IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

REV. STEVEN SOOS,	)	
	)	
REV. NICHOLAS STAMOS,	)	
	)	
DANIEL SCHONBRUN,	)	
	)	
ELCHANAN PERR and	)	
	)	
MAYER MAYERFELD	)	
	)	
Plaintiffs,	)	Case No. 1:20-CV-0651 (GLS/DJS)
v.	)	
	)	
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.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

This memorandum of law supports Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction pursuant to Fed. R. Civ. P. 65. This memo is supported by the Verified Complaint, Exhibits to the Verified Complaint, and the Declaration of Plaintiffs' expert Dr. George Delgado.

INTRODUCTION AND URGENCIES JUSTIFYING TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIVE RELIEF

As we all know by now, on May 25, 2020, African American George Floyd tragically died after a white Minnesota Police Officer used his knee to pin Mr. Floyd's neck to the ground, despite Mr. Floyd repeatedly saying "I can't breathe."[1] Over the ensuing days, mass protests erupted across our nation—and all across the state of New York—in righteous anger at this utterly inhumane incident and ongoing problems of racism in our country. After months of government lockdown to stop COVID-19, and despite ongoing restrictions in New York against "non-essential" gatherings of more than 10 people, protestors flooded New York streets by the thousands, often wearing masks, standing shoulder-to-shoulder, and filling up throughways to the brim—even crowding the entire span of the Brooklyn Bridge in New York City. (V. Compl. ¶¶60, 66; Declaration of Dr. George Delgado ¶21.)

As the protests carried on, Defendants Governor Andrew Cuomo and New York City Mayor Bill de Blasio both made public statements expressly approving the mass gatherings, so long as they are non-violent. (Id. ¶¶ 63-70) They made these statements between June 1 and June 4 in the face of media questions about why the mass protests are allowed when many businesses and houses of worship remain subject to New York's ongoing COVID-19 restrictions on non-

[1] Derrick Bryson Taylor, George Floyd Protests: A Timeline, New York Times, June 8, 2020, https://www.nytimes.com/article/george-floyd-protests-timeline.html.

essential gatherings. (Id.) Defendants did not back off their restrictions against houses of worship, thus extending an exemption to mass gatherings protesting the death of Mr. Floyd, but not to religious services seeking to exercise fundamental rights under the First Amendment of the United States Constitution. (Id.)

Indeed, even as New York enters a phased-in reopening plan, houses of worship have not been allowed to open on equal terms with the mass protests or similarly situated businesses and activities, including manufacturers, retail outlets, charitable and social service organizations like homeless shelters and drop-in centers, professional services, and beaches. Governor Cuomo issued his latest Executive Order (202.38) on June 6, 2020 and stated that in any region which has entered "Phase 2" of New York's reopening plan, houses of worship may have in-person gatherings of not more than 25% of capacity for indoor services. (Id. ¶54.) But the Order failed to remove an ongoing 10-person limit for all other "non-essential" gatherings across the state, including as applied to *outdoor* services in Phase 2 regions, where two of the Plaintiffs engage in ministry. (Id. ¶55.)

All of these restrictions are far less justified as the coronavirus positive-test rate has plummeted to only 2%, down from 26% approximately six weeks ago. (Delgado Dec. at ¶16.) The Reproduction Measure (R(t)) has also dropped to 0.4 in New York City and 0.6 in the rest of the state—far below the 1.0 number that signals when an outbreak is beginning to subside. (Id. ¶18.) At the beginning of the pandemic, the R(t) was approximately 2.5 to 3.0. (Id.)

It's true that the U.S. Supreme Court recently rejected a challenge to house-of-worship restrictions in California (discussed below). But that decision did not face a glaringly unequal 10-person limit that still exists as against all outdoor religious services in New York and against indoor services in non-Phase-2 regions like New York City. And it also expressly refrained from deciding the case on the merits.

Most important, the Supreme Court's decision preceded the exemption granted in this case to the mass protests demonstrating against the unjust death of Mr. Floyd. As the balance of this memorandum shows, that new exemption, along with numerous others, renders Defendants' Executive Orders ("Orders") fatally underinclusive and thus violative of the Free Exercise Clause. The Orders also restrict houses of worship (and their leaders and congregants) according to the content of their expression, since these gatherings would be exempt if they were demonstrating against racism rather than engaging in religious services.

Plaintiffs, two Catholic priests (Revs. Steven Soos and Nicholas Stamos) in the North Country, a Phase 2 region, and three Jewish congregants (Daniel Schonbrun, Elchanan Perr, and Mayer Mayerfeld) in New York City, therefore now seek temporary and preliminary injunctive relief against Defendants' Orders restricting their indoor and outdoor religious services. As New York begins to reopen and the next upcoming Sabbath and Sunday holy day rapidly approaches, it is only right that religion be deemed no less valuable than protests against systemic racism and other essential and non-essential businesses. Indeed, protecting religion and its message of radical equality will only advance the cause of ending racism and making tragic deaths like Mr. Floyd's unthinkable.

LEGAL ARGUMENT

"In the Second Circuit, the standard for issuance of a temporary restraining order is the same as the standard for a preliminary injunction." *Chestnut Hill NY, Inc. v. City of Kingston*, No. 117-cv-0095, 2017 WL 11418271, at *1 (N.D.N.Y. Feb. 22, 2017). And a plaintiff seeking a preliminary injunction must show: (1) "a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor"; (2) "a likelihood of irreparable injury in the absence of

an injunction"; (3) that the balance of hardships "tips in the plaintiff's favor"; and (4) that the injunction is not adverse to the public interest. *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015) (internal quotes omitted).

As to the first prong, if the injunction will "affect government action taken in the public interest pursuant to a statute or regulatory scheme," the plaintiff must show a likelihood of success on the merits." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016) (internal quotes omitted). "[A] party need not show as high a likelihood of success if it can demonstrate that the balance of hardships tips *decidedly* in its favor." *New York Life Ins. Co. v. Singh*, No. 14-cv-5726, 2017 WL 10187669, at *1 (E.D. N.Y. July 13, 2017) (unpublished) (citing *Thapa v. Gonzales*, 460 F.3d 323, 336 (2d Cir. 2006).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS THAT DEFENDANTS' ORDERS ARE UNCONSTITUTIONAL

A. *Jacobson* Does Not Control This Case Under Binding Second Circuit Precedent.

In some circumstances, government may restrain individual liberties "by reasonable regulations, as the safety of the general public may demand." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905). And "[t]he right to practice religion freely does not include the liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

However, the Second Circuit has held that *Jacobson* does not control free exercise challenges (rather than substantive due process challenges) to government restrictions on individual liberties in the wake of an epidemic. *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). In *Phillips*, the Second Circuit first rejected a substantive due process challenge to a vaccine restriction as foreclosed by *Jacobson*. *Id*. at 542-43. It then observed that as to the

plaintiffs' free exercise challenge, "*Jacobson* did not address the free exercise of religion because, at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states." *Id*. at 543. It thus held that "*Jacobson* does not specifically control" the plaintiffs' free exercise challenge. *Id*.

At least four U.S. Court of Appeals judges have expressed similar views in recent weeks, explaining or indicating that *Jacobson* does not apply in the present context. *See Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam) (granting injunction pending appeal against Kentucky's temporary ban on in-person church services and mentioning *Jacobson* only once in passing); *see also South Bay United Pentecostal Church v. Newsom*, No. 20-55533, 2020 WL 2687079, at *4 (9th Cir. May 22, 2020) (Collins, J., dissenting) (stating that *Jacobson* applies to substantive due process claims but not to claims under the Free Exercise Clause). Their reasoning is apt, and thus *Jacobson* ought not to apply

It's true, however, that in *Phillips* the Second Circuit went on to find *Jacobson*'s reasoning persuasive in rejecting the plaintiffs' free exercise challenge to a vaccine restriction. *Phillips*, 775 F.3d at 543. But even applying the *Jacobson* standard here, this case is easily distinguishable. "[I]ndividual rights secured by the Constitution do not disappear during a public health crisis." *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Under the *Jacobson* standard, governments may not restrict liberties in "an arbitrary, unreasonable manner," or in a way that "go[es] so far beyond what was reasonably required for the safety of the public." *Jacobson*, 197 U.S. at 28. Thus, when evaluating challenges to laws "purporting to have been enacted to protect . . . public health," courts must ask whether the law "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." *Id*.

As demonstrated below, Defendants' Orders fail this test. Restricting houses of worship while allowing gatherings of far more people for all manner of other activities and businesses without the same limitations is arbitrary and unreasonable under *Jacobson*. This is especially true as the rate of coronavirus positive tests plummets and the R(t) drops substantially below 1.0 across New York, and mass protests numbering in the thousands are allowed across the state. At this point, imposing disparate burdens on houses of worship is simply not substantially related to the end of preventing COVID-19, and is, "beyond all question, a plain, palpable invasion" of Plaintiffs' First Amendment rights.

A. Defendants' Orders Burden Plaintiffs' Sincere Religious Beliefs and Have Chilled the Exercise Thereof.

There is no doubt Defendants' Orders burden Plaintiffs' exercise of their sincerely held religious beliefs. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (scrutinizing "laws burdening religious practice"). The new 25%-of-capacity limit in the North Country requires Plaintiffs to say multiple additional Masses per Sunday than they otherwise would have at their church in Nicholville, NY. (V. Comp. ¶¶79, 80, 85-95.) Indeed, on Sunday, June 7, they were forced to host five Masses instead of their normal two at their Saint Therese Church in Nicholville, with the help of an additional priest, in order to accommodate their total flock of approximately 260 parishioners. (V. Compl. ¶¶ 93) This is a gratuitous burden on their sincere religious beliefs and those of their flock, unjustified by public health "science."

Meanwhile, Plaintiffs Schonbrun, Perr, and Mayerfeld remain entirely forbidden from attending Jewish worship services as congregants unless they are part of the *minyan* of 10 adult males, since houses of worship in New York City are still forbidden from having in-person religious services of more than 10 people. (V. Compl. ¶¶104-110) Governor Cuomo's allowance for drive-in religious services is of no help since any type of operation of a vehicle is prohibited

on the Sabbath, which is the day the main weekly services take place. (V. Compl. ¶107,109) Of course, "it is not for [this court] to say that [plaintiffs] religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 686 (2014). And the consequences for violating the Orders include criminal prosecution and $1,000 fines. (V. Compl. ¶22.) Defendant de Blasio even sent a "message to the Jewish community" via tweet saying "the time for warnings has passed" and that the NYPD would summon and arrest anyone gathering in large groups in Brooklyn's Jewish community. (V. Compl. ¶54.)

All of this easily amounts to the requisite burden triggering First Amendment scrutiny of the challenged Orders.

Additionally, Plaintiffs have been actually chilled in the exercise of First Amendment rights. *See Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) (requiring actual chill to show violation of these rights). Plaintiffs Revs. Soos and Stamos have attempted to hold drive-in Masses since becoming authorized on May 21 (V. Compl. ¶¶40, 41), but they have been unable to do so in compliance with the Orders since their faith commands that congregants leave their vehicles and receive Holy Communion on kneelers. (V. Compl. ¶97.c.) The new 25%-of-capacity limit does little better since Plaintiffs have to host extra Masses or otherwise turn parishioners away once their churches reach that limit, in violation of their duty to administer the Sacraments to all of their parishioners who seek them. And they remain forbidden from having outdoor Masses or burial services with more than 10 people despite room to do so. (V. Compl. ¶¶ 96, 100-101.)

In addition, the Jewish congregant Plaintiffs remain actually chilled from attending Jewish services when they are not part of the 10-person *minyan*. (V. Compl. ¶108, 112, 114). Plaintiffs are in constant fear of police intervention due to police harassment and dispersal of Jewish religious gatherings, and they and their family members have missed many religious services,

including during Passover. (V. Compl. ¶¶109-114; 121-126; 128-130; 135-137; 144; 147-148, 150; 155-158, 160).) Plaintiff Perr was unable to have a Bar Mitzvah for his son that was scheduled for May 2, and he is still prohibited from attending synagogue as a congregant after the *minyan* has assembled. (V. Compl. ¶148.) As to Plaintiff Mayerfield, one of his synagogues has been consistently monitored and effectively shuttered by police (V. Compl. ¶155-158). Although he has attempted to host a 10-person-compliant *minyan* in his backyard, he has been disrupted by neighbors peddling Mayor de Blasio's expressed hostility to Jewish gatherings. And he is unable to attend his regular synagogue with family members without violating the 10-person rule. (V. Compl. ¶¶159, 163) All of this amounts to actual chill. Thus, First Amendment scrutiny applies.

B. Defendants' Orders Are Not Neutral or Generally Applicable and Thus Must Satisfy Strict Scrutiny under the Free Exercise Clause.

It's true that neutral and generally applicable laws that burden the free exercise of religion are presumptively valid under the Free Exercise Clause. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 870 (1990). But Defendants' Orders are plainly *not* neutral or generally applicable and thus must undergo strict scrutiny. *See Lukumi*, 508 U.S. at 532. As already noted, Plaintiffs are aware of the U.S. Supreme Court's recent decision not to enjoin a California order restricting place-of-worship attendance to the lesser of 25% of building capacity or 100 congregants. *South Bay United Pentecostal Church v. Newsom*, -- S.Ct. ---, 2020 WL 2813056 (May 29, 2020). But that decision refrained from ruling on the merits. *See id*. at *2 (Roberts, C.J., concurring) (noting that case's "interlocutory posture" prevented it from being "indisputably clear," as required, that the restriction was unconstitutional). Nevertheless, here Defendants' authorization of mass rallies against racial injustice (regardless of gathering size or social distancing practices) occurred after the Supreme Court's decision in *Newsom* and thus

renders their Orders uniquely underinclusive. It also exposes the worship-gathering limits as a purposeful and thus a non-neutral singling out of religious conduct for disparate treatment.

1. The Orders are not generally applicable because they fail to extend an individualized exemption to religious hardships and they are underinclusive relative to asserted secular goals.

Although "neutrality and general applicability are interrelated," *Lukumi*, 508 U.S. at 531, they are two distinct tests. *See id*. at 542 (stating that general applicability is a *separate* requirement). The general applicability requirement ensures that the "Free Exercise Clause 'protect[s] religious observers against unequal treatment.'" *Id*. (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987)). A law is not generally applicable if it is substantially underinclusive—that is, when it "fail[s] to prohibit nonreligious conduct that endangers [the government's interests] in a similar or greater degree than [the prohibited religious activity] does." *Id*. at 543; *see also Central Rabbinical Congress of U.S. & Canada v. New York Dep't of Health*, 763 F.3d 183, 197 (2d Cir. 2014) (stating that 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").

Additionally, the Supreme Court has recognized that "in circumstances in which *individualized exemptions* from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason." *Lukumi*, 508 U.S. at 437 (emphasis added) (internal quotations omitted). Thus, when an otherwise general rule allows an "individualized government assessment of the reasons for the relevant conduct" as a basis for granting an exemption, the rule must undergo strict scrutiny. *Smith*, 494 U.S. at 884.

Here, the Orders only purport to mandate a general limit on non-essential gatherings across the state. But aside from the voluminous formal exemptions that undermine the Orders' general applicability (discussed below), Defendants recently granted an individualized exemption to mass gatherings protesting the death of George Floyd at the hands of a police officer. (V. Compl. at ¶¶15, 63, 67, 98, 100, 102, 115, 171, 174, 181, 189-190, 193). These protests have involved hundreds or thousands of protestors all across the state, often packed together shoulder-to-shoulder in express derogation of the Orders' limits on gathering sizes and social distancing. (V. Compl. ¶66). And yet, while Defendants expressly approve of these gatherings, they have insisted that limits on religious gatherings remain in place. (*See* V. Compl. ¶¶62, 68-69).

This is exactly the type of disparate individualized assessment that must pass strict scrutiny under the Free Exercise Clause. For example, the Supreme Court has explained that a law withholding unemployment benefits when someone quits or refuses work "without good cause" creates a mechanism for individualized exemptions" where *religious* reasons are not deemed "good cause." *Smith*, 494 U.S. at 884. So too does a law punishing anyone who kills an animal "unnecessarily" where the government's application of the "test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 437.

Here the operative mechanism is the term "essential." Defendants' express approval of the mass rallies in protest of Floyd's death means these rallies are *essential* gatherings and thus not subject to the Orders' limits on *non*-essential gatherings. (V. Compl. ¶¶60-63; 67, 70; 72-75; *and see* ¶¶ 19-21; 31-32; 37-40; 42, 44; 46-49; 51-52; 55-57) Yet Defendants have expressly devalued religious reasons for receiving the same exemption and openly judged them to be less important than rallies against racial injustice. *See* V. Compl. at ¶66 (Governor Cuomo acknowledging that

graduations and "religious ceremon[ies]" remain constricted because "[i]t's about *balancing the risk versus the reward*…"); and ¶70 (Mayor de Blasio stating that the problem of "400 years of American racism" which the protests highlight "is not the same question as the . . . devout religious person who wants to go back to services"). Defendants may certainly attempt to make such a value judgment—even while overlooking the fact our country's first pilgrims sailed here in hopes "they would find . . . what they needed most: the liberty to worship God according to their conscience." *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-cv-264, 2020 WL 1820249, at *2 (W.D. Ky. Apr. 11, 2020) (citing William Bradford, History of the Plymouth Colony 60 (Charles Deane, 1948)). But they cannot "refuse to extend that [same] system to cases of religious hardship" without satisfying strict scrutiny. *Smith*, 494 U.S. at 884.

And here, the Orders impose inequitable religious hardship on both outdoor and indoor religious services. As to outdoor services, Executive Order 202.38 allowing houses of worship in Phase 2 regions to have gatherings up to 25% of capacity expressly applies only indoors. (V. Compl. ¶57.) It thus arbitrarily and irrationally leaves outdoor worship services in these regions subject to the 10-person limit on non-essential gatherings. Meanwhile, the mass rallies protesting Floyd's death have obviously far exceeded 10 people on the sidewalks, streets, bridges, parking lots, and other outdoor areas where they have taken place throughout the state. (V. Compl. ¶¶60-76) Thus, Plaintiffs must be allowed to engage in outdoor religious services at least to the same extent as outdoor mass protests against racism.

With respect to indoor religious services, the Orders again fail to provide the same individualized exemption as extended to the mass protests. Defendants have said nothing indicating the exemption is limited only to protests which are outdoors. *See* V. Compl. ¶63 (Governor Cuomo stating "I think you can protest. . . . Protest. Just be smart about it."); and at ¶70

(Mayor de Blasio stating the protests are part of a "national crisis" about "American racism" and for that reason, and not because many have taken place outdoors, they are exempt from the limit on gatherings). Consistent with this understanding, many New York theaters, which are otherwise closed even under Phase 2, are engaging in a statewide "Open Your Lobby" campaign to allow protestors inside to rest, receive water and snacks, use restrooms, and access WiFi and phone-charging outlets, as long as they maintain social distancing "as much as possible"—*without* regard to the size of the indoor gathering.[2] (V. Compl. ¶73) The campaign even urges theaters to "not permit police inside of the building."[3] *Id.* Many theaters are of course participating,[4] thus clearly removing this case from the reasoning in Chief Justice Robert's recent concurrence stating that churches are akin to, and have received at least equal treatment as, movie and stage theaters, which were closed at the time in California. *See South Bay United Pentecostal Church*, 2020 WL 2813506 at *1. Here, the "Open Your Lobby" movement has no formal limitations on the number of people inside. Therefore, Defendants cannot refuse to provide the same exemption to Plaintiffs' indoor religious services (that is, beyond the new percent-of-capacity limit in the North Country and the 10-person limit on outdoor services and in New York City) without satisfying strict scrutiny.

Aside from the individualized exemption problem, the Orders are also "underinclusive in relation to [their] asserted secular goals." *Cent. Rabbinical Cong. of U.S. & Canada*, 763 F.3d at

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[2] Collier Sutter, "Major NYC cultural institutions are providing safe spaces for protestors: Theaters and museums citywide are opening their doors for New Yorkers," TimeOut.com, June 5, 2020, /www.timeout.com/newyork/news/major-nyc-cultural-institutions-are-providing-safe-spaces-forprotestors-060520.

[3] https://twitter.com/openyourlobby/status/1268199983666409473 (last visited June 7, 2020).

[4] Julia Jacobs, "New York Theaters Open Up Lobbies for Racial Justice Protestors," New York Times, June 4, 2020, https://www.nytimes.com/2020/06/04/theater/lobbies-protesters.html.

186. That's because they "regulate[] 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.

Start with the mass rallies. They have almost all involved large crowds in which people stand in close proximity to each other for an extended time—the very characteristics typically invoked to justify restrictions on churches. *See, e.g.*, *Antietam Battlefield KOA v. Hogan*, No. 20-cv-1130, 2020 WL 2556496, at *8 (May 20, 2020) (noting that religious services involve "a group congregating near one another for a longer period" and "prolonged exhalation of respiratory droplets" rather than "casual contact"); *see also Cassell v. Snyders*, No. 20-cv-50153, 2020 WL 2112374, at *9 (N.D. Ill. May 3, 2020) (stating that "religious services involve sustained interactions between many people" and are thus justifiably restricted). This is the precise type of conduct that allegedly harms the government's interest in protecting people from COVID-19, and yet it is exempted without limitation, while religious gatherings are not. What's worse, as Plaintiffs' expert shows, the risk of spreading COVID-19 in New York houses of worship is merely 0.2% of the risk of spreading it in a mass protest standing shoulder to shoulder for prolonged periods of time, even if outdoors. (Delgado Dec. at ¶20-32.)

But there is more. The Orders exempt a voluminous amount of essential and non-essential businesses from the restriction on gatherings, undermining any notion that the Orders are generally applicable. *See Neace*, 958 F.3d at 413 ("As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law."). And these exemptions, too, endanger the government's interests just as much, and often more than, socially distant religious services—including exemptions for essential manufacturing (where numerous workers stand in close proximity for 8-12 hours a day) (V. Compl. ¶49), non-essential

manufacturing in regions that have reached Phase 1 (up to 50% workforce occupancy unless a facility requires more employees to safely operate core functions and additional mitigation strategies are implemented),[5] essential retail outlets (V. Compl. ¶49), non-essential retail outlets in regions that have reached Phase 2 (up to 50% workforce and customer presence occupancy),[6] state beaches; providers of basic necessities to economically disadvantaged persons (which includes oft-crowded homeless shelters and drop-in centers), essential construction (V. Compl. ¶47-48), non-essential construction in regions that have reached Phase 1,[7] and many more. All of these involve prolonged contact among individuals in relatively close proximity for sustained time periods, in a similar, and often greater, degree as the kind of socially distant and hygienic religious services in which Plaintiffs seek to engage. Yet all of the former remain exempted, while religious services are restricted. This is a quintessential underinclusive, and thus non-generally applicable, law. It must satisfy strict scrutiny.

2. The Orders are not neutral because the gathering-size limits target a religious practice.

A law is not neutral if it discriminates against a religious practice on its face, or if in its real operation, as a practical matter, it targets a religious practice. *Cent. Rabbinical Cong. of U.S. & Canada*, 763 F.3d at 193, 194-95. To establish that the government has engaged in religious gerrymandering, the plaintiff must show the "absence of a neutral, secular basis for the lines government has drawn." *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d at 211 (2d

[5]https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ManufacturingShortGuidelines.pdf.

[6]https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/GeneralRetailSummaryGuidance.pdf.

[7]https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ConstructionShortGuidelines.pdf.

Cir. 2012). "Relevant evidence [of the basis of the law] includes . . . the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id*. (quoting *Lukumi*, 508 U.S. at 540).

Here, the 25%-of-capacity limit in regions that have entered Phase 2 is imposed specifically and only on houses of worship. It thus easily fails the test of facial neutrality. "Essential" businesses like grocery stores, hardware stores, manufacturers, and food processing plants are expressly exempt from any in-person limits. (V. Compl. ¶49.) And non-essential businesses like retail stores, non-essential manufacturers, and even non-essential offices[8] are allowed to accommodate people up to 50% of their capacity. The 25%-of-capacity limit is thus "specifically directed at [a] religious practice" and discriminatory on its face. *Id*. at 193.

In addition, the real operation of the 25%-of-indoor-capacity limit in Phase 2 regions, the 10-person limit on outdoor gatherings in Phase 2 regions, and the 10-person limit on non-essential gatherings (indoor or outdoor) everywhere else, purposefully singles out religious conduct for disparate treatment. The historical background and series of Orders makes that clear. (V. Compl. ¶¶28-49.) For example, Governor Cuomo's April 10, 2020 Guidance Document to Executive Order 202.10 specifically stated that in banning all non-essential gatherings of any size, "[c]ongregate services within houses of worship are prohibited," and provided additional emphasis on the ban's prohibitive effect on religious services. (V. Compl. ¶50.) Even when Executive Order 2020.32 allowed all non-essential in-person gatherings of up to 10 people, the corresponding Guidance Document on May 21, 2020, continued to emphasize the effect on religious services,

[8] https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/OfficesSummaryGuidelines.pdf.

stressing that drive-in services may have more than 10 people but that "congregations of groups for religious service" in excess of 10 people "remain prohibited." (V. Compl. ¶53.) Of course, the new 25%-of-capacity limit in Phase 2 regions operates exclusively on houses of worship, despite no such limits on essential businesses and the more lenient 50%-of-capacity limits on similarly situated non-essential businesses (e.g., manufacturers, offices, and in-store retailers). And Mayor de Blasio's threat to the Jewish community, and the fact he appeared in Williamsburg to ensure the NYPD broke up a Jewish funeral, further evince non-neutrality. (V. Compl. ¶¶53-54.).

Taken together, the effect of the gathering-size limits, in light of their historical background singling out houses of worship, is to purposely impose disparate treatment on religious services. Whether this is a result of government animus is beside the point, since "animus, pure and simple," is not required to conclude that a law "singl[es] out a religious practice for special burdens." *Cent. Rabbinical Cong. of U.S. & Canada*, 763 F.3d at 197; *see also Neace*, 958 F.3d at 415 (stating that "[t]he constitutional benchmark is 'government *neutrality*,' not 'governmental avoidance of bigotry.'" (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008)). Indeed, the non-neutrality here has become all the more evident as tens of thousands of mass protestors congregate shoulder-to-shoulder on streets, bridges, and sidewalks across the state to rightfully demonstrate against racism. Defendants' solicitude for these rallies, combined with their ambivalence (at best) at the ongoing burdens on religious services, is enough to render their Orders non-neutral and thus, for yet another reason, subject to strict scrutiny.

3. The Orders Fail Strict Scrutiny.

Strict scrutiny "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Where the Orders fail to meet the Free Exercise requirements of *Smith*, "[t]he compelling interest standard that [courts] apply . . . is not 'water[ed] . . . down' but 'really means what it says.'" *Lukumi*, 508 U.S. at 546 (ellipses and last alteration in original)

(quoting *Smith*, 494 U.S. at 888). Notably, "[i]t is established in [the Supreme Court's] strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Id*. at 547 (ellipses in original) (quoting *Florida Star v. B.J.F.,* 491 U.S. 524, 541-42 (1989)). As the Second Circuit has put it, "a policy's underinclusiveness suggests that the proffered interest is not quite as compelling as the government claims." *Williams v. Annucci*, 895 F.3d 180, 189-90 (2d Cir. 2018); *see also Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.) ("A law's underinclusiveness—its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest—can raise with it the inference that the government's claimed interest isn't actually so compelling after all.").

It may be acknowledged for the sake of argument that general efforts to contain the spread of COVID-19 are "compelling interests of the highest order." *On Fire Christian Ctr., Inc.*, 2020 WL 1820249 at *7. But as the Supreme Court has explained, the compelling interest test traditionally applied to non-neutral or non-generally applicable laws "look[s] beyond broadly formulated interests . . . and scrutiniz[es] the asserted harm of granting specific exemptions to particular claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (noting by way of example that the state's "paramount" interest in education in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) did not equate to a compelling interest in requiring Amish claimant to comply with compulsory education law).

Here, Defendants cannot demonstrate that they have a compelling interest in applying the Orders *to the Plaintiffs*—particularly where Plaintiffs abide by all social distancing and hygiene practices incumbent on other exempted activities. The Orders exempt all essential businesses from the gathering size limits, including manufacturers, retail outlets, big box stores, hardware stores,

charitable and social service organizations (including crowded drop-in centers), and more. Defendants have also extended an individualized exemption to the mass rallies protesting American racism across the state in recent days. Any harm done by extending the same exemption to Plaintiffs in this case would be de minimis, particularly as the spread of coronavirus has substantially slowed.

Furthermore, the current list of exemptions is voluminous, and it "leave[s] appreciable damage to" the government's interest "unprohibited." *Lukumi*, 508 U.S. at 547. As Dr. Delgado shows, the risk of spreading COVID-19 in a socially-distant church or synagogue setting is only 0.2% of the risk of spreading it in a mass shoulder-to-shoulder crowd protesting American racism. (Deglado Dec. ¶31.) Yet Defendants have authorized the mass-rally exemption, for example, not because it poses a lower risk of spreading COVID-19 than houses of worship, but because of national interests in ending racism. (V. Compl. ¶¶63-71.)

Such underinclusiveness reveals that a more narrowly tailored approach, one that authorizes religious services on equal terms with exemptions for mass rallies against racism, essential businesses, or even non-essential businesses in Phases 1 and 2, is possible. *See, e.g.*, *Annucci*, 895 F. 3d at 193 (holding that prison failed to explain disparate treatment of "analogous nonreligious conduct" in refusing to grant religious dietary accommodation to inmate, thus leading court "to suspect that a narrower policy that burdens [inmate] to a lesser degree is in fact possible"). Thus, Defendants plainly cannot demonstrate that applying the current gathering limits to Plaintiffs, but not to analogous nonreligious conduct, furthers a compelling interest. The Orders thus fail strict scrutiny.

C. Defendants' Orders are Content-Based Regulations of Speech, Assembly, and Expressive Association and must undergo strict scrutiny.

Under the U.S. Constitution, freedom of speech, assembly, and expressive association are "cognate rights," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), and can be analyzed together for purposes of the Orders' restrictions on Plaintiffs' religious expression.

The key principle for this case is that content-based laws "are presumptively unconstitutional" and must undergo strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The U.S. Supreme Court recently clarified that a restriction on speech is content-based if it regulates speech based on its "function or purpose," regardless of whether the government has a benign motive or whether the law defines regulated speech by a particular subject matter. *Id*. at 2227. For example, a law prohibiting brand name drug manufacturers from using data for the purposes of "marketing," but not for the purpose of "education," was facially content-based, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011), as was a municipal sign code regulating signs differently based on whether they were "ideological," "political," or "temporary direction[al]," *Reed*, 135 S. Ct. at 2224, 2230.

Here, Plaintiffs' activities proclaiming the Word of God to their assembled (and socially distant) congregations are quintessential protected expression. *See Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (recognizing forum restriction on organization that taught Bible verses to children via stories, games, and prayer was a restriction on the freedom of speech). Yet the Orders impose restrictions on Plaintiffs' religious assemblies that do not apply to similarly situated secular gatherings—in particular the mass gatherings in recent days protesting the death of Mr. Floyd. For instance, the 25%-of-capacity limit on the Catholic priest Plaintiffs in the North Country, and the 10-person limit on the priests' outdoor services and on the Jewish Plaintiffs'

indoor and outdoor services in New York City, apply based on the religious content of these expressive assemblies—that is, because they are not assembled for the purpose of protesting the death of Mr. Floyd and/or the problem of American racism. Put more simply, the Orders permit assembling for the purpose of anti-racism protests, but not for the purpose of religious services. That is plainly a regulation of speech's "function or purpose," and thus its content, under *Reed*.

Coming upon a gathering of more than 10 people in the North Country (particularly outdoors) or in New York City, law enforcement must evaluate *the purpose* of the group by considering the content of its speech before deciding whether it violates the Orders. Is the group protesting the death of Mr. Floyd? Then it is allowable. Or is the group praying and worshiping? That is verboten. *See McCullen v. Coakley*, 573 U.S. 464, 479 (2014) ("The Act would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." (internal quotation marks omitted)). No matter how you slice it, that is a content-based regulation and subject to strict scrutiny (which, as discussed above, it cannot satisfy).

Even if the Orders were content neutral, which they are not, they still must be narrowly tailored in furtherance of a significant government interest, and leave open ample alternative channels for communication. *McCullen*, 573 U.S. at 477. Here they flunk that test.

First, they are not narrowly tailored because they "burden substantially more speech than is necessary to further the government's legitimate interests." *Id*. at 486 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Plaintiffs are willing to follow social distancing and hygiene requirements. (V. Comp. ¶¶102, 118-119; 132-133, 151.) Yet the Orders forbid them from hosting more than 25% of capacity indoors and more than 10 people outdoors in the North Country, and from hosting more than 10 people indoors or outdoors in New York City. Meanwhile, the

Orders allow far greater in-person gatherings for all manner of other businesses and activities, including the recent mass protests against racism. In other words, the government has shown it can accomplish its interest in more narrow ways than outright forbidding religious gatherings beyond the aforesaid limits as long as Plaintiffs ensure the maintenance of social distance and hygiene (which, ironically enough, Defendants have not fully required of the shoulder-to-shoulder mass protests against racism). Plaintiffs are committed to following social distancing here, and thus the Orders are not narrowly tailored as to religious worship services.

Nor do the Orders leave open ample alternative channels of communication. For Plaintiffs, drive-in and online services do not comply with the religious mandate to assemble together to distribute and receive the Catholic sacraments, or to avoid driving any vehicles on the Sabbath or to have a *minyan* that must all be in the same room, not in different cars. Instead, Plaintiffs' in-person, socially distant, hygienic worship-services are the only means to convey their religious message to their congregants. Anything less is not adequate, let alone ample.

D. The Orders Violate the Equal Protection Clause.

When a government classification burdens a fundamental right, that classification is subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Hayden v. Paterson*, 594 F.3d 150, 169-70 (2d Cir. 2010). Otherwise, the government classification must bear at least a rational relation to a legitimate end. *Kwong v. Bloomberg*, 723 F.3d 160, 170 (2d Cir. 2013).

Here the Orders allow essential gatherings without gathering-size limitations while regulating "non-essential" gatherings for unique burdens. It also expressly classifies *religious* non-essential gatherings for special restrictions, including the requirement in EO 202.38 that houses of worship in Phase 2 regions allow no more than 25% of their building capacity to be present for indoor religious services. Additionally, the Guidance Document supporting EO 202.10, which

banned all non-essential gatherings statewide, specifically stated that "[c]ongregate services within houses of worship are prohibited." And even now, outdoor religious services anywhere in the state may have no more than 10 people, and indoor religious services in non-Phase-2 regions like New York City still remain subject to the 10-person limit, since all of these are considered "non-essential" gatherings. These government classifications clearly burden the fundamental rights of free exercise of religion, free speech, free assembly, and expressive association. (V. Compl. ¶¶77-163.) They must therefore undergo strict scrutiny, which they cannot satisfy (as shown above).

Even if the Orders are subject only to rational basis, there is no rational reason for treating religious services so obviously differently from similarly situated businesses and activities, particularly the mass protests that have erupted in recent days. Religious services that follow proper social distancing and hygiene guidelines pose only 0.2% of the risk of spreading COVID-19 as the mass shoulder-to-shoulder protests expressly allowed by Defendants. (Delgado Dec. ¶31.) And they pose only 25% of the risk of manufacturing facilities (id. ¶45) and 12% of the risk of grocery stores (id. ¶52). Thus, the Orders' discriminatory treatment of religious gatherings in light of the exemptions for mass protests, manufacturers, grocery stores, and others, lacks any semblance of rational basis and violates Plaintiffs' rights under the Equal Protection Clause.

E. The Orders are *Ultra Vires* State Action in Violation of Federal Rights.

In promulgating restrictions on religious gathering sizes, Governor Cuomo has consistently relied for authority on New York Executive Law § 29-a of Article 2-B of the Executive Law. *See* EO 202.38 (V. Compl. Ex. A at p. 82-83), EO 202.10 (Id. at p. 25, 28), EO 202.33 (Id. at p. 74). But Executive Law § 29-a only authorizes the Governor only to "temporarily *suspend*" law, not to unilaterally create it. (V. Compl. ¶¶198-200.) And any such suspensions are specifically "[s]ubject to the state constitution, the federal constitution, and federal statutes and regulations." (Id.) Yet Governor Cuomo's restrictions on religious gatherings are entirely new law, not suspensions of

old law. The challenged restrictions are thus *ultra vires* because in imposing unequal treatment on houses of worship under Executive Law § 29-a, Governor Cuomo himself has legislated new law.

In addition, Article III, Section 1 of the New York State Constitution provides: "The legislative power of this state shall be vested in the senate and assembly." N.Y. Const., art. III, sec. 1. The Governor himself has no power to legislate. Rather, he has power to convene the legislature or senate in extraordinary sessions to act exclusively on subjects recommended by the Governor. *See* N.Y. Const. art. IV, sec. 3. Here, Governor Cuomo has never convened an emergency legislative session to impose inequitable gathering size limits on houses of worship. (V. Compl. ¶¶205-206.) This is yet one more reason such restrictions are *ultra vires* and unenforceable.

II. PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF IMMEDIATE RELIEF.

To meet the second criterion for temporary injunctive relief, Plaintiffs must show a substantial likelihood that irreparable harm will occur if injunctive relief is not granted. The danger of irreparable injury to Plaintiffs resulting from Defendants' Orders here is actual and immediate. Prohibiting Plaintiffs from worshipping in accordance with their sincere religious beliefs and on the same terms and conditions as other exempted secular activities "assuredly inflicts irreparable harm." *Neace*, 958 F.3d at 416. Plaintiffs remain fearful that they will be prosecuted for holding outdoor or indoor worship services beyond the aforesaid limits, given that Defendants have enforced these limits by threats of arrest, criminal prosecution, and $1,000 fines for any violations. Each Plaintiff has been actually prevented or chilled from worshipping according to their sincere religious beliefs under Defendants' Orders.

It is well established 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); *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir.1969) ("The presumption of

irreparable harm is manifest . . . when it is alleged that first amendment rights have been chilled. . . ."). Plaintiffs therefore satisfy the second criterion for injunctive relief.

III. THE BALANCE OF HARMS TIPS DECIDEDLY IN PLAINTIFFS' FAVOR.

The next step is to balance the likelihood of irreparable harm to Plaintiffs from failure to grant interim relief against the likelihood of harm to Defendants from the grant of such relief. In this case, the likelihood of harm to Plaintiffs greatly exceeds any potential for harm to Defendants. Plaintiffs have suffered irreparable harm to their fundamental constitutional rights. By contrast, Defendants will suffer no real harm to any legitimate government interest, as noted above. For example, there is no evidence the mass rallies against racism in recent days have sparked an outbreak of COVID-19, even though these rallies started more than 10 days ago and have eschewed any adherence to social distancing mandates. (Delgado Dec. ¶17.) Plaintiffs, on the other hand, abide by social distancing and hygiene requirements in holding their religious services. They merely seek an injunction that "appropriately permits religious services with the same risk-minimizing precautions as similar activities, and permits the Governor to enforce social-distancing rules in both settings." *Roberts*, 958 F.3d at 416. Thus, the balance of hardships tips decidedly in favor of Plaintiffs.

IV. A RESTRAINING ORDER AND PRELIMINARY INJUNCTION FURTHERS THE PUBLIC INTEREST.

Finally, "treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees." *Id*. And "securing First Amendment rights is in the public interest." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Given the irreparable injury to Plaintiffs, the lack of any harm to Defendants' legitimate interests, and the critical nature of the First Amendment rights at issue, the

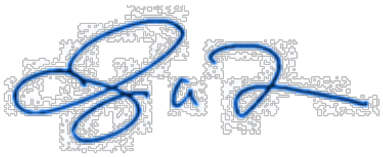
public interest is best served by issuance of a temporary restraining order and preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for a temporary restraining order and preliminary injunction.

Dated: June 10, 2020

Respectfully submitted,



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