IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, a corporation sole, Plaintiff, v. **MURIEL BOWSER**, et al., Defendants.	Civil Action No. 20-3625 (TNM) ELECTRONICALLY FILED RELIEF REQUESTED BY DECEMBER 18, 2020

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Government restrictions during the COVID-19 pandemic have resulted in some hard cases, but this is not one of them. This case calls for the simple application of settled principles of law recently applied by the Supreme Court to a nearly identical case, *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Nov. 25, 2020). Here, as in that case, the government has taken direct aim at worship, the very heart of the free exercise of religion. In both cases, the government imposed a rigid numerical limit on the number of worshippers allowed at a church service, no matter how capacious the church or how many it could safely accommodate. In both cases, officials applied more flexible occupancy limits—and often *no* occupancy limits—to comparable secular conduct. And in both cases, there were less restrictive ways to protect public health; "[a]mong other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue" to ensure social distancing. *Id.* at *2. Just weeks ago, the Supreme Court found these circumstances sufficient to trigger—and flunk—the strict scrutiny required by the Free Exercise Clause, and to warrant emergency relief. The same is true here.

The District's order discriminates against religious worship. It cuts a church off at 50 worshippers no matter its size or capacity. Yet it allows more than 50 people at a time to dine indoors in many restaurants—where indoor diners may sit across a table from one another for hours, masks off and wine glasses raised—and *no occupancy caps at all* on still other venues where people often congregate and linger, including many "big box" retail stores, train stations, and fitness centers. This disparate burden triggers strict scrutiny under both the Free Exercise Clause and the Religious Freedom Restoration Act. And it cannot survive that scrutiny because there is no conceivable justification for it. As the Supreme Court held in *Diocese of Brooklyn*, numerical caps on church attendance are not the least restrictive means to protect public health.

The District has many less restrictive ways to protect public health while respecting religion, including by using the capacity-based restrictions (instead of hard numerical caps) now applied to indoor dining and other secular activities. Indeed, both Virginia and Maryland have adopted policies that allow Masses to be safely conducted without the irrational 50-person cap imposed here. Plaintiff's churches have safely celebrated thousands of Masses with more than 50 people over many months—in dense population centers bordering the District—without a single outbreak traced to any Mass. The District cannot show a compelling need to ban the same Masses that are held just a short hop over the Maryland border, or across the river in Arlington.

In First Amendment cases, the likelihood of success on the merits alone justifies relief, but here the equitable factors point in the same direction. The deprivation of free exercise for any period—let alone the deprivation of worship, at one of Plaintiff's highest holy days—is a *per se* irreparable harm. And it is not outweighed by any public interest since Plaintiff's conduct has never been found to cause the harm the Mayor purports to target. Plaintiffs are entitled to relief.

To allow sufficient time to plan and celebrate Christmas Mass, and for appellate review if necessary, **the Archdiocese respectfully requests that the Court resolve this motion by December 18**. The Archdiocese recognizes that this request seeks highly expedited action by the Court, but unfortunately such a request has become unavoidable. In recent weeks, the Archdiocese has worked diligently outside of court in the hope that the District would grant relief from these unlawful requirements, but to no avail. Even the Supreme Court's recent decision rejecting such measures—*Roman Catholic Diocese of Brooklyn v. Cuomo*—has not caused the District to reconsider. Now, with Christmas fast approaching, the Archdiocese has no choice but to seek expedited relief from this Court, to ensure that it may exercise its

constitutional right to freely practice its religion in the holy season of Advent, with Christmas—one of its most important holy days—fast approaching.

BACKGROUND

A. The Archdiocese of Washington

The Archdiocese of Washington is one of the largest dioceses of the Catholic Church in America. Under civil law, the Archdiocese is a corporation sole established by a 1948 Act of Congress, with 501(c)(3) nonprofit status. It serves 655,000 Catholics in the District and in five surrounding Maryland counties. *See* Declaration of Fr. Daniel Carson ("Carson Decl.") ¶ 5. As part of its religious mission, the Archdiocese offers Mass and other Sacraments every day of the year, with particular significance given to Mass offered on Sundays and certain Holy Days, including Christmas. *Id*. ¶¶ 9, 12, 13. In addition, the Archdiocese engages in various corporal and spiritual works of mercy for Catholics and non-Catholics alike in the D.C. area. *Id*. ¶ 6. Its 91 schools serve 24,000 students in all financial conditions, from all backgrounds, and of any or no faith. *Id*. ¶ 7. And to make its schools available to as many as possible, the Archdiocese awards $6 million in tuition assistance to students in need each year. *Id*. The Archdiocese also provides legal and financial services, food, shelter, and healthcare. *Id*. ¶ 6. Its various programs and ministries are all motivated by the Catholic faith central to its identity. *Id.* Therefore, in addition to performing corporal and spiritual works of mercy, the Archdiocese meets the religious needs of its community by providing opportunities to engage in religious worship and ensuring the regular availability of Mass and the sacraments to all Catholics living in and visiting the D.C. area. *Id*. ¶ 8.

For the Archdiocese, "[t]he Sunday celebration of the Lord's Day and his Eucharist is at the heart of the Church's life," *id*. ¶ 9 (quoting Catechism of the Catholic Church § 2177)—not only a gathering of people, but an action of the gathered people together with Christ, *id.* "The

celebration of Mass … is the center of the whole of Christian life for the Church both universal and local, as well as for each of the faithful individually. For in it is found the high point both of the action by which God sanctifies the world in Christ and of the worship that the human race offers to the Father, adoring him through Christ, the Son of God, in the Holy Spirit." *Id*. (quoting General Instruction of the Roman Missal at 16).

"This practice of the Christian assembly dates from the beginnings of the apostolic age" and is reflected in the Letter to the Hebrews, which instructs the faithful "not to neglect to meet together." *Id*. ¶ 11 (quoting Catechism of the Catholic Church § 2178 (quoting Hebrews 10:25)). In other words, these practices cannot be adequately replicated by remote means, and in fact, congregants cannot participate in many practices and sacraments, such as partaking in the Eucharist, except in person. *Id*. ¶¶ 10, 11 (quoting Catechism of the Catholic Church § 2179 ("[One] cannot pray at home as at church, where there is a great multitude, where exclamations are cried out to God as from one great heart, and where there is something more: the union of minds, the accord of souls, the bond of charity, the prayers of the priests.").

As a result, the celebration of Sunday Mass in person is "the foremost holy day of obligation in the universal Church." *Id*. ¶ 12 (quoting Catechism of the Catholic Church § 2177). In addition to Sunday Masses each week, the Catholic Church offers Mass every day of the year. *Id.* ¶ 13. Catholics also attend Mass on certain holy days of obligation, including Christmas *Id*. (quoting Code of Canon Law, Canon 1246, § 2).

B. The Archdiocese's efforts to combat COVID-19

As the COVID-19 pandemic hit Washington, D.C. in March 2020, the Archdiocese—on its own initiative and out of concern for its flock and love for its neighbors—temporarily cancelled public Mass and suspended the religious obligation to attend Mass in person. *Id*. ¶ 14. The Archdiocese also shut down in-person education in its religious schools, even though its

educational ministries are central to its religious mission and to thousands of the District's children. *Id*.

At the same time, recognizing the growing need in its communities, the Archdiocese redoubled its efforts to serve the District's most vulnerable residents, particularly through Catholic Charities and the Archdiocese's various parish ministries. For example, Catholic Charities' food pantry in Columbia Heights now serves 650 people a week—more than sixteen times the number of people served before the COVID-19 crisis began. *Id*. ¶ 15.

In June 2020, after the District entered "Phase Two" of its reopening, the Archdiocese resumed public Masses in full compliance with the Mayor's Orders. *Id.* ¶ 16. Since then, the Archdiocese has continued to fully comply with all government regulations and gone above and beyond such requirements in order to protect public health. *Id.* The Archdiocese reviewed current guidance from the World Health Organization and the U.S. Centers for Disease Control and Prevention in crafting health and safety protocols. *Id.* ¶ 17. The Archdiocese also relied on the *Road Map to Re-Opening our Catholic Churches Safely*, a document created by doctors at some of the nation's top research hospitals and universities and submitted to the U.S. Conference of Catholic Bishops. *Id.*

Following the science, the Archdiocese instituted rigorous social distancing and hygiene measures for all in-person worship services. Among other protocols, the Archdiocese reconfigured worship spaces to use every other pew and required 6 feet of space between individuals or groups who did not arrive together; mandated the use of masks or face coverings during worship services; discontinued the use of choirs during worship services; created indoor traffic plans and entry and exit plans to maintain social distancing before, during, and after Mass—including during the distribution of Holy Communion; sanitized and disinfected worship

spaces after each liturgy; and encouraged the use of reservation systems for scheduling attendance at each Mass. *Id*. ¶ 18.

The Archdiocese's extensive efforts have worked. Over the past five months in which thousands of public Masses have been celebrated, no COVID outbreaks have been linked to the celebration of public Mass in Catholic churches in the District. *Id*. ¶ 20. In fact, Archdiocesan churches have been celebrating public Masses in Maryland for four months without numerical caps like those in the District and have had no known COVID outbreaks linked to Mass there either. *Id.* ¶ 21. The same is true in the neighboring Diocese of Arlington, where the government also does not impose numerical caps on Mass. *Id.* ¶ 22. This experience has been confirmed by a scientific study where three infectious disease experts reviewed more than one million public Masses held across the nation in the time since Catholic churches reopened during the pandemic. The infectious disease experts concluded that wherever the protocols described in the *Road Map to Re-Opening* were followed, there was not a single documented outbreak of COVID-19 linked to church attendance. *See* Ex. B-10.

C. D.C.'s uniquely harsh restrictions on houses of worship

Beginning in March, the Mayor issued governmental orders to respond to the COVID-19 pandemic. On March 11, the Mayor issued Mayor's Orders 2020-045 and 2020-046 declaring public emergencies due to COVID-19. Ex. B-1; Ex. B-2. On March 24, more than a week after the Archdiocese voluntarily suspended public Masses, the Mayor closed all non-essential businesses and forbade gatherings of 10 or more people in one confined or outdoor space. Ex. B-3 at 2-3, 7. Though the March 24 Order did not discuss houses of worship, an "Additional Questions" posted on the same webpage stated that "large gatherings of ten or more people are prohibited, so as a practical matter, most churches are not holding services." Ex. B-7 at 11.

At the same time, the Mayor's March 24 Order stated that "[a]ll Essential Businesses are strongly encouraged to remain open." Ex. B-3 at 3. "Essential Businesses" included liquor stores, laundromats, grocery stores (including big-box stores that sell groceries alongside other items), and medical marijuana "dispensaries" and "cultivation centers." *Id*. at 4-5. For these "Essential Businesses," the Mayor declined to establish any capacity limits and merely encouraged them to implement social distancing and staggered shifts for their employees. *Id.* at 4. The Mayor's webpage indicated that "big box stores" were permitted to have "more than ten people … in them at once" and need only "make efforts to preserve a safe distance between customers." Ex. B-7 at 12. Thus, the Mayor's March regulations placed no hard, numerical restrictions on "essential" businesses such as big-box stores or medical marijuana dispensaries and cultivation centers, but limited the number of people allowed in houses of worship to ten, regardless of capacity.

On June 19, the Mayor issued Mayor's Order 2020-075 and announced that the District was entering Phase Two of its reopening. Ex. B-4 at 1-2. Under Phase Two rules, religious gatherings at houses of worship were singled out for special treatment and capped at the lesser of 100 people or limited to 50% capacity. *Id.* at 6. But "essential businesses" continued to face no capacity-based restrictions. *Id*. And non-essential retail businesses, personal service businesses (including tattoo parlors, nail salons, and tanning facilities), restaurants, and public libraries were also allowed to open subject only to capacity-based limits, without fixed numerical caps. *Id.* at 3-5. To enforce these regulations, Mayor's Order 2020-075 also provided that those who "knowingly violate[]" the District's restrictions "may be subject to civil and administrative penalties authorized by law," including civil fines of $1,000 per violation. *Id*. at 11; *see* D.C.

Code § 7-2307. After the District entered Phase Two, the Archdiocese resumed public Masses in full compliance with the relevant Orders.

On October 9, this Court ordered the District to allow Capitol Hill Baptist Church to hold outdoor religious services without any numerical cap. *See Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710, 2020 WL 5995126, at *2 (D.D.C. Oct. 9, 2020). The District later updated its Phase Two guidance for houses of worship to reflect that the 100-person cap would not be enforced on outdoor gatherings held by houses of worship. Ex. B-12 at 1. But the uniquely harsh restrictions on indoor religious worship remained in place.

On November 23, the Mayor issued Mayor's Order 2020-119, which "modified" Phase Two rules and will remain in effect at least until December 31. Ex. B-5 at 1, 4. Under Mayor's Order 2020-119, houses of worship continue to be singled out for disfavored treatment and face even stricter numerical caps. Specifically, the new rules limit attendance at worship services to the lesser of 50 people or 50% of occupancy. *Id.* at 3; *see also* Ex. B-6 at 1. Meanwhile, restaurants, public libraries, nail salons, tattoo parlors, and other non-essential businesses face no hard numerical caps—they are permitted to operate with only capacity-based limits. Ex. B-4 at 3-5; Ex. B-5 at 2. Even fitness centers are allowed to have more than 50 people exercising indoors, as long as they have enough space for social distancing. *See* Ex. B-4 at 7. And "essential" businesses—including laundromats, liquor stores, and certain big-box retail stores—are subject to *no* occupancy caps at all. *See* Ex. B-3 at 3-6.

The result of this regulatory scheme is that churches are subject to uniquely harsh attendance limits. While half of the Archdiocesan churches in the District can accommodate 500 or more—and the nation's largest Catholic Church, the Basilica of the National Shrine of the Immaculate Conception, can seat thousands—they are nevertheless capped to 50 people. *See*

Carson Decl. ¶ 30; Ex. A-1. These new restrictions coincide with the holy season of Advent and Christmas, effectively barring many Catholics from celebrating Mass and receiving the sacraments during one of the most important religious observances of the year. *Id.* ¶ 35.

D. D.C. rejects the Archdiocese's requests for relief.

For months, the Archdiocese has diligently tried to work with the government to allow for the safe reopening of churches. Carson Decl. ¶ 24. During the District's "Phase I" in May and June, when all worship gatherings were prohibited, the Archdiocese sought a waiver for several parishes, which was denied. *Id*. The Archdiocese also sought a one-time waiver to host ordinations at the Basilica at no more than 10% occupancy on June 20—just days before the District entered Phase 2. *Id.* ¶ 25. That was also denied. *Id.*

On October 22, after several months of COVID-free Masses in D.C.—and several months of COVID-free Masses in nearby jurisdictions without numerical attendance caps—the Archdiocese again approached the District about lifting the numerical cap on Mass attendance. *Id.* ¶ 26; Ex. B-8 at 1. The Archdiocese emphasized the need for relief in time for the holiday season including Thanksgiving, the holy season of Advent, and Christmas. Carson Decl. ¶ 26; Ex. B-8 at 3. City officials eventually agreed to a conference call on October 29 to hear the Archdiocese's concerns and pledged to get back to the Archdiocese quickly. Carson Decl. ¶ 27. Despite multiple emails and calls, however, the government gave no further response. *Id.* ¶ 28. Instead, on November 23 (the Monday before Thanksgiving), Mayor Bowser announced at a press conference that restrictions on worship would be tightened to a 50-person limit, regardless of the size of the church. *Id.* ¶ 29. Later that evening, the Supreme Court decided *Roman Catholic Diocese of Brooklyn*.

On December 7, the Archdiocese again asked the District to lift the numerical cap on worship and instead use the kind of capacity-based regulations that govern other activities, such

as indoor dining, shopping, and personal services. *Id.* ¶ 32; Ex. B-9 at 1. The Archdiocese pointed out that the Supreme Court has now confirmed that capacity-based limits are a less restrictive alternative to numerical caps, making the City's policy plainly illegal under RFRA and the First Amendment. Carson Decl. ¶ 32; Ex. B-9 at 1, 5-7. On December 10, several City officials participated in a conference call with the Archdiocese. Carson Decl. ¶ 33. When asked, City officials did not indicate that they were aware of any Catholic Masses that were responsible for any COVID spread, and they admitted that the Archdiocese has been "conscientious." *Id*. But the government nevertheless refused to remove the cap. *Id.* ¶ 34. With only two weeks remaining until Christmas, the Archdiocese filed this suit the next day.

ARGUMENT

A TRO or preliminary injunction may be granted based on four factors: (1) the plaintiff is likely to succeed on the merits; (2) it will likely suffer irreparable harm absent interim relief; (3) the balance of equities tip in its favor; and (4) interim relief serves the public interest. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016); *Melton v. District of Columbia*, 46 F. Supp. 3d 22, 25 (D.D.C. 2014). When First Amendment rights are at stake, "the likelihood of success 'will often be the determinative factor.'" *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). Here every factor supports relief.

I. THE ARCHDIOCESE IS LIKELY TO SUCCEED ON THE MERITS

The Archdiocese is likely to prevail under RFRA and the Free Exercise Clause. Both require strict scrutiny, which is fatal to the District's arbitrary 50-person cap for indoor worship.

A. Both RFRA and the Free Exercise Clause require strict scrutiny here

1. RFRA requires strict scrutiny because the Order substantially burdens religious exercise

As the Supreme Court and this Court have recognized, the Religious Freedom Restoration Act provides "very broad protection[s] for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693-94 (2014); *see Capitol Hill Baptist*, 2020 WL 5995126, at *4. RFRA bars the government from "substantially burden[ing] a person's exercise of religion" unless it can satisfy strict scrutiny by "demonstrat[ing] that application of the burden to the person" is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1; *see also id.* § 2000bb-2(2) (covering the District). Because Congress found that "laws 'neutral' toward religion may burden religious exercise as surely as laws" targeting religion, the same scrutiny applies even if the law creating the substantial burden does not *discriminate* against religion. *Id.* §§ 2000bb, bb-1.

By its terms, RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000cc-5(7)(A), 2000bb-2(4) (emphasis added). An "exercise of religion" is any "religiously motivated *conduct*," which includes "assembling with others for a worship service" and "participating in sacramental use of bread and wine." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (cleaned up); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013) (rejecting "an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs") (emphasis in original).

Here, there is no question that the District's ban on Masses with more than 50 people substantially burdens the exercise of religion. As this Court has observed, worship services are the paradigmatic example of religious exercise safeguarded by RFRA. *See Capitol Hill Baptist*, 2020 WL 5995126, at *5-6. For Catholics, in particular, Mass is among the most important

aspects of religious practice. The Catholic Church offers Mass every day of the year. See Carson Decl. ¶ 13. Church teaching puts "[t]he celebration of Mass" at "the center of the whole of Christian life for the Church both universal and local, as well as for each of the faithful individually." *Id.* ¶ 9 (quoting General Instruction of the Roman Missal at 16). Sunday Mass is especially important, as "the foremost holy day of obligation in the universal Church." *Id.* ¶¶ 9, 12 (quoting Catechism of the Catholic Church § 2177). Christmas Mass, too, is a holy day of obligation, celebrating an event central to the faith—the birth of Christ. *Id.* ¶ 13 (citing Code of Canon Law, Canon 1246, § 2).

Moreover, there is no substitute for holding and attending Mass *in person*. Scriptures instruct Catholics "not to neglect to meet together," and Catholics understand the Mass as "an action of the gathered people together with Christ." *Id.* ¶¶ 10-11 (quoting Catechism of the Catholic Church § 2178 and General Instruction of the Roman Missal at 16); *cf. Capitol Hill Baptist*, 2020 WL 5995126, at *5 (recognizing the importance that another Christian faith places on in-person gatherings); *Diocese of Brooklyn*, 2020 WL 6948354, at *3 (noting "important religious traditions in the Orthodox Jewish faith that require personal attendance"). After all, it is through personal attendance at Mass that Catholics receive the Eucharist—the "source and summit of the Christian life." Carson Decl. ¶ 10 (quoting Catechism of the Catholic Church § 1324 (quoting *Lumen Gentium*, The Dogmatic Constitution of the Church (Nov. 21, 1964))). Alternatives to in-person Mass, such as "remote viewing," simply are "not the same as personal attendance" because "Catholics who watch a Mass at home cannot receive communion." *Diocese of Brooklyn*, 2020 WL 6948354, at *3. Quite simply, holding and attending Mass is central to Catholics' religious exercise. Accordingly, the Archdiocese believes that it has a religious duty

to offer Mass for more of the public now that it has a developed a safe protocol for doing so. Carlson Decl. ¶ 12.

The Mayor's Order substantially burdens religious exercise by making it practically impossible for the Archdiocese to hold Mass for the vast majority of its flock. Substantial burdens exist whenever the government imposes substantial penalties on religious adherents for engaging in sincere religious practice. *Hobby Lobby*, 573 U.S. at 726; *Capitol Hill Baptist*, 2020 WL 5995126, at *5-6; *see also, e.g.*, *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) (government substantially burdens religious exercise when it "prevents participation in conduct motivated by a sincerely held religious belief," or "places substantial pressure on an adherent . . . not to engage in conduct motivated by a sincerely held religious belief").

The Mayor's Order does that. It flatly prohibits the Archdiocese from holding its ordinary religious services under threat of substantial penalties, including fines of $1,000 per violation. Ex. B-5 at 3; D.C. Code § 7-2307. And compliance creates more than a substantial interference with religious exercise: Under the 50-person cap that the Order imposes on churches that would ordinarily serve hundreds or thousands at once, the Archdiocese cannot hold—and many parishioners cannot attend—Masses they believe spiritually crucial. Carson Decl. ¶¶ 12, 34. Nor can the Archdiocese provide—or many parishioners receive—the Eucharist that is the "source and summit" of Christian life. *Id.* ¶ 10. Indeed, "by effectively barring many from attending religious services," the Order "strike[s] at the very heart of" free exercise. *Diocese of Brooklyn*, 2020 WL 6948354, at *3; *see also Capitol Hill Baptist*, 2020 WL 5995126, at *6 (finding a substantial burden where a 100-person limit on worship services prevented a church from meeting as its faith required); *Sherbert v. Verner*, 374 U.S. 398, 404, 406 (1963) (finding a

substantial infringement where the "effect of a law is to impede the observance of one or all religions") (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

It makes no difference whether the Mayor thinks Catholics could exercise their faith in other ways, such as the "[v]irtual services" "encouraged" by the Order as substitutes. Ex. B-5 at 3. The question is "whether the government has substantially burdened religious exercise . . . not whether [the Church] is able to engage in other forms of religious exercise." *Capitol Hill Baptist*, 2020 WL 5995126, at *5 (quoting *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015)). Nor does this inquiry permit any second-guessing of the importance of Plaintiff's religious commitments. RFRA protects "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000cc-5(7)(A), 2000bb-2(4) (emphasis added). If a government threatens religious believers with substantial penalties for sincere religious practice, "it is not for [the courts or the Mayor] to say that their religious beliefs are mistaken or insubstantial." *Hobby Lobby*, 573 U.S. at 725. The court's "narrow function" is to see if the practice at issue reflects the plaintiff's "honest conviction"—which it indisputably does here. *Id.* (citation omitted).

By substantially burdening religious exercise, the Mayor's orders would trigger strict scrutiny under RFRA even if they did not discriminate against religion. 42 U.S.C. § 2000bb-1.

2. The Free Exercise Clause requires strict scrutiny because the Order is not neutral or generally applicable

The First Amendment forbids the government to disfavor religious exercise— including "assembling with others for a worship service," *Cutter*, 544 U.S. at 720—relative to secular activity. So any "law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). A law is not neutral or generally applicable if, for example, it "discriminate[s] on its face," *id.* at 533; "targets religious conduct for distinctive treatment," *id.*

at 546; or treats religious practices worse than comparable secular activities, *see id.* at 537-38, 542-43. "Neutrality and general applicability are interrelated," and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531.

The disparity here is clear in light of the Supreme Court's recent decision in *Diocese of Brooklyn*, which enjoined New York's hard numerical caps on churches in areas deemed to pose a high risk of spreading COVID. 2020 WL 6948354, at *1. As the Court held, those caps were not neutral or generally applicable "because they single[d] out houses of worship for especially harsh treatment" compared to similar secular venues. *Id.* In particular, businesses deemed "essential" were allowed to admit "as many people as they wish," including at manufacturing plants, large retail stores, transportation facilities, garages, campgrounds, and acupuncture facilities. *Id.* at *2. So while hundreds of people could go shopping together at "a large store," they could not go to church. *Id.* That disparate treatment triggered strict scrutiny. *Id.*

The disparity is even more striking here. While imposing a hard 50-person cap on churches, the Order imposes *no* occupancy limits on a category of "essential" businesses that includes not only the large retail stores and transportation facilities that the Court relied on in *Diocese of Brooklyn*, 2020 WL 6948354, at *2, but also, for example, "medical marijuana dispensaries." Ex. B-3 at 3-5. Even more troubling, the District treats churches worse than "*non*-essential" establishments like restaurants, public libraries, nail salons, and tanning facilities. Instead of hard caps, these entities enjoy more flexible limits based on a percentage of their maximum capacity. Ex. B-4 at 3-5; Ex. B-5 at 2. And even fitness centers are allowed to have more than 50 people exercising together indoors if they have enough space for social distancing. Ex. B-4 at 7. For the District, then, religious worship is worse than non-essential. Yet it is religion that the Constitution protects. *Cf. Diocese of Brooklyn*, 2020 WL 6948354, at *7

("[T]here is no world in which the Constitution tolerates . . . executive edicts that reopen liquor stores . . . but shutter churches, synagogues, and mosques.") (Gorsuch, J., concurring).

Restaurants are perhaps the most glaring example of the District's discrimination against religious exercise. Freed of the hard 50-person cap imposed on churches, restaurants may host indoor diners up to 25% of their capacity, whatever it is. Ex. B-5 at 2. Yet indoor dining at restaurants poses a far *greater* risk of COVID spread: Patrons sit across the table from each other while eating and drinking without wearing masks. Many consume alcohol. And they often linger together at meals for far longer than the duration of a typical Mass. *See* Carson Decl. ¶ 19.

In practice, this disparity allows restaurants to pack far more people into smaller spaces. To name a few examples, Le Diplomate ordinarily seats 310, Old Ebbitt Grill seats 550, Carmine's seats 700, and the Hamilton ordinarily seats 1,000. *See* Ex. B-11 at 1. These restaurants are allowed to invite between 77 and 250 people to dine indoors at the same time. By contrast, the Archdiocese cannot have 51 people in any church, even though half its churches can hold more than 500 worshippers, and St. Matthew's Cathedral can hold 1,000. Carson Decl. ¶ 30; Ex. A-1. The Basilica of the National Shrine of the Immaculate Conception accommodates more than 3,000 people under a ceiling more than 100 feet high, in a 129,912 square-foot interior large enough to fit the Statue of Liberty. Carson Decl. ¶ 30. There the 50-person cap mandates a 2,598 square-foot space for each worshipper—more than half a basketball court, or more than 50 feet of social distancing. *Id.* But if the Basilica began serving meals instead of offering Holy Communion, the District's 25% rule would allow it to host more than 750 people, all free to eat and drink together without masks.

This discrimination against religion, even more blatant than in *Diocese of Brooklyn*, clearly triggers strict scrutiny. 2020 WL 6948354, at *2 (quoting *Lukumi*, 508 U.S. at 546).

3. The Free Exercise Clause requires strict scrutiny because the Order interferes with religious worship

Even if the Mayor's orders did *not* discriminate against religion, they would trigger strict scrutiny under the Free Exercise Clause because they have the effect of interfering with not just any sort of religious exercise, but a particularly central form: worship. *See Diocese of Brooklyn*, 2020 WL 6948354, at *3 (if a law "effectively bar[s] many from attending religious services," it "strike[s] at the very heart of the First Amendment's guarantee of religious liberty."). This conclusion follows from the text, history, and tradition of the Free Exercise Clause.

The text protects the "exercise of religion," of which "worship" is a core part. Dr. Johnson defined "exercise" to include an "Act of divine worship whether publick or private." Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1114 n.23 (1990) (quoting Samuel Johnson, A Dictionary of the English Language (Phila. ed. 1805)). Likewise, two central targets of the Establishment Clause were "compulsory church attendance" and "prohibitions on worship in dissenting churches." Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2131 (2003); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2096 (2019) (Thomas, J., concurring) ("punish[ing] dissenting worship" forbidden by Religion Clauses). Both Religion Clauses thus place worship at the heart of "exercise."

So does historical context. The state constitutional provisions on which the Amendment was modeled specifically protected "worship." *See, e.g.*, N.Y. Const., art. XXXVIII (1777); ("the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed"); Pa. Const., art. I, § 2 (1776) (forbidding authorities to "in any case interfere with, or in any manner controul, the right of conscience in

the free exercise of religious worship"); N.H. Const., art. I, § 5 (1784) (guarding each person's "right to worship God according to the dictates of his own conscience, and reason").

As Professor McConnell sums up the evidence, "[i]t is extremely unlikely" that the Founders "would have countenanced an interpretation" allowing "government to dictate matters of worship to the church . . . ." Michael W. McConnell, Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in *City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819, 847 (1998). *See also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2284 (2020) (Breyer, J., dissenting) (Founders "came to believe 'with a passionate conviction that they were entitled to worship God in their own way[.]'" (quoting C. Radcliffe, The Law & Its Compass 71 (1960)). And that was no less true when the Fourteenth Amendment was adopted. *See* Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol'y 821, 832 (2012) ("People have a right to say how they will worship, what they will worship, and with whom they will worship") (quoting Sen. Morton).

Indeed, the Supreme Court has repeatedly recognized that "worship in the churches" enjoys "high estate under the First Amendment," *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943); that "our constitutional scheme" forbids the state to "regulate, or in any manner control sermons delivered at religious meetings," *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953); and thus that "freedom[ ] of . . . worship" may be curbed "only to prevent grave and immediate danger to interests which the state may lawfully protect," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). Even when it applied less scrutiny to neutral and generally applicable laws, the Court reaffirmed that it would "doubtless be unconstitutional" to ban particular activities undertaken "for worship purposes." *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877-78 (1990). And just weeks ago, the Court applied this enduring principle to

numerical caps that "strike at the very heart of the First Amendment's guarantee of religious liberty." *Diocese of Brooklyn*, 2020 WL 6948354, at *3.

Simply put, a law that restricts worship on pain of legal penalty prompts the most rigorous scrutiny, whether or not it targets religion. Text, history, and tradition demand nothing less. The Mayor's orders flatly prevent countless Archdiocesan parishioners from assembling for worship as Catholics have done for millennia. For this reason, and not only because of their disparate treatment of religion, the Mayor's orders must undergo strict scrutiny.

B. The Order cannot survive strict scrutiny

To survive strict scrutiny, the District bears the burden to establish that its rigid 50-person cap on Mass attendance is "narrowly tailored" to advance a "compelling" state interest. *Lukumi*, 508 U.S. at 546. Under RFRA, in particular, the Mayor must show that "application of the [Order] to" Plaintiffs "is the *least restrictive means* of furthering" such an interest. 42 U.S.C. § 2000bb-1(b) (emphasis added). This is an "exceptionally demanding" test, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)—indeed, "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), ensuring that "only those interests of the highest order and those not otherwise served" can justify religious coercion, *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). And it is the District's burden to show that the orders clear this hurdle—not just by arguments, but by evidence sufficient to overcome any evidence on the other side. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 427-28 (2006) ("[RFRA's] term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion").

That burden would be hard to carry in any case. It would be especially hard to shoulder for an order as gerrymandered as the District's. And carrying that burden is *impossible* in the wake of the Supreme Court's squarely controlling decision in *Diocese of Brooklyn*.

1. The District has no compelling interest in imposing a rigid 50-person cap on Mass attendance

There is no doubt that the District has a compelling interest in protecting public health and fighting the COVID pandemic, broadly defined, and indeed the Archdiocese is strongly supportive of those goals. But under strict scrutiny, courts must "look[ ] *beyond* broadly formulated interests" to "examine" if there is compelling need to apply this "specific" burden—a 50-person cap on church attendance, regardless of church capacity. *O Centro*, 546 U.S. at 431 (quoting *Yoder*, 406 U.S. at 213) (emphasis added). For two reasons, the District cannot show with "particularity how its admittedly strong interest . . . would be adversely affected" without a hard cap of 50 worshippers on the Archdiocese. *Id.* (quoting *Yoder*, 406 U.S. at 236).

First, it is well-established that an "interest . . . is not compelling" if the government limits constitutionally protected conduct while "fail[ing] to enact feasible measures to restrict other conduct producing . . . alleged harm of the same sort." *Lukumi*, 508 U.S. at 546-47. Yet here the District has done just that. While the District imposes a rigid 50-person cap on all churches, regardless of size or capacity, it applies only the more flexible, capacity-based limits—or no occupancy limits *at all*—to public libraries, big-box retail stores, train and metro stations, restaurants, offices, tattoo parlors, nail salons, laundromats, liquor stores, and marijuana dispensaries. *See* Ex. B-5 at 3; *supra* at 8. Indeed, the Mayor has encouraged many of these venues to stay open through the pandemic. *Id.* Yet employees and patrons spend hours at each.

Notably, for example, indoor diners at restaurants (including up to hundreds at a time, in D.C.'s larger restaurants, *see supra* at 16) talk to one another in close quarters, without masks, often for hours at a time. And they are free until 10:00 p.m. to consume alcohol—which by the Mayor's own admission makes them "less compliant with rules regarding social distancing and staying seated." Ex. B-5 at 2. From a public-health perspective, then, "[e]verything th[at could be

said] about [worship] applies in equal measure," *O Centro*, 546 U.S. at 433, if not greater measure, to indoor dining. Yet only the churches are subjected to a 50-person cap that is blind to their actual capacity. Under *Lukumi*, the District cannot establish a "compelling" need for the 50-person cap since it does not impose any such cap in venues where the public-health risks are equal or greater. 508 U.S. at 547. This alone is enough to doom the Order under strict scrutiny.

Second, the District cannot show any compelling need for the 50-person cap because there is no evidence of Masses causing *any* significant harm *without* the cap. Here, as in *Diocese of Brooklyn*, there has "not been any COVID–19 outbreak in any of the [Archd]iocese's churches since they reopened." 2020 WL 6948354, at *2 (citation omitted). That is, neither the Archdiocese nor the District is aware of a single outbreak from any of the thousands of public Masses celebrated over the last five months. Carson Decl. ¶¶ 20, 32. That includes all the Masses celebrated after reopening but before the 50-person cap was imposed. *Id*. ¶ 20. It includes Masses that the Archdiocese has celebrated for many months (and continues to celebrate) in its many Maryland churches, which face no hard occupancy cap. *Id*. ¶ 21. And the Archdiocese regularly communicates with at least five neighboring dioceses (covering all of Maryland, Virginia, Delaware, and West Virginia) and is unaware of any outbreaks occurring in Catholic churches in any of those jurisdictions—all of which operate without hard caps. *Id.* ¶¶ 22, 23.

This record is no surprise, given the extensive health measures taken by the Archdiocese: requiring masks; using every other pew and keeping six feet between families; creating traffic plans to keep distance during Communion; eliminating choirs; using reservations to schedule limited attendance at each Mass; adding Masses to the schedule to space out congregants; disinfecting churches after each Mass; and asking exposed or symptomatic congregants to stay home. *Id*. ¶ 18. *Cf. Diocese of Brooklyn*, 2020 WL 6948354, at *4 ("No apparent reason exists

why people may not gather [in churches], subject to identical restrictions, . . . when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of 'essential' businesses and perhaps more besides.") (Gorsuch, J., concurring).

The District bears the burden to show a compelling interest under "the circumstances of this case," not in the abstract. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (emphasis added). And under the conditions described above, it cannot establish *any* interest—much less a compelling one—in maintaining its "especially harsh treatment" of the Archdiocese's churches. *Diocese of Brooklyn*, 2020 WL 6948354, at *1.

2. The Order is not the least restrictive means of protecting public health

The District's Order also fails strict scrutiny because it is not the "least restrictive means" of combating the spread of COVID. That is proven by the District's regulations of other, comparable entities; and by the regulations of churches themselves in other jurisdictions near and far. These regulatory benchmarks, set by those with "special expertise and responsibility" for public health under our Constitution, *Diocese of Brooklyn*, 2020 WL 6948354, at *3, prove decisively that the District's regulation of churches is far from the least restrictive means to protect public health.

First, and conclusively, the Supreme Court has held that there *are* less-restrictive means because "the maximum attendance at a religious service could be tied to the size of the church." *Id.* at *2. That sentence was dispositive in *Diocese of Brooklyn*, and it is equally fatal to the District's Order. Here there can be *no doubt* that size- and capacity-based caps are feasible, since those are the alternatives that the District is *actually using* for restaurants, public libraries, fitness centers, nail salons, and other personal-service businesses. *Supra* at 8. If size- and capacity-based

limits are good enough for those entities, there is "[n]o apparent reason" they cannot work for churches. *Diocese of Brooklyn*, 2020 WL 6948354, at *4 (Gorsuch, J., concurring). "It is hard to believe that admitting more than [50] people to a 1,000–seat church . . . would create a more serious health risk," *id.* at *2, than allowing 250 people to have an alcohol-fueled banquet in a 1000-person restaurant without masks.

The gratuitous nature of the Order's limits on churches is even more apparent in light of the District's refusal to place *any* occupancy limits on offices, laundromats, liquor stores, marijuana dispensaries, bus, train or metro stations, or many big-box retail stores. *See* Ex. B-3 at 3-5, 7 (defining laundromats, liquor stores, marijuana dispensaries, railways, and many big-box retail stores as "essential businesses" with no caps, and exempting offices and bus, train, or metro stations from "large gathering" restrictions). As in *Diocese of Brooklyn*, it is "troubling" here that "a large store . . . could literally have hundreds of people shopping there on any given day" while a "church or synagogue would be prohibited from allowing more than [50] inside for a worship service," whatever its size. 2020 WL 6948354, at *2 (internal quotation marks omitted). If the District can allow large stores to operate without any occupancy limit *at all* consistent with public health—by encouraging or requiring mask-wearing and social-distancing—surely it can afford to let worshippers proceed under the capacity-based limits applied to the denizens of restaurants, libraries, tattoo parlors, and nail salons.

Second, in looking for less restrictive alternatives, the Supreme Court has used other jurisdictions as benchmarks, teaching that if "many" other states and cities have advanced an interest by less restrictive means, the government "must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt*, 574 U.S. at 369. Yet here, as in

Diocese of Brooklyn, the challenged restriction on churches is "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic." 2020 WL 6948354, at *2.

As of the last week in November, when the Order took effect, "32 states had *no capacity limit* on indoor, in-person worship"; of the minority that do, most "do not use numerical caps, and in the few that do, almost none are as low as the District's 50-person cap." Ex. B-9 at 4. "That so many other [jurisdictions]" give churches more leeway "while ensuring [health] safety . . . suggests that the [District] could satisfy its [health] concerns through a means less restrictive" than a hard 50-person cap. *Holt*, 574 U.S. at 368-69.

Any doubt about that is eliminated by the proven record of less-restrictive means in Maryland and Virginia. In Maryland's Montgomery and Prince George's Counties, services are subject to a 25% capacity limit. *See* Declaration of Anthony J. Dick ¶ 14. In three other counties—Calvert, Charles, and St. Mary's—they face only a 50% limit. *See id.* ¶¶ 15-18. In none are churches subject to hard numerical caps, as in D.C. *See* Carson Decl. ¶ 21. The Archdiocese itself spans all of these five counties. It has held Masses for months in each. And none has witnessed an outbreak associated with a single Mass. *Id*. Even more strikingly, in the densely populated Diocese of Arlington just across the river, Masses have been held for months, without incident, subject only to social-distancing and sanitation requirements. *Id*. ¶ 22. Such measures have worked in those adjacent locales. The District cannot claim that the same measures suddenly lose their effectiveness as they cross the Potomac.

II. ABSENT RELIEF, THE ARCHDIOCESE WILL SUFFER IRREPARABLE HARM

"There can be no question" that the Mayor's Orders cause "irreparable harm." *Diocese of Brooklyn*, WL 6948354, at *3. As the Supreme Court held just last month, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable

injury." *Id.* "[B]y extension the same is true of rights afforded under the RFRA, which covers the same types of rights as those protected under the Free Exercise Clause of the First Amendment." *Capitol Hill Baptist*, 2020 WL 5995126, at *10 (quoting *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 129 (D.D.C. 2012)). Thus, "[t]he conclusion that the Church is likely to succeed on the merits of its RFRA claim . . . also suffices to" show "irreparabl[e] harm[]" absent relief. *Id.*

It is easy to see why. "Missing a chance to gather on Sunday is not a '[m]ere injur[y] . . . in terms of money, time and energy,' but instead a harm for which 'there can be no do over and no redress[.]'" *Id.* at *11 (internal citation omitted). This is even more true for missing Christmas. As the Supreme Court just observed, remote participation in worship "is not the same as personal attendance"; for instance, "Catholics who watch a Mass at home cannot receive communion." *Diocese of Brooklyn*, 2020 WL 6948354, at *3. And this injury flows inevitably from fixed numerical limits: "[i]f only 10 people"—or only 50—"are admitted to each service, the great majority of those who wish to attend Mass on Sunday . . . will be barred." *Id*.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR RELIEF

The balance of equities and public interest—which "merge" when "the government is the party opposing the injunction"—also support relief. *Capitol Hill Baptist*, 2020 WL 5995126, at *12. In *Diocese of Brooklyn*, the Supreme Court found that these factors favored the houses of worship because "the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease," and "the State has not shown that public health would be imperiled if less restrictive measures were imposed." *Diocese of Brooklyn*, 2020 WL 6948354, at *3. This was true even under the All Writs Act standard, which is stricter than the standard here. And here, neither the Archdiocese nor the District is aware of a single COVID outbreak related to its public Masses. *See* Carson Decl. ¶¶ 20, 32. Lifting the District's fixed cap thus will not

imperil public health because for the past five months the Archdiocese has celebrated thousands of Masses in Maryland with no fixed caps, and also with no outbreaks—and the same is true in Arlington. *Id*. ¶¶ 21, 22.

On the other side of the ledger, "[i]t is in the public interest for courts to carry out the will of Congress," *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000), and "to prevent the violation of a party's constitutional rights," *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (internal quotation marks omitted). "[B]y effectively barring many from attending religious services," the District's fixed caps "strike at the very heart of the First Amendment's guarantee." *Diocese of Brooklyn*, 2020 WL 6948354, at *3. Leaving the caps in place for Christmas will deeply undermine the public's interest in "honoring protections for religious freedom in accordance with the laws passed by Congress[.]" *Capitol Hill Baptist*, 2020 WL 5995126, at *12 (cleaned up). Here, as in *Diocese of Brooklyn* and *Capitol Hill Baptist*, the equities favor relief.

CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court adjudicate this motion on an expedited basis and issue temporary and injunctive relief by December 18. In particular, Plaintiff requests an injunction against the 50-person limit on attendance at indoor worship services and against the enforcement of any other discriminatory limit on the number of attendees at worship services.

Respectfully submitted, this the 14th day of December, 2020.

/s/ Anthony J. Dick
Anthony J. Dick (D.C. Bar No. 1015585)
Donald F. McGahn (D.C. Bar No. 449987)
John M. Gore (D.C. Bar No. 502057)
Sherif Girgis (D.C. Bar No. 1048921)
Joseph P. Falvey (D.C. Bar No. 241247)
Caroline C. Lindsay
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
Telephone: (202) 879-7679
Facsimile: (202) 626-1700

John D. Goetz
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219
Telephone: (412) 391-3939
Facsimile: (412) 394-7959

Mark L. Rienzi (D.C. Bar No. 494336)
Eric C. Rassbach (D.C. Bar No. 493739)
Adèle A. Keim (D.C. Bar No. 989528)
William J. Haun (D.C. Bar No. 1024405)
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW, Suite 400
Washington, DC 20006
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14th, 2020, a true and correct copy of the foregoing was electronically filed using the CM/ECF system, which will send notification of such filing to all counsel of record. A copy of the foregoing was also served on counsel for Defendants by e-mail.

/s/ *Anthony J. Dick*
Anthony J. Dick

Counsel for Plaintiff