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.	)	

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO/PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

At the show cause hearing on June 17, defendants made several admissions that seal plaintiffs' entitlement to a temporary restraining order and preliminary injunction protecting their fundamental right to worship.[1]

First, defendants Cuomo and James acknowledged that local law enforcement is free *not* to enforce the gathering limitations in Cuomo's executive orders when it comes to mass gatherings they deem permissible according to the "best interests" of their communities. (Tr. p. 13:2-5.) These selectively permitted mass gatherings have thus far included demonstrations against racism, Black Lives Matter demonstrations, Black Trans Lives Matter demonstrations, and Juneteenth celebrations, marking the "23rd straight day of protests in New York City."[2] This admission confirms the independent authority of defendant Mayor de Blasio to restrict Plaintiffs' religious rights in New York City under Cuomo's orders while freely allowing the mass gatherings he supports and in which he has participated because he considers them more important than religious services. *See* Verif. Comp. ¶ 70. It also reveals that in addition to the exemptions discussed in Plaintiffs' earlier memos, the executive orders contain a mechanism of *individualized* exemptions

[1] As of today, June 22, 2020, Defendants have authorized non-essential outdoor gatherings up to 25 people in Phase 3 regions, including the North Country where Plaintiffs Soos and Stamos reside. *See* EO 202.42. As of the same date, New York City, where the three remaining plaintiffs reside, has entered Phase 2 allowing houses of worship a mere 25% of building capacity—an arbitrary limitation to which houses of worship alone are subject, while all other operating structures at 100% or 50% of capacity. *See* EO 202.38. Worse, New York City otherwise remains subject to a 10-person limit on outdoor "non-essential gatherings" while favored protesters march and party in the thousands. *See* EO 202.33 and Declarations of Dr. Robert Onder and Prof. John Rao, Exhibits A and B, respectively.

[2] *See* https://www.ny1.com/nyc/all-boroughs/news/2020/06/19/juneteenth-marches-rallies-and-events-across-nyc: "Juneteenth to Be an Official Holiday as Protesters Remember the Past, Fight for the Future," June 19, 2020, Spectrum News, NY 1.

based on defendant de Blasio's (or other local authority's) view of community "best interests"—a secular justification—without extending a similar individualized exemption for *religious* hardship. Strict scrutiny, which this scheme cannot survive, is thus unquestionably triggered.

Second, defendant de Blasio made a two-fold admission (consistent with its opposition memo) that it has not enforced the gathering restrictions against "peaceful" protestors out of concern for public safety, and that religious gatherings are not "comparable" because they do not pose the same public safety threat. (Hearing Tr. p. 20:4-8, 21:18-22:12.) But this again reveals that the de Blasio refrains from enforcing Cuomo's gathering limits for a secular reason (public safety) but not for less favored religious reasons, when religious gatherings do no more harm to the government's interest in "slowing the spread "of COVID 19—indeed, *less* harm. (Delgado Dec., ECF No. 2, Ex. 1, ¶32; Onder Declaration, Exhibit A, ¶¶ 19-21).[3] It also bizarrely indicates that if plaintiffs' religious activities became sufficiently unruly and threatening, *then* they could be permitted. That is circular nonsense, as it declares that precisely an attack on "public safety" is needed for an exemption to congregate for reasons of "public safety."

Developments since the hearing further solidify Plaintiffs' entitlement to relief. The first and only Court of Appeals judge to discuss gathering limits on worship versus exemptions for mass protests has stated the obvious: "If officials are now exempting protestors, how can they justify continuing to restrict worshippers? The answer is that they can't. Government does not have

[3] It also betrays a misapprehension of relevant "comparability," which is whether the exempted or permitted activity undermines the government's interests justifying house-of-worship restrictions (i.e., stopping the spread of COVID-19) *to the same or greater degree* than socially distanced religious gatherings—not whether religious services pose the same threat to public safety. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (holding that city ordinance was non-generally applicable because it "fail[ed] to prohibit nonreligious conduct that endangers" interests in protecting public health and preventing animal cruelty "in a similar or greater degree than Santeria sacrifice does").

carte blanche, even in a pandemic, to pick and choose which First Amendment rights are 'open' and which remain 'closed.'" *Spell v. Edwards*, -- F.3d. --, 2020 WL 3287239 at *4, 12 (5th Cir. June 18, 2020) (Ho, J., concurring) (appeal mooted because gathering limits for worship abandoned).

Meanwhile, Governor Cuomo signed an executive order making "Juneteenth" (June 19th) a state holiday celebrating the end of slavery, encouraging New Yorkers to "reflect on all the changes we still need to make to create a more fair, just and equal society."[4] It was thus no surprise when "thousands of New Yorkers participated in protests, marches, and celebrations to mark Juneteenth on Friday,"[5] while Plaintiffs' religious gatherings remained tightly restricted.

As the pandemic wanes, defendants will raise the specter of rising COVID-19 "cases" in other states—meaning asymptomatic or mildly symptomatic infections with no corresponding rise in deaths or hospitalizations. *See* Dr. Onder Dec., Exhibit A at ¶¶ 9-12. They may also speculate about a potential "spike" of infections (but not deaths or hospitalizations) in New York. But on the same date he launched a wave of mass gatherings in the streets for Juneteenth, Cuomo himself dismissed these fears: "[B]y the time the protest happened, we were down at 1% infection rate.

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[4] Danielle Garrand, "Cuomo declares Juneteenth a holiday for New York state employees," CBS News, June 17, 2020, https://www.cbsnews.com/news/juneteenth-new-york-cuomo-declares-holiday-for-state-employees/. Mayor de Blasio signed a similar executive order with an effective date of June 19, 2021. *See* Michael Gartland, "NYC Mayor de Blasio declares Juneteenth city holiday – to go into effect next year," New York Daily News, June 19, 2020, https://www.nydailynews.com/news/politics/ny-de-blasio-juneteenth-race-reconciliation-commission-20200619-xudlmcnjfrajxni4udv4naxgpq-story.html.

[5] Spectrum News Staff and Debora Fougere, "Juneteenth to Be an Official NYC Holiday as Protestors Remember the Past, Fight for the Future," Spectrum News, June 19, 2020, https://www.ny1.com/nyc/all-boroughs/news/2020/06/19/juneteenth-marches-rallies-and-events-across-nyc. *See also* Declaration of Professor John C. Rao (testifying that that on June 19, 2020, he witnessed from his home in Greenwich Village a "Juneteenth" "march of thousands of people up Sixth Avenue, packed together without the least 'social distancing.' The vast crowd was accompanied—front, back and middle, by police escorts on motorcycles, bicycles and in cars.")

We were so low by that point that I'm hoping we got lucky that yes, they came together, and they violated social distancing, *but they weren't infected anymore*." (emphasis added). *See* Exhibit D, p. 2. If thousands of protesters are presumed to be non-infected at this point in the waning pandemic, why not worshipers?

Defendants' exemptions (whether de facto or de jure) for mass gatherings—to protest racism, for Black Lives Matter, Black Trans Lives Matter, Juneteenth, or any other cause they favor—remove their restrictions on religious gatherings from the putative umbrella of Chief Justice Roberts' non-binding concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (May 29, 2020). Whether called "exemptions," "temporary relaxations" or some other euphemism, the exemptions allow precisely what Roberts described as "large groups of people gather[ing] in close proximity for extended periods of time." *Id.* at 1613.[6]

In short, nothing stands in the way of the relief requested.

DISCUSSION

Plaintiffs incorporate by reference the arguments from their previous papers (ECF No. 2-4 and ECF No. 25) demonstrating the requisites for injunctive relief. Plaintiffs now supplement those arguments with the following three points:

I. Defendant de Blasio Has Independent Authority to Restrict Plaintiffs' Religious Activities

In their opposition memo and during the Order to Show Cause hearing, defendant de Blasio denied that he has independent authority to impose gathering limits and is thus not a proper party

[6] Not to the contrary is *Elim Romanian Pentecostal Church v. Pritzker*, -- F.3d --, 2020 WL 3249062 (7th Cir. June 16, 2020). While the Court relied on Chief Justice Roberts' *non-binding* concurrence in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (May 29, 2020), it did not consider what was not before Justice Roberts: for mass protests that radically undermine the entire "public health" rationale on which defendants rely.

defendant. *See* City's Opposition Memo, ECF No. 19-7 at p. 2; Hearing Tr. at 8:9-24. But that is manifestly untrue. De Blasio must be enjoined in his official capacity for plaintiffs' to obtain relief.

First, de Blasio has declared his own state of emergency in New York City and has enacted a series of COVID-19-related local orders pursuant to his authority under "the New York City Charter, the Administrative Code of the City of New York, and the common law authority to protect the public in the event of an emergency." *See* Exhibit C, EO 125. Thus, if defendants Cuomo and James are enjoined, de Blasio would still be able to impose his own restrictions.

The City argues that Cuomo's executive orders prohibit anything of the sort. But although an outdated order (202.3) prohibited local governments from enacting local orders "inconsistent with, conflicting with or superseding" a state executive order, later executive orders (202.5 and 202.19)[7] merely require "approval of the State Department of Health" (202.5) or "consul[tation]with the state department of health" (202.19). *See* ECF No. 1-1 at p. 47. Nothing precludes the City from enacting restrictions *more* severe than Cuomo's.

In any case, at the hearing counsel for Cuomo and James represented multiple times that enforcement of Cuomo's orders is up to local officials. *See* Hearing Tr. at 10:18-19; 12:2-3; 12:11-13; 13:2-5; 18:7-8. And the City's own current emergency order incorporates Cuomo's executive orders, including the restrictions on non-essential gatherings, and directs New York City agencies to enforce them. *See* Exhibit C at §§2, 3. This easily suffices for purposes of *Monell* liability, *see Monell v. Dep't of Social Serv.*, 436 U.S. 658 (1978). It also requires, under *Ex Parte Young*, 209 U.S. 123 (1908), that Mayor de Blasio remain a defendant given his "proximity to and responsibility for" the challenged state action. *See Berean Baptist Church v. Cooper*, 2020 WL

[7]See, https://www.governor.ny.gov/news/no-2025-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency; and https://www.governor.ny.gov/news/no-20219-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency

2514313 at *11 n.3 (quoting *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008)). Thus, Mayor de Blasio must also be enjoined.

II. Defendants Have Exempted Mass Protests Against Racism

At the hearing, defendants insisted they have not actually exempted mass protests against racism from gathering restrictions. But the cases clearly establish that refusing to prohibit activity that otherwise violates a facially neutral and generally applicable rule is a de facto exemption that can undermine neutrality and general applicability. That is certainly the scenario here. What is more, defendants have not only tolerated but *positively approved and even (in de Blasio's case) participated* in what they have exempted from their regime of social control.

The U.S. Supreme Court has recognized that a law's *implementation* bears on its neutrality and general applicability for purposes of the Free Exercise Clause. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), the Court pointed to *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953), which invalidated a municipal ordinance that was "*interpreted* to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service" based on *an admission of the government attorney at oral argument*. Accordingly, in *Lukumi* the Court held that a statute prohibiting "unnecessary" killing of animals was not generally applicable because "[k]illings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition" according to "*the interpretation* given to the ordinance by [the city] and the Florida attorney general." *Id*. at 537 (emphasis added).

Numerous courts have held that de facto exemptions can undermine a policy's neutrality and general applicability. *See, e.g.*, *Bus. Leaders in Christ v. Univ. of Iowa*, 360 F. Supp. 885, 899 (S.D. Iowa 2019) (nondiscrimination policy for student groups not generally applicable where University allowed ad hoc exemptions for "educational and social" but not religious reasons);

Litzman v. New York City Police Dep't, 2013 WL 6049066, at *3 (S.D.N.Y. Nov. 14, 2013) (one-millimeter-beard policy rendered non-neutral and not generally applicable due to ad hoc exceptions for religious holidays, weddings, funerals and "because the NYPD does not always enforce its personal appearance standards"); *Ward v. Polite*, 667 F.3d 727, 736 (6th Cir. 2012) (de facto exemptions from non-discrimination policy in counseling for non-religious reasons without permitting religious exemptions rendered policy non-neutral and not generally applicable).

Here, each defendant has declared publicly that *implementation* of the gathering-size policy does not apply to the mass protests. A compilation of their many public statements in support of the protest exemption is Exhibit D to this Memorandum. Not to the contrary is Governor Cuomo's statement on June 13 that "[y]ou don't need to protest [anymore], you won," because very next day, on June 14, he said "You can protest." *Id.* Moreover, defendant de Blasio explicitly declared that protest gatherings take precedence over religious ones because of "400 years of American racism, [which] I'm sorry, that is not the same question as the understandably aggrieved … devout religious person who wants to go back to services…." *Id.* and Verif. Comp. ¶ 70. And defendant Attorney General Letitia James said on June 12 with respect to the protests: "The right to peacefully protest is one of our most basic civil rights, and *we are working without rest* to ensure that right is protected and guarded." *Id.* (emphasis added).

All of these statements privilege nonreligious reasons over religious reasons for noncompliance with the gathering limits. Again, strict scrutiny is undeniably triggered.

III. The Absurdities of Defendants' Scheme Negate Neutrality and General Applicability

The result of defendants' blatant double standard is nothing less than a constitutional theater of the absurd. Their patchwork of ever-changing executive orders, guidelines, and de facto exemptions for mass protests—including an "Open Your Lobby" movement allowing protest-

related gatherings in concert halls and theaters that are supposed to be closed until the hazy future of "Phase Four"[8]—reveals bureaucracy gone wild.

Start in the North Country. In a region that has reached "Phase 3," Plaintiffs Soos and Cuomo are permitted to say indoor Mass for a congregation limited to 25% of building capacity. *See* EO 202.38. This is a completely arbitrary limit on worship. *See* Dr. Onder Dec., Exhibit A at ¶ 18. That means approximately 51 people in their Saint Therese Church in Nicholville. (V. Compl., ECF No. 1 at ¶ 84.) But in that same Phase 3 region, they are prohibited from saying Mass for more than 25 people *outdoors*. *See* EO 202.42. Obviously, allowing Plaintiffs to say Mass for twice as many people indoors as outdoors is simply irrational, especially as the rate of positive tests in plaintiffs' St. Lawrence County has plummeted to a meager 0.28%. (Dr. Onder Dec., ¶16.)

Additionally, in a Phase 3 region like the North Country, restaurants may open for indoor dining up to 50% of capacity with tables six feet apart, but with 10 people per table allowed, who can dine without wearing masks while sitting closely together and even facing each other. *See* Exhibit F.[9] The notion that worshipers at a New York City synagogue or a North Country church pose a greater risk of spreading COVID-19, even if they socially distance, than diners who are permitted to sit closely together at tables of ten, eating, talking and laughing in each other's faces, is medical nonsense, not a rational public health policy. *See* Dr. Onder Declaration at ¶¶ 14-21.

Consider these additional absurdities in the regime defendants insist they must continue to impose on everyone whose gatherings they disfavor:

- As New York City enters "Phase 2" today—of no concern to thousands of marchers and partiers whose gatherings meet with official favor, *see* Rao Declaration, Exhibit B, ¶ 9—

[8] See Exhibit E, spreadsheet of lobbies made available according to this para-protest movement in violation of the Executive Orders.

[9]Reopening New York, Food Service Guidelines for Employers and Employees, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Food_Services_Summary_Guidelines.pdf (last visited June 22, 2020).

> workers whose "core function takes place within an office setting" must—laughably enough—quickly don an "acceptable face covering" whenever another worker happens to pass within six feet, even if this happens "unexpectedly."[10] Yet the same workers can engage in a mass protest against racism or slavery, packed onto a bridge or in a plaza, without enforcement of any mask requirement.[11]

- Defendant Cuomo has announced that starting on June 26, outdoor, socially distanced gatherings of up to 150 people will be allowed for *graduations*,[12] without extending any similar permission to outdoor religious gatherings.

- Cuomo's EO 202.37 authorizes *indoor special education* services for the summer term in school districts *with no capacity limitation*, without (of course) a similar allowance for indoor religious services, though both gatherings are comparable as courts recognize.[13]

Enough is enough. The ever-increasing absurdities of Defendants' scheme show they can no longer justify imposing disparate treatment on religious gatherings while allowing so many other putatively similar activities for favored secular reasons. To quote Judge Ho once again:

> The First Amendment does not allow our leaders to decide which rights to honor and which to ignore. In law, as in life, what's good for the goose is good for the gander. In these troubled times, nothing should unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution.

Spell, 2020 WL 3287239 at *6 (Ho, J., concurring).

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[10]Reopening New York, Office-Based Work Guidelines for Employers and Employees, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/OfficesSummaryGuidelines.pdf (last visited June 22, 2020).

[11]Spectrum News and Debora Fougere, *supra* n. 4 (see, e.g., post of Michael Herzenberg at 4:26 PM, June 19, 2020, showing a number of demonstrators not wearing masks)

[12]"Governor Announces Outdoor Graduations of up to 150 People Will Be Allowed Beginning June 26th," New York State, June 7, 2020, https://on.ny.gov/311JGWN.

[13] *See, e.g.*, *Cassell v. Snyders*, 2020 WL 2112374 (N.D. Ill. May 3, 2020) ("education and worship are both activities where people sit together in an enclosed space to share a communal experience" (internal quotations omitted).

Fear of a "second wave" or "spike" of COVID-19 cases is no excuse to continue imposing disparate treatment on plaintiffs' religious activities while streets and plazas are filled with protesters and Juneteenth celebrants—with access to theater lobbies that are supposed to be closed. Where Defendants have granted so many exemptions to similarly situated secular activities, they must extend equal treatment to plaintiffs' religious gatherings. That is the mandate of the First Amendment of which this Court is first guardian.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for a temporary restraining order/preliminary injunction providing the following relief:

A. Completely eliminating any gathering limits on outdoor religious gatherings, as Governor Murphy of New Jersey did after he had created his own de facto exemption for George Floyd protests. (*See* Murphy Executive Order 152 previously filed herein).

B. Completely eliminating indoor gathering limits for religious gatherings in parity with the 100% occupancy allowed for favored "essential businesses," day camps and special education classes or, alternatively, at least 50% occupancy in keeping with what is permitted for "non-essential" businesses and every other indoor activity allowed to continue under Phases Two and Three *except* religious activity, which *alone* is still arbitrarily confined to 25% occupancy.[14]

Respectfully submitted,

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[14] See Exhibit G, "inverted pyramid" graphic illustrating singling out of religion alone for the 25% capacity limitation.