No. 20-A87

In The Supreme Court of the United States

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,

Applicant,

v.

GOVERNOR ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY,

Respondent.

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

Reply Brief in Support of Emergency Application for Writ of Injunction

RANDY M. MASTRO
Counsel of Record
AKIVA SHAPIRO
WILLIAM J. MOCCIA
LEE R. CRAIN
LAUREN M. KOLE
AVERY E. MASTERS
DECLAN T. CONROY
SETON H. O'BRIEN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
rmastro@gibsondunn.com

Counsel for Applicant

PARTIES AND RULE 29.6 STATEMENT

Applicant is THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK. Applicant has no parent corporation, and there is no publicly held corporation owning 10% of more of its stock.

Respondent is ANDREW M. CUOMO, in his official capacity as the Governor of New York.

DECISIONS BELOW

Subsequent to the filing of the Diocese's application, the Second Circuit Order attached as Exhibit A to that application was also made available at 2020 WL 6559473 and designated for publication in the Federal Reporter. A reporter citation is not yet available.

On November 18, 2020, the court of appeals reissued the Second Circuit Order, with minor modifications, as a published per curiam opinion (the "Second Circuit Opinion"). The Second Circuit Opinion is attached hereto as Exhibit R. A copy of Judge Park's reissued dissenting opinion (the "Second Circuit Dissent"), which was docketed separately, is attached hereto as Exhibit S. The Second Circuit Opinion and Second Circuit Dissent are also available at 2020 WL 6750495. A reporter citation is not yet available.

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**TO THE HONORABLE STEPHEN BREYER,
ASSOCIATE JUSTICE OF THE SUPREME COURT AND
ACTING CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:**

The Governor offers no meaningful response to the issues raised in the Diocese's emergency application. He does not dispute that: (1) the Diocese has suffered irreparable harm from the infringement of its First Amendment rights caused by Executive Order 202.68's fixed-capacity limitations; (2) the Executive Order's fixed-capacity restrictions cannot satisfy strict scrutiny; and (3) a law is "'not of general application,'" subjecting it to strict scrutiny, if it is "intended to further particular governmental interests" and "burdens 'conduct motivated by religious belief,' but 'fail[s] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree.'" Resp. 20 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543, 545 (1993)).

That is plainly the case here: This Executive Order burdens "conduct motivated by religious belief"—by placing fixed-capacity limitations on "houses of worship"—and it "fail[s] to prohibit nonreligious conduct that endangers" the asserted governmental interests "in a similar or greater degree." In fact, the Governor *concedes* that numerous secular businesses in the so-called "red" and "orange" zones are allowed to remain open without any capacity restrictions at all, and thus are treated more favorably than "houses of worship," which are effectively shuttered. Moreover, the many businesses that this Executive Order does not regulate at all—including supermarkets and large hardware stores—are less safe from a COVID-19 risk perspective under the very metrics that the Governor's own Health Department official testified below are most relevant—"time" in the

establishment and "distance" between people. *See* Appl. 27. Yet those businesses are free from any capacity restrictions.

In attempting to justify these inconsistencies, the Governor sets up a troubling and unsupported strawman—that houses of worship present, categorically, a "super-spreader" risk. *See* Resp. 5, 22-23. But the examples he cites, largely "[f]rom the earliest days of the pandemic," Resp. 22; *see also id.* at 5 ("early cases")—long before people knew about things like social distancing and mask wearing—cannot possibly justify the Executive Order's house-of-worship-only fixed-capacity restrictions, first imposed last month. Indeed, the Governor admits that, "since July 2020, [the Diocese] has voluntarily imposed upon its churches its own COVID-19 prevention protocols, and that none of its churches have experienced any outbreaks." Resp. 30.

The Governor then proceeds to argue that houses of worship are treated "more favorably" than what he has deemed "comparable" secular events, such as "spectator sports, and theatrical performances," which are closed in affected zones, and that the law is therefore "generally applicable"—even though numerous *other* commercial activities are not subject to any capacity restrictions. Resp. 23-24. This argument, which asks "judges to decide whether a church is more akin to a factory or more like a museum," is entirely non-responsive to the threshold question "whether a given law on its face favors certain organizations and, if so, whether religious organizations are part of that favored group." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612-13 (2020) (Kavanaugh, J., dissenting). Here, strict scrutiny applies because the Governor has placed fixed-capacity restrictions on "houses of worship," while leaving

many secular businesses and services free of restrictions altogether. Target and Staples can welcome hundreds of people at a time, and brokers can sit together in cramped quarters from 9:00 a.m. to 5:00 p.m. every day, but the Diocese's parishioners are barred from attending a 45-minute Mass conducted under "rigorous safety protocols." PI Order at 3.

Strict scrutiny applies here, and this Executive Order clearly cannot meet that rigorous standard. The Governor's opposition admits as much by failing even to argue that it could satisfy strict scrutiny. No wonder: As Judge Park (the only jurist to address this question below) explained, "the fixed capacity limits do not account in any way for the sizes of houses of worship" and "bear little relation to the particular COVID-19 transmission risks the Governor identifies." Second Circuit Dissent at 6. Such an untailored approach is precisely what the U.S. Constitution forbids. The constitutional violation here is thus indisputably clear.

This case, moreover, presents urgent constitutional issues of nationwide importance. In arguing otherwise—and in a reversal of his arguments below—the Governor now seeks to distance himself from the lower courts' misapplication of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and of Chief Justice Roberts's concurrence in *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), disclaiming reliance on those cases that featured centrally in every one of his briefs below. *See* Resp. 35. But he cannot run from the fact that the lower courts here, and in so many other cases across the nation, have mistakenly relied on these opinions to

give *carte blanche* to government entities to impose disparate, adverse restrictions on religious activities in a pandemic of unknown duration.

The balance of hardships weighs decidedly in favor of the Diocese. While the Governor repeats the lower courts' error in presenting the governmental interest here in the most generalized terms—avoiding a coronavirus "second wave," Resp. 36—the Governor *concedes* that "the Diocese can plausibly claim that, in areas" that were not governed by Executive Order 202.68, "its own efforts may well have prevented outbreaks in its churches," *id.* at 31. That is the Diocese's whole point: Until the moment this new Executive Order took effect, the Diocese had been operating safely for months and without any COVID-19 outbreak or spread in any of its churches, *including* the ones located in neighborhoods that the Governor later designated as "red" and "orange" zones. This new admission by the Governor thus eliminates any remaining doubt as to the efficacy of the Diocese's protocols and confirms that no public interest is served by sweeping up the Diocese's churches under overbroad restrictions applicable to all "houses of worship." Moreover, the Diocese is not challenging the percentage capacity restriction of 25%, with which it will abide—as it already had been—as a condition of any injunction here; and its churches will abide by other onerous safety restrictions (including shortening the Mass, altering Holy Communion, limiting singing, and mandating masks and social distancing) that directly address the purported risks of allowing Catholic churches to reopen—thereby obviating any conceivable public health rationale for treating the Diocese's churches less favorably than the local Target, Staples, pet store, or brokers' office.

Finally, in a letter filed with the Court earlier today, the Governor implies—but does not actually argue—that this application may be moot, because the Governor announced yesterday afternoon, as his Response here was being filed, that what are currently designated "orange" zones in Brooklyn will soon be re-designated "yellow," such that the Diocese's churches may soon (and for some unknown time period) avoid these fixed-capacity restrictions (although other areas of the State remain designated as "orange" zones subject to those onerous limitations). The timing of the Governor's re-designation of Brooklyn zones—on the eve of a ruling by this Circuit Justice or the Court—is more than a little curious, especially when, as the Second Circuit majority recognized in its opinion reissued earlier this week, rates are otherwise rising in New York State. *Cf. Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."). In any event, any suggestion of mootness is belied by the Governor's concession that the challenged Executive Order remains in effect; that the zone designations reflect an "iterative process" that is reevaluated daily; and that, "if the circumstances warrant, zone boundaries are redrawn or zones are re-designated, causing restrictions to be modified accordingly." Resp. 13-14. In other words, any one of the Diocese's churches can again be subjected to fixed-capacity restrictions on literally a moment's notice. The fluid nature of these modifications, and the timing of the Governor's latest modification, fits squarely within the well-settled case law (not addressed by the Governor in his letter or Response) establishing that this application remains justiciable, including under both

the "voluntary cessation" and "capable of repetition, yet evading review" doctrines. *See infra* p. 15 n.7; Appl. 13 n.2. Because this Executive Order remains in effect, and can be invoked at the Governor's discretion on a moment's notice to once again place the Diocese's churches into "red" and "orange" zones, the Sword of Damocles continues to hang over the Diocese's head, whether or not a particular church happens to fall within a particular zone at a particular point in time, necessitating this Court's immediate intervention.

The Diocese therefore respectfully requests that this application be immediately granted or referred to the full Court to decide. It requests that an injunction issue as early as Friday, November 20, 2020, or as soon thereafter as practicable, and that it remain in effect until such time as this Executive Order's 10- and 25-person fixed-capacity caps are permanently withdrawn, repealed, or invalidated by a court.

ARGUMENT

I. The Violation Of The Diocese's Free Exercise Rights Is Indisputably Clear, And The Lower Courts' Contrary Decisions Exacerbate Confusion On Constitutional Issues Of Nationwide Importance.

A. The Executive Order Targets Religious Institutions For Adverse Treatment Such That Strict Scrutiny Applies.

The Governor's Executive Order expressly targets "houses of worship," as made plain by its text and effect, and by the Governor's surrounding comments. Appl. 21-25. It subjects "houses of worship"—and houses of worship alone—to onerous fixed-capacity caps while permitting a host of secular businesses to remain open in "red" and "orange" zones without any restrictions whatsoever. Strict scrutiny applies,

Lukumi, 508 U.S. at 533, 546, and each of the Governor's arguments to the contrary falls flat.

The Governor does not even try rehabilitate the district court's erroneous reliance on *Jacobson*—which the court of appeals majority appropriately declined to cite—and the denial of a prior emergency application in *South Bay*. *See* Appl. 30-34; *Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting); Second Circuit Dissent at 5. Instead, the bulk of the Governor's Response embraces the lower courts' flawed conclusion that the Executive Order is facially neutral because it *also* regulates institutions other than "houses of worship." But those restrictions are different from the ones imposed on "houses of worship"—textbook non-neutrality. *See, e.g.*, *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014); *see also* TRO Order at 3. It of is no moment "that *some* secular businesses, such as movie theaters, are subject to" more severe restrictions. *Calvary Chapel*, 140 S. Ct. at 2613-14 (Kavanaugh, J. dissenting) (emphasis in original); *see* Appl. 34-36. Rather, the threshold question is simply whether religious practice is distinctly burdened by a non-generally applicable or non-neutral law. *See Lukumi*, 508 U.S. at 533.

Such is the case here. As the Governor concedes, his Executive Order does not regulate with respect to capacity, and thereby favors, all of the many kinds of secular businesses that the State has deemed "essential." And, in orange zones, even most "non-essential" businesses can operate without restriction. Meanwhile, the Diocese's churches are subjected to 10- and 25- person capacity limits, regardless of the size of

the buildings. PI Order at 5-6. The result is that Target and Staples can host hundreds of shoppers at a time, and brokers can spend 40 hours per week working and hosting customers in poorly ventilated office buildings, but Catholics cannot attend a 45-*minute* Mass. This adverse treatment of religious practice ends the inquiry and triggers strict scrutiny, for reasons having nothing to do with "second guess[ing]" the State's "essential business" designations. *Id.* at 19.[1] Rather, this is a straightforward application of the constitutional principle that, when the government categorizes organizations for differential treatment, it cannot place religious organizations in a less favored category without satisfying strict scrutiny. *Lukumi*, 508 U.S. at 537; *see also, e.g.*, *Calvary Chapel*, 140 S. Ct. at 2612-13 (Kavanaugh, J., dissenting); *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam); *Fraternal Order of Police*, 170 F.3d at 366; *Denver Bible Church v. Azar*, 2020 WL 6128994, at *1 (D. Colo. Oct. 15, 2020).[2]

[1] In its newly issued Opinion—which is largely the same as the original Second Circuit Order but adds a few new points—the court of appeals observed for the first time that the Diocese "did not rebut" the distinction between "essential" and "non-essential" businesses. Second Circuit Op. at 4. But that is because the Diocese does not challenge the designations themselves; rather, the Diocese challenges the "value judgment," *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.), whereby the Governor determined that "life-sustaining operations" may continue to operate freely during the pandemic but "soul-sustaining" ones cannot, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (per curiam). *See also* Second Circuit Dissent at 3-4 & n.3 ("[T]he Constitution considers the free exercise of religion to be an essential activity, even if the Governor does not.").

[2] The Governor's suggestion that "non-essential businesses" in orange zones must comply with the 10-person limits for "non-essential gatherings," while houses of worship do not—and that houses of worship are therefore favored over non-essential businesses in orange zones—has no basis in the text of the Executive Order or the record. *See* Resp. 29. The Executive Order establishes separate rules for "businesses" and an undefined class of "gatherings." Ex. F. In orange zones, "businesses" (whether deemed essential or not) are not subject to *any* capacity limitations. Businesses are favored over houses of worship.

The Governor does not meaningfully dispute any of this. In fact, he does not even cite—on this issue or any other—most of the cases on which the Diocese relies, let alone try to distinguish them. Instead, the Governor simply adopts the lower courts' errant view that it is necessary to compare and contrast among various potential secular comparators. But his attempts to distinguish the Diocese's religious services from favored secular activities fall flat, as explained more fully below in the discussion of narrow tailoring, which is where such issues are properly raised. And aside from the Chief Justice's *South Bay* concurrence, the Governor's only citation on that question is to a case that was on the wrong side of *both* circuit splits and, even then, acknowledged that its comparators analysis could change "with more time" and information. *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020).

Finally, the Governor's public acknowledgment that Executive Order 202.68 is "most impactful on houses of worship" provides an independent basis for the application of strict scrutiny. Ex. H at 8; *see* Appl. 24-25. Seeking to side-step that admission, the Governor doubles down on the lowers courts' mistaken view that the neutrality question is one of "religious animus." Resp. 33. But as the Diocese already explained, citing a case the Governor ignores, "[t]he constitutional benchmark is 'government *neutrality*,' not 'governmental avoidance of bigotry.'" Appl. 36 (quoting *Roberts*, 958 F.3d at 415 (emphasis in original)). The Governor's argument that neutrality cannot be assessed "based solely on the statements of government officials" is a red herring, Resp. 32-33, as here his statements merely *confirm* what is apparent

from the Executive Order's text and effect. The Diocese does not cite those statements as evidence of "evil motives"—the use that concerned Justice Scalia in *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring)—but rather as an admission by the Governor concerning his own Executive Order's disparate *treatment* of religion. The Response tellingly ignores what Justice Scalia said two sentences later: "Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid." *Id.* at 559. In this regard, the Governor's concession in his Response that he "intend[ed] to target religious gatherings" is the end of the story from a neutrality perspective. Resp. 33. That he claims to have done so in furtherance of a valid public health interest is immaterial. *See ibid.* That is a compelling interest defense (here, not a winning one), not a neutrality argument. Strict scrutiny applies.

B. The Governor's Fixed Caps On In-Person Church Attendance Cannot Withstand Strict Scrutiny.

Once the correct standard—strict scrutiny—is applied, there is no question that the Executive Order's fixed-capacity caps cannot stand. Appl. 25-29; *see* Second Circuit Dissent at 6-7. The Governor does not even attempt to argue otherwise. Instead, he contends, erroneously, that "[t]he Diocese does not dispute, and thereby in effect concedes," that the Executive Order would survive *rational basis* review. Resp. 34 (arguing the point facially rather than as-applied). *But see* Appl. 26 ("That

the house-of-worship-only fixed-capacity restrictions bear no relationship at all to the physical size of the church or synagogue building—instead capping attendance in a 1,000-seat church, for example, at 10 people (the same as if the church had seated 40)—further belies their alleged necessity in combatting COVID-19, *as well as their purported rationality*." (emphasis added)).[3]

Nevertheless, because many of the Governor's purported neutrality and general applicability arguments in fact raise issues more suited for a narrow tailoring analysis, the Diocese responses to those points briefly here.

First, it is altogether irrelevant—both as a question of general applicability and one of narrow tailoring—that the fixed-capacity limits "are not designed to apply statewide" and that, according to the Response, the "zone boundaries" themselves are "data driven." Resp. 25-26.[4] The question is not (and the Diocese expresses no view on) whether the *zones* are narrowly tailored, but rather whether the 10- and 25-person caps on house-of-worship attendance are. They are not. Indeed, the only jurist to consider the question below found that "there is little doubt" on this point, given that the restrictions fail to account "in any way for the sizes of houses of worship" and "bear little relation to the particular COVID-19 transmission risks." Second Circuit Dissent at 6-7. The relative size of the zones in geographic terms has no bearing on whether the house-of-worship restrictions are the least restrictive means of

[3] *See also* Appl. 39 ("No public health interest is served by enforcing arbitrary 10- and 25-congregant limits inside spacious churches where masks, social distancing, and other measures are already in place, especially when a huge superstore like Target or Staples in these same 'red' and 'orange' zones 'can literally have hundreds of people shopping there.'").

[4] At the evidentiary hearing below, the State's witness repeatedly conceded that these "zones" were created by the "Executive Office," not by epidemiologists. Ex. D at 71:2-72:1; 72:22-24.

combatting COVID-19 *within* those zones. *See First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670-71 (5th Cir. 2020) (Willett, J., concurring in grant of injunction pending appeal) (explaining, in a case involving just a single church, that "[s]ingling out houses of worship—and *only* houses of worship, it seems—cannot possibly be squared with the First Amendment" (emphasis in original)). Indeed, the Free Exercise violation arises precisely because religion is singled out for adverse treatment relative to other activities within the same geographic confines. *See Roberts*, 958 F.3d at 414 ("Come to think of it, aren't the two groups of people often the *same people*—going to work on one day and going to worship on another? How can the same person be trusted to comply with social-distancing and other health guidelines in secular settings but not be trusted to do the same in religious settings?" (emphasis in original)). The Diocese has never challenged the zone designations, and the Governor's focus on that issue is a red herring.[5]

Second, the Governor attempts to brush aside the undisputed evidence of the Diocese's successful efforts to combat the virus's spread by misrepresenting the Diocese's position. Specifically, he cites the Diocese's strict scrutiny argument to suggest, erroneously, that the Diocese contends that "the principle of general applicability requires that its churches must be exempted from Executive Order 202.68's gathering-size limits." Resp. 30 (emphasis removed) (citing Appl. 26-27).

[5] Nor is it of any moment that the zone designations can change once the Governor unilaterally decides that "sufficient progress has been made in keeping the clusters under control." Resp. 26; *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Such a determination is neither permanent nor binding on the Governor; it can be undone at any time.

But the Diocese never made that argument or otherwise asked the State to tailor its COVID-19 response to each specific house of worship. *See id.* at 32. The Diocese's point is simply that a law cannot possibly be the least restrictive means of addressing public health concerns if it is so overbroad that religious institutions like the Diocese are "swept up" in its strictures (TRO Order at 3)—despite having operated safely and without any COVID-19 outbreaks for months before this *de facto* shutdown order—while myriad secular businesses remain free to operate *without* restriction. Such disparate treatment belies the Governor's suggestion that, because there are COVID "clusters" in certain geographic areas, his only option was to impose blanket shutdown orders across the entire zone. And it is on this point that the Diocese's safety protocols, which outpace even those imposed by the State, are eminently relevant: If the Governor can combat infection spikes while bankers, brokers, and accountants are allowed to sit in their offices and meet with customers *without* adhering to the Diocese's "rigorous safety protocols," then surely there is no need to shut down *all* houses of worship, including ones with a proven track record of preventing COVID spread. PI Order at 3; *see* Appl. 27.[6]

Given that the Diocese's safety protocols have successfully addressed the very COVID-19 transmission risks the Governor has identified, mandating similar protocols in other businesses—rather than shutting down all churches—would surely be a less restrictive (and more effective) approach. *See Roberts*, 958 F.3d at 414

[6] Tellingly, nowhere does the State attempt to justify the preferential treatment afforded to nine-to-five office jobs that plainly involve "people from different households arriving simultaneously" at the start of the work day, sitting in close proximity for eight hours or more, talking and/or mingling throughout the day, and "then leaving simultaneously." Resp. 28.

(explaining that the government cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings"). And if the Governor is concerned that members of certain communities (religious or otherwise) are not complying with *prior* State mandates, *see* Ex. I, the less restrictive alternative is to enforce existing law against the violators.

Third, the Governor briefly suggests that as-applied injunctive relief would present Establishment Clause concerns. *See* Resp. 32. Not so. *See Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting) ("[T]he Court's precedents make clear that the legislature *may* place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category without causing an Establishment Clause problem." (emphasis in original)); *see also S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J. dissenting) ("The Church and its congregants simply want to be treated equally to comparable secular businesses."). The Governor's sole support for this proposition is a "cf." citation to a case that addressed the wholly distinct question whether a state was affirmatively required to *fund* religious education as part of its student financial aid program. *See Locke v. Davey*, 540 U.S. 712, 721 (2004). And the relief sought here is nothing new. *See, e.g., First Pentecostal*, 959 F.3d at 670 (granting injunction "upon the assurances by the Church that it will satisfy the requirements entitling similarly situated businesses and operations to reopen" (alteration and quotation marks omitted)); *Maryville Baptist*, 957 F.3d at 616 (enjoining enforcement of COVID-19 restrictions as-applied to a single house of

worship, "if the Church, its ministers, and its congregants adhere to the public health requirements mandated for 'life-sustaining' entities"). The Diocese is not asking for an exception; it is asking for—and the Free Exercise Clause demands—equal treatment.[7]

C. The Decisions Below Exacerbated Divisions Among The Lower Courts On Two Fundamental, Urgent Legal Questions Of National Importance.

The decisions below sharpened conflicts among the lower courts on two pressing, fundamental legal questions. *See* Appl. 30 n.8, 35 n.9. The Governor does not dispute the existence of severe divisions among the lower courts on these issues. Instead, he argues—incorrectly—that the issues are not presented in this case.

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[7] In a letter to the Court and in a footnote, the Governor implies that this application may be moot, without expressly advancing that position or responding to the Diocese's affirmative argument to the contrary. *Compare* Nov. 19, 2020 Underwood Ltr., *and* Resp. 12 n.4, *with* Appl. 13 n.2. But the Governor concedes that the zone designations reflect an "iterative process" that is reevaluated daily, and that "zone boundaries are redrawn or zones are re-designated" as "circumstances" warrant, "causing restrictions to be modified." Resp. 13-14. Indeed, the Governor just yesterday announced, nearly contemporaneously with the filing of his Response here, that what are currently designated "orange" zones in Brooklyn will soon be re-designated "yellow" (while other zones in the state will remain "orange"). The fluid nature of these modifications, and the curious timing of the Governor's latest modification, confirm that all of the issues raised in this case are justiciable. As this Court has made clear, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "Furthermore, while a statutory change is usually enough to render a case moot, an executive action that is not governed by any clear or codified procedures cannot moot a claim." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (citation and quotation marks omitted). Nor is a challenge moot when it is "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007). That is the case here, as the Governor could redraw the "red" and "orange" zones to cover the Diocese's churches at any time. Because this Executive Order remains in effect, and can be invoked at the Governor's discretion on a moment's notice—and in light of the timing of the unilateral executive action—the Diocese's constitutional rights continue to be infringed and chilled by the Order, whether or not a particular church happens to fall within a particular zone at a particular point in time. *Cf. Knox*, 567 U.S. at 307 ("Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.").

First, although the Governor now takes the position that the Court need not decide whether *Jacobson* and *South Bay* supplant "ordinary modes of constitutional scrutiny," Resp. 35, this is a wholesale reversal of his arguments below. *See* Dist. Ct. Dkt. No. 18 at 10-12; Ct. App. Dkt. No. 52 at 20-22. Each lower court, moreover, relied on one or both of those decisions in denying the Diocese's requests for equitable relief, thereby placing themselves on the wrong end of a circuit split on that question. *See* Second Circuit Op. at 11; PI Order at 20; *see also* Appl. 30-34. Countless lower courts have misapplied these decisions during this pandemic of indefinite duration to confer on the States broad powers to restrict individual liberty, free from the normal checks imposed by constitutional-rights jurisprudence. *See, e.g.*, Appl. 30 n.8. They will continue to do so with impunity if this Court does not intervene.

Second, the Governor contends that this case does not implicate the issue of whether strict scrutiny is appropriately applied when a regulatory regime creates favored and disfavored categories and places religious activities in a disfavored category (even if some secular institutions are equally or more heavily regulated). Resp. 35-36; *see* Appl. 34-36. But the Governor's reasoning is circular: He says the question is not presented because, in his view, the better-treated secular institutions here are not appropriate comparators. That is the very conclusion reached by the courts on the wrong side of the split—including the lower courts here—which as a result have routinely failed to conduct the necessary strict scrutiny tailoring analysis. It is therefore imperative that this Court intervene now.

II. The Equities Weigh Strongly In Favor Of Injunctive Relief.

A. The Governor Does Not Dispute That The Harm To The Diocese Is Irreparable.

The district court expressly found that the Diocese "establish[ed] irreparable harm." PI Order at 10. The Governor did not dispute the point in the court of appeals, none of the judges on the motion panel questioned that finding, and Judge Park expressly adopted it in dissent. *See* Second Circuit Dissent at 7. The Governor declines to contest the point—and thus concedes it—in this Court as well. *See Elrod*, 427 U.S. at 373; *see also* Appl. 36-37.

B. The Balance Of Hardships And Public Interest Likewise Favor Injunctive Relief.

Protecting First Amendment rights is always "in the public interest," while enforcing an unconstitutional law is not. *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). But, as expected, the Governor doubles down on the district court's flawed conclusion that the balance of hardships and public interest favor the State. Not so. *See* Appl. 36-40 (addressing the Governor's arguments, which were largely adopted by the district court). The Governor's and district court's concerns about "avoidable death on a massive scale" as a result of the issuance of an injunction here are irreconcilable with the evidentiary record and narrow relief sought in this case. PI Order at 23-24; Resp. 36-37. No one disputes the Governor's interest in protecting the public, but the robust evidentiary record in this case flatly belies his contention that "the efficacy of the Diocese's voluntary protocols in a hotspot setting in the *absence* of the order's gathering-size limits has not been tested." Resp. 37 (emphasis in original); *cf.* Ex. L ¶ 14; Ex. P ¶ 14. As discussed above, the absence

of COVID outbreaks in any Diocesan churches—*including* those in "hotspot" neighborhoods, and *before* this Executive Order shut down the Diocese's churches in those zones—speaks *directly* to that issue.[8]

The Governor's contention that it was necessary to restrict religious worship because "there is a documented history of religious gatherings serving as COVID-19 super-spreader events," offered as a neutrality argument, again confirms that the Governor deliberately targeted religion for adverse treatment. Resp. 22. To the extent this argument is relevant to the balance of hardships, the Diocese already explained why the Governor's purported "evidence" is wholly inapposite. *See* Appl. 38-39 & n.11. The Governor continues to argue the point solely in the abstract, without regard to the Diocese's effective safety protocols, *e.g.*, Resp. 22, and based on irrelevant examples of incidents that bear no resemblance to the record in this case.[9]

The Governor's and district court's concerns about potential asymptomatic carriers likewise prove too much: The fact that the Diocese has not experienced any COVID outbreak in the months since it reopened its doors, despite the possible

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[8] Given the Diocese's proven track record and the as-applied nature of the relief sought, it is of no moment that the Ninth Circuit reached a different conclusion, in a case with a sparse evidentiary record in California, by analogizing to *South Bay*—which was decided at a far earlier stage of the pandemic and without the benefit of an evidentiary hearing. *See Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 730-31 (9th Cir. 2020).

[9] The Governor cites to the record for just three of those examples. The first is from India. *See* Resp. 22 (citing R.A. 205). The second is from Maine and involved not just a church service—presided over by a minister who publicly "questioned the wisdom of masks"—but also an over-capacity indoor reception at which "many attendees didn't wear masks or socially distance." R.A. 189-92 (cited at Resp. 23). The only New York example was traced to attendance at a bat mitzvah and funeral service in February, *see* Resp. 23 (citing R.A. 254), well before anyone would have had reason to put in place social distancing, mask wearing, or other COVID-related safety protocols, or even known what such protocols would look like. Other, extra-record examples are similarly far-flung geographically and/or temporally. Resp. 22-23.

presence of COVID-positive parishioners, only underscores that its rigorous protocols have succeeded in addressing that risk. Indeed, the Diocese has at all times been "ahead of the curve, enforcing stricter safety protocols than the State required at the given moment," and it is willing to accept more restrictions as a condition of injunctive relief. PI Order at 3; *see* Ex. D at 39:20-40:10; Ex. L ¶ 10; Ex. M at 37; Ex. N ¶¶ 10-13; *see also* Resp. 31 (acknowledging that the Diocese's protocols "commendably go above and beyond the measures imposed by New York's phased reopening plan"). On this record, it is beyond dispute that enjoining the 10- and 25-person fixed-capacity limits, on an as-applied basis, will in no way impede the Governor's ability to protect the public. The only equity on the scale is the Diocese's constitutional right to Free Exercise—a heavy weight, indeed.

CONCLUSION

For the reasons set forth above and in the initial application, the Diocese respectfully requests that the Circuit Justice or the full Court enjoin the 10- and 25-person capacity limitations in Executive Order 202.68, as applied to the Diocese and subject to its compliance with all other government-mandated and voluntarily imposed safety requirements.[10]

[10] Earlier this week, an Orthodox Jewish organization and several synagogues, who had brought a separate lawsuit in front of a different district court judge challenging this Executive Order, filed an emergency application in this Court seeking to enjoin the order. *See* Appl. No. 20A90; *see also* Compl., *Agudath Israel of Am. v. Cuomo*, No. 20-cv-4834 (E.D.N.Y. Oct. 8, 2020), ECF No. 1. While Agudath suggests that its application should be heard "in tandem" with this case, Appl. No. 20A90 at 18, there is no reason to delay resolution of the Diocese's application, which is fully briefed and ready for immediate resolution, pending completion of briefing on Agudath's later-filed application. That is particularly true because Agudath's case presents distinct facts, raises different legal theories, and involves procedural hurdles not at issue in this case. Having proceeded with maximum diligence to present this matter to the Court as quickly as possible, the Diocese respectfully requests that the Court resolve its application without delay.

Dated: November 19, 2020

Respectfully submitted,

/s/ *Randy M. Mastro*

RANDY M. MASTRO
Counsel of Record
AKIVA SHAPIRO
WILLIAM J. MOCCIA
LEE R. CRAIN
LAUREN M. KOLE
AVERY E. MASTERS
DECLAN T. CONROY
SETON H. O'BRIEN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
rmastro@gibsondunn.com

Counsel for Applicant

EXHIBIT R
(Ct. App. Dkt. No. 100)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2020

(Motion argued: November 3, 2020 Decided: November 9, 2020)

Docket Nos. 20-3572-cv; 20-3590-cv

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,

Plaintiff-Appellant,

v.

GOVERNOR ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY,

Defendant-Appellee.

Before:

LOHIER and PARK, *Circuit Judges*, and RAKOFF, *District Judge*.*

These tandem appeals arise from the ongoing COVID-19 pandemic. In response to a spike in cases, Appellee Governor Andrew Cuomo issued an executive order to limit further spread of the virus in certain COVID-19 hotspots. The Appellants each challenged the executive order as a violation of the Free Exercise Clause of the First Amendment. In each case, the United States District Court for the Eastern District of New York (Matsumoto, J.) (Garaufis, J.) denied the Appellants' motion for a preliminary injunction against the enforcement of the executive order. The Appellants now move for emergency injunctions pending appeal and to expedite their appeals. For the following reasons, the Appellants' motions for injunctions pending appeal are **DENIED**, and the motion to expedite their appeals is **GRANTED**.

Judge Park dissents from the denial of the motions for injunctions pending appeal.

AVI SCHICK, Troutman Pepper Hamilton Sanders LLP, New York, NY (W. Alex Smith, Troutman Pepper Hamilton Sanders LLP, New York, NY, Misha Tseytlin, Troutman Pepper Hamilton Sanders LLP, Chicago, IL, *on the brief*), *for Agudath Israel of America, Agudath Israel of Kew Garden Hills, Agudath Israel of Madison, Agudath Israel of Bayswater, Rabbi Yisroel Reisman, Rabbi Menachem Feifer, Steven Saphirstein, Plaintiffs-Appellants in No. 20-3572-cv*.

RANDY M. MASTRO, Gibson, Dunn & Crutcher LLP, New York, NY (Akiva Shapiro, William J. Moccia, Lee R. Crain, Gibson, Dunn & Crutcher LLP, New York, NY, *on the brief*), *for The Roman Catholic Diocese of Brooklyn, New York, Plaintiff-Appellant in No. 20-3590-cv*.

* Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

JOSHUA M. PARKER, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Andrea Oser, Deputy Solicitor General, *on the brief*), *for* Letitia James, Attorney General for the State of New York, New York, NY, *for Governor Andrew M. Cuomo, in his official capacity, Defendant-Appellee in Nos. 20-3572-cv and 20-3590-cv*.

PER CURIAM:

I

These appeals, which are being heard in tandem, arise from the ongoing COVID-19 pandemic. The pandemic has caused more than 25,000 deaths in New York State and more than 10,000 deaths in Brooklyn and Queens alone. In response to a recent spike in cases concentrated in parts of Brooklyn, Queens, and other areas, Governor Andrew Cuomo issued an emergency executive order to limit further spread of the virus in these COVID-19 "hotspots." No. 20 Civ. 4834 (KAM), doc. 12 ("Zucker Decl.") at 19; *see* No. 20 Civ. 4844 (NGG), doc. 20 ("Blog Decl.") at 20–24.

The executive order directs the New York State Department of Health to identify yellow, orange, and red "zones" based on the severity of outbreaks, and it imposes correspondingly severe restrictions on activity within each zone. *See* N.Y. Exec. Order No. 202.68. For example, the order

provides that in "red zones," which have "extraordinarily high rates of positivity" for COVID-19, No. 20 Civ. 4844 (NGG), doc. 31-1 ("Backenson Tr.") at 66, non-essential gatherings of any size must be cancelled, non-essential businesses must be closed, schools must be closed for in-person instruction, restaurants cannot seat any customers, and houses of worship may hold services but are subject to a capacity limit of 25 percent of their maximum occupancy or 10 people, whichever is fewer. The record on appeal also justifies, based on epidemiological evidence, the distinction the executive order draws between essential and non-essential businesses in these zones. *See, e.g.*, Backenson Tr. at 89–90. During the district court proceedings the Appellants did not rebut that distinction with any scientific evidence to the contrary.

The Appellants—Agudath Israel of America, Agudath Israel of Kew Garden Hills, Agudath Israel of Madison, Agudath Israel of Bayswater, Rabbi Yisroel Reisman, Rabbi Menachem Feifer, Steven Saphirstein (collectively, "Agudath Israel"), and The Roman Catholic Diocese of Brooklyn, New York (the "Diocese")—each challenged the executive order as a violation of the Free Exercise Clause of the First Amendment. In each case, the district court

denied the Appellants' motion for a preliminary injunction against the enforcement of the order. The Appellants now move for emergency injunctions pending appeal and to expedite their appeals, after an applications Judge on our Court denied their requests for an administrative stay, No. 20-3572, doc. 30; No. 20-3590, doc. 29. To be clear, in this opinion we resolve only these motions for emergency relief, not the Appellants' underlying appeals challenging the District Courts' refusals to provide preliminary injunctive relief.[1]

II

A

Preliminarily, we conclude that Agudath Israel did not "move first in the district court for" an order "granting an injunction while an appeal is pending" before filing with this Court its present motion for an injunction

[1] We originally resolved the motions that are the subject of this opinion in an order entered November 9, 2020. Except in unusual circumstances, this Court resolves such motions by order, not opinion. A dissent from an order does not necessarily require us to proceed by opinion. Nevertheless, our dissenting colleague has requested that we convert the original order and his dissent into opinions. In addition, shortly after our original order was issued and even before a merits panel could review the underlying appeals, the Appellants each filed an "Emergency Application for Writ of Injunction" with the Supreme Court. Given our dissenting colleague's request and the Appellants' recent filings, we reissue the order, with some modifications, and the accompanying dissent as opinions.

pending appeal. Fed. R. App. P. 8(a)(1)(C). Instead, Appellant moved for a preliminary injunction pending the district court's final judgment. In its briefs and at oral argument before this panel, moreover, Agudath Israel has not explained or otherwise justified its failure to comply with the straightforward requirement of Rule 8(a). Agudath Israel also has failed to demonstrate that "moving first in the district court would be impracticable," Fed. R. App. P. 8(a)(2)(A), or even futile, particularly in light of the fact that a full eleven days elapsed after the district court's ruling before Agudath Israel sought relief from this Court. We deny Agudath Israel's motion for these procedural reasons. *See Hirschfeld v. Bd. of Elections in N.Y.*, 984 F.2d 35, 38 (2d Cir. 1993).

B

We deny the Diocese's motion for an injunction pending appeal—and would deny the motion filed by Agudath Israel if it were properly before us—for the reasons that follow.

As an initial matter, an injunction is "an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). To obtain an injunction from a district court, movants generally bear the burden

of showing that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Id.* at 20. To obtain a stay of a district court's order pending appeal, more is required, including a "strong showing that [the movant] is likely to succeed on the merits." *New York v. U.S. Dep't of Homeland Sec.*, 974 F.3d 210, 214 (2d Cir. 2020). The motions at issue here seek a remedy still more drastic than a stay: an injunction issued in the first instance by an appellate court. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quotation marks omitted).

"The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quotation marks omitted); *see Cent. Rabbinical Cong. of U.S. & Canada v.*

N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014) ("[T]he Free Exercise Clause . . . protects the performance of (or abstention from) physical acts that constitute the free exercise of religion: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.") (quotation marks omitted)). But the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (quotation marks omitted), "even if the law has the incidental effect of burdening a particular religious practice," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

"A law burdening religious conduct that is *not* both neutral and generally applicable, however, is subject to strict scrutiny." *Cent. Rabbinical*, 763 F.3d at 193 (citing *Lukumi*, 508 U.S. at 531–32). "A law is not neutral if it is specifically directed at a religious practice." *Id.* (cleaned up). Similarly, a law is "not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at

least as harmful to the legitimate government interests purportedly justifying it." *Id.* at 197.

The Court fully understands the impact the executive order has had on houses of worship throughout the affected zones. Nevertheless, the Appellants cannot clear the high bar necessary to obtain an injunction pending appeal. The challenged executive order establishes zones based on the severity of the COVID-19 outbreaks in different parts of New York. Within each zone, the order subjects religious services to restrictions that are similar to or, indeed, *less severe than* those imposed on comparable secular gatherings. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, *C.J.*, concurring) (denying emergency injunctive relief to houses of worship that were subject to similar or less severe restrictions than those applicable to comparable secular gatherings); *see also Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 342, 346–47 (7th Cir. 2020) (upholding an order that capped religious gatherings at ten people where the most comparable activities—those "that occur in auditoriums, such as concerts and movies"— had been banned completely); *cf. Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210–11 (2d Cir. 2011) (holding that a

Kosher food labeling act was a neutral and generally applicable law subject to rational basis review because it applied to "food purchased by individuals of many different religious beliefs" and impacted consumers who purchased kosher products "for reasons unrelated to religious observance"). Gatherings at houses of worship in these zones, far from being relegated to a second tier, are favored over comparable secular gatherings.

Thus, while it is true that the challenged order burdens the Appellants' religious practices, the order is not "substantially underinclusive" given its greater or equal impact on schools, restaurants, and comparable secular public gatherings. *Cf.* No. 20-3590, doc. 20, Ex. L at 2 (Governor Cuomo criticizing the order's policy of "clos[ing] every school" as "a policy being cut by a hatchet," not "a scalpel"). To the contrary, the executive order "extend[s] well beyond isolated groups of religious adherents" to "encompass[] *both* secular and religious conduct." *Cent. Rabbinical*, 763 F.3d at 195.

Before the District Courts, the State also explained why gatherings at certain large commercial stores deemed essential are not meaningfully comparable to religious gatherings. Unlike shopping at large stores, an in-person religious service or ceremony necessarily involves a community of

adherents arriving and leaving at the same time and interacting and praying together over an extended period of time. The State provided unrebutted evidence that this type of purposeful interaction poses a higher risk of transmission of the coronavirus; the District Courts so found. *See* Zucker Decl. at 15; Blog Decl. at 16–20; No. 20 Civ. 4834 (KAM), doc. 18-1 at 62–63; No. 20 Civ. 4844, doc. 32 at 20 & n.10.

III

Our dissenting colleague asserts that the executive order is subject to strict scrutiny because it violates the minimum requirement of neutrality. The fact that theaters, casinos, and gyms are more restricted than places of worship, the dissent reasons, "only highlights the fact that the order is not neutral towards religion." But this view is undermined by recent precedent, which makes clear that 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. *See, e.g.*, *S. Bay*, 140 S. Ct. at 1613 (Roberts, *C.J.*, concurring) (guidelines that "place[d] restrictions on places of worship" less severe than those on comparable gatherings "appear consistent with the Free Exercise Clause"); *see also Elim*, 962 F.3d at 347 (same).

The dissent attempts to distinguish *South Bay* as having been decided during the early stages of the pandemic while local governments were actively shaping their response to changing facts on the ground. But here, too, the executive order is a response to rapidly changing facts on the ground. For several months, New York's "limits and restrictions lessen[ed] and evolve[d] as the curve continue[d] to flatten," and the State's "limits and restrictions . . . increase[d]" only when "a review of the data indicate[d] a trend of increasing COVID-19 cases or spikes of cases in [the] cluster areas" targeted by the challenged executive order. Zucker Decl. at 14, 18–19. The pandemic is deadly and fast moving. Indeed, the dissent's assertion, only last week, that the seven-day average of deaths per day from COVID-19 has not exceeded twenty for months, *see* No. 20-3590, doc. 80 at 2, is no longer true today.[2] And the State recently informed us that, as of November 9, 2020, there are no longer any areas in New York designated as red zones. *See* No. 20-3590, doc. 78. The State's restrictions aim to keep pace with rapidly changing conditions.

[2] *See New York Covid Map and Case Count*, N.Y. Times (updated Nov. 16, 2020), https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html.

In any event, *South Bay* did not draw a distinction between the pandemic in its early or late stage. Its central relevant facts exist in New York in November 2020 just as they existed in California in May 2020: There is no vaccine or known cure for COVID-19; the pandemic has killed hundreds of thousands of Americans; and "[b]ecause people may be infected but asymptomatic, they may unwittingly infect others." *S. Bay*, 140 S. Ct. at 1613 (Roberts, *C.J.*, concurring).

IV

As noted, in this opinion we address only the Appellants' motions for injunctions pending appeal and to expedite their appeals, not their underlying appeals challenging the district courts' refusals to provide preliminary injunctive relief. For the foregoing reasons, it is hereby ORDERED that the Appellants' motions for injunctions pending appeal are DENIED. Among other infirmities in their arguments, the Appellants have failed to meet the requisite standard for an injunction pending appeal. *See New York v. U.S. Dep't of Homeland Sec.*, 974 F.3d at 214. It is further ORDERED that the motion to expedite the appeals is GRANTED.

With respect to the underlying appeals, the parties have agreed to the following merits briefing schedule: Appellants' briefs are due November 17, 2020; Appellee's brief is due December 8, 2020; Appellants' reply briefs are due December 14, 2020, and the matter is to be calendared as early as the week of December 14, 2020.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

EXHIBIT S
(Ct. App. Dkt. No. 101)

PARK, *Circuit Judge*, dissenting:

In response to the COVID-19 pandemic, the Governor of New York issued an executive order imposing strict capacity limits on "houses of worship" in certain specified "zones." Those restrictions apply only to religious institutions; in the same zones, pet shops, liquor stores, and other businesses the Governor considers "essential" remain open, free from any capacity limits. By singling out "houses of worship" for unfavorable treatment, the executive order specifically and intentionally burdens the free exercise of religion in violation of the First Amendment. I would thus grant the motions for injunctive relief pending appeal.

I

Discrimination against religion is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). "Official action that targets religious conduct for distinctive treatment" must thus satisfy "the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993).

A

First, the executive order fails the "minimum requirement of neutrality" towards religion, which means that a government policy may "not discriminate

on its face." *Id.* at 533. The order authorizes the New York State Department of Health to designate "areas in the State that require enhanced public health restrictions" as red, orange, or yellow zones. N.Y. Exec. Order No. 202.68. In each zone, the order subjects only "houses of worship" to special "capacity limit[s]": in red zones, "25% of maximum occupancy or 10 people, whichever is fewer"; in orange zones, "the lesser of 33% of maximum occupancy or 25 people"; and in yellow zones, "50% of . . . maximum occupancy." *Id.* But in the very same zones, numerous businesses deemed "essential" may operate with no such restrictions.[1] This disparate treatment of religious and secular institutions is plainly not neutral.

The Governor's public statements confirm that he intended to target the free exercise of religion. The day before issuing the order, the Governor said that if the "ultra-Orthodox [Jewish] community" would not agree to enforce the rules, "then we'll close the institutions down."[2] *See Masterpiece Cakeshop, Ltd. v. Colo. C.R.*

[1] *See Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Recent Executive Orders*, N.Y. State Dep't of Econ. Dev. (updated Oct. 23, 2020), https://esd.ny.gov/guidance-executive-order-2026; *Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Executive Order 202.68*, N.Y. State Dep't of Econ. Dev. (updated Oct. 7, 2020), https://esd.ny.gov/ny-cluster-action-initiative-guidance; Hearing Tr. at 81–82, No. 20-cv-4844 (E.D.N.Y. Oct. 15, 2020).

[2] *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, Off. of the Governor (Oct. 5, 2020), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1.

Comm'n, 138 S. Ct. 1719, 1731 (2018) (factors relevant to the assessment of neutrality include "the specific series of events leading to the enactment or official policy in question" and "contemporaneous statements made by members of the decisionmaking body").

The Governor argues that the executive order should nonetheless be subject to only rational-basis review because it treats houses of worship "more favorably" than "non-essential" secular businesses, like theaters, casinos, and gyms. But this only highlights the fact that the order is not neutral towards religion. Rational-basis review applies when a generally applicable policy incidentally burdens religion, but a policy that expressly *targets* religion is subject to heightened scrutiny. *See Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 194 (2d Cir. 2014). Here, the executive order does not impose neutral public-health guidelines, like requiring masks and distancing or limiting capacity by space or time. Instead, the Governor has selected some businesses (such as news media, financial services, certain retail stores, and construction) for favorable treatment, calling them "essential," while imposing greater restrictions

on "non-essential" activities and religious worship.[3] Such targeting of religion is subject to strict scrutiny.

South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.), is not to the contrary. Summary decisions of the Supreme Court are precedential only as to "the precise issues presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Petitioners in *South Bay* sought a writ of injunction, which is granted only when "the legal rights at issue are indisputably clear." *Id*. at 1613 (Roberts, *C.J.*, concurring) (citation omitted). Here, Appellants seek injunctions pending appeal, for which they need to show, at most, a "'substantial' likelihood" of success on the merits. *United for Peace & Just. v. City of New York*, 323 F.3d 175, 178 (2d Cir. 2003). In addition, the motions before this Court arise from quite different circumstances. *South Bay* was decided during the early stages of the pandemic, when local governments were struggling to prevent the healthcare system from being overwhelmed and were "actively shaping their

[3] The majority claims the distinction between "essential" and "non-essential" was based on "epidemiological evidence." That is an overstatement. The purported evidence consists primarily of observations by public-health officials, not data or scientific study. *See* Hearing Tr. at 89–90, No. 20-cv-4844 (E.D.N.Y. Oct. 15, 2020); *see also id.* at 65–66 (testimony by State official that "[e]ssential businesses . . . are allowed to remain open because they provide essential services to the State and to New Yorkers"). In any event, the Constitution considers the free exercise of religion to be an essential activity, even if the Governor does not.

response to changing facts on the ground." 140 S. Ct. at 1614 (Roberts, *C.J.*, concurring). By contrast, the Governor's stated concern here is maintaining localized containment and preventing a "second wave." In April, New York reported a seven-day average of nearly 1,000 deaths per day from COVID-19.[4] Six months later, that average had not exceeded 20 for months.[5] *See id.*

Finally, the Governor overstates the import of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld a mandatory vaccination law against a substantive due process challenge. *Jacobson* was decided before the First Amendment was incorporated against the states, and it "did not address the free exercise of religion." *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). Indeed, the Court specifically noted that "even if based on the acknowledged police powers of a state," a public health measure "must always yield in case of conflict with . . . any right which [the Constitution] gives or secures." 197 U.S. at 25. *Jacobson* does not call for indefinite deference to the political branches exercising extraordinary emergency powers, nor does it counsel courts to abdicate their responsibility to review claims of constitutional violations.

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[4] *See New York Covid Map and Test Count*, N.Y. Times (updated Nov. 16, 2020), https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html.

[5] The majority notes that the average is now approaching 30, but this remains a tiny fraction—less than three percent—of the April peak.

B

Applying strict scrutiny, there is little doubt that the absolute capacity limits on houses of worship are not "narrowly tailored." *Lukumi*, 508 U.S. at 546. As the Governor himself admitted, the executive order is "not a policy being written by a scalpel," but rather is "a policy being cut by a hatchet." *See* Appellant's Br., No. 20-3590, at 4.

First, the fixed capacity limits do not account in any way for the sizes of houses of worship in red and orange zones. For example, two of the Diocese's churches in red or orange zones as of October 8, 2020 seat more than a thousand people. But the order nonetheless subjects them to the same 10-person limit in red zones applicable to a church that seats 40 people. Such a blunderbuss approach is plainly not the "least restrictive means" of achieving the State's public safety goal. *Lukumi*, 508 U.S. at 578.

The fixed capacity limits also bear little relation to the particular COVID-19 transmission risks the Governor identifies with houses of worship, such as "singing or chanting" and mingling before and after services. Churchgoers and daveners remain subject to generally applicable distancing and mask requirements, so the additional capacity limits assume that worshippers—unlike

participants in "essential" activities—will not comply with such restrictions. The Governor may not, however, "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020). Here, Appellants have made clear that they would follow any generally applicable public-health restrictions.[6]

II

The remaining injunction factors also support granting the motions. Appellants presented unrebutted evidence that the executive order will prevent their congregants from freely exercising their religion. And "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)).[7]

[6] For example, the Diocese presented evidence that, even before the order, it had voluntarily restricted attendance to 25% of building capacity and required masks during Mass; it has also "agreed to accept potential further restrictions (such as eliminating congregant singing and choirs during Mass) as a condition of injunctive relief." Appellant's Br., No. 20-3590, at 4.

[7] The district court in the *Agudath Israel* case found that plaintiffs had not demonstrated irreparable harm because "the Orthodox community has previously complied with the total lockdown" and they could "continue to observe their religion" with "modifications." Tr. of Proceedings at 66, No. 20-cv-04834 (E.D.N.Y. Oct. 9, 2020). This was error, in light of which plaintiffs reasonably believed that another motion for injunction in the district court would be

Finally, the balance of equities and public interest favor Appellants. The question is not whether the State may take generally applicable public-health measures, but whether it may impose greater restrictions only on houses of worship. It may not.

I respectfully dissent from the denial of the motions for injunctions pending appeal.

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fiable. *See, e.g.*, *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").