App. No. 20A90

In the

Supreme Court of the United States

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

v.

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

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

To the Honorable Stephen Breyer
Associate Justice of the Supreme Court of the United States

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TO THE HONORABLE STEPHEN BREYER,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

This Court's intervention remains necessary to protect Applicants' right to worship, on each of the grounds that Applicants articulated in their Application. With respect to unconstitutional targeting, to Applicants' knowledge this case is the first time in living memory where a state governor has drawn targets on a map over neighborhoods of a discrete religious minority, while proclaiming that he is "targeting" that particular religious minority to allay the majority's "fears" that this minority was deepening a national crisis. This Court should not permit such remarkable scapegoating of a religious minority to stand. And the Governor has directly restricted worship and specifically singled out "houses of worship" for disfavored treatment, as compared to so-called "essential" gatherings, "essential businesses" and other favored, secular activities. This Court should grant relief to protect the core principles of the Free Exercise Clause. Doing so will make clear to lower courts that the denial of relief in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), was not intended to signal that States can discriminate against religion as long as COVID-19 remains a crisis in this country.

The Governor's Opposition offers no persuasive reason to deny relief to Applicants. His lead argument—that there can be no relief because the two individual synagogue Applicants are now in Yellow Zones—is meritless. Lead Applicant Agudath Israel of America seeks, and has always sought, statewide relief against the Cluster Initiative's numerical caps on attendance at places of worship. Especially because the Governor has threatened to reimpose these restrictions.

As for his repeated statements explaining that he created the Cluster Initiative to target Orthodox Jews, the Governor ignores the most indefensible of his statements, while offering implausible rationalizations of the rest. His efforts to whitewash the Cluster Initiative's discriminatory origins with later-adopted and ever-evolving metrics and inconsistent re-designations demonstrate that the Cluster Initiative is not based upon science or data but on one man's ever-changing notions: whether those notions are to target a religious minority to tamp down the "fears" of the majority, or to evade this Court's review for his discriminatory words and actions.

The Governor does not even attempt to justify why he has privileged so-called "essential" gatherings over houses of worship in his Cluster Initiative's facial favoritism of secular activity, let alone cogently explain why such worship is more dangerous than the many secular activities that he has exempted.

This Court should grant the injunction against the discriminatory Cluster Initiative pending appeal, or, in the alternative, grant certiorari before judgment and then enjoin the Cluster Initiative pending further action from this Court.

ARGUMENT

I. Applicants Need Urgent Relief

Aware that the Cluster Initiative is in trouble, the Governor's first response in this Court is to feign retreat. On the very day his Opposition in the *Diocese of Brooklyn* case, No. 20A87, was due, the Governor abruptly announced that he was going to re-designate the Brooklyn zones from Orange to Yellow—even though these areas do not satisfy his own announced criteria for downgrading to Yellow, *see infra*

10–11—and he now says there are "no critical or exigent circumstances" to warrant relief, Opp. 17–18 (capitalization altered). This argument misunderstands both the scope of Applicants' interests and the continuing threat to their ability to worship. Simply put, the current version of the Cluster Initiative still imposes unconstitutional 10- and 25-person caps on Orthodox Jewish synagogues, and it threatens hundreds more with imminent restriction. The circumstances remain exigent.

First, Applicant Agudath Israel of America is an umbrella organization for Orthodox Jewry. App. 397; *accord* App'x 182–83. Throughout this case, it has consistently sought *statewide* relief against the Cluster Initiative's numerical caps on places of worship, explaining that such relief was "essential to safeguarding the core religious practices of thousands of Orthodox Jews." *Agudath Israel of Am. et al. v. Cuomo*, No. 20-cv-4834, Dkt. 2-2 (E.D.N.Y. Oct. 8, 2020); *accord* App'x 182–83. At no time has Agudath Israel suggested that its request for relief was limited to the two synagogues that are also parties to the litigation, and at no time did the Governor or any court suggest it should be. Rather, Agudath Israel has always been in this case precisely to "safeguard[ ] the core religious practices of thousands of Orthodox Jews" throughout the State. *Agudath Israel*, Dkt. 2-2 at 1. The Governor does not deny, and cannot deny, that the Cluster Initiative continues to impose worship caps on synagogues at which these Jews seek to worship.

Second, while the Governor has for the moment removed certain synagogues from the Cluster Initiative's numerical caps, he retains the unfettered discretion to re-impose those restrictions on them at a moment's notice. *See infra* 8–11. Indeed, at

the very same press conference in which the Governor announced his re-designation of the Brooklyn Orange Zone he threatened to declare *all of New York City* an Orange Zone, thereby subjecting all places of worship in the City to the Cluster Initiative's 25-person caps.[1] The Governor's renewed threats confirm the obvious: Applicants need urgent relief.

II. The Cluster Initiative Targets Orthodox Jews And His *Post Hoc* Changes Do Not Save The Cluster Initiative From Unconstitutionality Or Diminish The Need For Immediate Relief

Applicants have shown that the Governor created the Cluster Initiative to target the Orthodox Jewish community. Application 21–25. The day before issuing the Cluster Initiative, the Governor singled out the "ultra-Orthodox community" and "religious institutions" as causing the recent COVID-19 "problem" and threatened to "close the [religious] institutions down" if "you do not agree to enforce the rules." App'x 101–02. Shortly thereafter, he said that "we have a couple of unique clusters, frankly, which are more religious organizations, and that's what we're targeting,"[2] and he stressed that the targeted cluster "is predominately an ultra-orthodox cluster," App'x 80.[3] The Governor then announced—on television and on his official

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[1] *Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones*, New York State (Nov. 18, 2020), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-announces-updated-covid-19-micro-cluster/.

[2] *Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto*, New York State (Oct. 9, 2020) ("October 9 Interview"), https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-guest-cnn-newsroom-poppy-harlow-and-jim-sciutto/.

[3] *See also* https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/.

website—that the spread was "because of their religious practices." App'x 310, 386.[4] And he emphasized that "[t]he micro-cluster we're focusing on is the ultra-Orthodox communities" and that it is necessary to impose stringent restrictions on "these ultra-Orthodox communities, who are also very politically powerful."[5]

In his Opposition, the Governor has no serious defense for his repeated discriminatory statements, which show beyond dispute that he targeted the Orthodox Jewish community. The Governor simply ignores many discriminatory statements for which he has no possible answer. He does not even attempt to provide a neutral basis for his October 14 identification of Orthodox Jewish religious practices for targeting, stating "[w]ere now having *issues in the Orthodox Jewish community* in New York, where *because of their religious practices*, etc., we're seeing a spread." App'x 310, 386 (emphasis added). He likewise has no response for his October 9 comments when asked whether he planned to impose a "targeted fix" or "a more broader lockdown," to which he responded unequivocally that "we have a couple of unique clusters, frankly, which are more *religious organizations, and that's what we're targeting*" and identified "the cluster [as] a *predominately ultra-orthodox cluster*." October 9 Interview (emphasis added). The Governor's statements that he believes the "religious practices" of "the Orthodox Jewish community" cause COVID-19 spread

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[4] *See also* https://www.nationalreview.com/news/cuomo-says-religious-practices-of-orthodox-jews-causing-virus-to-spread-in-new-york-city/.

[5] *NY Gov. Andrew Cuomo Conference Call Transcript October 14*, rev.com (Oct. 14, 2020), https://www.rev.com/blog/transcripts/ny-gov-andrew-cuomo-conference-call-transcript-october-14/.

and that he is "targeting" the "ultra-orthodox cluster" and "religious organizations" for restrictions thus stand unrebutted.

The Governor's post-hoc rationalizations of his other statements fall flat. The Governor on October 5 did not "identif[y] the 'problem' as 'mass gatherings'" and mention the Orthodox Jewish community simply out of "respect" to "make plain that houses of worship would not be exempt from" restrictions. Opp. 27–28. Instead, the Governor stated unequivocally that "[w]e know *religious institutions* have been a *problem*" and he singled out just one religious group in his threats: "I'm going to meet with members of *the ultra-Orthodox community* tomorrow. I want to have that conversation directly, myself. This cannot happen again. *If you do not agree to enforce the rules, then we'll close the [religious] institutions down*." App'x 101–02 (emphases added). And the Governor's October 14 identification that the targeted "cluster is a predominately ultra-orthodox cluster," App'x 80, was not simply "a descriptive observation about the focus zones at issue," as the Governor now contends, Opp. 29. The Governor stated *immediately* before this statement that "we have a couple of unique clusters, frankly, which are more religious organizations, *and that's what we're targeting*." October 9 Interview (emphasis added). The Governor has no response for his admitted "targeting" of certain "clusters . . . which are more religious organizations," while claiming that the "cluster is a predominately ultra-orthodox cluster." *Id.*; App'x 80.

The Governor argues that, in any event, none of his many discriminatory statements amount to "religious animus." Opp. 21. But a government edict designed

to target a religious minority is unconstitutional under *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), whether the state actor creating the edict personally disdains the religious minority, or simply believes—and tells the public personally and via the State's own websites—that this minority is to blame for the public's problems. As the amicus briefs submitted by the Muslim Public Affairs Council and others well explains, "[t]oo often, religious minorities have served as scapegoats in times of sickness, war, and fear." Muslim Public Affairs Council, *et al.*, Amicus Br. 2. And when that scapegoating turns from incendiary words to discriminatory targeting of religious practice, this Court has not hesitated to protect Free Exercise, without requiring a showing of animus toward the religious minority. *See Lukumi*, 508 U.S. at 532–40; *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." (citations omitted)).

The Governor next attempts to escape liability for his targeting of Orthodox Jews by arguing that his ongoing changes to the Cluster Initiative show that scientific "data" "drives the zone[s]." Opp. 22–24 (alteration in original). But the Governor cannot dispute that the Cluster Initiative itself includes no metrics and that no such metrics existed when the Governor made his original designations that placed the

Orthodox Jewish community in the highly restrictive Red Zone. App'x 324, 325–35.[6] And since those initial designations of predominantly Orthodox Jewish communities in Red Zones on October 6, the Governor has not designated any other community or neighborhood as a Red Zone.

Even for his subsequently-issued metrics, the Governor concedes that he retains absolute discretion in carving his restricted zones,[7] admitting that "[t]he Cluster . . . Initiative is an iterative process," Opp. 11, and that he "considers multiple factors" in determining zone designations, such as "(i) hospitalization rates, (ii) positive cases per capita, and (iii) other epidemiologically relevant facts, such as population density or whether a spike in infection rates may be explained by a cluster in a single institution (e.g. nursing home, factory, college, etc.), rather than transmission throughout the community at large," Opp. 23 (citation omitted). And he stated in another version of his metrics that he "*may* . . . place[ ]" an area "in a 'Red Zone' if" it "has a 7-day rolling average positivity rate of 3% or higher *for a sustained period of time*" and it "is in the best interest of public health," App'x 452 (emphasis added), and that "[t]here is no specific percentage or threshold to determine when an area should be designated as an Orange or Yellow Zone, as it is a nuanced process

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[6] The Governor wrongly contends that evidence supports that he used generally applicable metrics in designating his original restricted zones. *See* Opp. 24–25. The Governor relies on Red Zone criteria he disclosed 10 days *after* he issued the Cluster Initiative and the original zones, and after the Cluster Initiative had become the subject of several lawsuits. App'x 449–56.

[7] Although in his Opposition Brief the Governor generically characterizes "the State" as drawing the restricted zones, the State's witness in the *Diocese of Brooklyn* preliminary injunction evidentiary hearing testified unequivocally that "the creation of the zones were done by the executive office." *The Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, Ex. D at 62:16-20; *see also id.* at 62:21-23 (confirming "the Governor's office" creates the restricted zones).

that takes multiple factors into account and not solely the positivity percentage," App'x 454.

The evidence before this Court strongly supports the conclusion that the Governor has unfairly wielded that discretion to impose stringent Red and Orange Zone restrictions on predominately Orthodox Jewish communities in Brooklyn, which is consistent with his discriminatory words and initial gerrymandered Red Zones targeting Orthodox Jewish communities. At the same time, the Governor has imposed less-restrictive Orange and Yellow Zones on other areas that have higher COVID-19 infection rates. Thus, when Orthodox Jewish areas of Brooklyn were in the Red Zone, other neighborhoods with significantly higher 7-day rolling averages of positivity rates were designated as less restricted Orange and Yellow Zones:

	Oct. 23	**Oct. 29**	**Nov. 6**
Brooklyn Red Zone	4.57%[8]	3.64%	3.08%
Chemung Orange Zone	8.13%	7.21%	6.84%
Broome Yellow Zone	6.30%	6.75%	4.05%
Steuben Yellow Zone	4.65%	5.13%	4.15%

[8] *See Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones*, New York State (Nov. 6, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-updated-covid-19-micro-cluster-focus-zones/; *Governor Cuomo Announces New Record High Number of COVID-19 Tests Reported*, New York State (Oct. 29, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-new-record-high-number-covid-19-tests-reported-0/; *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Oct. 23, 2020), https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-50/.

This pattern continued even after the Brooklyn Red Zone was re-designated as an Orange Zone. Then, other neighborhoods with far higher positivity rates were designated as even less restricted Yellow Zones:

	Nov. 10	Nov. 15
Brooklyn Orange Zone	3.57%[9]	3.92%
Onondaga Yellow Zone	5.68%	6.58%
Erie Yellow Zone	6.22%	7.30%
Monroe Yellow Zone	4.81%	5.54%
Broome Yellow Zone	4.48%	3.39%
Tioga Yellow Zone	-	10.81%

The Governor's effort to explain away his disparate treatment in the Chemung Orange Zone simply underscores that he wields total discretion in deciding whether to impose restrictions on an area based on countless discretionary "factors." Opp. 24. Nevertheless, he fails even to attempt to justify the many other examples of disparate treatment for the predominately Orthodox Jewish Brooklyn restricted zones, as discussed in the Application, *see* Application 14–16, 24–25, and immediately above.

Finally, the Governor's last-minute re-designation of certain areas in Brooklyn as Yellow Zones—in a failed effort to frustrate this Court's review, *see supra* 2–4—further shows that the Cluster Initiative is not based in any objective metrics, but only the whims of one executive official. According to the Governor's latest guidelines,

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[9] *See Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Nov. 15, 2020), https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-66/; *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Nov. 10, 2020), https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-63/.

to move from Orange to Yellow, a zone must "ha[ve] positivity below 2% . . . for at least 3 consecutive days at end of 10-day period."[10] The Brooklyn zone, however, in the three days prior to the announcement, had positivity rates of 2.91%, 3.5%, and 3.18%.[11] Apparently, avoiding this Court's review is also a factor in zone designation decisions.

The targeting of a religious minority triggers strict scrutiny under the Free Exercise Clause. The Governor does not even attempt to show that his actions can satisfy strict scrutiny and so there is a violation of the Free Exercise Clause.[12]

III. Strict Scrutiny Applies To The Cluster Initiative For Several Additional and Independent Reasons

First, the Cluster Initiative *also* triggers strict scrutiny, which even the Governor does not argue the Cluster Initiative can satisfy, because it facially discriminates against "worship" as compared to permitted secular activity. Application 25–29. The Governor's restrictions afford more favorable rules in *all* zones to "essential" businesses, such as "financial services" and manufacturing, child care services, liquor stores, farmer's markets, and pet shops, as well as any gathering

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[10] New York "Micro-Cluster" Strategy at 8 (Oct. 21, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/MicroCluster_Metrics_10.21.20_FINAL.pdf/.

[11] *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones*, New York State (Nov. 17, 2020), https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-68/; *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones* New York State (Nov. 15, 2020), https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-66/.

[12] Although the district court relied heavily on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Governor makes no mention of it here. The Court should clarify that *Jacobson* has no bearing on Free Exercise claims. Application 29–31.

that the Governor deems, in his subjective judgment, to be "essential." App'x 324; *see also* App'x 192–93. The Cluster Initiative also provides a bevy of "non-essential" businesses, such as offices, malls, and retail, favorable treatment as compared to religious worship in Orange Zones, App'x 324; *see also* App'x 255–56, 267, 279–80. The attendance limits at places of religious worship apply *only* to houses of worship, and are not tied in any way to the size of the building. Attendance is limited to 10- or 25-worshippers, whether the legal capacity is 100 or 1,000.[13]

In response, the Governor argues that he actually provides worship especially *favorable* treatment. Opp. 30, 32–35. Yet the Governor elsewhere asserts that he would have been "justified in altogether prohibiting" even masked, socially-distant worship in Red and Orange Zones. Opp. 31. This is a remarkable assertion of executive power over constitutional rights, particularly for COVID-19 levels that the Governor acknowledged would be "nothing" to other states.[14]

The Governor's "special treatment" argument depends on the unsupported assertion that *all* favored essential businesses and essential gatherings do not involve people congregating and remaining in close proximity for extended periods. Opp. 33–34. Yet the Governor offers no reason to believe that other favored activities—such

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[13] By imposing the same numerical caps on all houses of worship regardless of size, even where a large house of worship could accommodate many more religious practitioners while still adhering to social distancing protocols, the Governor's social distancing justification as a guiding principle for his restrictions, Opp. 3–5, cannot possibly support his disparate treatment of religious practice.

[14] *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Oct. 12, 2020), https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-11.

as running an office or brokerage firm all day, every day,[15] or gathering for activities that the Governor deems important enough to qualify for the "essential" gatherings exception—do not involve similar or greater risks for much longer periods of time. Tellingly, the Governor has no response to Applicants' observation that they could legally gather in the exact same buildings for reasons *other than worship* unencumbered by the 10- and 25-person caps. Application 28. The Governor offers no response because the charge is true: worshipping G-d is constrained while worshipping mammon—in the same building and for longer hours—is not. At a minimum, that triggers strict scrutiny.

Second, that the Governor portrays the Cluster Initiative as iterative and subject to frequent adjustments and re-designations, Opp. 6–12, 20–24, only further undermines his constitutional arguments. This is especially so given that he does not dispute that, at bottom, decisions about how, when, and where the Cluster Initiative is applied and imposed is left to his discretion. As the Governor now concedes, the Cluster Initiative involves "short-term aggressive measures" with frequent determinations as to "whether and in what manner any such measures" should change. Opp. 7. These decisions involve "case-by-case" criteria, and "zone boundaries"

[15] The Governor argues for the first time in this case that he considers low-risk "non-essential" businesses in the Orange Zone to be "non-essential" gatherings, and thus that the Cluster Initiative restricts those businesses to a 10-person maximum rather than the 50% capacity that State health protocols afford such conduct, *see, e.g.,* App'x 256, 269, 280. Opp. 34. The Governor's executive orders, including the Cluster Initiative, have consistently categorized "non-essential" businesses and "non-essential" gatherings separately. *See* App'x 324; *see also* N.Y. Exec. Order Nos. 202.8 and 202.10. The Governor's belated attempt to show favorable treatment to worship as compared to low-risk "non-essential" businesses in the Orange Zone thus fails.

can be "redrawn" or even "eliminated" "when the circumstances warrant." Opp. 8, 11. The State's approach does "not necessarily allow one geographic area to be compared to another geographic area" because the State "considers multiple factors" when engaging in "microtargeting of neighborhoods" using "additional empirical metrics." Opp. 23–25. This highly subjective and discretionary system is the antithesis of the "across-the-board" prohibition at issue in *Employment Division v. Smith*, 494 U.S. 872, 884 (1990). To the contrary, the Governor describes precisely the kind of "individualized governmental assessment" for which *Smith* recognized the First Amendment requires strict scrutiny. *Id.* Under *Smith*, such a system is by definition not generally applicable and therefore must face strict scrutiny, a test the Governor makes no effort to pass.

Third, Applicants have shown that the Free Exercise Clause—read in light of its text, history, and tradition—requires strict scrutiny *whenever* a government directly regulates the core religious activity of worship. Application 25–29. In response, the Governor says that the "original meaning" of the Free Exercise Clause "does not prevent states from enacting generally applicable public health or safety measures." Opp. 36. Fair enough. But the question here is what happens when a public health measure, enacted or not, directly regulates religious worship: does it come within *Smith*'s primary rule, or is it subject to strict scrutiny? The text, history, and tradition of the Free Exercise Clause show that direct regulation of worship must satisfy strict scrutiny. Application 25–29. Text, history, and tradition also teach that worship is similar to other core religious activities such as religious education. For

example, *Yoder*—which *Smith* expressly did not abrogate—requires that strict scrutiny be applied to restrictions on the key religious activity of religious education. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). *See also Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (relying on *Yoder* and *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)). And worship is just as "vital" and "a matter of central importance" as religious education. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064–65 (2020); Application 26–28.

The Governor argues that the original meaning of the Free Exercise Clause allows for governmental interest in protecting public health. Opp. 36. Applicants agree. The question is which balancing test should be used to weigh free exercise rights against that interest. The text, history, and tradition of the Free Exercise Clause show that when it comes to direct government regulation of worship, it should be strict scrutiny, not the rational basis test the Governor seeks.

IV. The Undisputed Irreparable Harm And The Balance Of Equities Both Favor Injunctive Relief

The Governor's argument on the equities also fails. For more than six weeks, the Governor has asserted the discretionary power to forbid Applicants from engaging in the most basic and fundamental religious freedoms: worship, communal prayer, and ritual. The irreparable injury is particularly acute for Orthodox Jews who cannot travel by vehicle on the Sabbath and religious holidays. Application 33–34. The Governor has never disputed that his restrictions render it "impossible" for Applicants to worship in synagogue and to engage in core religious practices. App'x 168, 173, 178. He does not contest the irreparable harm here.

On the balance of harms, injunctive relief would benefit the public by protecting Applicants' constitutional rights, and it would not harm the Governor's interest. Moreover, the Governor—and public health more generally—would *benefit* from an injunction requiring equal treatment. Public trust in government is degraded by governmental double standards and "low trust in government" makes it "much less likely" for the public to "abide by government-mandated . . . mechanisms designed to contain the spread of the virus." Ethics and Religious Liberty Commission, Amicus Br. at 6.[16]

The Governor has repeatedly and correctly said that masking and social distancing protect against COVID-19 spread. *See* App'x 100 (the Governor recognizing that "how's it increasing? Because people are not following the rules."), 103 ("[N]one of these rules are going to make a darn, if you don't have the enforcement."). Indeed, last week the Governor reiterated the point: "And just to make it very simple, if you socially distance and you wore a mask and you were smart, none of this would be a problem. It's all self-imposed. . . . If you didn't eat the cheesecake, you wouldn't have a weight problem."[17] That kind of responsible behavior puts the pet shop, the brokerage firm, and the mall in good standing, and no equitable reason exists why it cannot also equally apply to Applicants' worship.

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[16] *Cf.* Frank Maynard, *As many mitigate restriction damages, gaming venues roll on*, Kentucky Today (Nov. 20, 2020) https://bit.ly/2UOHkWM (Kentucky governor exempting "the state's politically influential horse tracks" and "casinos" from "surgical" restrictions that he imposes on "family Thanksgiving[s]" and "houses of worship").

[17] *Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones*, New York State (Nov. 18, 2020).

The Governor claims that granting relief "*could* help contribute to a COVID-19 resurgence" and invokes the "enormity of the *potential* harm." Opp. 38 (emphasis added). But speculation of this sort does not outweigh constitutional rights.[18]

Lastly, the Governor admits that New York's Cluster Initiative stands alone as the most targeted and draconian restriction on worship in the country. Application 36–38. He simply asserts (without evidence) that "[t]he approaches of other states are not working" and that New York can be a "laborator[y] for experimentation." Opp. 38. But targeting of Orthodox Jews here is just the sort of alarming "experiment on our liberties" that the First Amendment was designed to prevent. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in Selected Writings of James Madison 21, 23 (R. Ketcham ed. 2006); *see also Espinoza*, 140 S. Ct. at 2260 ("Our federal system prizes state experimentation, but not state experimentation in the suppression of . . . the free exercise of religion." (citation omitted)).

V. In The Alternative, The Court Should Grant Certiorari Before Judgment And Issue An Injunction Pending Resolution

The Governor says that the questions presented are "not susceptible of nationwide resolution" because the facts are too different in different states. Opp. 39. But the questions presented are legal, not factual: does the Free Exercise Clause allow admitted targeting of a religious minority, or the express disfavoring of

[18] That the Governor cites to a February 2020 funeral at a synagogue, Opp. 31 (citing R.A. 181), suggesting that this "super-spreader[ ]" event justifies the Cluster Initiative's restrictions on worship, further underscores the guilt-by-religious-association of his restrictions. This funeral occurred well before the Governor (or any other State) declared a state of emergency or imposed health and safety protocols.

worship? Of course the Third and Sixth Circuits looked at secular comparators in the process of evaluating claims, but that is beside the point. The question is what rule of law those courts applied, and they applied different rules than did the Second Circuit—on an urgent matter of utmost national importance. Application 39–40.

CONCLUSION

This Court should grant the injunction against the discriminatory Cluster Initiative pending appeal, or, in the alternative, grant certiorari before judgment and then enjoin the Cluster Initiative pending further action from this Court.

Respectfully submitted,

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