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**THE CONSTITUTIONALITY OF ENDANGERING OTHERS:
HOW ONE SUPREME COURT CASE RATIONALIZED
RISKY CONDUCT DURING A PANDEMIC AS
INTERPRETED IN ROMAN CATHOLIC DIOCESE OF
BROOKLYN NEW YORK V. CUOMO**

ANDRIEL GARY

INTRODUCTION

The American people hold dear to their constitutional rights. For years, we have repeatedly heard the arguments around the right to keep and bear arms, the right to free speech, and the right to freedom of religion, and most have agreed that these rights should be retained by the American people. But what happens when the exercise of these rights has the potential to endanger others? In *Roman Catholic Diocese of Brooklyn New York v. Cuomo*, the Supreme Court hastily wrestled with the importance of constitutional rights, the importance of public safety, and when, if ever, it is necessary to temporarily abandon certain constitutional rights, specifically freedom of religion, for the sake of protecting an entire state from the novel coronavirus.¹

This is not the first time the Court has dealt with challenged restrictions or mandates amid a public health crisis. In *Jacobson v. Commonwealth of Massachusetts*, the Court declined to declare that a state statute that mandated smallpox vaccinations was unconstitutional. The Court recognized that when necessary “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”² The Court further recognized that constitutional rights are not absolute, and there are “many restraints to which every person must be subject for the common good, as determined by the state authorities, in a health crisis.”³

1. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

2. *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27 (1905).

3. Linda A. Sharp, Annotation, *COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, 55 A.L.R. Fed 3d Art. 3 (2020) (citing *Jacobson*, 197 U.S. at 26).

With this, the Court concluded that courts should give deference to state decisions in a public health crisis and should only

review legislative action in respect of a matter affecting the general welfare if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, 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.⁴

Following the reasoning in *Jacobson*, the Court in *South Bay United Pentecostal Church v. Newsom*, in response to the current pandemic, again declined to declare that a California executive order limiting attendance capacity at houses of worship was unconstitutional.⁵ The Court reiterated *Jacobson*, stating that

our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake [] to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.⁶

Nevertheless, in *Roman Catholic Diocese of Brooklyn*, the Court declined to give deference to Governor Cuomo’s Executive Order No. 202.68 (“Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency”)(hereinafter the “Emergency Order”), placing capacity limitations on houses of worship located in COVID-19 hotspots. The Court agreed with the Diocese’s argument, stating that the challenged restrictions violated the “minimum requirement of neutrality” to religion required by *Church of Lukumi Babalu Aye, Inc. v. Hialeah*.⁷ In *Church of Lukumi Babalu Aye, Inc.*, the Court reiterated that “a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny.”⁸

4. *Jacobson*, 197 U.S. at 31.

5. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (Mem) (2020) (C.J. Roberts, concurring).

6. *Id.* at 1613 (citing *Jacobson*, 197 U.S. at 38; *Marshall v. United States*, 414 U.S. 417, 427; *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (2020)).

7. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66. (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)).

8. *Church of Lukumi Babalu Aye*, 508 U.S. at 546.

“To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.”⁹ Interests of the highest order would seem to encompass a pandemic that has killed more than 550,000 people to date in the United States and more than two million people globally.¹⁰ Yet, the Court in *Roman Catholic Diocese of Brooklyn* seems to overlook this fact as they struck down an Emergency Order crafted to combat COVID hotspots during the pandemic in the name of respecting a constitutional right that is impossible to enforce or even enjoy without life. Although our constitutional rights are sacred, it would seem appropriate that these rights be subjected to regulation when the public’s health is at stake; governmental orders should be respected when it is evident that the enforcement of these rights could possibly affect the health of others.

This note will explore the impact of the Supreme Court’s decision not to uphold Governor Cuomo’s capacity restrictions on houses of worship located in red and orange zones during the coronavirus pandemic. This note will also discuss the initial litigation that initiated the Supreme Court’s decision as well as the case law from which the decision was derived. Lastly, this note will explore the current state of law at the time the Supreme Court rendered its decision and review and analyze the rationale behind the Court’s decision to enjoin Governor Cuomo’s Emergency Order and the possible effects this decision could have on the health of the public.

THE CASE

On October 6, 2020, the governor of the state of New York, Andrew Cuomo, issued an Emergency Order that prohibited non-essential businesses, restaurants, schools, and houses of worship from operating at full capacity if the businesses or institutions were located in areas designated as red or orange zones.¹¹ Areas in New York were designated as red zones if the area was identified as an area “experiencing a concerning increase in

9. *Id.* (citing *McDaniel v. Paty*, 435 U.S. 618,628 (1978)).

10. COVID-19 Mortality Overview, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 24, 2021), <https://www.cdc.gov/nchs/covid19/mortality-overview.htm>.

11. STATE OF NEW YORK EXECUTIVE CHAMBER: CONTINUING TEMPORARY SUSPENSION AND MODIFICATION OF LAWS RELATING TO THE DISASTER EMERGENCY, Vol. XLII N.Y. Reg. Issue 44 (Nov. 4, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.68.pdf>

COVID-19 spread.”¹² Orange zones were considered warning zones, and yellow zones were precautionary zones.¹³ In red zones, the following restrictions were imposed: (1) houses of worship were limited to the fewer of twenty-five percent capacity or ten people, (2) mass gatherings were prohibited, (3) only essential businesses could remain open, (4) dining was reduced to takeout only, and (5) schools were closed, allowing for remote-learning only.¹⁴ In orange zones, the following restrictions were imposed: (1) houses of worship were limited to thirty-three percent capacity or twenty-five people maximum, (2) mass gatherings were limited to ten people maximum, indoor and outdoor, (3) essential businesses remained opened and high-risk non-essential businesses remained closed, (4) dining was reduced to outdoor only with four people maximum, and (5) schools remained closed for remote learning only.¹⁵

In response to the Emergency Order, The Roman Catholic Diocese of Brooklyn New York (hereinafter “Diocese”) filed a complaint against Governor Cuomo, seeking a temporary restraining order and a preliminary injunction against Governor Cuomo’s Emergency Order. The Diocese argued that the Emergency Order violated the Free Exercise Clause of the First Amendment, and that their church was treated more harshly than other comparable secular facilities in the orange and red zones such as pet shops or grocery stores.¹⁶ In two separate orders, the United States District Court of the Eastern District of New York denied the Diocese’s motion for a temporary restraining order and a preliminary injunction.¹⁷ The court recognized that the order was not facially neutral and specifically targeted houses of worship which subjected the capacity limitations to strict scrutiny.¹⁸ However, the court reiterated *Jacobson* in its reasoning, concluding that the government is afforded wide latitude in managing the spread of deadly

12. Executive Summary: New York “Micro-Cluster” Strategy (Oct. 21, 2020), https://www.caacs.org/cms/lib/NY01001870/Centricity/Domain/593/MicroCluster_Metrics_10.21.20_FINAL.pdf.

13. *Id.*

14. *Id.*

15. *Id.*

16. Complaint at 48, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 493 F. Supp. 3d 168 (E.D.N.Y. 2020) (No. 20-CV-4844).

17. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 493 F. Supp. 3d 168 (E.D.N.Y. 2020); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 2020 WL 6120167 (E.D.N.Y. 2020), *rev’d* 983 F.3d 620 (2d Cir. 2020) (reversing the federal court’s decision after the Supreme Court enjoined Governor Cuomo’s Emergency Order).

18. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 493 F. Supp. 3d 168, 171 (E.D.N.Y. 2020).

diseases and that “the Constitution principally entrusts the safety and health of the people to the politically accountable officials of the States to guard and protect.”¹⁹ The court also noted that “worship services do not seem comparable to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods.”²⁰ Lastly, the Court also relied on the Supreme Court’s decision in *South Bay United Pentecostal Church* where the Court declined to grant injunctive relief to a church in California who sought to enjoin a similar executive order that limited attendance at religious services during the pandemic.²¹ In order to obtain a temporary restraining order, the Diocese was required to establish (1) a likelihood of success on the merits and (2) that the balance of equities favored the Diocese.²² With both Supreme Court precedents in mind, the court found those elements lacking and denied the Diocese’s motion for a temporary restraining order.²³

In response to the preliminary injunction, the court held that the Diocese’s claim was subject to a rational basis rather than strict scrutiny standard of review, the Diocese was not likely to succeed on merits of its claim, and the balance of equities and public interest did not favor issuance of a preliminary injunction.²⁴ The court reasoned that under the Emergency Order, religious gatherings were treated more favorably than schools, restaurants, and non-essential businesses which were closed entirely while religious gatherings were permitted with capacity limitations.²⁵ The court further reasoned that the interaction that commonly occurs during worship services is the type of interaction that could transmit the virus; therefore, the rules set out in the Emergency Order did not target the religious gatherings because of religion but because of the gatherings, making the strict scrutiny standard of review inapplicable.²⁶

19. *Id.* (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct 1613 (Mem) (2020); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905)).

20. *Id.* (quoting *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344 (7th Cir. 2020)).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Roman Cath. Diocese of Brooklyn*, 2020 WL 6120167, *rev’d* 983 F.3d 620 (2d Cir. 2020) (reversing the federal court’s decision after the Supreme Court enjoined Governor Cuomo’s Emergency Order).

25. *Id.* at 9.

26. *Id.*

The court also refused to question how the state of New York categorized essential and non-essential businesses and elected to leave that categorization to the political branches of the state.²⁷ Additionally, the court disagreed with the Diocese's argument that businesses that were deemed essential, such as grocery stores, were comparable to religious gatherings; the court noted that essential businesses like grocery stores typically do not involve people singing, chanting, or greeting each other in tightly enclosed spaces.²⁸ Lastly, the court reasoned that it would not be in the public interest to grant an injunction when the Emergency Order was specifically crafted to attack COVID hotspots in New York. The court concluded that the harm that could result from failure to contain the virus could be overwhelming, affecting not only the entire public but places of worship as well.²⁹

After the denial of the preliminary injunction and temporary restraining order, the Diocese and Agudath Israel of America and affiliated entities (hereinafter "Agudath"), another religious organization who also unsuccessfully sought to enjoin Governor Cuomo's Emergency Order, then appealed to the United States Court of Appeals for the Second Circuit seeking an emergency injunction pending appeal of the denial of their preliminary injunction and to expedite their appeal.³⁰ Like the result at lower court, the Diocese's and Agudath's motion for an emergency injunction was denied. However, the Second Circuit granted their motion to expedite their appeal. The court reasoned that when a law burdens religious conduct, and that burden is not neutral and generally applicable, then the law is subject to strict scrutiny.³¹ In this case, the court stated that the Emergency Order was not subject to strict scrutiny because it was neutral and generally applicable because the order did not specifically target houses of worship for harsh treatment since there was other comparable secular public gatherings that were treated more harshly.³²

Additionally, the court noted that the state provided evidence before the District Court that explained that large commercial stores deemed essential were not comparable to religious gatherings because in-person religious services commonly involved prayer and interaction with others over an

27. *Id.*

28. *Id.*

29. *Id.* at 11.

30. *Agudath Israel of America v. Cuomo*, 980 F.3d 222 (2d Cir. 2020).

31. *Id.* at 226.

32. *Id.*

extended period of time; the state also showed that it was this type of interaction that posed a higher risk of transmitting the virus.³³

The Diocese and Agudath then separately appealed to the U.S Supreme Court, seeking injunctive relief pending appeal of their preliminary injunction application.³⁴ Because the Diocese and Agudath had the same issue, the Court addressed both issues in the opinion.³⁵ The Court held that the Diocese and Agudath were likely to succeed on merits, would be irreparably harmed in the absence of injunctive relief, and public interest favored injunctive relief.³⁶ Finding that the Diocese and Agudath were likely to succeed on the merits of the case, the Court reasoned that the Emergency Order was subject to a strict scrutiny judicial review since there was evidence that houses of worship were treated more harshly than businesses categorized as essential in red zones and non-essential businesses in orange zones; in red zones, houses of worship were limited to ten people and in orange zones houses of worship were limited to twenty-five people.³⁷

From there, the Court found that the Emergency Order served a compelling governmental interest, but the interest was not narrowly tailored to serve a compelling state interest. The Court reasoned that the restrictions in the Emergency Order were more restrictive than any COVID-related regulation that previously came before the court, more severe than what was required to prevent the spread of the virus at the applicants' services, and the Diocese and Agudath could accommodate more than ten or twenty-five people.³⁸ Finding that the Diocese and Agudath would suffer irreparable harm, the Court reiterated that loss of First Amendment freedoms, no matter how long, constitute irreparable harm and limiting religious services to ten people meant that others would be barred from attendance; the Court noted that Catholics could not receive communion and that there were important religious traditions in the Orthodox Jewish Faith that require personal attendance. Finally, in finding that public interest favored injunctive relief, the Court stated that there was no evidence attendance at the religious services contributed to the spread of the disease and that the State did not show that public health would be imperiled if less restrictive measures were imposed.³⁹

33. *Id.* at 227.

34. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65.

35. *Id.*

36. *Id.*

37. *Id.* at 66.

38. *Id.*

39. *Id.* at 66-69.

BACKGROUND

Human coronaviruses were first identified in the mid-1960s.⁴⁰ At the time, there were only four main subcategories of coronaviruses that were known to affect humans.⁴¹ However, there were some coronaviruses that infected animals that could evolve and make humans sick, becoming a new type of coronavirus.⁴² On January 9th 2020, the World Health Organization (WHO) confirmed fifty-nine cases of a mysterious coronavirus that loomed in Wuhan, China.⁴³ Unsure of its origin, public health experts kept a close eye on the new virus.⁴⁴ As days passed, additional reports of the virus appeared in Thailand and Japan which prompted health officials to begin screenings at JFK international, San Francisco International, and Los Angeles International airports to follow the transmission of the virus between Wuhan, China and the United States.⁴⁵

On January 21st 2020, the Centers for Disease Control and Prevention confirmed the first case of the virus in the United States while 200 more cases in China developed. By January 23rd, China confirmed that 17 people had died from the virus, and an additional 300 individuals were infected.⁴⁶ On February 11th 2020, the WHO announced the official name for the virus was severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), and the disease it causes was named - COVID-19, an abbreviation of coronavirus disease 2019.⁴⁷ By May 28th 2020, the virus that seemed to only be on one side of the world seemingly made its way to the United States, as the CDC confirmed more than 100,000 Americans had contracted the virus and died.⁴⁸ In the midst of an epidemic that turned into a pandemic within a

40. Human Coronavirus Types, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 15, 2020), <https://www.cdc.gov/coronavirus/types.html>.

41. *Id.*

42. *Id.*

43. American Journal of Medical Care, *A Timeline of COVID-19 Developments in 2020*, AJMC (Jan. 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

44. *Id.*

45. *Id.*

46. *Id.*

47. Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It, WORLD HEALTH ORGANIZATION, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it#:~:text=ICTV%20announced%20%E2%80%9Csevere%20acute,two%20viruses%20are%20different](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it#:~:text=ICTV%20announced%20%E2%80%9Csevere%20acute,two%20viruses%20are%20different).

48. How Does COVID-19 Spread Between People, Coronavirus Disease (COVID-19): How is it transmitted? WORLD HEALTH ORGANIZATION (Apr. 30,

few months, public health officials went to work to analyze the elements of the virus and its potential transmissibility.⁴⁹

As officials learned more about the novel coronavirus, public health experts warned that the virus could be spread through respiratory droplets or small particles when an infected person coughed, sneezed, sang, talked, or breathed and that these particles could be inhaled into the nose, mouth, airways, and lungs, causing infection.⁵⁰ Other warnings revealed that respiratory droplets from an infected person could land on surfaces and objects, and the virus could be transmitted if those surfaces and objects were touched by another individual who subsequently touched their eyes, mouth, or nose.⁵¹ There was also evidence that respiratory droplets and airborne particles could remain suspended in the air or travel distances and be breathed in by others.⁵²

As public health officials presented this alarming information, state officials began implementing curfews, closing businesses, closing schools, enacting mask mandates, enforcing isolation and quarantine periods for infected persons, enforcing social distancing practices, and enforcing stay-at-home orders to reduce human interaction.⁵³ Through executive orders, governors of various states tried to curate plans to reduce the spread of the virus as it ravaged the United States. Executive orders commonly included placing severe restrictions on the operations of certain businesses, including houses of worship, schools, restaurants, gyms, and other establishments that could potentially increase the spread of the virus.⁵⁴ As a result of the executive orders, backlash from the public roared over the restrictions placed on certain businesses; specifically, houses of worship sought to enforce their constitutional right to freedom of religion amid the pandemic, and the courts began to see a wave of COVID-19-related litigation.⁵⁵

Decisions on whether state executive orders that placed capacity limitations on houses of worship violated the Free Exercise Clause of the First

2020), <https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted#:~:text=Current%20evidence%20suggests%20that%20the,eyes%2C%20nose%2C%20or%20mouth.>

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Executive Orders, THE COUNCIL OF STATE GOVERNMENTS, <https://web.csg.org/covid19/executive-orders/>.

54. *Id.*

55. Sharp, *supra* note 3.

Amendment varied among the courts.⁵⁶ Federal courts ruled inconsistently, striking down some executive orders that limited attendance at houses of worship while upholding others. For example, in *Antietam Battlefield KOA v. Hogan*, plaintiffs challenged an executive order that placed capacity limitations on houses of worship limiting attendance of no more than ten people.⁵⁷ In response, plaintiffs brought suit to enjoin the order, arguing that the capacity limitation violated the Free Exercise Clause of the First Amendment.⁵⁸ The court declined to enjoin the executive order, stating:

[L]egislative review is only proper when the legislation or order which has been enacted to protect the public health has no real or substantial relation to those objects, or is beyond all question a plan palpable invasion of rights secured by the fundamental law.⁵⁹

The court reasoned that the executive order had real or substantial relation to the public health crisis because the order was enacted to reduce the spread of the novel coronavirus;⁶⁰ thus, the purpose of reducing the capacity at houses of worship was to reduce the spread of COVID-19 which was easily spread in large groups. As to whether the orders were beyond all question, a plain, palpable invasion of rights secured by the fundamental law, the court found that the prohibitions were neutral and of general applicability because prohibitions applied to all mass gatherings whether the conduct involved was religiously motivated or not.⁶¹ The court found that comparable secular facilities were also banned and declined to agree that businesses that remained opened were comparable to religious gatherings, as those businesses did not involve groups of people gathering for hours at a time.⁶²

Similarly, in *Cassell v. Snyders*, plaintiffs challenged an executive order that prohibited gatherings of more than ten people and encouraged houses of worship to use online or drive-in services.⁶³ Plaintiffs argued that the capacity limitations on religious services violated the Free Exercise Clause of the First Amendment; however, the court declined to enjoin the execu-

56. See, e.g., *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214 (Dist. of Md. 2020); but see, e.g., *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020).

57. *Antietam Battlefield KOA*, 461 F. Supp. 3d 214, 224 (D. Md. 2020).

58. *Id.* at 226.

59. *Id.* at 228 (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905)).

60. *Id.* at 229.

61. *Id.* at 231.

62. *Id.* at 231-32.

63. *Cassell v. Snyders*, 458 F. Supp. 3d 981, 989 (N.D. Ill. 2020).

tive order.⁶⁴ Like the court in *Antietam Battlefield KOA*, the court cited *Jacobson*, reiterating that courts only overturn rules that lack a real or substantial relation to [public health] or that amount to plain, palpable invasion of rights, and that a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.⁶⁵ With this, the court stated that the restrictions in the executive orders aligned with the principles of *Jacobson*, and it was evident that the order advanced the government's interest in reducing the spread of COVID-19.⁶⁶

In *Roberts v. Neace*, however, the United States Court of Appeals for the Sixth Circuit enjoined two executive orders that prohibited faith-based mass gatherings.⁶⁷ The first executive order prohibited all mass gatherings, and the second executive order required organizations that were not "life-sustaining" to close.⁶⁸ Religious organizations were not included in the life-sustaining category.⁶⁹ The court stated that the governor's restrictions on in-person worship services more than likely prohibited the free exercise of religion.⁷⁰ The court noted that an order that is generally applicable will more than likely be upheld, but orders that discriminate against religion are commonly invalidated because it is rare for a law to be "justified by a compelling interest and [] narrowly tailored to advance that interest."⁷¹ The court went on to find that the orders were not motivated by animus toward people of faith but that the group activities that were allowed removed the orders from being neutral and of general applicability.⁷² The court furthered found that there were other secular activities that were permissible that posed comparable public health risks, and that there were other less restrictive means that the governor could have undertaken to meet the goal of reducing the spread of COVID-19.⁷³

Similar to *Roberts*, the court in *First Baptist Church v. Kelly* granted a temporary restraining order in response to an executive order that prohibited mass gatherings of more than ten people which included churches and

64. *Id.* at 1003.

65. *Id.* at 993.

66. *Id.*

67. *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020).

68. *Id.* at 411-12.

69. *Id.*

70. *Id.* at 413.

71. *Id.* at 413 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

72. *Id.*

73. *Id.* at 414.

religious services.⁷⁴ The order allowed those performing at religious services to exceed ten people as long as the individuals followed safety protocols to reduce the spread of COVID-19.⁷⁵ In granting the temporary restraining order, the court used the analysis in *Church of the Lukumi Babalu Aye, Inc.*, reiterating that “laws burdening religion must be of general applicability” and if the law is not generally applicable then it is subject to strict scrutiny.⁷⁶ Based on this analysis, the court found that the executive order expressly targeted religion and was not facially neutral.⁷⁷ The court reasoned that the disparate treatment could be inferred from the fact that the houses of worship were subject to stricter treatment because of the nature of the activity involved rather than evidence showing that these gatherings posed a greater health risk than commercial mass gatherings or that the risks at religious gatherings could not be reduced by adhering to safety protocols.⁷⁸ The court also stated that the plaintiffs were likely to succeed in their assertion that the order was not narrowly tailored to achieve the state’s compelling interest to reduce COVID-19 spread; the court found that there were essential secular mass gatherings comparable to religious gatherings that were subject to conditions that were not as harsh.⁷⁹

Unlike the lower courts that varied in their decisions to uphold challenged governmental orders, the Supreme Court initially deferred to governmental orders that restricted mass gatherings amid the pandemic. In *South Bay United Pentecostal Church v. Newsom*, plaintiffs sought to enjoin an executive order that placed capacity limitations at places of worship to twenty-five percent of building capacity or a maximum of 100 attendees.⁸⁰ The Court declined to enjoin the order, stating “[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showing, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.”⁸¹

The Court further found that the order excluded or treated only activities that were considered dissimilar more leniently, such as grocery stores, banks, and laundromats in “which people neither congregate in large groups

74. *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1081 (D. Kan.).

75. *Id.* at 1082.

76. *Id.* at 1088.

77. *Id.* at 1089.

78. *Id.* at 1089-90.

79. *Id.*

80. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (Mem) (2020) (C.J. Roberts, concurring).

81. *Id.* (C.J. Roberts, concurring).

nor remain in close proximity for extended periods.”⁸² Likewise, in *Calvary Chapel Dayton Valley v. Sisolak*, plaintiffs sought a temporary restraining order against an executive order that reduced capacity limitations at houses of worship to no more than fifty people while some establishments were permitted to operate at fifty percent capacity.⁸³ The Court confirmed the lower court’s findings that the case was similar to *South Bay United Pentecostal Church* and held that the executive order was neutral and of general applicability and did not violated the Free Exercise Clause of First Amendment.⁸⁴

ANALYSIS

In each case where the court is presented with challenges to capacity limitations on houses of worship, the courts consistently consider whether the capacity limitations are also applicable to comparable secular gatherings in reaching their decisions. This is how the Court in *Roman Catholic Diocese of Brooklyn* confirmed the decision that the challenged restrictions were not neutral and of general applicability and were subject to strict scrutiny.⁸⁵ The Court found that a synagogue or a church in a red zone could only admit ten persons, but businesses categorized as essential in red zones (such as grocery stores, campgrounds, pet stores, and transportation facilities) could admit as many as they wish.⁸⁶ In orange zones, attendance at houses of worship could only admit twenty-five persons, and non-essential businesses could decide for themselves how many persons to admit.⁸⁷

On their face, the restrictions do appear to subject houses of worship to disparate treatment with the assumption that houses of worship are essential. However, deeper analysis of the COVID-19 spread in New York tells a different story: the capacity limitations on houses of worship in red and orange zones are necessary. Before the issuance of the Emergency Order at issue, Governor Cuomo worked with public health officials in curating an initiative called the New York’s Micro-Cluster Strategy to identify areas with increased COVID-19 spread and placing those areas under severe restrictions until viral transmission could be controlled.⁸⁸ The strategy involved identifying clusters of increased COVID-19 cases in neighborhoods

82. *Id.* (C.J. Roberts, concurring).

83. Sharp, *supra* note 3.

84. Sharp, *supra* note 3.

85. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66.

86. *Id.* at 65-66.

87. *Id.*

88. Executive Summary, *supra* note 12.

and small areas and designating those areas as red zones to contain the spread in that particular area.⁸⁹ Surrounding the red zone areas were areas identified as orange zones to prevent further spread of the red zone areas, and surrounding orange zones were areas identified as yellow zones to help prevent the spread of COVID-19 from red and orange zones.⁹⁰ Therefore, houses of worship in designated red zones were considered to be in areas with high rates of COVID-19 cases.⁹¹

Public health officials have warned the population that sitting in enclosed spaces for extended periods of time and engaging in activity that involves singing, speaking, or even breathing hard increases the risk of transmitting the coronavirus.⁹² The activity involved in synagogues and churches is essentially the very same activity that is known to transmit the virus. Yet, the Court overlooks this integral part of understanding the transmissibility of the virus as the Court looks at other establishments that involve activity that is nowhere near comparable to the same activity conducted in a synagogue or church. It is common knowledge that traffic in and out of grocery stores is constant; persons do not congregate in grocery stores for extended periods of time, and it is rare for a grocery store, on a regular day, to be so compacted that a sneeze could potentially find its way into another person's airways.⁹³

Additionally, the Court mentions that the Diocese and Agudath can accommodate up to 1000 people in conjunction with social distancing practices,⁹⁴ but so can NBA arenas and NFL stadiums. Despite the ability to do so, recent news has shown that these organizations have opted not to take that risk and have either prohibited fans from entry or substantially reduced capacity limitations.⁹⁵ With the enjoyment of Governor Cuomo's Emer-

89. *Id.*

90. Executive Summary, *supra* note 12.

91. Executive Summary, *supra* note 12.

92. Ramananda Ningthoujam, *COVID-19 Can Spread Through Breathing, Talking, Study Estimates*, CURR MED RES PRACT, May-June 2005, at 132-33.

93. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct 1613 (Mem) (C.J. Roberts, concurring).

94. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67.

95. Todd Haislop, NBA bubble, explain: A complete guide to the rules, teams, schedule & more for Orlando games, SPORTING NEWS (Aug. 26, 2020), <https://www.sportingnews.com/us/nba/news/nba-bubble-rules-teams-schedule-orlando/zhap66a9hcwq1kxmcex3ggabo>; Todd Haislop, Will there be fans at NFL games in 2020? Team-by-team attendance & ticket policies during COVID-19, SPORTING NEWS (Sept. 27, 2020), <https://www.sportingnews.com/us/nfl/news/fans-at-nfl-games-2020-covid-19-attendance-tickets/1vh5xyd47cokq17yykgepds6zi>.

gency Order, houses of worship in red and orange zones are permitted to engage in risky conduct that could potentially spread COVID-19. Consequently, Governor Cuomo's entire initiative to target clusters and restrict activity to contain the spread of COVID-19 is substantially undermined because a small portion of the cluster, houses of worship, does not have to abide by the restrictions in the Emergency Order. Accordingly, services at houses of worship could potentially act as super-spreader events if a congregant is infected.⁹⁶

That is not to say that the Court did not acknowledge the current state of the world. The Court did recognize that reducing the spread of COVID-19 was a compelling state interest, but the Court declined to recognize that the challenged regulations were narrowly tailored to achieve those interests, noting that the challenged "restrictions are more restrictive than any COVID-related regulation that have previously come before the court."⁹⁷ This may be true, but the Court neglected to acknowledge that, at the beginning of the pandemic, New York accounted for five percent of the coronavirus cases worldwide.⁹⁸ It was the efforts and initiatives of Governor Cuomo and public health officials through their daily testing and "dramatic" efforts to wipe out clusters of infections before they could spread that eventually reduced New York's infection rate to one percent, one of the lowest rates in the United States at the time.⁹⁹

However, the Court believed that the capacity limitations on the Diocese's and Agudath's religious services were more severe than necessary to prevent the spread of COVID-19.¹⁰⁰ The spread of COVID-19 is quite unpredictable. Public health experts have stated that COVID-19 symptoms may not show until almost two weeks after exposure; furthermore, some infected individuals do not show any symptoms at all but still have the abil-

96. Health and Wellness, Superspreader Events and Small Gatherings: COVID-19 Safety Tips, PENN MEDICINE (Dec. 10, 2020), <https://www.pennmedicine.org/updates/blogs/health-and-wellness/2020/december/covid-super-spreader>.

97. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67.

98. New York Has Roughly 5% of Coronavirus Cases Worldwide, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/03/22/nyregion/coronavirus-new-york-update.html>.

99. Audio & Rush Transcript: Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto, MEDIA (Oct. 9, 2020), <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-cnn-newsroom-poppy-harlow-and-jim-sciutto>.

100. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67.

ity to infect others.¹⁰¹ Therefore, it seems reasonable to implement capacity limitations on places in high-risk areas to lessen the high possibility of virus transmission; this is exactly what Governor Cuomo was trying to do and should have been afforded the broad latitude to do so.

As stated in *Jacobson*, “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”¹⁰² Governor Cuomo tried to exercise this right by placing capacity limitations on houses of worship located in red and orange zones. However, the only right the Court seemed to be concerned with was the constitutional right to freedom of religion, stating that “the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury.”¹⁰³ The Court reasoned that members of the churches and synagogues would be deprived of the right to equally attend worship services, take communion, and other activities within their faith that required personal attendance.¹⁰⁴

Agreeably, constitutional rights are sacred and represent some of the most fundamental rights that we have in a free society; however, constitutional rights are not absolute and can be regulated in certain scenarios especially when “the conduct or actions so regulated have invariably posed some substantial threat to public safety, peace, or order.”¹⁰⁵ The First Amendment right to free speech can be regulated if it is used to incite violence or imminent lawless action;¹⁰⁶ similarly, the Second Amendment right to keep and bear arms can be and is regulated to prevent firearm possession by certain people and within certain places.¹⁰⁷ Therefore, it would not be abnormal to defer to the right of state officials to regulate conduct that has a

101. Claire Gillespie, What’s the Difference Between Asymptomatic and Pre-symptomatic Spread of COVID-19? EXPLORE HEALTH (June 11, 2020), <https://www.health.com/condition/infectious-diseases/coronavirus/asymptomatic-vs-presymptomatic>.

102. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

103. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67-68.

104. *Id.*

105. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (recognizing that constitutional rights are not absolute and can be regulated if the conduct interrupts public safety), *abrogated by Holt v. Hobbs*, 574 U.S. 352 (2015).

106. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that constitutional guarantees of free speech and free speech do not permit a state to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action).

107. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (noting that the right to possess a firearm is not absolute and can be regulated in certain circumstances).

high likelihood of transmitting a virus that has killed over 400,000 people to date.¹⁰⁸

Was it truly safe to say that it was in the public interest to enjoin the Emergency Order? The Court answered in the affirmative, noting that no evidence was shown that the services in the churches or synagogues “contributed to the spread of the disease” or that “public health would be imperiled if less restrictive measures were imposed.”¹⁰⁹ To date, however, the coronavirus cases in New York have spiked since the conclusion of the case, and New York is averaging about 13,492 cases per day.¹¹⁰ Although there is no way to confirm or deny the spike came from religious services, the increased numbers show that the restrictive measures Governor Cuomo implemented in red and orange areas were necessary and in the public’s interest. The areas in question where the churches and synagogues are located have since been reclassified to yellow zones.¹¹¹ However, if Governor Cuomo needed to reimplement those capacity limitations on religious services, the power to do so has been taken away from him; this ruling is a hindrance to state officials who need to implement certain restrictions to contain the spread of the virus.¹¹²

CONCLUSION

The rationale the Court used in enjoining Governor Cuomo’s Emergency Order does not comport with our current circumstances. Action from state officials will be crucial to controlling the virus, and the Court has limited the power of state officials to implement necessary measures to ensure the virus does not continue to spread. Although our constitutional rights are sacred, they are not absolute. During a public health crisis where more than

108. Mazzei, *supra* note 10.

109. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67-68.

110. New York Coronavirus Map and Case Count, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html>.

111. Jon Campbell, New York lifts COVID restrictions in all orange zones, most yellow zones. What it means, DEMOCRAT AND CHRONICLE (Jan. 27, 2021), <https://www.democratandchronicle.com/story/news/2021/01/27/new-york-lifts-covid-restrictions-all-orange-zones-most-yellow-zones/4275589001/>.

112. Richard Wolf, Supreme Court Grants California Church’s Challenges to Coronavirus Restrictions, USA TODAY (Dec. 3, 2020), <https://www.usatoday.com/story/news/politics/2020/12/03/supreme-court-order-reverse-covid-19-limit-california-churches/3781911001/>; see California Corona-virus Map and Case Count, N.Y. TIMES (Jan. 24, 2021), <https://www.nytimes.com/interactive/2020/us/california-coronavirus-cases.html> (revealing California corona-virus rates which confirm that the state is also a COVID-19 hotspot).

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400,000 people have died and cases of the infected continue to rise, governmental orders crafted with the help of public health experts should be respected. State officials who have the knowledge and expertise in the needs of their locality should be given the broad latitude to make necessary decisions to nurse their state back to good health. State officials should not be subject to “second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.”¹¹³

113. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct 1613 (Mem) (2020). (C.J. Roberts, concurring) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905); *Marshall v. United States*, 414 U.S. 417, 427; *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 545 (2020)).