No. 20A90

In the Supreme Court of the United States

AGUDATH ISRAEL OF AMERICA, AGUDATH ISRAEL OF KEW GARDEN HILLS, AGUDATH ISRAEL OF MADISON, RABBI YISROEL REISMAN, STEVEN SAPHIRSTEIN,

Applicants,

v.

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK,

Respondent.

To the Honorable Stephen Breyer, Associate Justice of the United States Supreme Court and Acting Circuit Justice for the Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANTS BY THE ETHICS AND RELIGIOUS LIBERTY COMMISSION

MILES E. COLEMAN
Counsel of Record
KATIE E. TOWERY
ELIZABETH C. EDMONDSON
NELSON MULLINS RILEY & SCARBOROUGH LLP
2 W. Washington Street, Fourth Floor
Greenville, South Carolina 29601
(864) 373-2352
miles.coleman@nelsonmullins.com

Counsel for Amicus Curiae

The Ethics and Religious Liberty Commission ("ERLC") respectfully moves for leave to file an *amicus* brief in support of Applicants' Emergency Application for Writ of Injunction without the 10 days' advance notice to the parties of *amici*'s intent to file as ordinarily required. In light of the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice. Applicants have consented to the filing of this brief, and Respondent takes no position on this motion.

The ERLC is the public policy arm of the nation's largest Protestant denomination—the Southern Baptist Convention ("SBC")—comprised of more than 46,000 autonomous churches and nearly 16 million members. The ERLC is dedicated to engaging the culture and speaking to issues in the public square for the protection of religious liberty and human flourishing. The ERLC is charged by the SBC with addressing issues including religious toleration, free association, and the free exercise of religion. Religious freedom is an indispensable, bedrock value for Southern Baptists. The ERLC fears the government action at issue in this proceeding threatens the long-standing principle that the State may not single out religious believers and entities for the imposition of disparate burdens and restrictions that are not imposed on similarly-situated individuals and entities of other religions or of no religion.

The ERLC writes separately to increase the Court's understanding of (1) how restrictions like those challenged by the Applicants infringe on the religious exercise of many faith traditions and do so in a way that is not narrowly tailored to achieve the government's legitimate interest in public health, (2) how the double-standard created by such restrictions—even if they are outliers—undermines public confidence

in and compliance with neutral and even-handed public health measures, and (3) why immediate relief is needed to prevent the Applicants' injury from being mooted, either intentionally or by the passage of time. The *amicus* brief thus includes relevant material not fully brought to the attention of the Court by the parties. *See* Sup. Ct. R. 37.1.

For the foregoing reasons, proposed *amicus* respectfully requests the Court grant this motion to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Respectfully submitted,

/s/ Miles E. Coleman
MILES E. COLEMAN
Counsel of Record
KATIE E. TOWERY
ELIZABETH C. EDMONDSON
NELSON MULLINS RILEY & SCARBOROUGH LLP
2 W. Washington Street, Fourth Floor
Greenville, South Carolina 29601
(864) 373-2352
miles.coleman@nelsonmullins.com

Counsel for amicus curiae

November 20, 2020

No. 20A90

In the Supreme Court of the United States

AGUDATH ISRAEL OF AMERICA, AGUDATH ISRAEL OF KEW GARDEN HILLS, AGUDATH ISRAEL OF MADISON, RABBI YISROEL REISMAN, STEVEN SAPHIRSTEIN,

Applicants,

v.

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK,

Respondent.

To the Honorable Stephen Breyer, Associate Justice of the United States Supreme Court and Acting Circuit Justice for the Second Circuit

BRIEF OF THE ETHICS AND RELIGIOUS LIBERTY COMMISSION

MILES E. COLEMAN
Counsel of Record
KATIE E. TOWERY
ELIZABETH C. EDMONDSON
NELSON MULLINS RILEY & SCARBOROUGH LLP
2 W. Washington Street, Fourth Floor
Greenville, South Carolina 29601
(864) 373-2352
miles.coleman@nelsonmullins.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Ethics and Religious Liberty Commission ("ERLC") is the public policy arm of the nation's largest Protestant denomination—the Southern Baptist Convention ("SBC")—comprised of more than 46,000 autonomous churches and nearly 16 million members. The ERLC is dedicated to engaging the culture and speaking to issues in the public square for the protection of religious liberty and human flourishing. Religious freedom is an indispensable, bedrock value for Southern Baptists, and the ERLC is charged by the SBC with addressing issues including religious toleration, free association, and the free exercise of religion. The ERLC fears the government actions at issue in this proceeding threaten the long-standing principle that the State may not single out religious believers and entities for the imposition of disparate burdens and restrictions that are not imposed on other similarly-situated individuals and entities.

SUMMARY OF THE ARGUMENT

The health threat posed by the COVID-19 pandemic is real and significant, and sensible public health measures designed to slow or prevent its spread are legitimate, important, and necessary. Thankfully, the majority of States and local governments have imposed such measures in rational and even-handed ways. Certain outliers, however, including the "cluster initiatives" challenged by the Applicants here, single out religious individuals and entities for the imposition of

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. This brief has been submitted with an unopposed motion for leave to file it.

disparate treatment that substantially burdens their religious exercise. Such unequal treatment violates this Court's well-established precedent and, perversely, tends to undermine public confidence in, and compliance with, legitimate public health measures intended to slow the spread of the virus. This Court's intervention is warranted and is needed immediately lest the harm inflicted on Applicants stretch from weeks into months into years, and lest any eventual judicial redress be mooted either by Respondent's eve-of-judgment change of position or by the passage of time. Just as justice delayed is justice denied, so too free exercise delayed is free exercise denied. This Court should issue the requested injunction.

ARGUMENT

I. Restrictions like Respondent's "cluster initiative" impose substantial and disparate burdens on religious exercise and violate well-settled law.

Reasonable public health measures designed to slow or prevent the spread of COVID-19 are necessary, important, and legitimate. Such measures, however, may not impose disparate or disproportionate burdens on religious exercise. Under any standard of this Court's jurisprudence, the singling out of religious believers and houses of worship for disparate and burdensome treatment is unconstitutional. See *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2019 (2017) ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'") (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 533, 542 (1993)); *Emp't Div., Dept' of Human Res. of Or.*

v. *Smith*, 494 U.S. 872, 877–78 (1990) ("It would doubtless be unconstitutional" to ban activities undertaken "for worship purposes") (citations omitted).

The disparate and burdensome effect of regulations like Respondent's "cluster initiative" are especially substantial on those like Applicants and Southern Baptists such as *amicus curiae* whose faiths compel them to assemble in corporate religious worship. Such faith communities are willing and have proven their ability to assemble in ways that are designed to prevent the spread of COVID-19, such as assembling outdoors, in masks, or in socially distanced ways, but a prolonged prohibition on in-person gathering represents a substantial burden on the free exercise of their faith. Gathered religious worship remains crucial to the practice of their respective faiths, and the government is obligated by the First Amendment to accommodate these practices.

For example, a Southern Baptist church located mere blocks from this Court recently sought and received injunctive relief in District Court after the District of Columbia mayor's office declined the church's application for permission to assemble outdoors with attendees wearing masks and practicing social distancing. *Capitol Hill Baptist Church* v. *Bowser*, Case No. 20-cv-02710 (TNM), 2020 WL 5995126 (D.D.C. Oct. 9, 2020). The church explained it was willing to observe preventative measures and to alter the place and nature of its normal gatherings, but Holy Scripture compelled its belief in a "doctrinal requirement of a weekly gathering of its entire congregation[.]" *Id.* at *1. The District Court correctly concluded the District of Columbia's restrictions on religious gatherings imposed a substantial burden on the church's religious exercise, and the court granted the preliminary injunction. *Id.* at *12.

Other courts, however, have been hesitant to intervene in such situations, and this Court has not yet articulated a clear standard. See generally *South Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613 (Mem), 207 L.Ed.2d 154 (2020); *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603 (Mem) (2020). This Court's guidance is needed, and, in its absence, the lower courts are left grasping for whatever they can find. Indeed, a search of Westlaw reveals that the concurring opinion in *South Bay* (declining to grant the requested injunction) has been cited 118 times in the past five-and-a-half months, leading to a hodge-podge of results across the United States and uncertainty as to what standard the lower courts should apply. See, e.g., *Harvest Rock Church, Inc.* v. *Newsom*, 977 F.3d 728, 732 (9th Cir. 2020) (O'Scannlain, J., dissenting) (noting the court was not "meaningfully guided by the Supreme Court's decision to deny a writ of injunction" in *South Bay* and that "we have no guidance whatsoever . . . as to why the Court declined to provide" the requested relief).

It is time for the Court to weigh in and provide clear rules for lower courts struggling to resolve these questions during the COVID-19 pandemic. Respondent's conduct giving rise to this emergency application clearly (and intentionally) imposes a substantial and disparate burden on religious exercise and falls far short of this Court's repeatedly articulated holdings. The Court should take this opportunity to provide redress and needed guidance.

II. Restrictions targeting or disproportionately burdening religious exercise undermine the credibility of, and the public's confidence in, legitimate, even-handed public health measures.

Public health restrictions that single out religious exercise for disparate and burdensome treatment erode public confidence in other, legitimate restrictions and

in the institutions and officials who enact them, and, as a result, undermine the State's ability to combat the pandemic in neutral and even-handed ways. The effectiveness of preventative health measures depends in large part on the public's confidence that the restrictions are, in fact, reasonable and even-handed, and the resulting public willingness to comply with measures implemented to protect the general wellbeing of each individual, family, neighborhood, and community. This crucial confidence in the rule of law and impartiality of government takes a major blow when (as here) certain entities, industries, and communities are given favorable treatment, while other similarly-situated or adjacent groups are disproportionately targeted by burdensome regulations. Public sentiment towards necessary and crucial health measures aimed at combating the COVID-19 pandemic is negatively impacted when news media, financial services, liquor stores, and pet shops receive favorable treatment, while neighboring houses of worship, religious communities, and small businesses are subject to different, heightened restrictions. The dangerous result of such double standards: the public views COVID-19 restrictions as influenced by politics or power, rather than as aimed at protecting the public health. This has the net effect of reducing observance of public health standards and diminishing the public's trust in the government.

This effect is only magnified when, as here, an elected official openly states in his official capacity and in the course of governance that he is targeting minority religious groups. Here, for example, Governor Cuomo stated publicly that "because of their [i.e., Orthodox Jews'] religious practices, etc., we're seeing a spread of [COVID-19]" and as a result, he threatened to (and then did) "close the institutions down." A

regulation that "society is prepared to impose upon [religious groups] but not upon itself," is the "precise evil . . . the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545–46 (1993) (internal quotations and citations omitted). Open and obvious double standards, including ones targeting religious exercise (and minority faiths in particular) degrade the public's trust in government officials and institutions. If the public loses faith in the validity of public health measures, a resulting consequence will be a decrease in the observance of legitimate measures that are aimed at combating the pandemic. See, e.g., Robert A. Blair et al., *Public health and public trust: Survey evidence from the Ebola Virus Disease epidemic in Liberia*, 172 SOC. SCI. & MED. 89 (2017) ("We find that respondents who expressed low trust in government were much less likely to take precautions against EVD in their homes, or to abide by government-mandated social distancing mechanisms designed to contain the spread of the virus."); Lydia Saad, *Americans' Readiness to Get COVID-19 Vaccine Falls to 50%*, Gallup (Oct. 12, 2020), *available at* https://news.gallup.com/poll/321839/readiness-covid-vaccine-falls-past-month.aspx (last visited November 20, 2020) (noting that willingness to be vaccinated against COVID-19 is tied to a respondent's trust in government efforts).

Further, the absence of a meaningful check and balance by the judicial system likewise degrades public confidence in health regulations by suggesting to the public that courts condone the imposition of more burdensome restrictions on disfavored minorities. While the great majority of State and local governments have implemented COVID-preventative measures that place religious gatherings on even footing with similarly-situated commercial, artistic, political, and athletic activities, the absence

of the Court's intervention has given a handful of outlier jurisdictions a free hand, culminating most recently in Respondent's express "targeting" of Orthodox Jewish communities and houses of worship for more onerous burdens than those imposed on their more well-connected and politically-favored neighbors.

While allowing States some latitude may have made sense in the early days of the pandemic, that is not true now, particularly not in this case. Indeed, it now seems clear that all Americans will be subject to emergency orders for well over a year. This is at the same time as physicians and public health professionals have learned a great deal about how to manage and treat the spread of the virus. See J. David Goodman & Joseph Goldstein, *Virus Hospitalizations are Up in N.Y.C. But This Time, It's Different*, THE NEW YORK TIMES (Oct. 30, 2020), *available at* http://www.nytimes.com/2020/10/30/nyregion/new-york-city-coronavirus-hospitals.html (last visited November 19, 2020). To be clear, the use of sensible and even-handed emergency orders to control the spread of a disease like COVID-19 is legitimate and, indeed, important. The duration of these emergency orders, however, calls for the check and balance of the judiciary to ensure that Americans' fundamental rights are not abrogated. This check on the State's imposition of restrictions on religious exercise (and especially when, as here, the restrictions overtly target minority religious faiths) is needed to preserve the public's trust and confidence in public health orders. The pending Application provides this Court with the opportunity to do so. This Court should take it, both to provide guidance to the lower courts and to restore public trust and compliance with legitimate public health measures that apply equally and evenhandedly to all.

III. Immediate relief is warranted to prevent the Applicants' injury from being mooted, either intentionally or by the passage of time.

In the absence of this Court's immediate intervention, the substantial burdening of Applicants' religious exercise will stretch on unabated and may be shielded from any judicial review either by being intentionally mooted on the eve of review or by the passage of time as the proceeding wends its way through the judicial system. See, e.g., *New York State Rifle & Pistol Ass'n* v. *City of New York*, 140 S. Ct. 1525 (2020) (per curiam) ("After we granted certiorari, the State of New York amended its firearm licensing statute, and the City amended the rule . . . . Petitioners' claim for declaratory and injunctive relief with respect to the City's old rule is therefore moot."); *Roman Catholic Diocese of Brooklyn, New York* v. *Cuomo* (20A87), Letter of Respondent Andrew M. Cuomo (Nov. 19, 2020) (notifying this Court literally on the eve of the Court's consideration of an application for injunctive relief challenging Respondent's "cluster initiative" that Respondent was altering the initiative so that "effective tomorrow, none of the Diocese's churches will be affected by the gathering-size limits it seeks to enjoin") (emphasis omitted); *South Bay United Pentecostal Church* v. *Newsom* (19A1044), Opposition of Respondent Gavin Newsom, 14 (May 28, 2020) (arguing this Court's review of the State's religion-burdening restrictions was not needed in light of "California's newly issued guidance" permitting some "in-person worship this coming Sunday"); *Elim Romanian Pentecostal Church* v. *Pritzker* (No. 19A1046), Reply in Support of Emergency Application, 1 (May 29, 2020) ("Mere hours before his Response was due in this Court, the Governor announced a sudden change in his 10-person limit on religious worship services [] after vigorously defending his

policy in both lower courts, and having announced barely 3 weeks ago that it would be 12 to 18 months before numerical limits on worship services were lifted."). Such an eleventh-hour reversal here would not, of course, moot Applicants' case, because there could hardly be a clearer and more repeatedly demonstrated example of a harm capable of repetition but evading review—a fact tacitly conceded by Governor Cuomo's last-minute reversal filed yesterday in *Roman Catholic Diocese of Brooklyn, New York* v. *Cuomo* (20A87).

Even if Respondent does not intentionally attempt to evade review by "mooting" the Applicants' case, the sheer passage of time while awaiting this Court's review in the normal course compounds and extends the Applicants' injury. See Federal Court Management Statistics, United States District Courts—National Judicial Caseload Profile at 1 (reporting the nationwide median time from filing to disposition other than trial in civil cases in District Courts from June 30, 2019 through June 30, 2020 was 8.9 months), *available at* https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2020.pdf (last visited November 19, 2020); Federal Court Management Statistics, U.S. Court of Appeals Summary at 2 (reporting the median time from filing a notice of appeal to disposition in the federal Circuit Courts of Appeal from June 30, 2019 through June 30, 2020 ranges from 5.8 months to 12.1 months), *available at* https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0630.2020.pdf (last visited November 19, 2020).

The issues raised by the pending Application implicate matters of fundamental importance to people of faith across the United States, and not just for the COVID-19 pandemic but for future pandemics and public health crises. Nor does it appear

the exigencies of the current situation will soon be past. As justice delayed is justice denied, so too free exercise delayed (or mooted) is free exercise denied. This Court should not countenance it and should issue the requested injunction.

CONCLUSION

This Court should issue the requested injunction.

Respectfully submitted,

/s/ Miles E. Coleman
MILES E. COLEMAN
Counsel of Record
KATIE E. TOWERY
ELIZABETH C. EDMONDSON
NELSON MULLINS RILEY & SCARBOROUGH LLP
2 W. Washington Street, Fourth Floor
Greenville, South Carolina 29601
(864) 373-2352
miles.coleman@nelsonmullins.com

Counsel for amicus curiae

November 20, 2020