

No. 20A87

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IN THE  
**Supreme Court of the United States**

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THE ROMAN CATHOLIC DIOCESE OF  
BROOKLYN, NEW YORK,

*Applicant,*

v.

GOVERNOR ANDREW M. CUOMO,  
IN HIS OFFICIAL CAPACITY,

*Respondent.*

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**On Emergency Application for Writ of  
Injunction to the Honorable Stephen G. Breyer,  
Associate Justice of the United States  
Supreme Court and Acting Circuit Justice  
for the Second Circuit**

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**MOTION FOR LEAVE TO FILE BRIEF AS  
*AMICI CURIAE* AND BRIEF OF  
THE AMERICAN MEDICAL ASSOCIATION  
AND THE MEDICAL SOCIETY OF THE  
STATE OF NEW YORK AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENT**

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November 18, 2020

**MOTION FOR LEAVE TO FILE  
BRIEF AS *AMICI CURIAE***

The American Medical Association (AMA) and the Medical Society of the State of New York (MSSNY) respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Respondent. The Applicant, the Roman Catholic Diocese of Brooklyn, has stated that it will not oppose this motion. The Respondent, New York Governor Andrew M. Cuomo, has consented to the filing of this *amicus* brief.

Since the COVID-19 pandemic began, this Court and others have grappled with the States' attempts to balance public health and civil liberties, including the free exercise of religion. For scientific questions, particularly questions about the relative risks of religious services and other activities, the courts have largely relied on assumptions and guesses. This is not an aspersion; knowledge about transmission of the novel coronavirus (SARS-CoV-2) has developed quickly, and much of it was not yet available when the courts issued their decisions.

The AMA and MSSNY believe that scientific research has progressed enough to identify factors that contribute to the risks of various activities, and to compare the risks of various activities to each other. As the largest organizations of physicians in the United States and the State of New York, respectively, the AMA and MSSNY share a strong interest in assuring that decisions about public health are rooted in sound science. Their *amicus* brief will assist the court by explaining that science, and putting it in the context of the executive order at issue in this case.

Respectfully submitted,

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## **CORPORATE DISCLOSURE STATEMENT**

The American Medical Association and the Medical Society of the State of New York have no parent corporation, and no publicly held company has a 10% or greater ownership interest in their stock.

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## **BRIEF OF *AMICI CURIAE***

The American Medical Association (AMA) and the Medical Society of the State of New York (MSSNY) respectfully submit this brief as *amici curiae* in support of the Respondent.<sup>1</sup>

### **INTEREST OF *AMICI CURIAE***

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policymaking process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including New York, and in every medical specialty, including infectious diseases. The AMA believes that governmental mandates designed to halt the spread of SARS-CoV-2, the virus that causes COVID-19, should be based on sound science.

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<sup>1</sup> All parties provided written consent to the filing of this brief. Providing ten days' notice to the parties as required under Rule 37.2(a) was not possible because the request for a response to the Application was docketed six days before the response was due. Counsel for *amici* nevertheless requested and received written consent. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae*, their members, or their counsel, made such a monetary contribution. *Amici* did not review a draft of the Respondent's brief before filing their brief.

MSSNY is an organization of approximately 30,000 licensed physicians, medical residents, and medical students in New York State. Members participate in both the state society and in their local county medical societies. MSSNY is a non-profit organization committed to representing the medical profession as a whole and advocating health-related rights, responsibilities and issues. MSSNY strives to promote and maintain high standards in medical education and in the practice of medicine in an effort to ensure that quality medical care is available to the public. MSSNY joins the AMA's belief that governmental mandates designed to halt the spread of COVID-19 should be based on sound science.

The AMA and MSSNY submit this brief on their own behalf and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition of the AMA and the medical societies of each state and the District of Columbia. One of its purposes is to present the viewpoint of organized medicine to the courts in cases of importance to the practice of medicine or to public health.

### **SUMMARY OF ARGUMENT**

COVID-19, the greatest public health emergency in a century, has required governments to make difficult choices about how best to protect their citizens. To do so, these governments must weigh science on one hand, and the basic human needs and civil liberties of their citizens on the other. Among these civil liberties is the free exercise of religion, for which the AMA and MSSNY have the utmost respect.

The AMA and MSSNY will not tell this court how to strike that balance, but they do believe that the science clearly shows that congregating indoors, as the Diocese asks this Court to allow, endangers public health. Remaining in close proximity indoors for long durations, as well as singing and talking, make attendance at a religious service risky, even if congregants follow precautions. The risk profile of a religious service is similar to that of attending an indoor sporting event, going to a bar, or eating in a restaurant, all of which are prohibited in New York’s “red zones” and “orange zones.” In sum, the Governor’s Executive Order has singled out religious services for more lenient treatment than similarly risky activities.

## ARGUMENT

### I. Several Factors Determine the Risk of Spreading SARS-CoV-2.

In the months since COVID-19 arrived, scientists and physicians have learned a great deal about how the disease spreads from person to person, and how to contain it. Everyone is now familiar with many preventive measures, such as wearing masks, social distancing, and frequent hand washing. Even with these precautions, some activities remain risky. Several factors affect their relative risks:

*Enclosed spaces.* Clusters of COVID-19 infections are linked mostly to indoor settings.<sup>2</sup> Even if improved ventilation may in theory reduce transmission, there

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<sup>2</sup> Quentin J. Leclerc et al., *What settings have been linked to SARS-CoV-2 transmission clusters?*, 5 Wellcome Open Research 83 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7327724/>; Hua Qian et al., *Indoor Transmission of SARS-CoV-2*, *Indoor Air* (forthcoming 2020), <https://onlinelibrary.wiley.com/doi/10.1111/ina.12766>.

is currently no scientific consensus on ventilation standards for controlling the spread of SARS-CoV-2.<sup>3</sup>

*Large groups.* On average, larger groups will contain more people who are infected, and more people who can potentially become infected. Empirical research and predictive modeling both show that reducing time spent in large groups reduces COVID-19 outbreaks.<sup>4</sup> Excluding people who show symptoms of COVID-19 cannot solve the problem because a substantial proportion of transmission—perhaps a majority— involves presymptomatic or asymptomatic carriers.<sup>5</sup>

*Close proximity to others.* An infectious person sheds the virus through respiration in droplets that range in size. While the largest droplets do not travel far before falling to the ground or encountering a barrier,

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<sup>3</sup> Kenichi Azuma, et al., *Environmental factors involved in SARS-CoV-2 transmission: effect and role of indoor environmental quality in the strategy for COVID-19 infection control*, 25 *Environmental Health & Preventative Medicine* 66 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7607900/>.

<sup>4</sup> Huaiyu Tian et al., *An investigation of transmission control measures during the first 50 days of the COVID-19 epidemic in China*, 368 *Science* 638 (2020), <https://pubmed.ncbi.nlm.nih.gov/32234804/>; Kenji Karako et al., *Analysis of COVID-19 infection spread in Japan based on stochastic transition model*, 14 *Biosci Trends* 134 (2020), [https://www.jstage.jst.go.jp/article/bst/14/2/14\\_2020.01482/\\_pdf/-char/en](https://www.jstage.jst.go.jp/article/bst/14/2/14_2020.01482/_pdf/-char/en).

<sup>5</sup> Luca Ferretti et al., *Quantifying SARS-CoV-2 transmission suggests epidemic control with digital contact tracing*, 368 *Science* 619 (2020), <https://science.sciencemag.org/content/368/6491/eabb6936>; Xi He et al., *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 *Nature Medicine* 672 (2020), <https://www.nature.com/articles/s41591-020-0869-5>; Xi He et al., *Author Correction: Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 *Nature Medicine* 1491 (2020), <https://www.nature.com/articles/s41591-020-1016-z>.

the smallest droplets can remain airborne and travel farther than six feet, the figure that many use as a rule of thumb for social distancing.<sup>6</sup> In the scientific community, there is no agreed-upon “safe” distance.<sup>7</sup> That said, standing near an infectious person is riskier than standing farther away.<sup>8</sup>

*Long duration of exposure and staying in one place.* The amount of virus to which a person is exposed can influence the chance of infection, as well as its severity. That amount depends on how long a person spends breathing the virus in. Staying in one place for a longer time creates a higher risk of infection.<sup>9</sup>

*Loud talking and singing.* Loud speech can emit thousands of oral fluid droplets per second.<sup>10</sup> Many of

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<sup>6</sup> Chanjuan Sun & Zhiqiang Zhai, *The efficacy of social distance and ventilation effectiveness in preventing COVID-19 transmission*, 62 *Sustainable Cities & Society* 102390 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357531/pdf/main.pdf>.

<sup>7</sup> Mahesh Jawaweera et al., *Transmission of COVID-19 virus by droplets and aerosols: A critical review on the unresolved dichotomy*, 188 *Environmental Research* 109819 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7293495/#>.

<sup>8</sup> Yuki Furuse et al., *Clusters of Coronavirus Disease in Communities, Japan, January–April 2020*, 26 *Emerging Infectious Diseases* 2176 (2020), [https://wwwnc.cdc.gov/eid/article/26/9/20-2272\\_article](https://wwwnc.cdc.gov/eid/article/26/9/20-2272_article); Charles Courtemanche et al., *Strong Social Distancing Measures In The United States Reduced The COVID-19 Growth Rate*, 39 *Health Affairs (Millwood)* 1237 (2020), <https://pubmed.ncbi.nlm.nih.gov/32407171/>.

<sup>9</sup> Maogui Hu et al., *The risk of COVID-19 transmission in train passengers: an epidemiological and modelling study*, *Clinical Infectious Diseases* ciaa1057, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7454391/pdf/ciaa1057.pdf>.

<sup>10</sup> Valentyn Stadnytskyi et al., *The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2*



these droplets can remain in the air for eight to fourteen minutes before evaporating.<sup>11</sup> Likewise, singing expels large amounts of oral fluid droplets—significantly more than normal talking produces.<sup>12</sup> One of the earliest and best-known superspreader events in the United States was a choir practice at which fifty-three of the sixty-one attendees became infected.<sup>13</sup>

## **II. Attending a Religious Service Is Among the Riskiest Activities.**

Religious services have every one of the risk factors listed above. Large groups of people enter an enclosed space, then sit or stand near each other for a significant amount of time, and typically talk and sing. Reducing attendance to 25% of capacity, which the Diocese proposes, could mitigate these risk factors to some extent, but it would not eliminate any of them.<sup>14</sup> Since the COVID-19 pandemic began, several out-

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*transmission*, 117 Proceedings of the National Academy of Sciences 11875 (2020), <https://www.pnas.org/content/117/22/11875.long>.

<sup>11</sup> *Id.*

<sup>12</sup> Malin Alsved et al., *Exhaled respiratory particles during singing and talking*, 54 *Aerosol Science & Technology* 1245 (2020), <https://www.tandfonline.com/doi/full/10.1080/02786826.2020.1812502>.

<sup>13</sup> Lea Hamner et al., *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice — Skagit County, Washington, March 2020*, 69 *Morbidity & Mortality Weekly Report* 606 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm>.

<sup>14</sup> The Diocese has proposed to eliminate singing (except by the cantor or organist) as a condition of the injunction it seeks. The Diocese apparently has not made a similar commitment with respect to loud talking.

breaks have been tied to religious services in the United States and abroad.<sup>15</sup>

A religious service’s profile of risk factors closely matches that of other activities that are understood to be relatively dangerous, including eating inside a restaurant, or attending an indoor concert or sporting event. Other activities, such as shopping at a grocery store, pet food store, or hardware store, or working in an accounting or payroll office,<sup>16</sup> lack one or more of the risk factors associated with religious services.

Epidemiologists and physicians generally agree that religious services are among the riskiest activities. The Illinois State Medical Society asked physicians and infectious disease specialists to rate thirty-seven activities by their COVID-19 exposure risk; in third place was “Attending a large indoor religious service, concert or other event (more than 50 people),” even if participants wore masks and adhered to social distancing.<sup>17</sup> (Without masks and social distancing,

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<sup>15</sup> Allison James et al., *High COVID-19 Attack Rate Among Attendees at Events at a Church — Arkansas, March 2020*, 69 *Morbidity & Mortality Weekly Report* 632 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6920e2.htm>; Kate Conger, Jack Healy, & Lucy Tompkins, *Churches Were Eager to Reopen. Now They Are Confronting Coronavirus Cases.*, *N.Y. Times*, July 8, 2020 (updated July 10, 2020), <https://www.nytimes.com/2020/07/08/us/coronavirus-churches-outbreaks.html>; Sungchan Kim et al., *Evaluation of COVID-19 epidemic outbreak caused by temporal contact-increase in South Korea*, 96 *International Journal of Infectious Diseases* 454 (2020), <https://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7224674&blobtype=pdf>.

<sup>16</sup> The Diocese notes that these activities are permitted in red and orange zones. Applicant Br. at 12, 23.

<sup>17</sup> Illinois State Medical Society, *ISMS COVID-19 Risk Survey* (2020), [https://www.isms.org/Resources/For\\_Physicians/COVID\\_chart/](https://www.isms.org/Resources/For_Physicians/COVID_chart/).

this activity ranked first.) The only two riskier activities were going to a bar and hugging or shaking hands. “Grocery or other indoor shopping” was in twenty-fifth place. In a similar survey conducted by the Texas Medical Association, “Attending a religious service with 500+ worshippers” tied for the highest risk score with attending a large music concert, going to a sports stadium, and going to a bar.<sup>18</sup> By contrast, “Working a week in an office building” was considered a moderate risk, comparable to swimming in a public pool. Grocery shopping was considered a “low-moderate” risk, comparable to playing golf. Finally, the New York Times asked 511 epidemiologists when they expect to resume twenty activities of daily life.<sup>19</sup> The plurality estimated that it would be a year or more before they would “Attend a church or other religious service,” trailing only “Stop routinely wearing a face covering” and “Attend a sporting event, concert or play” for the longest anticipated wait until the activity could be resumed. The vast majority of the epidemiologists expected to work in a shared office in less than a year.

A recent epidemiological study matches the consensus among physicians and epidemiologists. The study used cell-phone location data from 98 million people

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<sup>18</sup> Texas Medical Association, *TMA Chart Shows COVID-19 Risks for Various Activities* (2020), <https://www.texmed.org/TexasMedicineDetail.aspx?id=54216>. Survey respondents assumed that participants in each activity would wear a mask when practical, stay at least 6 feet away from people who are not immediate family members, and wash their hands frequently.

<sup>19</sup> Margot Sanger-Katz, Claire Cain Miller, & Quoc Trung Bui, *When 511 Epidemiologists Expect to Fly, Hug and Do 18 Other Everyday Activities Again*, N.Y. Times, June 8, 2020, <https://www.nytimes.com/interactive/2020/06/08/upshot/when-epidemiologists-will-do-everyday-things-coronavirus.html>.

and a model of coronavirus spread to project the number of cases of COVID-19 that could be avoided by not reopening various types of establishments.<sup>20</sup> “Religious Organizations” were clustered at the high end with establishments like fitness centers and limited-service restaurants.<sup>21</sup> The numbers of cases avoided by not reopening stores (including grocery stores, pet stores, hardware stores, and convenience stores) were much lower.

### **III. The Rules in New York’s Red Zones and Orange Zones Treat Religious Services More Leniently Than Comparably Risky Activities.**

When comparing the Governor’s restrictions on various activities in red and orange zones, it is important to classify those activities by the risk they pose. On the spectrum of risk, attending a religious service, even with precautions, is more similar to eating in a restaurant or bar, working out at a gym, or attending an indoor concert or sporting event, than it is to less risky activities like working in an office building or shopping in a store.

Under the Governor’s executive order, eating in a restaurant or bar, working out at a gym, and attending a concert or sporting event are prohibited in red and orange zones.<sup>22</sup> But religious services are permitted, with up to ten people in red zones and twenty-five in orange zones. The activities that the Diocese notes

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<sup>20</sup> Serina Chang et al., *Mobility Network Models of COVID-19 explain inequities and inform reopening*, *Nature* (forthcoming 2020), [https://www.nature.com/articles/s41586-020-2923-3\\_reference.pdf](https://www.nature.com/articles/s41586-020-2923-3_reference.pdf).

<sup>21</sup> *Id.*, Extended Data Figure 5(d).

<sup>22</sup> Application Ex. F.

are permitted without capacity restrictions in red and orange zones—shopping in stores and working in offices for businesses deemed “essential”—are substantially less risky than the activities the Governor has prohibited. Thus, religious services have been singled out for more lenient treatment than comparably risky activities.

### CONCLUSION

The AMA and MSSNY sympathize with the Governor, who must balance public health with civil liberties in a difficult and fast-changing pandemic, and with the Diocese, which sincerely believes in the importance of its mission and has taken measures to mitigate the risk of its services. While the AMA and MSSNY recognize that this case cannot be decided by science alone, they believe that the Court’s understanding of the science should be as accurate as possible. The science indicates that even with protective measures in place, attending a religious service is inherently risky, that its risk is comparable to that of activities prohibited in New York’s red and orange zones, and that this risk cannot be eliminated.

Respectfully submitted,

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