No. 20A90

In the

Supreme Court of the United States

AGUDATH ISRAEL OF AMERICA, et al.,

Applicants,

v.

ANDREW M. CUOMO, Governor of New York,

Respondent.

OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION OR, IN THE ALTERNATIVE, CERTIORARI BEFORE JUDGMENT

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November 20, 2020

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QUESTION PRESENTED BY APPLICANTS' REQUEST IN THE ALTERNATIVE FOR CERTIORARI BEFORE JUDGMENT

To address recent surges in new COVID-19 infections in geographic micro-areas in the State of New York, Governor Andrew M. Cuomo issued Executive Order 202.68, which imposes numerical limits on gatherings, but treats gatherings in houses of worship more favorably than comparable activities of a secular nature. Applicants allege that Executive Order 202.68 violates their rights under the First Amendment's Free Exercise Clause. The question presented is:

Whether the district court abused its discretion in denying a preliminary injunction to enjoin enforcement of Executive Order 202.68's provisions relating to houses of worship.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

A. The COVID-19 Pandemic and the State's Early Response 3

B. Executive Order 202.68's "Cluster Action Initiative" 6

C. The Litigation Underlying This Application 12

1. Proceedings in the District Court 12

2. Proceedings in the Court of Appeals 14

ARGUMENT 17

I. AGUDATH ISRAEL FAILS TO SHOW THAT IT IS ENTITLED TO THE EXTRAORDINARY REMEDY OF A WRIT OF INJUNCTION. 17

A. There Are No Critical or Exigent Circumstances. 18

B. Agudath Israel Is Unlikely to Succeed on the Merits Because It Cannot Establish an "Indisputably Clear" Free Exercise Clause Violation 19

1. Executive Order 202.68 Is Neutral. 20

2. Executive Order 202.68 Is Generally Applicable. 30

C. The Executive Order Has a Rational Basis 37

D. The Balance of Equities and the Public Interest Do Not Weigh in Favor of Injunctive Relief 37

II. CERTIORARI BEFORE JUDGMENT IS NOT WARRANTED 39

CONCLUSION 41

TABLE OF AUTHORITIES

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No. 20-3572, __ F.3d __,
2020 WL 6750495 (2d Cir. Nov. 9, 2020) 16, 21

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140 S. Ct. 2603 (2020) 33, 40

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508 U.S. 520 (1993) ....*passim*

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962 F.3d 341 (7th Cir. 2020) 32

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94 U.S. 872 (1990) 20

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977 F.3d 728 (9th Cir. 2020) 38

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561 U.S. 1306 (2010) 17, 20, 37

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138 S. Ct. 1719 (2018) 26, 27

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No. 1:20-cv-4844-NGG-CLP, __ F. Supp. 3d __,
2020 WL 6120167 (E.D.N.Y. Oct. 16, 2020) 20, 25, 30

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479 U.S. 1312 (1986) 17, 18

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Case No. 1:20-CV-651, __ F. Supp. 3d __,
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140 S. Ct. 1613 .... 32, 34

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138 S. Ct. 2392 (2018) 22

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514 U.S. 549 (1995) 39

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 18, 37, 40

CONSTITUTIONAL PROVISIONS

New York Constitution,
art. XXXVIII 36

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First Amendment .... *passim*

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Rule 8(a)(2) 15
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PRELIMINARY STATEMENT

At issue in this application for a writ of injunction is a critical public health measure designed to prevent a COVID-19 resurgence in the State of New York. The Cluster Action Initiative, implemented by Executive Order 202.68, imposes heightened restrictions in discrete geographic areas—also known as clusters—that are experiencing alarming spikes in new infections. Executive Order 202.68, which is also the subject of a parallel application for a writ of injunction in *The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87, targets settings that most naturally facilitate COVID-19 spread, namely those in which persons tend to gather closely for an extended period of time. Across the board, the restrictions significantly constrain the extent to which gatherings may occur. But, they treat gatherings in houses of worship more favorably than comparable gatherings of a secular nature. For example, within areas designated as "red zones," in which the most troubling COVID-19 spikes are occurring, houses of worship may remain open and host gatherings that do not exceed the lesser of 10 people or 25 percent of maximum occupancy. Comparable secular gatherings, such as concerts and other events where attendees arrive simultaneously, congregate for an extended period of time, and leave simultaneously are completely prohibited. Within areas designated as "yellow zones," houses of worship may host gatherings up to 50 percent of maximum occupancy, with no other limit on the numbers of people who may be present.

Applicants—two New York City-based synagogues, a rabbi and an employee of those synagogues, and an Orthodox Jewish organization—commenced the litigation

underlying the present application by filing a lawsuit against Governor Andrew M. Cuomo in the United States District Court for the Eastern District of New York. They alleged that Executive Order 202.68 violates their rights under the First Amendment's Free Exercise Clause and sought immediate injunctive relief. As their subsequent statements made clear, they sought to enjoin Executive Order 202.68's limits on houses of worship, only to the extent those limits were more restrictive than the limits that were in place before the State's Cluster Action Initiative. Both the district court and the United States Court of Appeals for the Second Circuit denied injunctive relief.

This Court should do likewise. As of this writing, there are no such more-restrictive limits in effect in New York City, where the two synagogues for which applicants seek relief are located. Due to the Cluster Action Initiative's efficacy in controlling infections rates, all cluster zones in New York City are now yellow zones. And the limits imposed in yellow zones are no more restrictive than the limits that were in place before that initiative. In light of this, and for the reasons that follow, applicants cannot satisfy the demanding requirements for obtaining emergency injunctive relief from this Court. Nor can applicants show that certiorari before judgment is warranted.

STATEMENT OF THE CASE

A more detailed recitation of the facts is set forth in the Governor's opposition to the parallel application for a writ of injunction pending in *The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87 (U.S.). The following statement

summarizes those facts with a focus on those that are specifically relevant to the present application.

A. The COVID-19 Pandemic and the State's Early Response

Since the first cases were reported in January 2020 in China (Respondent's Appendix ("R.A.") 3, 25), COVID-19 has infected more than 56 million people throughout the world and claimed more than 1.3 million lives, including over 249,000 Americans to date.[1]

Large indoor gatherings of extended duration present a significant risk of COVID-19 spread. The larger the gathering, the more likely it is that some attendees are already infected and capable of transmitting the virus. (R.A. 14-15, 103, 178.) This is especially true because people may carry and transmit the virus for days before symptoms develop, or they may never develop symptoms at all, and, thus, may not recognize the need to avoid group settings. Research indicates that over 40 percent of cases may be caused by people who do not have symptoms. (R.A. 56.) Also, the larger the gathering, the more people who may be potentially infected from someone with COVID-19, and the more difficult it is for the level of social distancing critical for preventing virus transmission to be maintained. (R.A. 15-17, 115, 118, 178.) The longer the gathering lasts, the more person-to-person interactions that lead to virus transmission may occur. (R.A. 16, 105, 115, 148, 178-79.) And when the attendees disperse and go their separate ways, they each present a risk of spreading

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[1] WHO, *Coronavirus Disease (COVID-19) Dashboard*, http://covid19.who.int (last visited Nov. 20, 2020); United States Centers for Disease Control and Prevention ("CDC"), *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Nov. 20, 2020).

the virus in their respective communities. (R.A. 16, 180.) In short, large gatherings of extended duration have a "super-spreader" potential. (R.A. 15, 178-80.)

In March 2020, with COVID-19 cases and deaths surging in New York, the State implemented "New York on PAUSE," an initiative designed to slow the virus's spread. As part of New York on PAUSE, persons were ordered to practice social distancing by remaining at least six feet from others in public settings and to wear facial coverings when social distancing was impracticable. (R.A. 5-7.) "Essential" businesses—"business[es] providing products or services that are required to maintain the health, welfare and safety of the citizens of New York State,"[2] such as hospitals, grocery stores, and banks—were allowed to remain open, provided they complied with masking, social distancing, and other safety measures. All other businesses were directed to cease in-person operations altogether. (R.A. 7.)

All gatherings of individuals not necessary to the conduct of essential business were declared cancelled or indefinitely postponed. (R.A. 7.) This prohibition encompassed gatherings "of any size for any reason," including religious gatherings. (R.A. 8, 90.) Houses of worship, however, were not ordered closed. They were allowed to remain open for individuals to use, provided no congregate services were held.[3]

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[2] Empire State Development Corporation, *Frequently Asked Questions for Determining Whether a Business Is Subject to a Workforce Reduction under Recent Executive Order Enacted to Address COVID-19 Outbreak*, at 2 (Mar. 22, 2020), https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_032220.pdf.

[3] Gov. Andrew M. Cuomo, *Governor Cuomo Issues Guidance on Essential Services under the "New York State on PAUSE" Executive Order* (Mar. 20, 2020), https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order.

New York on PAUSE succeeded in dramatically curbing the spread of COVID-19 in the State. To be sure, the total number of COVID-19 cases in the State continued to climb, and in April 2020 it hit 267,000, with over 13,000 fatalities. (R.A. 6.) But, that month, the number of *new* daily cases began to steadily decline, as did the number of hospitalizations. (R.A. 9.)

Against that backdrop, in late April 2020, Governor Cuomo announced "New York FORWARD," a plan for reopening the sectors of the economy affected by New York on PAUSE.[4] Under the reopening plan, the State is divided into geographic regions, and as each region attains certain statistical benchmarks concerning COVID-19 containment, it advances through four "phases" in which increasingly more activities are allowed to resume, so long as social distancing and other health protocols are followed. (R.A. 10.)[5] By the end of July 2020, all regions of the State had advanced to Phase 4, where they currently remain. (R.A. 10.) In Phase 4, gatherings of up to 50 people are authorized, with requirements for social distancing and related precautions still in effect. (R.A. 16.) The 50-person limit does not apply to gatherings held in houses of worship; rather, such gatherings are subject to a limit of 33 percent of certified maximum occupancy. (Applicants' Appendix ("A.A.") 294.) Applicants did not challenge that limit below (A.A. 46), and they do not challenge it here.

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[4] Gov. Andrew M. Cuomo, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Outlines Phased Plan to Re-Open New York Starting with Construction and Manufacturing* (Apr. 26, 2020), https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-outlines-phased-plan-re-open-new-york-starting.

[5] Gov. Andrew M. Cuomo, *NY FORWARD: A Guide to Reopening New York & Building Back Better*, at 43-60 (May 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf.

As a result of New York's measured approach to reopening, substantial sectors of the economy have rebounded, while the virus was largely kept in check through the summer. (R.A. 10-11.) By contrast, states that took a less-cautious approach experienced COVID-19 surges.[6]

B. Executive Order 202.68's "Cluster Action Initiative"

By October 2020, the New York State Department of Health ("Health Department") saw COVID-19 clusters emerge in certain areas in the New York City boroughs of Brooklyn and Queens, and three counties outside New York City. (R.A. 18, A.A. 327.) The data was alarming: at a time when the City's overall positivity rate—the percentage of tests coming back positive—was just 1 percent, the positivity rates in these cluster areas reached as high as 8 percent. (R.A. 18-19, 142-43.)

At an October 5 press conference, the Governor expressed frustration that local authorities and some leaders in the religious community writ large—including the Orthodox Jewish community—appeared not to be enforcing mandatory masking and gathering limitations in these cluster areas. As he explained, "mass gatherings are the superspreader events." (A.A. 101, *see* A.A. 99-100.) "We know there have been mass gatherings going on in concert with religious institutions in these communities [experiencing COVID-19 clusters] for weeks." (A.A. 101.) The Governor then emphasized that *all* organizations must follow the rules, whether it be bars, parade organizers, or churches, and that the State would take aggressive measures to combat

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[6] *See, e.g.*, Allison Prang & Tawnell D. Hobbs, *California Orders Rollback of Reopening as Cases Surge*, Wall St. J., July 14, 2020; Lazaro Gamio, *Reopened States Now Lead Surge in Cases*, The Houston Chronicle, July 11, 2020; J. David Goodman & Patricia Mazzei, *Tide Turns as Florida, Not New York, Surges*, N.Y. Times, June 27, 2020.

the spread of COVID-19 if sufficiently high infection rates necessitated such action. (A.A. 101-03.)

On October 6, Governor Cuomo announced the "Cluster Action Initiative," a program implemented by the contemporaneously issued Executive Order 202.68. (R.A. 19-20, 152.) The initiative's purpose is to identify COVID-19 clusters, to impose short-term aggressive measures in those areas and their vicinities to prevent the clusters from expanding further, and to monitor progress to determine whether and in what manner any such measures should thereafter be lifted or modified.[7] (R.A. 21, A.A. 329-30, 455-56.)

Under this initiative, the Health Department begins by identifying the ZIP codes with the highest COVID-19 positivity rates. (A.A. 104, 454.) Within each of those ZIP codes, the Health Department uses geocoded location data to represent the individual positive cases as dots on a map corresponding to the home addresses of infected persons, and then analyzes the dots to identify clusters. (A.A. 453-55.)

Once a cluster is identified, the Health Department studies the areas containing and surrounding it based upon a variety of quantitative metrics, including positivity rates, total new cases, and hospitalization rates. (A.A. 452-54.)[8] If the

[7] Like any executive order issued pursuant to the Governor's emergency powers, Executive Order 202.68 is reviewed every 30 days. *See* New York State Executive Law § 29-a. It is presently authorized to continue in force until December 3, 2020. *See* Executive Order No. 202. 72 (Nov. 3, 2020). However, the zone designations are reviewed daily by the Department of Health, and are regularly revised to keep pace with the latest COVID-19 infection data. *See infra* at 11-12, 15.

[8] Gov. Andrew M. Cuomo, *Governor Cuomo Details COVID-19 Micro-Cluster Metrics* (Oct. 21, 2020), https://www.governor.ny.gov/news/governor-cuomo-details-covid-19-micro-cluster-metrics; State of New York, *New York 'Micro-Cluster' Strategy* (Oct. 21, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/MicroCluster_Metrics_10.21.20_FINAL.pdf.

increase in positive cases is sufficiently severe according to pre-set thresholds; if the increase is found to reflect community spread rather than an outbreak confined within a single institution, such as a nursing home or correctional facility; and if the increase meets certain case-by-case epidemiological criteria, then the State can designate the area immediately containing the cluster as a "red zone," the immediately surrounding area as an "orange zone," and the outlying area as a "yellow zone" (collectively, "focus zones"). (A.A. 452-53.)

When announcing the Cluster Action Initiative on October 6, the Governor explained that "[t]he problem is mass gatherings." (A.A. 333.) This included gatherings on college campuses, at bars, and at outdoor venues, as well as in houses of worship. (A.A. 333.) Consequently, in red zones, where the most restrictive provisions apply, the focus is on eliminating gatherings to the maximum extent practicable. (A.A. 451.) However, an exception is made for houses of worship. Specifically, in red zones:

- All non-essential businesses must cease in-person operations.
- Restaurants may offer takeout and delivery only.
- Schools are closed for in-person instruction, except as otherwise provided by executive order.
- Non-essential gatherings are deemed cancelled or postponed.
- But, gatherings in houses of worship may continue so long as the number of attendees does not exceed the lesser of 10 people or 25 percent of the house of worship's maximum occupancy.

(R.A. 19-20, 152-53.)

More modest mitigation measures apply in orange zones, but they too are designed to reduce the potential for large groups of individuals to gather. And they similarly provide an exception for gatherings in houses of worship. In orange zones:

- Non-essential businesses "for which there is a higher risk associated with the transmission of the COVID-19 virus," such as gyms and certain personal-care services, must cease in-person operations.
- In addition to takeout and delivery, restaurants may offer outdoor dining, so long as they do not seat more than 4 persons per table.
- Schools are closed for in-person instruction, except as otherwise provided by executive order.
- Non-essential gatherings are permitted up to 10 people.
- However, gatherings in houses of worship may continue so long as the number of participants does not exceed the lesser of 25 people or 33 percent of the house of worship's maximum capacity.

(R.A. 20, 153.)

And the restrictions in yellow zones, among other things, limit non-essential gatherings to 25 people, but houses of worship to "a capacity limit of 50% of its maximum occupancy," with no other limit on the numbers of persons who may gather inside.[9] (R.A. 20, 153.)

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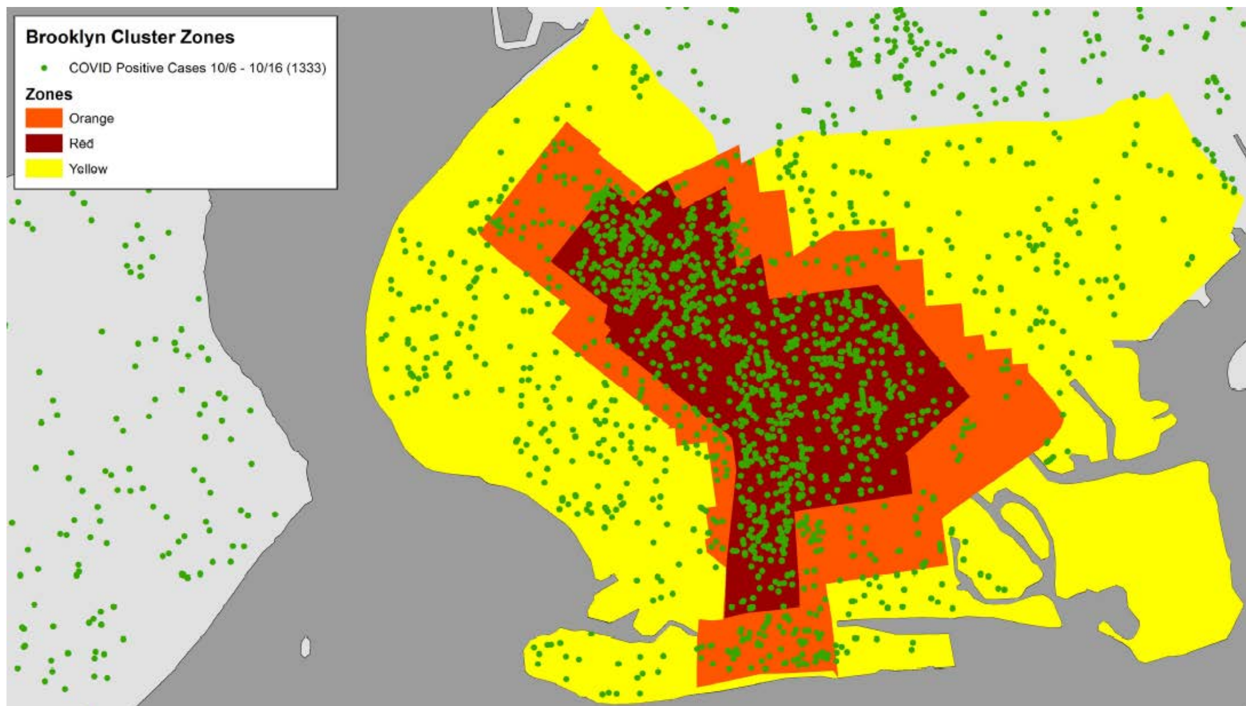
[9] Although the pre-existing restriction provides that houses of worship may operate at 33 percent of maximum occupancy, Executive Order 202.68 imposes a 50 percent maximum occupancy limit out of respect for the preliminary injunction issued in *Soos v. Cuomo*, Case No. 1:20-CV-651, __ F. Supp. 3d __, 2020 WL 3488742, at *11, *13 (N.D.N.Y. June 26, 2020), *appeal docketed*, Case Nos. 20-2414 & 20-2418 (2d Cir.). *See* Declaration of Howard Zucker, *Soos v. Cuomo*, Case No. 1:20-cv-00651 (N.D.N.Y.), Dkt. No. 91-2, at 26. In *Soos*, the district court held that the plaintiff houses of worship should have the benefit of the 50 percent occupancy limit applicable to the non-essential businesses permitted resume in-person operations in Phase 2 of the State's reopening plan. 2020 WL 3488742, at *11, *13. Notably, the *Soos* court thereafter declined to enjoin the restrictions imposed by Executive Order 202.68 for the same reasons that the lower courts in this case gave. *See Soos v. Cuomo*, ___ F. Supp. 3d __, 2020 WL 6384683, at *6-*8 (N.D.N.Y. Oct. 30, 2020).

When announcing the Cluster Action Initiative, the Governor acknowledged that these rules will apply in areas with a "large Orthodox population," among other places, and place an "imposition" on their practices. (A.A. 333.) At the same time, he made clear that the initiative was not designed to target Orthodox Judaism or any other religion. "I have such respect and love for the Orthodox community," he stated. "I have been friends with them all my life and my father before me . . . ." (A.A. 333.) He made clear that the Cluster Action Initiative was "about saving a life"; "you look at those clusters, people will die in those clusters and this is about protecting people and saving lives." (A.A. 333.)

On October 9, the first cluster zones took effect in Brooklyn and Queens, in New York City, as well as in Broome, Orange, and Rockland counties. (R.A. 18, 153.) The map reproduced below[10] shows the boundaries of Brooklyn's red, orange, and yellow zones when this lawsuit was filed, superimposed over the cluster of COVID-19 cases detected between October 6 and 16:

[10] The map was filed as an exhibit to a declaration by New York State Health Commissioner Howard Zucker in *Plaza Motors of Brooklyn, Inc. v. Cuomo*, No. 20-cv-4851 (E.D.N.Y.), Dkt. No. 22-25.



The Cluster Action Initiative is an iterative process. The Health Department reviews daily the positivity rates and other relevant data to determine whether particular cluster areas are improving or worsening; when the circumstances warrant, zone boundaries are redrawn or eliminated. (A.A. 455-56.)

Such revisions have already occurred multiple times, including with respect to the zones at issue in this application, as those restrictions have served their purpose of helping control cluster spread. As a result of these changes, at this time, there are no red or orange zones in Brooklyn or in Queens—or indeed anywhere in New York

City—only yellow zones. Accordingly, the two synagogues for which applicants seek relief at issue are located in yellow zones.[11]

C. The Litigation Underlying This Application

1. Proceedings in the District Court

Applicants are (i) Agudath Israel of Kew Garden Hills, a synagogue located in Queens, New York, (ii) an employee of that synagogue, (iii) Agudath Israel of Madison, a synagogue located in Brooklyn, New York, (iv) a rabbi of that synagogue, and (v) Agudath Israel of America, a national Orthodox Jewish organization (collectively, "Agudath Israel"). (Application at iii-iv, A.A. 397-98.) On October 8, Agudath Israel commenced the litigation underlying this application by filing a complaint in the United States District Court for the Eastern District of New York, alleging that Executive Order 202.68's provisions relating to houses of worship violated its rights under the First Amendment's Free Exercise Clause because it made it impossible for the two synagogues "to conduct services for all of their congregants."[12] (A.A. 413.) Agudath Israel also moved for a temporary restraining order and preliminary injunction to prohibit enforcement of those provisions against it, citing the then-upcoming holiday weekend as the reason that injunctive relief was immediately required. (A.A. 422-23.) At that time, the two synagogues at issue in this

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[11] Gov. Andrew M. Cuomo, *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones* (Nov. 18, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-updated-covid-19-micro-cluster-focus-zones-2.

[12] Agudath Israel of Bayswater, a synagogue in Queens, New York, and its rabbi are plaintiffs in the underlying litigation but are not applicants in this Court. Since November 6, 2020, Agudath Israel of Bayswater has not been located in any of the focus zones. *See* Gov. Andrew M. Cuomo, *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones* (Nov. 6, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-updated-covid-19-micro-cluster-focus-zones.

application were located in the red zones that were set to take effect in Brooklyn and Queens. *See* D. Ct. Dkt. No. 2-2, at 12.

The next day, on October 9, the district court conducted a hearing on Agudath Israel's motion, which it denied in a ruling from the bench. (A.A. 10, 75.) The court found that Agudath Israel had failed to show a likelihood of success on the merits of its free exercise claim because it did not establish that Executive Order 202.68 was anything other than a neutral and generally applicable law subject to rational basis review, which it readily satisfied. (A.A. 59, 66.)

The court specifically rejected for lack of sufficient evidence Agudath Israel's claim that Executive Order 202.68 was the product of religious animus or targeting and, thus, not neutral. The court acknowledged the Governor's comments on which Agudath Israel relied, but explained that Agudath Israel had cited those comments "selectively out of context," and had thus provided "no evidence" of "an animus" against any Orthodox Jewish community or a "deliberate imposition of a requirement directed at thwarting the religious practices of the [community's] religious practice." (A.A. 74.) Rather, the Governor had affirmatively "established with sound medical and scientific evidence that the executive order was necessary" to protect the public, including members of the synagogues at issue. (A.A. 67; *see also* A.A. 59 (noting that the State relied on "medical, epidemiological and other expertise in formulating" Executive Order 202.68).)

The district court held further that Agudath Israel had not established that the order treated religious gatherings less favorably than any secular activities that

posed the same "attendant risks" of COVID-19 transmission, i.e., gatherings that involve individuals "arriving at the same time," "intermingling," "singing or chanting," and "leaving together." (A.A. 71-72.) Rather, religious gatherings, which are limited in size, "are accorded more lenient restrictions" than secular activities that pose a comparable transmission risk, such as performances at concert venues and movie-theater showings, which "have been and remained closed throughout the entire state." (A.A. 69, 72-73.) Thus, the court explained, "[t]o the extent the executive order singles out religious activities," it "is to accommodate worship not to thwart it." (A.A. 69.)

While Agudath Israel's failure to establish a likelihood of success on the merits was sufficient to justify the decision to deny injunctive relief, the district court also found that relief inappropriate because the equities and the public interest "weigh[ed] strongly in favor of New York's mission to protect its citizens form this global pandemic which continues to be of great concern." (A.A. 74.) The court acknowledged the extent to which, absent an injunction, the ability of the Agudath Israel synagogues to host in-person services would be affected. (A.A. 75.) However, the court declined to second-guess the State's considered evidence-based efforts to combat "a very lethal pandemic." (A.A. 75.)

2. Proceedings in the Court of Appeals

On October 19, Agudath Israel filed a notice of appeal to the United States Court of Appeals for the Second Circuit. *See* D. Ct. Dkt. No. 16. On October 21, twelve days after the district court denied the requested injunction, Agudath Israel moved

in the Second Circuit for an emergency injunction pending appeal. (A.A. 106.) It did not, however, first request that relief in the district court or attempt to show that such request would be "impracticable," as required under Rule 8(a)(2) of the Federal Rules of Appellate Procedure. (A.A. 122.) A judge of the Second Circuit denied an administrative stay and scheduled the motion to be heard on an expedited basis by a motions panel in tandem with the motion seeking similar relief filed by The Roman Catholic Diocese of Brooklyn ("Diocese"). (R.A. 192.) *See The Roman Catholic Diocese of Brooklyn v. Cuomo*, Case No. 20-3590 (2d Cir.).

While the motion was pending, the Health Department's iterative review process revealed that the Cluster Action Initiative was having its intended effect—the positivity rate within Brooklyn's red zone had dropped from 5.9 percent to 3.1 percent. As a result, the red zone was made smaller and its surrounding area was converted from orange to yellow.[13] Similar improvements in the red and orange zones in Queens caused those zones to be downgraded fully to yellow. Thus, since October 22, one of the two applicant synagogues here—Agudath Israel of Kew Garden Hills—has been allowed to operate at 50 percent of maximum occupancy, with no other limit on the number of persons who may congregate inside.[14]

On November 3, at oral argument before the Second Circuit, Agudath Israel clarified that it sought to enjoin only Executive Order 202.68's 10- and 25-person limits, which apply in red and orange zones, respectively, but not *any* percentage-of-maximum-

[13] *Governor Cuomo Details COVID-19 Micro-Cluster Metrics, supra* at 12 n.12.

[14] *Governor Cuomo Details COVID-19 Micro-Cluster Metrics*, *supra* at 8 n.8.

occupancy limits, including the most restrictive one applicable in red zones. *See* Ct. App., Oral Arg. Audio, 9:29-9:45 (Nov. 3, 2020), https://www.ca2.uscourts.gov/oral_arguments.html ("[Q:] You also don't object to the 25 percent limitation? [A:] That's correct, Your Honor.").

On November 9, the Second Circuit, with one judge dissenting, denied Agudath Israel's request for an injunction pending appeal and the Diocese's parallel request. Case No. 20-3572, __ F.3d __, 2020 WL 6750495 (2d Cir. Nov. 9, 2020). The court held that injunctive relief was inappropriate as to Agudath Israel for two independent reasons. First, the motion was procedurally defective because Agudath Israel "has not explained or otherwise justified its failure to comply with the straightforward requirement of Rule 8(a)." *Id.* at *2 (citing Fed. R. App. P. 8(a)). Second, the court found that, even if the motion were properly before the court, it would be denied because Agudath Israel, like the Diocese, failed to establish a sufficient likelihood of success on the merits of the appeal. *Id.* The court reasoned that Executive Order 202.68's limits respecting the size of religious gatherings were "similar to or, indeed, *less severe than* those imposed on comparable secular gatherings." *Id.* at *3. And "COVID-19 restrictions that treat places of worship on a par with or more favorably than comparable secular gatherings do not run afoul of the Free Exercise Clause." *Id.* To the contrary, they implicate, and pass, rational basis review. *Id.*

Shortly before the Second Circuit issued its decision, the Health Department's iterative review process caused a yellow zone in Queens to be eliminated entirely, and

what remained of the Brooklyn red zone to be downgraded to an orange zone.[15] New cluster zones were established in Monroe, Erie, and Onondaga counties. Then, on November 18, due to continued progress in containing COVID-19 spread, the Governor announced that the Brooklyn orange zone will be downgraded to a yellow zone as of November 20.[16] Consequently, there are currently no red or orange zones anywhere in New York City, and both of the synagogues for which Agudath Israel seeks relief are now located in yellow zones. In yellow zones, houses of worship are subject to a 50 percent maximum occupancy limit and no absolute-size limit—restrictions that Agudath Israel does not challenge.

This application followed.

ARGUMENT

I. AGUDATH ISRAEL FAILS TO SHOW THAT IT IS ENTITLED TO THE EXTRAORDINARY REMEDY OF A WRIT OF INJUNCTION.

A writ of injunction from this Court may be issued only where the applicant demonstrates that the "legal rights at issue" are "indisputably clear" in its favor, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), and, even then, "only in the most critical and exigent circumstances." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers). Further, as with injunctive relief generally, the applicant must also satisfy all of the remaining factors relevant for such relief, namely "that [it] is likely

[15] Gov. Andrew M. Cuomo, *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones* (Nov. 9, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-updated-covid-19-micro-cluster-focus-zones-0.

[16] *Governor Announces Updated COVID-19 Micro-Cluster Focus Zones*, *supra* at 12 n.11.

to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

As Agudath Israel's statements to the lower courts made clear, Agudath Israel seeks emergency injunctive relief only to enjoin enforcement of Executive Order 202.68's "10- and 25-person capacity limitations" for houses of worship (Application at 1) that apply in red and orange zones, respectively. Further, in its papers to this Court, Agudath nowhere asks the Court to enjoin the provision of Executive Order 202.68 that applies to houses of worship in yellow zones, namely, the 50 percent maximum occupancy limit. Nor could Agudath Israel have any basis for emergency relief against that occupancy limit in any event, because it is more generous than the pre-existing and otherwise applicable occupancy limits for indoor religious gatherings that Agudath Israel does not challenge. (Application at 1 (stating that the emergency relief it seeks will "leave New York's already-stringent capacity restrictions in place and enforceable").)

Agudath Israel's application should be denied. As explained below, it fails to satisfy the demanding requirements for injunctive relief to enjoin against it—let alone to enjoin on a statewide basis—the limits imposed by Executive Order 202.68 to which it is not even subject at this time.

A. There Are No Critical or Exigent Circumstances.

Agudath Israel cannot show that there exists "critical and exigent circumstances" that warrant the emergency relief it seeks. *Ohio Citizens*, 479 U.S. at

1312. It seeks to enjoin the 10- and 25-person limits that apply in red and orange zones, claiming that those limits make it "impossible" for the two Agudath Israel synagogues that are parties here to conduct services for all of their congregants. (Application at 11, 33 (citing A.A. 168, 173, 178).) But these synagogues are now located in yellow zones—one as of October 22 and the other as of November 20—and thus are not subject to the fixed-number gathering limits. Rather, they are subject to the 50 percent occupancy limit, which Agudath Israel has never challenged. As it told the district court, a *33 percent* occupancy limit is "reasonable" and "something that we . . . can live with." (A.A. 46.) Indeed, it told the Second Circuit that it did not object to a *25 percent* occupancy limit. Yet the applicable capacity limits are now twice that.

To be sure, Agudath Israel of America, a national Orthodox Jewish organization, is an applicant here. But the instant request for emergency injunctive relief, like the requests for injunctive relief below, is premised solely on Executive Order 202.68's impact on two synagogues located in Brooklyn and in Queens.

Agudath Israel has thus offered no grounds for issuing emergency relief to enjoin Executive Order 202.68's occupancy limits.

B. Agudath Israel Is Unlikely to Succeed on the Merits Because It Cannot Establish an "Indisputably Clear" Free Exercise Clause Violation.

Under the Free Exercise Clause, a restriction on religious practices that is not "neutral and of general applicability" implicates strict scrutiny and is thus invalid unless it is narrowly tailored to advance a compelling governmental interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). A law

is not neutral if its object is "to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. A law is not generally applicable if it burdens religiously motivated conduct while "fail[ing] to prohibit nonreligious conduct that endangers" the government's interests to "a similar or greater degree." *Id.* at 543-44. If the law is both neutral and generally applicable, then it is subject to rational basis review and will be upheld so long as it rationally furthers a legitimate governmental interest. *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879 (1990).

Agudath Israel has not demonstrated with any clarity, let alone indisputable clarity, *see Lux*, 561 U.S. at1307, that Executive Order 202.68, which targets discrete, emergent COVID-19 hotspots, implicates and fails strict scrutiny. To the contrary, the absolute-size limits that Agudath Israel contests are neutral and generally applicable, are assessed under rational basis review, and, as Agudath Israel in effect concedes, readily satisfy that review.

1. Executive Order 202.68 Is Neutral.

Neither the district court nor the Second Circuit credited Agudath Israel's factual claim that Executive Order 202.68 is motivated by religious animus against the Orthodox Jewish community and, thus, not neutral. The district court in *Roman Catholic Diocese of Brooklyn*, after conducting an evidentiary hearing, likewise found that Executive Order 202.68 was not "religiously targeted." Case No. 1:20-cv-4844-NGG-CLP, __ F. Supp. 3d __, 2020 WL 6120167, at *9 (E.D.N.Y. Oct. 16, 2020).

Agudath Israel has not come close to proving that these courts were indisputably wrong.

To begin, the order's "real operation," *Lukumi*, 508 U.S. at 535, evinces no trace of religious animus. The focus zones are drawn to encircle the cluster of COVID-19 cases that require "immediate action" "to contain the virus and to prevent a super-spreader event." (R.A. 18-19). When instituting the zones, the State is "not looking at the businesses or entities located within those zones, only the number and grouping of positive cases." (A.A. 454.) A map of one of those zones, *see supra* at 11, shows that its boundaries are narrowly drawn to reflect the relevant densities of actual cases in each of the focus zones.

Executive Order 202.68's neutrality is further demonstrated by the fact that, as the Second Circuit observed, the order "extend[s] well beyond" any single religious group. 2020 WL 6750495, at *3; *cf. Lukumi*, 508 U.S. at 536 (finding impermissible religious targeting where "almost the only conduct subject to [the challenged ordinances] is the religious exercise of Santeria church members"). The focus zones affect a variety of secular businesses and other activities, and, indeed, impose on the synagogues at issue, like all houses of worships, limitations that are similar to or less severe than those imposed on secular gatherings that pose a comparable transmission risk, as demonstrated *infra* at 30-36. The focus zones also affect numerous religious institutions that are unaffiliated with Orthodox Judaism, as evidenced by the Diocese's parallel application for a writ of injunction in this Court. Relatedly, one of the original focus zones announced on October 6, located in Broome County (R.A. 18),

covered a geographic area that—as Agudath Israel notes—lacks any "substantial Orthodox Jewish population." (Application at 25.)

Equally relevant is where the focus zones have not been established. The Cluster Action Initiative has left untouched other areas in New York City with substantial Orthodox Jewish populations, including Williamsburg and Crown Heights in Brooklyn. (Application at 10.) This is because "data"—not animus or improper targeting—"drives the zone[s]." (A.A. 454.) *See Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) (no inference of religious animus where, *inter alia*, the challenged policy "covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks").

Developments since the issuance of Executive Order 202.68 confirm its neutrality. Over the last few weeks, as the order's restrictions have helped to reduce the rate of infections in the various clusters, the State has been able to reduce the size of, or downgrade, the focus zones in which the two synagogues at issue are located.[17] Indeed, the focus zone in Queens that encompassed Agudath Israel of Bayswater—a plaintiff in the underlying litigation, but not an applicant in this Court—was eliminated entirely on November 6. And while there are no longer any red or orange zones anywhere in New York City, new focus zones have been established as new clusters have emerged elsewhere in the State, such as in Monroe, Onondaga,

[17] *See Governor Cuomo Details COVID-19 Micro-Cluster Metrics*, *supra* at 8 n.8; *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones*, *supra* at 12 n.11.

and Tioga counties. Agudath Israel notably does not assert that any of these new focus zones contain a significant Orthodox Jewish population.

Seemingly acknowledging that the focus zones affect all kinds of New Yorkers, Agudath Israel asserts that a lack of neutrality may be inferred from the fact that the focus zone in Brooklyn included a red zone throughout October 2020, while other areas with higher positivity rates, but without "substantial Orthodox Jewish populations," were designated as orange or yellow zones. (Application at 24-25.) But the positivity rate has never been the exclusive metric for determining whether an area should be designated as a red, orange, or yellow zone—just as it was never the exclusive metric for implementing New York's phased reopening earlier this year. *See New York 'Micro-Cluster' Strategy*, *supra* at 8 n.8.

Rather, as detailed in the State's focus-zone strategy, "positivity rates must be understood in context, and do not necessarily allow one geographic area to be compared to another geographic area based solely on this metric," as such rates are also a function of how much (or how little) testing is occurring. *Id.* at 2. Thus, to assess properly the prevalence of COVID-19 spread in a community and determine the best mitigation strategy, the State considers multiple factors, including (i) hospitalization rates, (ii) positive cases per capita, and (iii) other epidemiologically relevant facts, such as population density or whether a spike in infection rates may be explained by "a cluster in a single institution (e.g. nursing home, factory, college, etc.)," rather than transmission throughout the community at large. *Id.* at 2-5. Indeed, the CDC has

identified these exact factors in its guidance for implementing strategies to combat COVID-19 transmission. (R.A. 147, 149.)

The State's neutral criteria, and *only* those criteria, determine the focus zones' boundaries and designations. For example, Agudath Israel emphasizes that, on October 23, the orange zone in Chemung County had a positivity rate of 8.13 percent, while the rate in Brooklyn's red zone was 4.57 percent. (Application at 24-25.) But that fact fails to suggest, much less establish, a discriminatory purpose. The population density in rural Chemung, which has a population of less than 84,000 people,[18] is far less than in the Brooklyn red zone. Further, in mid-October, Elmira Correctional Facility in Chemung was experiencing a spike in COVID-19 cases,[19] a fact that indicated that the positivity rate outside of the facility may have been lower. The State thus reasonably accounted for these two factors, among others, when assessing the rate of spread within the community and deciding the appropriate focus-zone designation.

Given the State's documented data-driven methodology, Agudath Israel pivots to complaining that the State did not use "any criteria—generally applicable or otherwise—for designating areas for restrictions" when it implemented the Cluster Action Initiative. (Application at 23.) This is wrong. The declaration of the New York State Commissioner of Health cited by Agudath Israel (Application at 24) makes clear

[18] United States Census Bureau, *Quick Facts: Chemung County, New York*, https://www.census.gov/quickfacts/fact/table/chemungcountynewyork/BZA010218.

[19] Jeff Murray, *Elmira Prison Closed to Visitors After More than 250 Inmates Test Positive for COVID-19*, Elmira Star-Gazette, Oct. 22, 2020, https://www.stargazette.com/story/news/public-safety/2020/10/22/elmira-prison-closed-visits-after-major-covid-19-outbreak/3725374001.

that to qualify as a red zone, an area must have had a 7-day rolling average positivity rate of at least three percent for a sustained period, and any such elevated positivity rate must not have been attributable to a cluster confined to a single institution. (A.A. 452-53.) Moreover, as the district court in *Roman Catholic Diocese* expressly found, in implementing the Cluster Zone Initiative, the State relied on data "from the Electronic Clinical Laboratory Reporting System to generate precise maps to allow for microtargeting of neighborhoods with high positivity rates and evidence of community spread." 2020 WL 6120167, at *10.

It is true that, two weeks after Executive Order 202.68 was issued, the State announced additional empirical metrics for designating areas as red, orange, or yellow zones. *See New York 'Micro-Cluster' Strategy*, *supra* at 8 n.8. But, contrary to Agudath Israel's unsupported assertion, these detailed metrics were not a "post hoc" justification for Executive Order 202.68. (Application at 24.) Rather, they provided further clarification of how the Cluster Action Initiative would operate on a statewide basis going forward. This type of policy refinement is not just proper but ubiquitous where, as here, a government seeks to combat a rapidly evolving public health crisis.

The excerpts from the Governor's public comments that Agudath Israel cites out of context do not suggest, let alone indisputably prove, that Executive Order 202.68 was the product of "clear and impermissible hostility toward" the religious

beliefs or practices of Orthodox Judaism. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

Even if the public statements of government officials could by themselves establish that a law had an unconstitutional object,[20] the Governor's public statements fall far short of showing that Executive Order 202.68 was motivated by religious animus. Indeed, his public statements demonstrate his respect for the Orthodox Jewish community and his singular focus on public health and safety. To be sure, the Governor recognized at an October 6 press conference the effect that Executive Order 202.68 would have on religious gatherings, including in areas with large Orthodox Jewish populations. (A.A. 333.) But, during the same press conference, the Governor made clear that the order did not target any gatherings because of their religious nature, but, rather, the documented fact of their COVID-19 super-spreader potential. As the Governor explained: "This is about mass gatherings. And one of the prime places of mass gatherings are houses of worship." (A.A. 333.) The Governor went on to express his respect for Orthodox Jewish communities: "I have been very close to the Orthodox community for many years," a community that he "respect[s]" and "love[s]." (A.A. 333.) The Governor then identified Executive Order 202.68's singular object: "protecting people and saving lives." (A.A. 333.)

[20] This Court, however, has never found that a law had an unconstitutional object based solely on the public statements of government officials. *Cf. Lukumi*, 508 U.S. at 535 (finding animus based on the law's operation); *Masterpiece Cakeshop*, 138 S. Ct. at 1730-31. To the contrary, "[m]embers of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account" for this purpose. *Masterpiece Cakeshop*, 138 S. Ct. at 1730 (considering statements of governmental officials made "by an adjudicatory body deciding a particular case"); *see also Lukumi*, 508 U.S. at 558-59 (Scalia, J., concurring in part and concurring in the judgment) (questioning "the business of invalidating laws by reason of the evil motives of their authors" without regard to whether the laws "in fact single[] out a religious practice for special burdens").

These comments stand in stark contrast to those at issue in *Masterpiece Cakeshop* and *Lukumi*. Those cases involved statements that explicitly disparaged religiously motivated conduct. In *Masterpiece Cakeshop*, a member of the adjudicatory body deciding a case against the petitioner described the petitioner's faith as "one of the most despicable pieces of rhetoric that people can use" and likened petitioner's "invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." 138 S. Ct. at 1729. In a similar vein, in *Lukumi*, a city council member who voted for the challenged ordinances described Santeria—the religion at issue in that case—as violating "everything this country stands for," and one city official described Santeria as "foolishness," "an abomination to the Lord," and the worship of "demons." 508 U.S. at 541-42.

The remaining comments on which Agudath Israel relies—which the district court expressly found had been quoted "selectively out of context" (A.A. 74)—do not suggest any religious animus or targeting, either.

First, contrary to Agudath Israel's assertion, the Governor did not "claim[] that the 'ultra-Orthodox community' was causing the 'problem.'" (Application at 6, 22.) Rather, during the relevant press conference, the Governor identified the "problem" as "mass gatherings." (A.A. 101.) "We know mass gatherings are the superspreader events," he stated. (A.A. 101) He reiterated this point: "[I]n terms of numbers [of COVID-19 infections], it's large gatherings and large religious gatherings are large gatherings." (A.A. 101.) Although he referenced the "ultra-Orthodox community," he

did so while reporting that he is "meet[ing] with members of [that] community tomorrow" (A.A. 102)—a community for which he expressed longstanding respect.

Second, to the extent the Governor at that same press conference advised "religious institutions" and "members of the ultra-Orthodox community" that "[i]f you do not agree to enforce the rules, then we'll close the [religious] institutions down (A.A. 101-02), he did so to make plain that houses of worship would not be exempt from a generally applicable executive order. As he said moments before making this statement, "whether it's the Jewish community, whether we're talking about Black churches, whether we're talking about Roman Catholic churches, the religious community has to agree . . . that they are going to follow the rules." (A.A. 101-02.) The Governor thus did not single out the Orthodox Jewish community, or any religious community, for negative treatment. He simply clarified that they too would have to comply with the State's COVID-19 restrictions.[21]

Third, Agudath Israel cites entirely out of context statements by the Governor that certain *proposed* restrictions were not based on science, "but rather on 'fear' and 'emotion,'" and that the they reflected a policy "'cut by a hatchet,'" not a "'scalpel.'" (Application at 2, 7, 32.) As the Governor's full statement makes plain, the Governor was not referencing Executive Order 202.68 at all, but rather restrictions "proposed

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[21] Agudath Israel also makes much of the fact (Application at 2-3) that a PowerPoint presentation given by Governor Cuomo at the same press conference included a slide with pictures of recent social-distancing violations that mistakenly contained a picture from an Orthodox Jewish funeral in 2006. This mistake was due to staff error and was corrected during the press conference itself; within minutes, the photograph was replaced with a different one taken at the same location in late September 2020 that showed a large mass gathering. *See* https://twitter.com/richazzopardi/status/1313189551163224065.

by the mayor . . . in the City" that would have closed all schools in nine ZIP codes.[22] "I didn't propose this," the Governor said before emphasizing that he was "trying to sharpen [the proposal] and make it better."[23]

Fourth, the Governor's subsequent statement—after the Cluster Zone Initiative was implemented—that "the cluster is a predominantly ultra-orthodox cluster" likewise fails to suggest a lack of neutrality. (Application at 22.) The Governor made that statement when asked about the lawsuits filed by Agudath Israel and the Diocese to challenge Executive Order 202.68.[24] The statement was a descriptive observation about the focus zones at issue in these lawsuits—i.e., that, as the district court recognized, those zones "happen to have within them a large number of Orthodox Jewish citizens of our state." (A.A. 68.) Indeed, right after making this statement, Governor Cuomo emphasized that Executive Order 202.68 did not target anyone because of their religious beliefs or lack thereof: "I don't care if you're Roman Catholic, you're Jewish, you're Muslim, you're an atheist." What matters, the Governor explained, is following the rules because, otherwise, "the infection rate spreads, people get sick, and then you make others sick."[25]

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[22] Reuvain Borchardt, *EXCLUSIVE FULL RECORDING: Jewish Leaders Say They Were 'Stabbed in the Back' by Cuomo*, Hamodia, Oct. 16, 2020, https://hamodia.com/2020/10/12/exclusive-recording-jewish-leaders-say-stabbed-back-cuomo/.

[23] *Id.*; *see also* City of New York, *Mayor de Blasio Sends State Proposal to Close Schools and Non-Essential Businesses in Nine New York City Zip Codes* (Oct. 4, 2020), https://www1.nyc.gov/office-of-the-mayor/news/693-20/mayor-de-blasio-sends-state-proposal-close-schools-non-essential-businesses-nine-new-york#/0.

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

[25] *Id.*

In sum, the Governor's statements confirm what the broader context establishes: "EO 202.68 targets public gatherings based on COVID-19 transmission risk factors," so, as the district court in *Roman Catholic Diocese* observed, "although the EO establishes rules specific to religious gatherings, it does so because they are gatherings, not because they are religious." 2020 WL 6120167, at *9.

2. Executive Order 202.68 Is Generally Applicable.

Executive Order 202.68 is generally applicable because its limits on the size of gatherings do not disfavor religious gatherings in houses of worship, as compared with any secular activities that present "a similar or greater degree" of risk of COVID-19 spread. *Lukumi*, 508 U.S. at 543. To the contrary, religious gatherings are treated *more* favorably. They are allowed in red and orange zones, subject to size limits, even though they commonly present an outsized risk of transmitting the virus, whereas the secular activities that present similar transmission risks are banned entirely.

As the district court recognized, indoor religious gatherings commonly possess features that foster the spread of COVID-19. (A.A. 71-72.) They tend to involve large numbers of people from different households arriving simultaneously; congregating as an audience for an extended period of time to talk, sing, or chant; and then leaving simultaneously—as well as the possibility that participants will mingle in close proximity throughout. (*See* R.A. 18.) Particularly because COVID-19 may be spread by infected individuals who are not yet, or may never become, symptomatic, these features combine to generate an unusually high likelihood that infected persons will be present, that they will expel respiratory droplets and aerosols in close proximity

to others and infect them, and that those newly-infected persons will further spread the virus after they disperse and go their separate ways. *See supra* at 3-4. Religious gatherings thus tend to have "super-spreader" potential. (*See* R.A. 15, 17-18.)

Indeed, there is a documented history of religious gatherings serving as COVID-19 super-spreaders. From the earliest days of the pandemic, they have caused a disproportionately high number of infections across the United States, from California to New York and many states in between.[26] (*See, e.g.*, R.A. 181.)

Moreover, the risk of transmission that religious and comparable secular gatherings pose is not sufficiently addressed by masking and social-distancing requirements. As proposed amici curiae explain, physicians and infectious disease specialists rated such gatherings as third most risky activity of 37 activities, "even if participants wore masks and adhered to social distancing." Motion for Leave to File Brief as *Amici Curiae* and Brief of the American Medical Association and the Medical Society of the State of New York, at 7 (Nov. 19, 2020).[27]

The State thus would have been justified in altogether prohibiting gatherings in houses of worship located in red and orange zones—areas so designated because they were found to have an above-average prevalence of COVID-19 infections and thus a heightened risk that those attending religious services in those areas would be infected and could infect others. (A.A. 451-52.) This is the course the State has

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[26] *See, e.g.*, Ryan Sabalow et al., *After Coronavirus Infects Sacramento Church, Religious Leaders Restrict More Services*, Sacramento Bee, Mar. 17, 2020; Alison Kuznitz, *More COVID-19 Deaths Linked to Super-Spreader Event at Charlotte Church*, Charlotte Observer, Nov. 4, 2020.

[27] *See also* Motion for Leave to File Brief of *Amici Curiae* Leading Epidemiologists and Public Health Experts, *Harvest Rock Church, Inc. v. Newsom*, Case No. 20-55907 (9th Cir.), Dkt. No. 42-1.

taken with respect to "comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (Roberts, C.J., concurring in denial of application for injunction). These activities are "the right comparison group," because, like religious services, each of these activities "puts members of multiple families close to one another for extended periods, while invisible droplets containing the virus may linger in the air," and "speaking and singing by the audience increase the chance that persons with COVID-19 may transmit the virus through the droplets that speech or song inevitably produce." *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020) (Easterbrook, J.), *petition for cert. filed*, No. 20-569 (U.S. Oct. 22, 2020). Each of these activities is completely banned in red and orange zones; many have been banned since March.[28]

Instead, as the district court found (A.A. 69), Executive Order 202.68 treats religious gatherings *more* favorably. Rather than prohibit houses of worship located in red and orange zones from hosting gatherings altogether, Executive Order 202.68 allows such gatherings to occur, subject to limits on their size. It thus accords *preferential* treatment to religious gatherings in houses of worship, as compared with

[28] *See* New York State Department of Health, *Interim Guidance for Movie Theaters During the COVID-19 Public Health Emergency*, at 1 (Oct. 19, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Movie_Theater_Detailed_Guidelines.pdf; New York State Department of Health, *Interim Guidance for Professional Sports Competitions with No Fans During the COVID-19 Public Health Emergency*, at 3 (Sept. 11, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Professional_Sports_Competitions_With_No_Fans_Detailed_Guidelines.pdf; New York State Department of Health, *Interim Guidance for Low-Risk Indoor Arts & Entertainment in New York City During the COVID-19 Public Health Emergency*, at 1 (Aug. 19, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYC_LowRiskIndoorArtsEntertainmentMasterGuidelines.pdf.

secular activities that present "a similar or greater degree" of risk of COVID-19 spread. *Lukumi*, 508 U.S. at 543.

There is no merit to Agudath Israel's argument (Application at 21-25) that Executive Order 202.68 *disfavors* religious gatherings relative to similarly situated secular activities and therefore implicates strict scrutiny. Agudath Israel has not shown that any of the secular businesses or activities it identifies (a) presents the same COVID-19 super-spreader potential as indoor religious gatherings, yet (b) is regulated by Executive Order 202.68 in a more-permissive manner. It has thus failed to establish that the order gives preferential treatment to "a single secular analog." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting).

Applicants offer, as supposed comparators, a variety of commercial enterprises—offices, retail stores, malls, brokerage services, and news reporting. (Application at 28, 29.) Some of these businesses have been deemed essential, and, thus, are not restricted by Executive Order 202.68, regardless of whether they are located in red or orange zones. And any non-essential businesses on that list that are not considered "high risk," within the meaning of Executive Order 202.68, can continue in-person operations in areas other than red zones.

However, *none* of those businesses present anywhere near as much risk of COVID-19 spread as religious services. They do not ordinarily share the features of religious services that pose heightened risks of COVID-19 transmission: large numbers of people from different households arriving simultaneously; congregating

as an audience for an extended period of time to talk, sing, or chant; and then leaving simultaneously—as well as the possibility that participants will mingle in close proximity throughout. Rather, at businesses like those Agudath Israel identifies, "people neither congregate in large groups nor remain in close proximity for extended periods," let alone while vocalizing in a communal fashion. *South Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). To the contrary, and most clearly in the retail settings that Agudath Israel emphasizes, customers come and go randomly and do not visit and remain for the purpose of congregating. Those settings thus do not present the risk of mingling—and consequential risk of COVID-19 spread—that congregate gatherings present.

Additionally, Executive Order 202.68 treats the non-essential businesses that applicants identify *less* favorably than houses of worship as far as gatherings—the events at issue in this case—are concerned. This is most clear in red zones. In red zones, *all* non-essential businesses must cease in-person operations entirely, whereas houses of worship may continue in-person operations, and may continue to host gatherings, subject to applicable size constraints. (R.A. 153.) In orange zones, non-essential businesses that are not deemed "high-risk" are still disfavored with respect to the hosting of gatherings. Such businesses *are not* exempted from, and thus must comply with, the 10-person limit that applies in orange zones to non-essential gatherings generally. (R.A. 153.) Houses of worship, in contrast, *are* exempted from that limit altogether and are instead subject to a 25-person limit (if that limit is more restrictive than the applicable occupancy limit). (R.A. 153.) Thus, in an orange zone,

a non-essential business cannot hold a 25-person staff meeting or other 25-person event, but a house of worship can hold a 25-person service.

Contrary to Agudath Israel's contention (Application at 28), in-person school instruction, which was permitted to resume in red and orange zones in late October 2020, in public, private, and parochial schools, is not a proper secular analog to religious services. It is more heavily regulated than religious services in several critical respects.

For schools in red and orange zones, only students, teachers, and staff who test negative for COVID-19 are allowed to return to school.[29] Once students, teachers, and staff are back at school, they must be subjected to daily intensive symptom and exposure screening, in addition to strict distancing, masking, and sanitation protocols. Further, a random sample of 25 percent of each school's on-campus population must be re-tested every week, and if the positivity rate ever exceeds a strict numerical threshold—in New York City, 2 percent—the entire school must close.

Religious gatherings in red and orange zones are not subject to any of those requirements. Indeed, other than the more-restrictive size limits, religious gatherings in red and orange zones are not subject to any health and safety protocols above and beyond those applicable to such gatherings in the remainder of the State pursuant to the rules and regulations governing Phase 4 of the reopening plan.

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[29] New York State Department of Health, *Interim Guidance on COVID-19 Test-Out for Public and Non-Public Schools Located in Areas Designated as "Red or Orange Micro-Cluster Zones" under the New York State Micro-Cluster Action Initiative*, at 2 (Nov. 3, 2020), https://coronavirus.health.ny.gov/system/files/documents/2020/11/guidance-for-school-test-out-in-red-and-orange-zones_0.pdf.

Finally, Agudath Israel's invocation of the "history" and "tradition" of the Free Exercise Clause (Application at 26) casts no doubt on Executive Order 202.68's general applicability. Whatever the precise contours of the clause's original meaning may be, that clause does not prevent states from enacting generally applicable public health or safety measures. The provisions of founding-era state constitutions that Agudath Israel theorize were a model for the federal clause confirm as much. *See, e.g.*, N.Y. Const., art. XXXVIII (1777) ("[T]he liberty of conscience, hereby granted, shall not be so construed as to . . . justify practices inconsistent with the peace or safety of this State."); *see also* John Fabian Witt, *American Contagions: Epidemics and the Law from Smallpox to COVID-19* 118 (2020) ("Churches have always been subject to the general epidemic regulations enacted under the police powers of the states."). When disease and sickness were part of daily life, as was true then as it is now, "pursuing happiness meant promoting health." Witt, *American Contagions*, *supra*, at 14. Thus, as scholars have recognized, these state constitutions contained "caveats [that] reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions," including the function of protecting the public's health and safety. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 916 (1992) (describing the founding-era state constitutions setting forth "safety" exceptions to free-exercise guarantees). In all events, the history and tradition of the Free Exercise

Clause is far from "indisputably clear" support for Agudath Israel's application. *Lux*, 561 U.S. at 1307.

C. The Executive Order Has a Rational Basis.

Agudath Israel does not dispute, and thereby in effect concedes, that Executive Order 202.68 satisfies rational basis review. Indeed, the rational basis is manifest. Executive Order 202.68 was intended to help, and indeed did help, slow the spread of COVID-19 by limiting the occurrence of events in which the virus is most readily transmitted: gatherings where large numbers of attendees arrive simultaneously, congregate as an audience for an extended period of time, and leave simultaneously—and possibly mingle throughout—in narrowly-circumscribed areas that are already experiencing an unusually high incidence of COVID-19 infection.

D. The Balance of Equities and the Public Interest Do Not Weigh in Favor of Injunctive Relief.

The application should be denied for the additional reason that Agudath Israel has not established that the balance of the equities and the public interest—which merge here, because the application seeks to enjoin governmental action, *Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh in favor of an injunction. Those factors cut decisively against an injunction, and "alone require[] denial of the requested injunctive relief," notwithstanding Agudath Israel's likelihood of success on the merits of its Free Exercise Clause claim. *Winter*, 555 U.S. at 23.

Agudath Israel's interest in enjoining absolute-size limits that do not even now apply to the synagogues for which it seeks relief does not outweigh the State's interest in enforcing those limits in other places experiencing dangerous surges in COVID-19

infections. (R.A. 15-17.) As the district court found, to allow mass gatherings in houses of worship in red and orange zones could help contribute to a COVID-19 resurgence that "blossom[s] into a full blown pandemic," as the State experienced in the Spring. (A.A. 71.) The balance of equities and the public interest thus weigh against injunctive relief, given the enormity of the potential harm to the public, including members of the synagogues at issue, that Executive Order 202.68 is designed to prevent. *See Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 731 (9th Cir. 2020) (finding a church failed to show that enjoining COVID-19 preventions materially identical to those at issue in *South Bay Pentecostal Church* served the public interest).

Agudath Israel's assertion that granting the requested injunction would bring New York "into line with the approaches of other States" does not help its case. (Application at 36-37.) The approaches of other states are not working. The Nation's rate of new infections and COVID-19-related hospitalization are currently at record highs; more than a thousand people are now dying daily, a 50 percent increase since mid-October.[30] Regardless, that public officials in other states may deem certain measures sufficient to protect their own citizens does not prevent New York State from pursuing a different public health strategy.[31] Applicants' suggestion to the contrary ignores the vital role of States as "laboratories for experimentation to devise

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[30] Melanie Evans, *Record Covid-19 Hospitalizations Strain System Again*, Wall St. J., Nov. 11, 2020; Sarah Mervosh et al., '*It's Traumatizing': Coronavirus Deaths Are Climbing Once Again*, N.Y. Times, Nov. 14, 2020.

[31] For recent reporting on the effectiveness of New York's containment policies vis-à-vis other states' policies, see Lauren Leatherby and Rich Harris, *States That Imposed Few Restrictions Now Have the Worst Outbreaks*, N.Y. Times, Nov. 19, 2020.

various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

II. CERTIORARI BEFORE JUDGMENT IS NOT WARRANTED.

The Court should deny Agudath Israel's alternative request (Application at 39-40) to grant certiorari before judgment. The two synagogues for which relief is sought are not subject at this time to the 10- and 25-person limits that Agudath Israel seeks to have enjoined. This case thus does not "require immediate determination in this Court." S. Ct. R. 11. Moreover, the Second Circuit has determined to handle Agudath Israel's appeal on an expedited basis. The court has directed that briefing be complete by December 14 and the appeal argued on December 18, 2020. Ct. App. Dkt. No. 119; *see Dep't of Homeland Sec. v. Regents of Univ. of California*, 138 S. Ct. 1182 (2018) (certiorari before judgment is unwarranted where "[i]t is assumed that the Court of Appeals will proceed expeditiously to decide [the] case").

Agudath Israel has also not identified any cert-worthy question. The Second Circuit below did not profess any disagreement with the Third or Sixth Circuits as to the proposition (Application at 40) that "a single secular exemption to an otherwise-applicable prohibition can render a law not neutral and generally applicable as applied to religion." Rather, all three courts engaged in the same legal inquiry: they analyzed whether the secular conduct that is the subject of a given "exemption" is comparable in the relevant sense to the religious conduct that remains regulated. *That* inquiry is not susceptible of nationwide resolution as a matter of law because it is highly context dependent, hinging on the interests the particular law at issue seeks

to advance. And, within each context, including the public health context at issue here, the comparability calculus is highly fact-dependent. *See Calvary Chapel*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting) (noting that a state's public health justification must be evaluated "on th[e] record" presented).

Further, the interlocutory posture of this case poses significant vehicle problems. Agudath Israel asks this Court to resolve two questions, both of which pertain exclusively to the merits of their claim under the Free Exercise Clause. (Application at ii.) But the decision Agudath Israel asks this Court to review is the district court's decision denying a preliminary injunction, which the district court found justified not only because of a lack of success on the merits of the free exercise claim, but because "[t]he balance of equities and the public interest weigh strongly in favor of New York's mission to protect its citizens from this global pandemic which continues to be of great concern." (A.A. 74.) Because proper consideration of the public interest alone supports the district court's judgment, *see Winter*, 555 U.S. at 24, and because, on top of that, such consideration is reviewed only for an abuse of discretion, *see id.* at 32, this case presents a poor vehicle for consideration of the constitutional questions applicants wish to present.

CONCLUSION

Agudath Israel's application for a writ of injunction or, in the alternative, certiorari before judgment should be denied.

Respectfully submitted,

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November 20, 2020

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