

**In the Supreme Court of the United States**

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

v.

ANDREW M. CUOMO, in his official capacity as Governor of New York,  
RESPONDENT.

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**EMERGENCY APPLICATION FOR WRIT OF INJUNCTION  
RELIEF REQUESTED BY 3:00 PM ON FRIDAY, NOVEMBER 20, 2020**

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

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## QUESTIONS PRESENTED

1. Whether an executive order violates the Free Exercise Clause as targeting and a religious gerrymander when the official who issued it made clear through unambiguous statements that the order was targeted at a religious minority's practices and traditions.

2. Whether an executive order violates the Free Exercise Clause when the order, on its face, disfavors worship.

## **RULE 29 STATEMENT**

Pursuant to Supreme Court Rule 29, Applicants Agudath Israel of America, Agudath Israel of Kew Garden Hills, and Agudath Israel of Madison state that they have no parent companies or publicly held companies with a 10% or greater ownership interest in them.

### **PARTIES TO THE PROCEEDING**

Applicants Agudath Israel of America, Inc., Agudath Israel of Kew Garden Hills, Agudath Israel of Madison, Rabbi Yisroel Reisman, and Steven Saphirstein were plaintiffs below in proceedings before both the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Eastern District of New York.

Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel has a large number of Agudath-Israel affiliated synagogues throughout the country, with close to 70 in New York State.

Agudath Israel of Kew Garden Hills is an Orthodox Jewish Synagogue located in New York. Agudath Israel of Kew Garden Hills holds worship services, which are conducted every day, and serves more than 150 men and women each week. Agudath Israel of Kew Garden Hills is located in a geographic area affected by Respondent's gathering restrictions on houses of worship. Steven Saphirstein serves as the Secretary of Agudath Israel of Kew Garden Hills.

Agudath Israel of Madison is an Orthodox Jewish Synagogue located in New York. Agudath Israel of Madison holds worship services, which are conducted every day, and serves more than 300 men and women each week. Agudath Israel of Madison is located in a geographic area affected by Respondent’s gathering restrictions on houses of worship. Rabbi Yisroel Reisman serves as the Rabbi of Agudath Israel of Madison.

Respondent Andrew M. Cuomo, in his official capacity as Governor of New York, was the defendant below in proceedings before both the Court of Appeals for the Second Circuit and the District Court for the Eastern District of New York.

#### **RELATED PROCEEDINGS**

In *Agudath Israel of America v. Cuomo*, No. 20-3572-CV (2d Cir.), a panel of the Second Circuit Court of Appeals, over the dissent of Judge Michael H. Park, entered an order denying Applicants’ motion for injunctive relief pending appeal on November 9, 2020. App. 1–9. In *Agudath Israel of America v. Cuomo*, No. 1:20-cv-04834-KAM (E.D.N.Y.), the District Court for the Eastern District of New York denied Applicants’ motion for temporary restraining order and preliminary injunction in an oral ruling on October 9, 2020. App. 10–78.

In *The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87 (U.S.), docketed in this Court on November 12, 2020, the Roman Catholic Diocese of Brooklyn requests a writ of injunction against the same Executive Order at issue in this case.

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

Pursuant to Rule 22 of the Rules of this Court, and 28 U.S.C. § 1651(a), Applicants respectfully request a writ of injunction barring enforcement of New York Executive Order No. 202.68 (the “Cluster Initiative”), which Respondent Governor Andrew M. Cuomo issued on October 6, 2020, to restrict attendance at houses of worship. The recently pending emergency application for writ of injunction in *The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20A87 (the “Diocese App.”), raises the same issues that are contained in this application’s *second* Question Presented, and as explained below Applicants here are entitled to relief under that theory. To avoid undue duplication, this application focuses primarily on the *first* Question Presented: the discriminatory targeting of the Orthodox Jewish community in crafting and implementing the Cluster Initiative. Granting this relief will leave New York’s already-stringent capacity restrictions in place and enforceable, blocking the Cluster Initiative’s 10- and 25-person capacity limitations.

For six weeks and counting, Applicants have been laboring under discriminatory restrictions on their religious exercise. Their neighborhoods and religious institutions have been—in the words of the Governor himself—“targeted.” The Governor publicly asserted that other Orthodox Jews had violated his prior rules, and therefore the Governor imposed severe restrictions on worship across several Orthodox Jewish neighborhoods. Applicants themselves are not alleged to have violated any public health or safety rules. To the contrary, they have carefully and

successfully complied with mask requirements, social distancing, and capacity constraints. Yet the Governor’s guilt-by-religious-association restrictions have made it impossible for Applicants and their members to exercise their religious faith. The restrictions have eliminated the ability of many Jews to worship on important religious holy days. None of this is necessary to protect public health. The Governor has admitted that the restrictions are *not* based on science, but rather on “fear” and “emotion” about areas that would be “safe zones” in other states.

The Governor’s statements and actions are more discriminatory than those in *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). In a series of press conferences, the Governor explained that he was enacting new restrictions on places of worship, in certain neighborhoods that contain many Orthodox Jews, because he believed that this religious minority is to blame for a recent increase in COVID-19 infection rates. The Governor left no doubt that targeting Orthodox Jews was his primary motivation. He described the problem he sought to address as “predominantly an ultra-orthodox cluster,”<sup>1</sup> adding that he planned to “meet with members of the ultra-Orthodox community tomorrow,” to let them know that “we’ll close the [religious] institutions down” if “you do not agree to enforce the rules.”<sup>2</sup> The Governor also highlighted pictures of Orthodox Jews as

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<sup>1</sup> App. 80. *See also* <https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/>. All websites last visited on November 15, 2020.

<sup>2</sup> App. 102.

allegedly demonstrating “clear violations of social distancing,” wrongly claiming that the pictures were from “the recent past” (one of those photos was of a 2006 funeral).<sup>3</sup> And the Cluster Initiative that the Governor issued matched his discriminatory rhetoric, as it was plainly gerrymandered to target the Orthodox Jewish community.

The Governor’s targeting of this religious minority is widely understood. A federal judge explained that the Governor “made remarkably clear that this [Cluster Initiative] was intended to target a different set of religious institutions,” *i.e.*, Orthodox Jews.<sup>4</sup> National publications have noted that, in issuing his Cluster Initiative, the Governor made “sweeping accusation[s]” and used harmful “rhetoric” against the Orthodox community.<sup>5</sup> Legal commentators have noted that the Governor’s discriminatory comments harken back to the “hostility” that Jews have faced for hundreds of years.<sup>6</sup>

The Governor’s targeting of a religious minority for blame during a pandemic, falsely tarring them as perpetrators rather than victims of the virus, is incompatible with the Free Exercise Clause. Almost eighty years ago, this Court rejected an attack on another religious minority that had been scapegoated as a threat. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Few things could be more corrosive to society than allowing collective guilt to be applied to a disfavored religious group

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<sup>3</sup> App. 100.

<sup>4</sup> App. 112–13. *See also The Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 1:20-cv-04844 (E.D.N.Y. Oct. 9, 2020), Dkt.15:3.

<sup>5</sup> App. 113. *See also* <https://www.wsj.com/articles/a-jewish-revolt-against-lockdowns-11602198987>.

<sup>6</sup> *Id.* *See also* <https://reason.com/2020/10/08/understanding-governor-cuomos-hostility-towards-jews/>.

because of the perceived actions of some of their coreligionists. As it was 77 years ago, it is sadly again “necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.” *Id.* at 641; *accord Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944)). Or, as an amicus brief submitted below by the Muslim Public Affairs Council, *et al.*, explains, the Governor’s statements and actions are yet another example of the regrettable historical experience that “[t]oo often, religious minorities have served as scapegoats in times of sickness, war, and fear.”<sup>7</sup> Our pluralistic Nation depends on the Constitution and the courts to function in good times and in bad. This Court should not countenance the use of an emergency to target a religious minority.

## **JURISDICTION**

Applicants’ appeal from the district court’s denial of a preliminary injunction is pending in the Second Circuit. This Court has jurisdiction under 28 U.S.C. § 1651.

## **BACKGROUND AND PROCEDURAL HISTORY**

### **A. The Synagogues And Their Response To COVID-19**

Applicants’ synagogues are a necessary and essential component of religious practice for thousands of Orthodox Jews in New York. Orthodox Jews pray in Applicants’ synagogues every day, and the services that the synagogues conduct on Saturdays and Jewish holidays form a vital part of Orthodox religious worship. App. 167, 172, 177. Because Orthodox Jews are prohibited from vehicular travel on

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<sup>7</sup> App. 152.

Saturdays and holidays, synagogues are tightly clustered around where practitioners reside. App. 170, 175, 180, 183.

When the COVID-19 pandemic struck the State earlier this year, Applicants' synagogues adopted rigorous health protocols and altered religious congregation to safeguard against the spread of the virus. Applicants split the traditional congregational service into several separate gatherings, which accommodates every congregant while still ensuring that congregants maintain proper social distancing. App. 168, 172–73, 178. Applicants require congregants to wear masks during the entirety of their religious services, and congregants have fully complied with the mask policy. *Id.* By implementing health and safety protocols, Applicants have been able to allow their members to continue to practice their religious beliefs while still safeguarding against the spread of COVID-19. Indeed, the Governor has never disputed that Applicants have rigorously implemented and adhered to all health protocols and that there has been no outbreak in their congregations. App. 167, 172–73, 177–78.

**B. The Governor's COVID-19 Cluster Initiative And Targeting Of The Orthodox Jewish Community**

In response to COVID-19, the Governor closed businesses and restricted gatherings, and then permitted them to take part in a phased reopening. On March 7, the Governor issued Executive Order No. 202 declaring a State emergency. App. 185–87. The Governor issued Executive Order Nos. 202.6 and 202.8 that required all non-essential businesses or entities to close. Pursuant to these orders, the Empire State Development Corporation designated an array of “essential businesses” exempt

from closure, including, for example, the financial services and the manufacturing industries, pet stores, liquor shops, and farmer’s markets. App. 115–16;<sup>8</sup> *see also* App. 191–93 (“essential” businesses for the Cluster Initiative).

By now, all of the State is in Phase Four (the final phase) of reopening. *See generally* App. 202–52. In this Phase, most non-essential businesses can open under capacity and social distancing guidelines. App. 239–46. For many businesses considered “non-essential” but permitted to reopen in Phase Four, such as offices, retail stores, and malls, State guidelines limit capacity to 50% of maximum occupancy. *See* App. 256, 267, 280. For religious services, State rules impose a 33% indoor capacity restriction. App. 294, 296. Phase Four also allows “non-essential gatherings” of up to 50 people for “any lawful purpose or reason.” N.Y. Exec. Order No. 202.45.<sup>9</sup>

The week of October 5, the Governor instituted new restrictions designed to target the Orthodox Jewish community; those new rules are the heart of this case. During an October 5 press conference, the Governor stated that he planned to “meet with members of the ultra-Orthodox community tomorrow,” threatening that “we’ll close the [religious] institutions down” if “you do not agree to enforce the rules.” App. 102. He falsely claimed that the “ultra-Orthodox community” was causing the “problem,” *id.*, and described the COVID-19 cluster as “predominantly an ultra-

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<sup>8</sup> *See also* <https://esd.ny.gov/guidance-executive-order-2026>.

<sup>9</sup> On November 12, the Governor modified this restriction to limit “non-essential private residential gatherings to 10 or fewer individuals for any lawful purpose or reason.” N.Y. Exec. Order No. 202.74.

orthodox cluster,” App. 80. He continued to single out Orthodox Jews for over a week, stating that “[w]e’re now having issues in the Orthodox Jewish community in New York, where because of their religious practices, etc., we’re seeing a spread,” App. 310,<sup>10</sup> and emphasizing that such restrictions are necessary because of “ultra-Orthodox communities, who are also very politically powerful,” *Governor Cuomo’s Conference Call with Reporters*, Radio.com (Oct. 14, 2020).<sup>11</sup>

The Governor warned his new restrictions would not be “a highly nuanced, sophisticated response. This is a fear driven response. You know, this is not a policy being written by a scalpel, this is a policy being cut by a hatchet[.]” App. 117.<sup>12</sup> The Governor acknowledged that “the fear [was] too high” in the City to take “a smarter, more tailored approach” because “we have a real problem with fear and anxiety” and people “moving out.” App. 389.<sup>13</sup>

On October 6, the Governor issued the Cluster Initiative, which implemented gathering restrictions targeting the Orthodox Jewish community. App. 322–24. The Cluster Initiative does not provide any generally applicable metrics for triggering an area’s inclusion in the restrictions, such as a minimum COVID-19 test positivity rate or positive tests per capita. *See id.* Rather, the Cluster Initiative states simply that

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<sup>10</sup> *See also* <https://www.nationalreview.com/news/cuomo-says-religious-practices-of-orthodox-jews-causing-virus-to-spread-in-new-york-city/>.

<sup>11</sup> Available at <https://www.radio.com/1010wins/podcasts/winsam-on-demand-44196/governor-cuomos-conference-call-with-reporters-347936831/> (recording at 11:55-12:05).

<sup>12</sup> *See also* <https://hamodia.com/2020/10/12/exclusive-recording-jewish-leaders-say-stabbed-back-cuomo/> (recording at 18:58–22:30).

<sup>13</sup> *Id.*

“[t]he Department of Health shall determine areas in the State that require enhanced public health restrictions based upon cluster-based cases of COVID-19 at a level that compromises the State’s containment of the virus.” App. 323. The Governor likewise did not provide any set metrics in announcing his new restrictions. App. 325–35.

The Cluster Initiative subjects violators to “a civil penalty not to exceed \$15,000 per day.” App. 323. It creates three types of zones—a “Red Zone,” “Orange Zone,” or “Yellow Zone”—and imposes different restrictions on each.

In a “Red Zone,” the Cluster Initiative restricts houses of worship “to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer.” App. 324. The Cluster Initiative bans all “[n]on-essential” gatherings, whether indoors or outdoors, and requires “all non-essential businesses, as determined by the Empire State Development Corporation based upon published guidance, shall reduce in-person workforce by 100%.” *Id.* The Cluster Initiative also closes schools and restaurants. *Id.* Any “[ ]essential” gatherings—a term not defined in the Cluster Initiative<sup>14</sup>—as well as “essential” businesses, are not subject to the capacity limitations imposed on houses of worship. *See id.*

In an “Orange Zone,” the Cluster Initiative restricts houses of worship to “a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer.” *Id.* The Cluster Initiative bans “[n]on-essential” gatherings of more than 10 people, whether indoors or outdoors, and requires only “certain non-

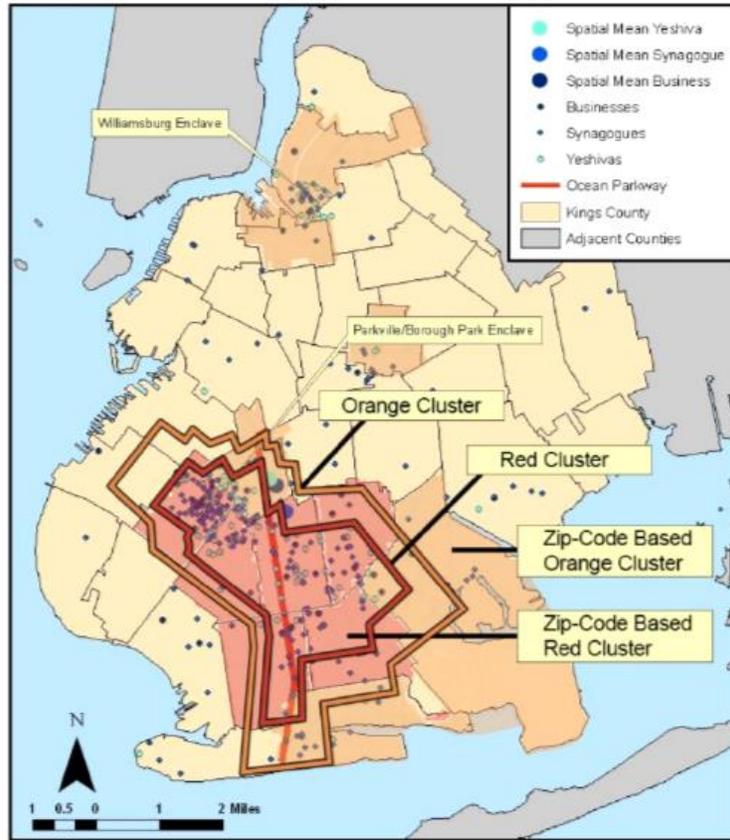
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<sup>14</sup> Even the district court found that “the State seems to concede [‘non-essential gatherings’] is not clearly defined in the Executive Order or on the New York Governor’s website.” App. 52.

essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus,” to close. *Id.* The Cluster Initiative allows restaurants to open for outdoor service, and it closes schools. *Id.* The Governor exempts most businesses, such as offices, malls, and retail stores, (as well as “essential” gatherings) from these restrictions imposed on houses of worship, allowing such businesses to operate at 50% capacity. App. 253–91.

In a “Yellow Zone,” the Cluster Initiative restricts houses of worship to “a capacity limit of 50% of its maximum occupancy” and requires them to “adhere to Department of Health guidance.” App. 324. The Cluster Initiative bans all “[n]on-essential” gatherings of more than 25 people, whether indoor or outdoor. *Id.* Yet the Cluster Initiative exempts most businesses—and, again, “essential” gatherings—from these restrictions, including restaurants for both indoor and outdoor dining services (limiting “any one seated group or party size to 4 people”). *Id.* The Cluster Initiative likewise allows schools to open in Yellow Zones at full capacity, with certain testing protocols in place. *Id.*; *see also* App. 336–73.

In issuing his Cluster Initiative, the Governor announced the restrictions would apply only to areas in Brooklyn and Queens, Broome County, Orange County, and Rockland County. App. 196–201, 327. The restricted zones wind through these areas, at times stopping midblock to encircle members of the Orthodox Jewish community. *Id.* Indeed, when the restricted areas in Brooklyn are overlaid on a map of Orthodox synagogues, yeshivas, and businesses in the area, the Governor’s targeting of Orthodox Jewish communities is readily apparent:



See App. 385.

On October 9, the Governor acknowledged that “we have a couple of unique clusters, frankly, which are more religious organizations, and that’s what we’re targeting.” Governor Andrew M. Cuomo, *Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto*, New York State (Oct. 9, 2020) (“[T]he issue is with that ultra-orthodox community.”).<sup>15</sup>

On October 12, the Governor admitted that the micro-clusters’ positivity rates would be “nothing” “[t]o other states” and indeed would be a “safe zone” or “cool spot”

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<sup>15</sup> Available at <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-cnn-newsroom-poppy-harlow-and-jim-sciutto/>.

nationwide. Governor Andrew M. Cuomo, *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Oct. 12, 2020).<sup>16</sup> The Governor further explained that he was applying an “absurdly low” and “unrealistic” standard. *Id.*

### **C. The District Court Proceedings**

On October 8, 2020, Applicants filed a complaint in the Eastern District of New York challenging the Cluster Initiative as violating Applicants’ free-exercise rights, App. 395–419, and Applicants filed a Motion for a Temporary Restraining Order and a Preliminary Injunction the same day, App. 420–24.

Applicants showed that the Cluster Initiative renders it “impossible” for Applicants’ synagogues and their congregants to fulfill their religious obligations. App. 168, 173, 178. Under the restrictions, it is impossible to conduct services for all of Applicants’ congregants. *Id.*

Applicants also demonstrated that the Governor’s restrictions disproportionately impact Orthodox Jewish services. While Orthodox Jews can engage in other activity outside of prohibited zones, the Cluster Initiative bars Orthodox Jews principally from attending religious services, as their beliefs prohibit them from vehicular travel to synagogues outside of their restricted zones (unlike practitioners of many other faiths). App. 170, 175, 180, 183. Additionally, there are hundreds of synagogues and tens of thousands of Orthodox Jews in the restricted

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<sup>16</sup> Available at <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-46/>.

areas. App. 182–183. Thus, the Cluster Initiative imposes the brunt of its religious burden on Orthodox Jewish worshippers, who it totally deprives of the ability to participate in religious services. App. 170–71, 175, 180. The Governor also scheduled his religious shutdown to begin on the eve of a Jewish holiday weekend. App. 170, 175, 180. While these holidays have passed, the discrimination persists, as Orthodox Jews celebrate the Sabbath *every* weekend. *Id.*

On October 9, the district court held a hearing and denied Applicants’ motion. App. 50–75. The court reviewed the Cluster Initiative under “the deferential standard announced by the Supreme Court in *Jacobson v. Massachusetts* [197 U.S. 11 (1905)],” and held that Applicants did not have a likelihood of success on their claims. App. 56 (also citing, among other authorities, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020)). The court concluded that the “balance of equities and the public interest weigh strongly in favor of [the Governor].” App. 74. Applicants, the court explained, would not suffer irreparable harm—despite loss of their right to worship in synagogue—because they have “previously complied with the [State’s] total lockdown and ha[ve] continued to comply with the Phase Four restriction” and “can continue to observe their religion” with “modifications.” App. 75.

#### **D. The Governor’s Changes To The Cluster Initiative**

In the weeks following his issuance of the Cluster Initiative, the Governor has released various iterations of metrics that he purportedly uses to designate and re-designate zones for restrictions.

The day after Applicants filed this lawsuit, the Governor cited the following data as purportedly supporting the basis for his original restricted zones: “For example, while most of New York City has a rate of positive tests around 1%, the red zone area had a positivity rate of approximately 8% which is alarming.” App. 442. But the Governor provided no objective, generally applicable metrics that he applied to areas in designating the zones. *Id.*

On October 16, after several additional lawsuits were filed against the initiative, the Governor unveiled new metrics to “inform decisions on what steps the State needs to take to address areas of concern with higher positivity rates” in designating or re-designating zones, which provided that “[a]n area may be placed in a ‘Red Zone’” if it has a 3% or higher positivity rate “for a sustained period of time,” among other factors. App. 119.<sup>17</sup> These new metrics stated that “[t]here is no specific percentage or threshold to determine when an area should be designated as an Orange or Yellow Zone,” providing that the Governor can consider multiple, unspecified factors. App. 119–20.<sup>18</sup>

On October 21, the Governor released still new criteria, tied to positivity rates and other discretionary factors. App. 313 & n.5.<sup>19</sup> The guidelines subject areas in the State to different rules of 7-day rolling average positivity rates and daily positive

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<sup>17</sup> App. 452

<sup>18</sup> *See also* App. 454.

<sup>19</sup> *See also* [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/MicroCluster\\_Metrics\\_10.21.20\\_FINAL.pdf/](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/MicroCluster_Metrics_10.21.20_FINAL.pdf/).

cases per capita. *Id.*<sup>20</sup> Yet even the Governor concedes that the guidelines “afford the Governor and DOH some discretion,” App. 487, in deciding which areas to restrict based on myriad factors, including, for example, “demographic information” and “community cooperation,” App. 313 & n.5.<sup>21</sup>

In the weeks after the issuance of his Cluster Initiative, the Governor continued to impose Red Zone restrictions on predominately Orthodox Jewish areas, while relieving other areas with higher positivity rates. For example, the Governor maintained heavily restrictive Red Zone status for Jewish communities in Brooklyn that had a 7-day rolling average positivity rate of 4.57% on October 23. App. 313–14.<sup>22</sup> Yet the Governor did not impose similar restrictions on areas with higher positivity rates but without a meaningful Orthodox Jewish population. Thus, there was a “Broome yellow-zone” with 6.30% positivity, a “Steuben yellow-zone” with 4.65%, and a “Chemung orange-zone” with 8.13%. *Id.* On October 27, the Governor continued to impose “Red Zone” restrictions on Brooklyn Orthodox Jewish communities with 4.23% positivity, while areas without a Jewish population have higher positivity but fewer restrictions: “Broome yellow-zone” at 8.04%, “Steuben yellow-zone” at 4.44%, and “Chemung orange-zone” at 7.80%. App. 314.<sup>23</sup>

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<sup>20</sup> See also *id.* at 5–7.

<sup>21</sup> See also *id.* at 3, 5–6, 8–9.

<sup>22</sup> See also <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-50/>.

<sup>23</sup> See also <https://www.governor.ny.gov/news/governor-cuomo-announces-travel-advisory-requiring-14-day-quarantine-0/>.

And while the Governor has lifted the Red Zone in Brooklyn, he continued to impose more stringent Orange Zone restrictions on predominately Orthodox Jewish communities than other areas with higher positivity rates. On November 6 and 7, while he re-designated some of the Brooklyn Red Zone to Yellow Zone status, Governor Andrew M. Cuomo, *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones*, New York State (Nov. 6, 2020),<sup>24</sup> he disclosed the following positivity rates: Brooklyn Red Zone at 3.26%, Broome Yellow Zone at 4.03%, Steuben Yellow Zone at 4.11%, and Chemung Orange Zone at 6.92%. Governor Andrew M. Cuomo, *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Nov. 7, 2020).<sup>25</sup> The Governor finally re-designated all Brooklyn to Orange or Yellow Zone status on November 9. Governor Andrew M. Cuomo, *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones*, New York State (Nov. 9, 2020).<sup>26</sup> Yet the Governor still imposed harsh Orange Zone restrictions on Brooklyn Orthodox Jews areas with 7-day positivity rates of 4.22% on November 14, and he afforded less severe Yellow Zone restrictions for areas with greater rates: Erie at 7.45%, Monroe at 5.57%, Onodaga at 6.58%, Staten Island at 4.26%, and Tioga at 10.32%. Governor Andrew M. Cuomo, *Governor Cuomo Updates*

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<sup>24</sup> Available at <https://www.governor.ny.gov/news/governor-cuomo-announces-updated-covid-19-micro-cluster-focus-zones/>.

<sup>25</sup> Available at <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-61/>.

<sup>26</sup> Available at <https://www.governor.ny.gov/news/governor-cuomo-announces-updated-covid-19-micro-cluster-focus-zones-0/>.

*New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Nov. 14, 2020).<sup>27</sup>

On November 3, the Governor issued Executive Order No. 202.72, which “continues the suspensions and modifications of law . . . as continued and contained in Executive Order[ ] . . . 202.68 for another thirty days through December 3, 2020.”<sup>28</sup>

### **E. The Second Circuit Proceedings**

On October 21, Applicants filed an Emergency Motion For Injunction Pending Appeal in the Second Circuit. On November 9, a divided panel denied the motion. App. 1–9. The panel held that Applicants did not “clear the high bar necessary to obtain an injunction pending appeal,” concluding that the Cluster Initiative is neutral towards religious practice because it “subjects religious services to restrictions that are similar to or, indeed, *less severe than* those imposed on comparable secular gatherings.” App. 3 (emphasis in original). The panel did not address the other elements of injunctive relief on appeal: the irreparable injury to Applicants in the absence of relief, the balance of the equities, and the public interest. The panel also denied the motion on the erroneous, alternative grounds that Applicants did not comply with Federal Rule of Appellate Procedure 8(a) by moving first in the district court for an injunction pending appeal, after their injunction was denied. App. 2.

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<sup>27</sup> Available at <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-65/>.

<sup>28</sup> The Governor originally imposed Red Zone restrictions on Agudath Israel of Madison and Agudath Israel of Kew Garden Hills. App. 168, 178. The Governor re-designated Agudath Israel of Madison to be in the Orange Zone on November 9. *See* COVID-19 Micro-Cluster Strategy, New York State, available at <https://forward.ny.gov/>. Agudath Israel of Kew Garden Hills is in the Yellow Zone. *Id.*

Judge Park dissented, concluding that the Cluster Initiative is not neutral towards religious practice and fails strict scrutiny. App. 6. In particular, citing *Masterpiece Cakeshop*, Judge Park found that the Governor’s “public statements confirm that he intended to target the free exercise of religion.” *Id.* Judge Park also reasoned that the “disparate treatment of religious and secular institutions” evidenced by the Cluster Initiative’s “favorable” capacity limitations provided to “businesses deemed ‘essential’” is “plainly not neutral.” *Id.* Judge Park rejected the Governor’s reliance on *South Bay* and *Jacobson*, concluding that *South Bay* is not precedential and “was decided during the early stages of the pandemic,” and that *Jacobson* dealt only with “a substantive due process challenge” and “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.” App. 7–8. Judge Park concluded that the Cluster Initiative’s “blunderbuss approach is plainly not the ‘least restrictive means’ of achieving the State’s public safety goal,” reasoning the Red and Orange Zones’ “fixed capacity limits do not account in any way for the sizes of houses of worship” and that the Governor failed to show how “generally applicable public-health restrictions” for favored secular conduct would not similarly prevent “COVID-19 transmission” for religious gatherings. App. 8 (quoting *Lukumi*, 508 U.S. at 578). Judge Park also found that the equities favored relief, recognizing that Applicants “presented un rebutted evidence that the [Cluster Initiative] will prevent their congregants from freely exercising their religion” and that the State “may not” implement “greater

restrictions only on houses of worship.” App. 8–9. Finally, Judge Park held that in light of the district court’s “error” that Applicants would not suffer irreparable harm, “[P]laintiffs reasonably believed that another motion for injunction in the district court would be futile” under Rule 8(a). App. 8 n.5.

#### **F. The Diocese’s Lawsuit**

Pending in this Court is an emergency application to Justice Breyer for writ of injunction submitted by the Diocese of Brooklyn. *See* Diocese App. The Diocese’s lawsuit has proceeded in tandem with this case. Both sets of plaintiffs filed their complaints on October 8, and both district courts heard and denied the plaintiffs’ TRO motions on October 9. On October 21 both sets of plaintiffs filed in the Second Circuit requests for injunctive relief pending appeal, and the court held argument in tandem on November 3. The Second Circuit denied both motions in a single order and expedited both appeals in tandem. App. 4.

#### **REASONS FOR GRANTING THE APPLICATION**

In cases of “exigent circumstances,” the All Writs Act, 28 U.S.C. § 1651(a), authorizes either an individual Justice or the Court to issue an injunction when the “legal rights at issue are indisputably clear” and relief is “necessary or appropriate in aid of the Court’s jurisdiction.” *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). In such cases, this Court exercises broad discretion: it may issue an injunction pending appellate review “based on all the circumstances of the case . . . [without] express[ing]

. . . the Court’s views on the merits.” *Little Sisters of the Poor Home for the Aged, Denver v. Sebelius*, 134 S. Ct. 1022, 1022 (2014).<sup>29</sup>

**I. Applicants Have An Indisputably Clear Right To Relief**

**A. The Cluster Initiative Is Subject To Strict Scrutiny**

The First Amendment forbids States from enacting laws that target religious groups or unduly burden the free exercise of religion, *Lukumi*, 406 U.S. at 531, and a law can be subject to strict scrutiny in several independent ways. An edict that is not neutral toward religion in any one of these ways can survive only if it clears strict scrutiny, which occurs “only in rare cases.” *Id.* at 546. Two of those independent ways are relevant to this Application.

*First*, a government edict that restricts religious practice because of the decision-maker’s targeting of a *particular religious sect* is not neutral, regardless of its facial text. *Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1729–32; *Lukumi*, 508 U.S. at 533–38. In determining whether a discriminatory object exists, a court should analyze “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or

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<sup>29</sup> Rule 8(a) poses no barrier to this Court granting relief to Applicants. Consistent with Judge Park’s conclusion below, App. 8, Applicants explained that this case plainly satisfies Rule 8(a)’s “impracticable” exception, as it would be futile to ask the district court for the same relief the court had just denied to them in rejecting their injunction motion, especially when the court erroneously concluded that the Cluster Initiative’s harsh capacity limitations do not impose irreparable harm on Applicants, App. 318–19 (citing *In re Flint Water Cases*, 960 F.3d 820, 825 (6th Cir. 2020), *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410–11 (5th Cir. 2013), and *Homas v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001)). In any event, out of an abundance of caution, Appellants filed such a request in the district court on November 13. App. 495–96.

administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 540).

This Court’s decisions in *Lukumi* and *Masterpiece Cakeshop* are instructive. In *Lukumi*, members of the Santeria religion sought to open a house of worship, school, cultural center, and museum in the City of Hialeah. 508 U.S. at 525–26. Some in the community found this prospect “distressing” because the church engaged in ritual animal sacrifice, and the city council passed a resolution “declar[ing] the city policy ‘to oppose the ritual sacrifices of animals’ within [city limits] and announc[ing] that any person or organization practicing animal sacrifice ‘will be prosecuted.’” *Id.* at 526–27. The city council also adopted ordinances outlawing animal sacrifice. *Id.* at 527–28. This Court held that the government action violated the Free Exercise Clause, even though the ordinances were facially neutral, because “suppression of the central element of the Santeria worship service was the object of the ordinances.” *Id.* at 535. In *Masterpiece Cakeshop*, a Christian baker declined to create a cake for a same-sex wedding because it violated his “deeply held [religious] beliefs.” 138 S. Ct. at 1724. During hearings before the Colorado Civil Rights Commission, some commissioners maligned the baker’s religious beliefs, with one commissioner criticizing religion as having been used to both “justify all kinds of discrimination throughout history” and “hurt others.” *Id.* at 1729. This Court concluded that the “[t]he official expressions of hostility to religion in some of the commissioners’

comments” were “inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.” *Id.* at 1731–32.

*Second*, a law also is not neutral if it “target[s]” religious practice when the law’s “operation is considered,” as “[a]part from the text, the effect of a law in its real operation is strong evidence of its object.” *Lukumi*, 508 U.S. at 535. Thus, in *Lukumi*, this Court concluded that the challenged “ordinances’ operation” also evidenced “target[ing]” of religious practice because the law was underinclusive in the conduct that it proscribed. *Id.* The Court found that the ordinances permitted animal killing in most nonreligious contexts and also explicitly exempted certain secular activity from the restrictions. *Id.* at 536–37. The Court reasoned that if the city’s secular basis for restricting animal sacrifice—protecting public health and preventing cruelty to animals—were accepted, the city also should have barred similar nonreligious animal killings. *Id.* at 536–38. Because the city did not, the “pattern of exemptions” in the ordinances evidenced the law’s singling out religious practice. *Id.* at 537.

Here, the Governor illegally targeted *both* a specific religious minority and religion more broadly.

- 1. The Governor’s “Targeting” Of Orthodox Jews Triggers Strict Scrutiny**

The Governor’s *repeated* statements singling out the Orthodox Jewish community—matched by his clear gerrymandering to encircle primarily Orthodox communities and synagogues—are sufficient to render this Order unconstitutional under *Masterpiece Cakeshop*.

a. The Governor made overwhelmingly clear that his Cluster Initiative was designed to target a particular religious minority that he falsely blames for the spread of COVID-19—Orthodox Jews. He threatened “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.” App. 101–02. He described the COVID-19 “cluster [as] predominantly an ultra-orthodox cluster” and identified “the ultra-Orthodox community” as causing the “problem,” putting any doubt regarding his religious targeting to rest. App. 80.

The “contemporaneous statements” that the Governor made when restricting houses of worship, as well as the Cluster Initiative’s context, plainly show his “discriminatory object” of targeting Orthodox practices. *Lukumi*, 508 U.S. at 533, 540. The Governor’s Cluster Initiative required enforcement of his restrictions by October 9—the beginning of the Jewish holidays, App. 168, 173, 178, ensuring that it was “impossible” for Applicants and other Orthodox Jews to conduct and participate in such services, App. 168, 173, 178. The brunt of the Governor’s restrictions falls disparately on Orthodox Jews, who cannot use vehicular travel on the Sabbath or on religious holidays and thus are unable even to travel to houses of worship for religious practice in permitted areas. App. 170, 175, 180. If anything, the Governor’s contemporaneous comments here are worse than those in *Lukumi* and *Masterpiece Cakeshop*. The Governor did not attack religious belief generally, but singled out a particular religion for blame and retribution for an uptick in a society-wide pandemic.

App. 80, 101–02. He threatened “members of the ultra-Orthodox community” and referred to them as a “problem,” due to his own perceptions of the community. *Id.*<sup>30</sup>

b. The context of the Governor’s actions likewise separately demonstrates that his Cluster Initiative specifically targeted the Orthodox Jewish community. The Cluster Initiative as initially issued did not include any criteria—generally applicable or otherwise—for designating areas for restrictions, App. 322–24, and the Governor did not disclose any set criteria when he designated Applicants’ communities as restricted zones on October 6, App. 325–35. The Governor’s Cluster Initiative does not require that when other neighborhoods reach the same or even greater COVID-19 concentration levels they will be subject to the same restrictions imposed on Applicants, or that if the restricted zones meet certain criteria they will be released from lockdown. Rather, the Governor simply announced gerrymandered areas that contain predominately Orthodox Jewish communities for stringent gathering limitations without providing any generally applicable basis for the restrictions. App. 196–201; *see also* App. 385; *supra* p. 10. The Governor has eschewed traditional geographic boundaries, and has afforded himself carte blanche authority to inflate or diminish rates as he desires, including by moving the boundaries of the “zones” at will. The Free Exercise Clause does not allow the Governor to use religion as a basis

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<sup>30</sup> In issuing his Order, the Governor was acting as the *sole* adjudicator—implementing capacity restrictions and enforcing them. His repeated discriminatory comments thus are even more egregious than those at issue in *Masterpiece Cakeshop*, which involved the comments of one or two of the seven commissioners, and this Court relied upon the silence of the other commissioners in failing to object to those discriminatory statements. 138 S. Ct. at 1726–27, 1729.

for such restrictions by gerrymandering disparate Orthodox Jewish communities into a single restricted zone. *See* App. 385.

The Governor has relied on *post hoc* zone criteria released in the weeks after issuing his Cluster Initiative as evidence of the nondiscriminatory nature of the original zones being challenged, but these metrics purport to explain only how a new “cluster” can achieve a zone designation. *See* App. 112–14, 119,<sup>31</sup> 313.<sup>32</sup> These metrics do not attempt to explain how the original zones targeting Orthodox Jewish communities were designated, and they cannot cure the Governor’s own, “frank[]” admission that the original clusters *were* “religious organizations.” *See supra* pp. 5–11.

Moreover, the Governor’s post-filing actions only further underscore that he continues to target Orthodox Jewish communities as his “discriminatory object.” *Lukumi*, 508 U.S. at 533, 540. For example, the Governor maintained the heavily restrictive Red Zone status for Jewish communities in Brooklyn, which restricts synagogue attendance to no more than 10 people, even when other neighborhoods with far higher positivity rates were subject to far fewer restrictions. On October 23, for example, Red Zones in Brooklyn had a 7-day rolling average positivity rate of 4.57%, but the Governor did not similarly impose Red Zone restrictions on areas with higher rates but without a meaningful Orthodox Jewish population. App. 313–14.

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<sup>31</sup> *See also* Declaration of Howard A. Zucker, *The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 1:20-cv-04844 (E.D.N.Y.), Dkt. 29-1 at ¶¶ 12–13, 20.

<sup>32</sup> *See also* [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/MicroCluster\\_Metrics\\_10.21.20\\_FINAL.pdf/](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/MicroCluster_Metrics_10.21.20_FINAL.pdf/).

Thus, there was a “Broome yellow-zone” with 6.30% positivity on October 23, a “Steuben yellow-zone” with 4.65%, and a “Chemung orange-zone” with 8.13%, all communities without the substantial Orthodox Jewish populations in the Governor’s disfavored Red Zone regions. *Id.*

This inconsistent treatment of communities has not abated. On October 27, the Governor continued to impose Red Zone restrictions on Brooklyn Orthodox Jewish communities with 4.23% positivity, while areas without a Jewish population had higher positivity but fewer restrictions: “Broome yellow-zone” at 8.04%, “Steuben yellow-zone” at 4.44%, and “Chemung orange-zone” at 7.80%. App. 314.

And while the Governor has since changed the Brooklyn Red Zone into an Orange Zone, he continues to implement those restrictions unequally. He imposed Orange Zone restrictions on Brooklyn Orthodox Jewish neighborhoods with 7-day positivity rates of 4.22% on November 14, while affording less stringent Yellow Zone restrictions to areas with higher positivity rates: Erie at 7.45%, Monroe at 5.57%, Onondaga at 6.58%, Staten Island at 4.26%, and Tioga at 10.32%. Governor Andrew M. Cuomo, *Governor Cuomo Updates New Yorkers on State’s Progress During COVID-19 Pandemic*, New York State (Nov. 14, 2020). The Governor has not set forth any neutral justification for such disparate treatment.

## **2. The Cluster Initiative Also Triggers Strict Scrutiny Because It Disfavors “Worship”**

Even ignoring the Governor’s impermissibly discriminatory targeting of the Orthodox Jewish community—and as already explained to this Court by the Roman Catholic Diocese of Brooklyn, New York, *see* Diocese App. 21–29—his restrictions are

also facially discriminatory against religious practice more broadly by expressly imposing gathering restrictions on “houses of worship” that the Governor does not force on secular conduct. App. 324.

The Cluster Initiative’s regulation of worship separately requires heightened scrutiny under the text, history, and tradition of the Religion Clauses. Worship is at the core of the “exercise of religion” protected by the Free Exercise Clause. Dr. Johnson defined “exercise” to mean *inter alia* an “Act of divine worship whether publick or private.” Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1153 n.23 (1990) (quoting Samuel Johnson, A Dictionary of the English Language (Phila. ed. 1805)). The provisions of Founding-era state constitutions that served as a model for the Bill of Rights specifically protected worship. *See, e.g.*, N.Y. Const., art. XXXVIII (1777) (“[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind.”); Pa. Const., art. I, § 2 (1776) (“[N]o authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.”); N.H. Const., art. I, § 5 (1784) (“Every individual has a natural and unalienable right to worship G[OD] according to the dictates of his own conscience, and reason; and no subject shall be

hurt, molested, or restrained in his person, liberty, or estate, for worshipping G[ ]D, in the manner and season most agreeable to the dictates of his own conscience.”<sup>33</sup>

This Court and individual Justices have repeatedly recognized that worship is at the heart of what has always been protected by the Religion Clauses. *Barnette* specifically held that “freedom[ ] of . . . worship” could not be infringed on the “slender grounds” of rational basis scrutiny but instead is “susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.” 319 U.S. at 639. Indeed, although its doctrinal validity has been put in question, even *Employment Division v. Smith* sees a special role for “worship” under the Free Exercise Clause. *Smith* specifically held that “[i]t would doubtless be unconstitutional” to ban activities undertaken “for worship purposes.” 494 U.S. 872, 877–78 (1990) (citations omitted). In the same vein, Justices have repeatedly singled out worship as obviously protected religious activity. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., joined by Kagan, J., concurring) (“The First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services . . . .”); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2284 (2020) (Breyer, J., dissenting) (Founders “came to believe ‘with a passionate conviction that they were entitled to worship G[ ]d in their own way . . . .’” (quoting C. Radcliffe, *The Law & Its Compass* 71 (1960))); *Am. Legion v. Am. Humanist Ass’n*,

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<sup>33</sup> Some state constitutions focused *solely* on freedom of worship, but “[t]he limitation to ‘worship’ was not carried over into the federal free exercise clause.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1460 (1990).

139 S. Ct. 2067, 2096 (2019) (Thomas, J., concurring) (“punish[ing] dissenting worship” forbidden by Religion Clauses).

In this case, the Governor’s restrictions in each of the three zones single out “houses of worship” for disparate treatment by imposing stringent capacity limitations yet permitting comparable secular conduct, such as offices, retail stores, malls, and schools, as well as a host of other “essential” businesses and an undefined “essential” gatherings category, to operate under preferential capacity requirements.

In the Red and Orange Zones, the Governor restricts houses of worship to a 10- and 25-person maximum—*no matter the size of the place of worship*. App. 324. Yet an undefined category of “[ ]essential gatherings” is exempted, and thus favored over religious gatherings. *See id.* Further, Red Zone restrictions explicitly do not apply to secular “essential” businesses, thereby allowing (under the Governor’s definition of “essential”) industries such as “financial services and research” and manufacturing, child care services, and farmer’s markets, App. 192–93, to operate in group settings even in these “most severe[ly]” restricted zones, App. 324.

In the Orange Zones, the Governor closes only those specific “non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus.” *Id.* As Judge Park explained, because “numerous businesses deemed ‘essential’ may operate with no such restrictions” that are imposed on houses of worship, the Cluster Initiative’s “disparate treatment of religious and secular institutions is plainly not neutral.” App. 6. “[A] generally applicable policy incidentally burdens religion[.] . . . 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. Such targeting of religion is subject to strict scrutiny.” App. 7. The Governor has “impermissibl[y] . . . target[ed] [Applicants] and their religious practices” for disfavored treatment, which shows the “[t]he design of the[ ] law[ ] accomplishes [ ] a ‘religious gerrymander.’” *Lukumi*, 508 U.S. at 535–38 (quoting *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). If Applicants used their exact same building for some approved purpose other than religious worship—running a brokerage service, selling widgets, or reporting the news—they would not face such draconian limits.

### 3. ***Jacobson* Does Not Permit The State To Discriminate Against Religious Minorities Or Target Religious Practice**

*Jacobson* does not change any of these conclusions. *Jacobson* rejected a substantive due process challenge to an across-the-board mandatory vaccination law. *Jacobson* came before the First Amendment was incorporated against the states, and it did not address the Free Exercise Clause. Thus, “[i]t is a considerable stretch to read the decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case.” *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting). *Jacobson* also acknowledged that a State’s power to protect public health and safety is “subject, of course, . . . to the condition that no rule . . . shall contravene the Constitution of the United States, nor infringe any right

granted or secured by that instrument.” 197 U.S. at 25. And a public health measure, “even if based on the acknowledged police powers of a state, must always yield in case of conflict with . . . any right which [the Constitution] gives or secures.” *Id.*

In any event, even though *Jacobson* authorized vaccine regulations “applicable equally to all in like condition,” *id* at 30, it surely cannot displace or undermine judicial review where, as here, the Governor is targeting a particular minority for disfavored treatment, in violation of *Lukumi* and *Masterpiece Cakeshop*. See, e.g., *Zucht v. King*, 260 U.S. 174, 176 (1922) (*Jacobson* merely “settled that it is within the police power of a state to provide for compulsory vaccination”).

Finally, even when denying requests for injunctive relief pending appeal, this Court has acknowledged the stark difference between generally applicable COVID-19 restrictions that permissibly impact religious practice under *Jacobson*, and those that single out religious activity. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (“Although California’s guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings . . . .”). Thus, even if *South Bay* was applicable beyond its precise circumstances, *but see Mandel v. Bradley*, 432 U.S. 173, 176 (1977), while “[t]he Constitution allows a State to impose certain calculated, neutral restrictions,” it “emphatically, does not allow a State” to “more aggressively” seek out religious activity for such restrictions. *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 731–32 (9th Cir. 2020) (O’Scannlain, J., dissenting). Therefore, while *Jacobson* may provide public officials broad latitude

during pandemics, it is possible for the government to “exceed” that latitude, *S. Bay*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring), and it has done so here both by discriminating against a religious minority and by treating similar secular conduct more favorably than religion.

### **B. The Governor’s Cluster Initiative Cannot Withstand Strict Scrutiny**

To survive strict scrutiny, a law must be the least restrictive means of furthering a compelling interest. *Lukumi*, 508 U.S. at 531–32. This standard “is exceptionally demanding,” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014), and to meet it, the State must provide evidence, not only argument. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). Where “many” other jurisdictions have furthered the same interest with less restrictive means, the government “must, at a minimum, offer persuasive reasons why it believes that it must take a different course.” *Holt v. Hobbs*, 574 U.S. 352, 369 (2015). The Governor’s restrictions plainly do not satisfy that burden.

The Cluster Initiative is not the “least restrictive means” to curbing COVID-19 spread; indeed, the Governor admitted as much when he explained that initiative was “not a policy being written by a scalpel,” but one “cut by a hatchet.” App. 117. One less-restrictive alternative is the most obvious: the Governor could enforce his own pre-existing health guidelines. The Governor believes that the current outbreak is the result of people not following the guidelines he previously set out, stating before issuing his new restrictions that “how’s [COVID-19] increasing? Because people are not following the rules.” App. 100. Targeting the Orthodox Jewish community by

shutting down synagogues that indisputably *have* complied with the Governor’s guidelines is not the least restrictive means of stemming COVID-19 spread. *See McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (“the police appear perfectly capable of singling out lawbreakers” and therefore the government must use existing laws). Another less-restrictive alternative is to follow the practices in numerous other jurisdictions that have managed the virus without limiting religious worship so severely (or at all). *See infra* pp. 36–38.

The Cluster Initiative is also not narrowly tailored because of the initiative’s special restrictions of “worship,” as opposed to other activities that have a similar, and even greater, impact on COVID-19 spread. A “law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Lukumi*, 508 U.S. at 547 (citation omitted). Yet here, while the Cluster Initiative restricts houses of worship, it imposes less stringent restrictions on “pet shops, liquor stores, and other businesses,” App. 6 (Park, J., dissenting), among an array of other activity, *see supra* pp. 5–11. Nor do the Cluster Initiative’s “fixed capacity limits . . . account in any way for the sizes of houses of worship in red or orange zones.” App. 8 (Park, J., dissenting).

At bottom, the only interest consistent with the Governor’s actions is the one he “candid[ly]” articulated on October 6: responding to a climate of “fear” in the City, which the Governor thought he could address with a blunt policy cut by “a hatchet.” App. 117. Indeed, the Governor acknowledged that “the fear [was] too high” in the City to take “a smarter, more tailored approach” because “we have a real problem

with fear and anxiety” and people “moving out.” App. 383, 389. But “unsubstantiated” “fear[s] . . . are not permissible bases for” overriding fundamental rights. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Even in a pandemic, constitutional rights deserve better than a hatchet job.

## **II. The Circumstances Are Critical And Exigent**

Absent temporary relief, the Governor’s Cluster Initiative is causing immediate, massive, and irreparable harm to Applicants, making it impossible for their members to gather for worship. By contrast, allowing Applicants to resume worship subject to generally applicable public health guidelines—including capacity restrictions, masking, and distancing rules—will cause no harm to the government; it will bring New York back into line with its sister States. In such circumstances, interim relief is proper. *See, e.g., Williams v. Rhodes*, 89 S. Ct. 1, 2 (1968).

### **A. The Ongoing Harm To Applicants Is Real and Immediate**

The ongoing burden on Applicants’ religious exercise is severe.

*First*, the burden on Applicants is particularly acute, even as among other faith groups. Applicants cannot simply “modif[y]” their religious practices to avoid irreparable harm, as the district court concluded. App. 75. Rather, the Governor’s restrictions render it “*impossible*” for Applicants to worship in synagogue and to engage in core religious practices. App. 168, 173, 178. Many synagogues serve several hundred men and women each week, and have occupancy capacities that permit them to have several hundred worshippers in the building at any one time. App. 167, 172, 177. But under the Cluster Initiative’s restrictions, “it is practically impossible to

conduct services for all of Plaintiffs’ congregants” within a Sabbath timeframe, from Friday sundown until Saturday sundown. App. 168, 173, 178. And because Orthodox Jews are prohibited from vehicular travel on Saturdays and religious holidays, the Governor’s restrictions disproportionately harm Orthodox Jewish services. App. 170, 175, 180, 183. While practitioners of other faiths can drive to nearby houses of worship outside of their restricted zones, Orthodox Jews are unable to do so. *Id.*

Likewise, Orthodox Jews’ observance of holy days has been uniquely and intentionally burdened under the restrictions. The Governor timed his religious shutdown to begin on the eve of a Jewish holiday weekend, immediately before Hoshana Rabbah, Shmini Atzeres, and Simchas Torah—all holidays which preclude observant Jews from traveling by car to worship. *Id.*

*Second*, the Governor is engaged in open and obvious targeting of Orthodox Jews and their religious worship and observance, which is itself a distinct and irreparable injury. This Court has recognized that unconstitutional discrimination constitutes its own form of injury. *See Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). This is particularly true in the context of protecting the enumerated right to Free Exercise because religious discrimination itself “is odious to our Constitution . . . , and cannot stand.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

The discrimination injury here is heightened given the long history of recognized discrimination against Orthodox Jews by New York area governments. For instance, New York City was recently caught “*purposefully*” and “*exclusively*”

“singl[ing] out religious conduct performed by a subset of Orthodox Jews” for “special burdens” which the City chose not to impose on similar secular conduct. *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 186, 194 (2d Cir. 2014) (emphasis in original). And the Second Circuit has found that whole municipalities in New York were incorporated out of sheer “animosity toward Orthodox Jews as a group.” *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995).<sup>34</sup> More broadly, Jews have long been the leading target for religious hate crimes nationwide. In 2018 alone, almost 60% of religious hate crimes were targeted at Jews—which was over *40 points* higher than the next targeted group and more than all other targeted groups *combined*.<sup>35</sup>

**B. Applicants’ Worship Activities, Undertaken In Strict Accordance With CDC Guidelines, Do Not Harm The Public Interests**

Since the beginning of the pandemic, it is undisputed that Applicants have complied with all State and City mandates. App. 167–68, 172–73; 177–78. Applicants split traditional worship services into smaller group settings to ensure their congregations followed social distancing protocols, and they require their congregants to wear masks during all services—rules with which congregants have fully complied. App. 168, 172–73, 178. By carefully and responsibly implementing health and safety

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<sup>34</sup> See, e.g., *Congregation Rabbinical Coll. of Tartikov v. Vill. of Pomona, NY*, 945 F.3d 83, 122 (2d Cir. 2019) (affirming finding of “religious animus” in governmental action against Orthodox Jews); *Tenafly Eruv Ass’n v. Borough of Tenafly*, 309 F.3d 144, 153 (3d Cir. 2002) (residents “expressed vehement objections” to having “Orthodox Jews” move to town; one Council member “voiced his ‘serious concern’ that ‘Ultra–Orthodox’ Jews might ‘stone[] cars that drive down the streets on the Sabbath’”).

<sup>35</sup> See <https://ucr.fbi.gov/hate-crime/2018/topic-pages/victims>.

protocols, Applicants have been able to allow their members to continue to practice their religious beliefs while still safeguarding from the spread of COVID-19.

The Governor does not dispute that Applicants have rigorously implemented and adhered to all health protocols and that there has been no outbreak COVID-19 in their congregations. Indeed, the Governor himself has indicated that merely following his prior rules sufficed. *See* App. 100 (“[H]ow’s it increasing? Because people are not following the rules;” “[N]one of these rules are going to make a darn, if you don’t have the enforcement.”). That is presumably why the Governor is willing to allow many other secular activities to continue unabated and for more hours than worship, so long as participants are masked and socially distanced. And it is why masked, socially distanced worship is permitted across the country, and across the non-Orthodox neighborhoods of the State.

Tellingly, the Governor does not claim that *these* Orthodox Jewish synagogues ever broke any rules or contributed to the spread of COVID-19. The best the Governor can offer is the claim that *some* Orthodox Jewish synagogues allegedly broke rules and contributed to spread elsewhere. That cannot be enough to overcome the undisputed facts that Applicants’ masked and socially distant worship poses no threat to the government’s interests.

### **C. The Cluster Initiative Is Out Of Step With Other States**

Nor would a grant of temporary relief intrude on any legitimate interest of the State; in fact, temporary relief would bring New York into line with the approaches

of other States, most of which have no capacity limits on places of worship, and none of which have anything like New York’s discriminatory Cluster Initiative.

For example, as of October 5 (the same week that the Governor was preparing to ban nearly all in-person religious worship in the targeted zones), thirty-one other States had no statewide numerical caps on religious worship. App. 512–20. This widespread approach is not surprising in light of our Nation’s history and tradition of robustly protecting religious worship as such.

Even among states that have adopted a more restrictive approach, New York is an outlier. The California and Nevada in-person worship restrictions that this Court has already considered are far more permissive of religious worship than is New York’s cluster system. Nevada allows in-person worship of up to “250 people or 50 percent of fire code capacity.”<sup>36</sup> Venues holding more than 2,500 can apply to allow for larger crowds. *Id.* And California permits attendance up to “25% of capacity or 100 people, whichever is less” in counties experiencing positivity rates between 5% to 8% and “50% of capacity or 200 people, whichever is less” in counties with positivity rates between 2% and 4.9%.<sup>37</sup> California prohibits indoor worship only when a county’s positivity rate exceeds 8%.<sup>38</sup>

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<sup>36</sup> Nevada Places of Worship and Life-Rites Ceremonies (Sept. 29, 2020), <https://nvhealthresponse.nv.gov/wp-content/uploads/2020/09/Nevada-Places-of-Worship-and-Life-Rites-Ceremonies.pdf>.

<sup>37</sup> *Quick Answers Places of Worship and Cultural Ceremonies*, COVID-19.CA.GOV, <https://covid19.ca.gov/search/?q=worship#gsc.tab=0&gsc.q=worship&gsc.page=1>; *Understand Your County’s Status*, COVID-19.CA.GOV, <https://covid19.ca.gov/safer-economy/>.

<sup>38</sup> See references *supra* note 37.

New York’s neighbors are also far more accommodating of religious exercise. Pennsylvania completely exempts houses of worship from its regulations on social gatherings.<sup>39</sup> Connecticut and Massachusetts likewise provide that houses of worship can welcome 50% of their occupancy.<sup>40</sup> And in New Jersey, indoor worship can occur with “150 people or 25% of a room’s capacity—whichever number is lower.”<sup>41</sup>

New York’s regime is also far more severe than other jurisdictions with similar rates of COVID-19 infection. Maryland allows for houses of worship to open at 75% capacity.<sup>42</sup> In Washington, D.C., houses of worship can accommodate 50% of their capacity, up to 100 people.<sup>43</sup> And Virginia completely exempts religious services from its numerical cap on gatherings provided attendees comply with basic precautions like mask-wearing and social distancing.<sup>44</sup>

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<sup>39</sup> COVID-19 Guidance for Businesses (Oct. 6, 2020), <https://perma.cc/GCR6-UPUG>.

<sup>40</sup> *Sector Rules and Certification for Reopen*, CT.gov, <https://portal.ct.gov/DECD/Content/Coronavirus-Business-Recovery/Sector-Rules-and-Certification-for-Reopen>; Safety Standards and Checklist: Places of Worship (Oct. 29, 2020), <https://www.mass.gov/info-details/safety-standards-and-checklist-places-of-worship>.

<sup>41</sup> *Are Churches and Other Houses of Worship Offering Services? What Are the Social Distancing Requirements?*, NJ.gov (Oct. 28, 2020), <https://covid19.nj.gov/faqs/nj-information/reopening-guidance-and-restrictions/are-churches-and-other-houses-of-worship-offering-services-what-are-the-social-distancing-requirements>.

<sup>42</sup> Md. Exec. Order No. 20-09-01-01 (Sept. 1, 2020), <https://perma.cc/Z7JD-YPQY>.

<sup>43</sup> Phase Two Guidance Coronavirus 2019 (COVID-19) Guidance for Places of Worship, Coronavirus.DC.gov (Oct. 10, 2020), [https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page\\_content/attachments/COVID-19\\_DC\\_Health\\_%20Guidance\\_for\\_Places\\_of\\_Worship\\_2020.10.10-p2.pdf](https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/COVID-19_DC_Health_%20Guidance_for_Places_of_Worship_2020.10.10-p2.pdf).

<sup>44</sup> Va. Exec. Order No. 67 (6th amend. Nov. 13, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-SIXTH-AMENDED-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Further-Adjusting-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-67-SIXTH-AMENDED-and-Order-of-Public-Health-Emergency-Seven---Phase-Three-Further-Adjusting-of-Certain-Temporary-Restrictions-Due-to-Novel-Coronavirus-(COVID-19).pdf).

### III. In The Alternative, The Court Should Also Grant Certiorari Before Judgment

In the alternative to entering an injunction pending appeal, the Court should grant certiorari before judgment in the Court of Appeals and enjoin the Governor's actions pending disposition by this Court. *See* 28 U.S.C. § 2101(e). Religiously discriminatory COVID-19 restrictions are an ongoing problem of nationwide scope—yet without prompt action the Court will be unable to give additional guidance on these issues until next Term. More to the point, the Governor's targeted shutdown of synagogues in a City home to hundreds of thousands of Orthodox Jews is itself an issue of “imperative public importance,” S. Ct. R. 11—fundamentally contradicting the “immunities of citizenship” promised at the founding to people of all faiths, including the “community of American Jews,” *Town of Greece v. Galloway*, 572 U.S. 565, 636–37 (2014) (Kagan, J., dissenting) (quoting George Washington, Letter to Newport Hebrew Congregation (Aug. 18, 1790)).

Certiorari is further warranted given the conflicts between the Second Circuit's decision and decisions of other Circuits and of this Court. The Second Circuit declined to apply heightened scrutiny even though the Cluster Initiative treated houses of worship worse than so-called “essential” businesses, App. 6 (Park, J., dissenting), simply because (in some zones) the Cluster Initiative *also* imposed stringent restrictions on other entities, like schools and restaurants, App. 4 (majority). Yet the Sixth Circuit subjected a Kentucky COVID-19 order to heightened scrutiny because it closed houses of worship but not other “life-sustaining” organizations, without regard to which other entities were closed, too. *Roberts v. Neace*, 958 F.3d 409, 411–

15 (6th Cir. 2020) (per curiam). And the Third Circuit has held that even a single secular exemption to an otherwise-applicable prohibition can render a law not neutral and generally applicable as applied to religion, regardless whether other secular conduct is likewise banned. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365–66 (3d Cir. 1999); *see Calvary Chapel*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting) (“The point is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated.” (citation omitted) (emphasis in original)).

Moreover, the Second Circuit’s refusal to apply strict scrutiny to an order targeted at religion runs afoul of this Court’s well-settled precedent, as explained above. This case—in which the targeting is not just obvious but admitted—is the proper vehicle to resolve these conflicts.

## CONCLUSION

This Court should issue the requested injunction.

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