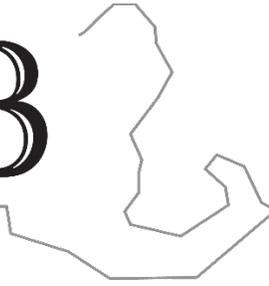


# MAHNB

Assisting Massachusetts Boards of Health through  
training, technical assistance and legal education



## MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS COVID-19 December 4, 2020

### **Analysis of U.S. Supreme Court case, *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U.S. \_\_\_\_\_, 2020 WL 6948354 (11.25.2020) and Its Effect on Governor Baker's Orders relative to Houses of Worship**

Public health professionals, especially local health departments and boards of health, are facing many questions from local public officials, residents, parents, health care providers, and others about COVID-19. MAHNB's series of documents are meant to provide answers and guidance to health departments and boards of health. **This document is provided for educational purposes only and is not to be construed as legal advice. For legal advice, please contact your city or town attorney.**

#### **Houses of Worship in Massachusetts**

In Massachusetts, attendance at houses of worship (HOW) is limited to 50% of the building's maximum permitted occupancy, except if such a limit is not established in a municipality's building department records, the HOW may allow 10 persons (including staff) per 1,000 sq. ft. In any case, no enclosed space within the building may exceed occupancy of 10 persons per 1,000 sq. ft. inclusive of attendees, staff, and other workers. In addition, attendees not part of the same immediate household must be seated at least 6 feet apart. Members of the same immediate household may sit together and be less than 6 feet apart.<sup>1</sup>

These standards are based upon, and are entirely consistent with other workplace specific standards, COVID-19 Executive Orders, and mandatory safety standards governing various workplaces, public assemblies, and performance sectors. Houses of worship and all other businesses are subject to the same occupancy, distancing, and other safety standards, without distinguishing between them.

#### **Discussion of Supreme Court Decision on Houses of Worship in New York**

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<sup>1</sup> <https://www.mass.gov/doc/phase-iii-step-1-places-of-worship-protocol-summary/download>

In the *Diocese of Brooklyn* case<sup>2</sup>, the U.S. Supreme Court held that the Archdiocese has a likelihood of prevailing on the merits of the case, and upheld an injunction<sup>3</sup> issued against the State of New York, which barred the State from limiting attendees to 10 persons in congregations in “red zone” areas and 25 persons in “Orange zone” areas in NYC.

Under New York’s Executive Orders and Guidance,<sup>4</sup> houses of worship are treated totally differently than other establishments.

- In a “red zone,” “essential” businesses **may admit as many people as they wish**. The order (fn. 4) lists 14 categories of essential business including acupuncture facilities, campgrounds, and shuffleboard courts;
  - But houses of worship in red zones may have **no more than 10 people** inside.
- The Court stated that “the disparate treatment is even more striking in an orange zone,” where *even non-essential businesses* may admit **as many customers as they would like**;
  - But houses of worship in orange zones may allow **only 25 persons** inside.

This treatment was deemed to be a likely First Amendment violation in light of the following:

- The challenged restrictions were not “neutral” because they unfairly burdened religious practice and therefore needed to serve a “compelling state interest.”
- New York could have used a less restrictive method to stem the spread of COVID-19 and were not “narrowly tailored.” In other words, they were far more severe than needed to prevent spread in a religious congregation.

The Court also observed that there was a lack of evidence of any outbreaks in religious congregations. In fact, the Diocese was consistently ahead of the curve in enforcing its own stricter protocols than the state required.

### **Potential Effect of Supreme Court Decision in Massachusetts**

Governor Baker’s COVID Orders are neutral. They do not carve out exceptions for any class of business or activity. Houses of worship standards do not differ from indoor shopping, offices, retailers, or other sector specific workplaces. Local boards of health should feel comfortable enforcing the current statewide COVID-19 guidelines. If a place of worship refuses to abide by the state’s guidelines, local boards of health should consult with its town or city attorney for advice. Further, if a municipality restricts places of worship to a degree greater than the statewide COVID-19 guidelines, then the town or city attorney should be consulted to determine whether the restriction is appropriate in light of this latest Supreme Court decision.

While the Supreme Court’s decision affects New York’s ability to enforce its COVID-19 restrictions, the decision does not have a binding effect on Massachusetts. The Supreme Court did not decide the case on the merits; it only granted an emergency injunction while a full appeal is heard by the United States Court of

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<sup>2</sup> In addition to the claims presented by the Diocese of Brooklyn, there were substantially similar claims brought by Agudath Israel of America, a grass roots organization of Chasidic and Orthodox Jewish congregations in Brooklyn, whose claims were treated equally by the SCOTUS in this decision.

<sup>3</sup> An injunction may be properly entered if the party claiming the right to it shows the court that the party has a likelihood to prevail in the case, that denying the injunction would lead to irreparable injury to the party, and that the public interest would not be harmed by the court granting the injunction.

<sup>4</sup> See, <https://esd.ny.gov/guidance-executive-order-2026>

Appeals for the Second Circuit.<sup>5</sup> Depending on the outcome in the Court of Appeals, there is a chance that the Supreme Court hears the case again on full appeal.

The decision does signal a change in the Supreme Court's treatment of restrictions on religious activities since the death of Justice Ruth Bader Ginsburg and subsequent appointment of Justice Amy Coney Barrett. Only seven months ago, the Court denied a similar challenge to a similar restriction in California.<sup>6</sup> Based on this shift, if *Roman Catholic Diocese* did make its way back to the Supreme Court, there is a strong chance that the Court would again rule in favor of the religious institutions. At that point, there may be a binding effect on Massachusetts' enforcement efforts.

Currently, Massachusetts allows places of worship to operate at 50% capacity, which is far less restrictive than the "red" and "orange" zones created by Executive Order 202.68.<sup>7</sup> Further, since initiating the Phased Reopening, Massachusetts has ceased to describe certain businesses as "essential."<sup>8</sup> These two issues—capacity limits and labeling of certain businesses as "essential"—were front and center in *Roman Catholic Diocese*.<sup>9</sup>

In conclusion, local boards of health should feel comfortable enforcing the current statewide COVID-19 guidelines. If a place of worship refuses to abide by the state's guidelines, local boards of health should consult with its town or city attorney for advice. Further, if a municipality restricts places of worship to a degree greater than the statewide COVID-19 guidelines, then the town or city attorney should be consulted to determine whether the restriction is appropriate in light of the latest Supreme Court decision.

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<sup>5</sup> Id.

<sup>6</sup> See South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (holding that restriction on places of worship of 25% capacity or 100 attendees is consistent with Free Exercise Clause).

<sup>7</sup> DEPARTMENT OF PUBLIC HEALTH AND EXECUTIVE OFFICE OF HOUSING AND ECONOMIC DEVELOPMENT, Safety Standards and Checklist: Places of Worship, available at <https://www.mass.gov/info-details/safety-standards-and-checklist-places-of-worship>.

<sup>8</sup> OFFICE OF GOVERNOR, COVID-19: Essential Services, available at <https://www.mass.gov/info-details/covid-19-essential-services> ("Learn more about businesses and organizations that *were* designated as providing COVID-19 Essential Services *before the launch of the Commonwealth's reopening plan.*") (emphasis added).

<sup>9</sup> Roman Catholic Diocese, 2020 WL 6948354, at \*2-\*3 (discussing how capacity limits of 10 and 25 people will cause irreparable harm and that "essential" businesses have no restrictions on capacity).