed by the City's significant interest in protecting the public during this unprecedented public health emergency. Indeed, in *Geller v. de Blasio*, the Court acknowledged the City's interest in slowing "the spread of a virus that has hospitalized and killed tens of thousands of New Yorkers and infected hundreds of thousands more." *See Geller v. de Blasio*, 2020 U.S. Dist. LEXIS, at *10. Accordingly, given the paramount importance of the City's interest in protecting the public health, the balance of hardships tips decidedly in Defendant de Blasio's favor.

CONCLUSION

For the foregoing reasons, Defendant Mayor Bill de Blasio respectfully requests that this Court deny Plaintiffs' motion for a temporary restraining order and preliminary injunction, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 15, 2020

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