20-3572-CV

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

On appeal from the United States District Court for the Eastern District of New York, No. 1:20-cv-04834-KAM

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PLAINTIFFS-APPELLANTS AND AN INJUNCTION PENDING APPEAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Each of The Becket Fund for Religious Liberty and The Jewish Coalition for Religious Liberty states that it has no parent corporation and that no publicly held corporation owns any part of it.

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INTEREST OF THE *AMICI*

Amicus Becket Fund for Religious Liberty is a non-profit law firm dedicated to protecting the free exercise of all religious traditions.[1] To that end, it has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country, including multiple merits cases at the United States Supreme Court. *See, e.g., Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* 565 U.S. 171 (2012).

Becket has also appeared frequently before this Court. *See, e.g.*, *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (merits counsel); *Central Rabbinical Congress v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d. Cir. 2014) (amicus).

Amicus Jewish Coalition for Religious Liberty is an incorporated group of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty. JCRL has an

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[1] Appellants have consented to the filing of this brief. Appellees take no position on the filing of this brief. No party's counsel has authored this brief in whole or in part; no party nor party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. FRAP 29(a)(4)(E).

interest in restoring an understanding of the Free Exercise Clause that offers broad protection to religious liberty.

Amici currently represent Yitzchok and Chana Lebovits and their two daughters, along with Bais Yaakov Ateres Miriam ("BYAM"), an Orthodox Jewish girls' school in Far Rockaway, Queens. The Lebovits family and BYAM have challenged Governor Cuomo's actions—including the Executive Order at issue in this appeal—in federal district court. *Lebovits v. Cuomo*, No. 1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020).

Amici submit this brief to make a simple but important point: because all parties to the case agree that Governor Cuomo's Executive Order No.202.68 is directed at Orthodox Jews and their worship services, strict scrutiny applies, *regardless of the government's motive*. Whether the Governor targeted Orthodox Jews for bad reasons or good ones, the First Amendment requires strict scrutiny. And the Governor's own admissions foreclose any hope of meeting that standard.

ARGUMENT

Some free exercise cases are hard, but this one is not. Under any theory of the Free Exercise Clause, a government that uses targeted restrictions to close houses of worship must face constitutional scrutiny. That is particularly true where, as here, the religious restrictions are specifically focused on a minority group. Express attacks on religious minority groups in response to real or perceived threats have a terrible historical pedigree, and do not belong in American public discourse. The

First Amendment helps weed out such attacks by subjecting targeted restrictions to strict scrutiny to ensure it happens only where government has exceptionally good reasons.

Almost eighty years ago, the Supreme Court rejected an attack on another religious minority that had been scapegoated as a threat and singled out for ill treatment. *See W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Few things could be more corrosive to the body politic than allowing collective guilt to be applied to a disfavored religious group because of the perceived actions of some of their co-religionists. 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)). By applying strict scrutiny, the Court should nip this attack on our core constitutional values in the bud.

And it is on this question of strict scrutiny—even more than on targeting—where Governor Cuomo's many public comments about his Order are dispositive. Where the Governor himself characterizes his Order as based on fear rather than science, as cut by a "hatchet" rather than a scalpel, and designed to manage public "anxiety" and people "moving out" of the City, no Court should uphold his Order and allow worship to be largely prohibited for a religious minority. Rather, the only constitutional course is an injunction.

I. The Governor's Order violates the Free Exercise Clause.

A. The Governor's Order is not neutral.

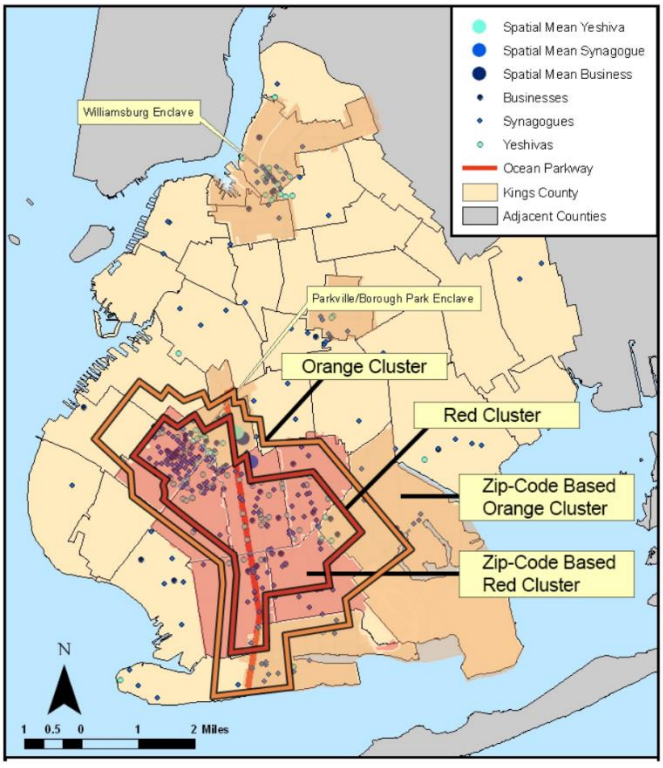
Governor Cuomo's Order is not neutral because it is "'specifically directed at [a] religious practice.'" *Central Rabbinical Congress v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990)). That is exactly what happened here. Governor Cuomo has clearly and repeatedly emphasized that his Order is designed to specifically restrict Orthodox Jewish religious practice. As Judge Komitee held, "the Governor of New York made remarkably clear that this Order was intended to target [Orthodox Jewish] institutions." *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-CV-4844, 2020 WL 5994954 at *1 (E.D.N.Y. Oct. 9, 2020).

To determine whether a government action is an "improper attempt to target [a religion]," courts look to its "text" as well as its "effect" "in its real operation." *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 534-35 (1993). A court also "must consider '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 administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *New Hope Family Services v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (quoting *Lukumi*, 508 U.S. at 534, 540).

Here, the text, effect, and history of the Governor's Order show it was designed to limit Orthodox Jewish practices and institutions.

As to text, the Order specifically regulates "houses of worship[.]" *See* Executive Order 202.68, *available at* https://perma.cc/QV5W-YF2M. Under *Lukumi*, the "choice of these words" supports "a finding of improper targeting of" religion. 508 U.S. at 534.

The effect of the Governor's Order is likewise unmistakable. The Governor specifically targeted as "clusters" several predominantly Jewish areas in New York, as overlaying the Brooklyn clusters on a map of Orthodox Jewish synagogues, yeshivas, and businesses illustrates:



Lebovits, Dkt.6-1, Ex.X at 3. By drawing the boundaries of the "clusters" to include Orthodox Jewish areas while excluding other areas that are experiencing similar COVID-19 rates, the Governor "accomplishe[d] . . . a "religious gerrymander." *Lukumi*, 508 U.S. at 535.

The history of the Governor's order is even more damning. The Governor explained on October 9 that "we have a couple of unique clusters, frankly, which are more religious organizations, *and that's what we're targeting*." *Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto*, New York State (Oct. 9, 2020), https://perma.cc/LDV2-8EVR (emphasis added) ("[T]he issue is with that ultra-orthodox community."). The Governor further explained that he believed the spread was "because of their religious practices." Hana Levi Julian, *Cuomo Warns Yeshivas, 'Stay Closed or Lose Funding,'* Jewish Press (Oct. 14, 2020), https://perma.cc/HLB7-CXAJ.

The Governor's other statements confirm the targeting. *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Oct. 5, 2020), https://perma.cc/67T4-TDPH ("10/5 Briefing"). At the October 5 press conference announcing the "cluster" policy, the Governor repeatedly referred to "the Orthodox community," the "Jewish community" and "rabbi[s]." *Id*. He stated that he was "going to meet with members of the ultra-Orthodox community" and tell them "[i]f you do not agree to enforce the rules, then we'll close

the institutions down." *Id.* And he illustrated his claim that "[r]eligious gatherings . . . have been a problem" with photographs of gatherings of members of one (and only one) religion—Orthodox Jews. *Id.*

That targeting is enough to trigger strict scrutiny: It does not matter whether the government acted out of subjective animus or hostility towards Orthodox Jews. As this Court has previously ruled, "close scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus, pure and simple." *Central Rabbinical*, 763 F.3d at 197-98; *accord Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) ("the Free Exercise Clause is not confined to actions based on animus"); *Hassan v. City of N.Y.*, 804 F.3d 277, 309 (3d Cir. 2015) (hostility not required).

With or without animus, Governor Cuomo's admitted "targeting" requires strict constitutional scrutiny.

B. Governor Cuomo's Order fails strict scrutiny.

Compelling governmental interest. The government has a "compelling interest in preventing the spread of" COVID-19. *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020). But compelling interests aren't assessed in the abstract. Courts must "look[] beyond broadly formulated interests" and "'searchingly examine'" whether Governor Cuomo has a compelling interest in taking the *particular action at issue here*—placing onerous restrictions on Plaintiffs' synagogues. *Gonzales v. O Centro*

Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)). There is no such interest.

The Governor has said renewed lockdowns are justified by positivity rates in the "micro-clusters" exceeding 2%, while the statewide goal is 1%. *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Oct. 12, 2020), https://perma.cc/KR96-G4BP ("10/12 Briefing"). Yet as the Governor admitted, the micro-clusters' positivity rates would be "nothing" "[t]o other states"; indeed, the micro-clusters would be a "safe zone" or "cool spot" nationwide. *Id.* And the 1% goal is "unrealistic" when considered "intellectually"—"absurdly low." *Id.*; *compare U.S. coronavirus map: What do the trends mean for you?*, Mayo Clinic, https://perma.cc/Q7TV-V5BR (showing 6.49% national positivity rate as of Oct. 25). *Amicus* doesn't blame the Governor for wishing the virus would evaporate. But a government official's self-described "emotional[]" fixation on an "absurd[]" and "unrealistic" goal, *see* 10/12 Briefing, is not an "interest[] of the highest order" that overrides First Amendment rights, *Lukumi*, 508 U.S. at 546. As in other First Amendment contexts, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 803 n.9 (2011).

At bottom, the only interest consistent with his actions is the one Governor Cuomo "candid[ly]" articulated on October 6—a climate of

"fear" in the City, which the Governor thought he needed to appease with a "blunt policy." Reuvain Borchardt, *Jewish Leaders Say They Were 'Stabbed in the Back' by Cuomo*, Hamodia (Oct. 12, 2020), https://perma.cc/93XT-TS3Q. 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." *Id.*

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).

Furthering. Nor does the Order "actually further[]" the claimed compelling interest. *Holt* v. *Hobbs*, 574 U.S. 352, 364 (2015); *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994) (government "must demonstrate" that restriction "will in fact alleviate these harms in a direct and material way."). Effectively shutting down Plaintiffs' synagogues won't help prevent the spread of COVID-19, because Plaintiffs have been assiduously following health guidance and have experienced no COVID-19 outbreak. Agudath Mot. 23. Indeed, the Governor himself has indicated that merely following his *prior* rules sufficed. *See* 10/5 Briefing ("[H]ow's it increasing? Because people are not following the rules."). *Cf. McCullen v. Coakley*, 573 U.S. 4646, 492 (2014) (government should have enforced "existing" restrictions). Shuttering

synagogues that are following the rules out of fear that others aren't does not further the asserted interest.

Least restrictive means. The Governor has also freely admitted that he is not using the means least restrictive of religious exercise. He expressly conceded that applying the Order to effectively shut down Orthodox Jewish worship was "not a policy being written by a scalpel," but rather one "cut by a hatchet." Borchardt, https://perma.cc/93XT-TS3Q. Indeed, he expressly contrasted it with "a smarter, more tailored approach[.]" *Id.* A dumber, less-tailored approach is hardly the least restrictive means.

II. *Jacobson* is also no defense.

The courts below mistakenly supplanted ordinary free exercise principles with *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—a 115-year-old case addressing substantive due process objections to an across-the-board mandatory vaccination law. But this Court has already decided that "*Jacobson* does not specifically control [a Plaintiff's] free-exercise claim," "because, at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states." *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). *Jacobson* only "settled that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176 (1922). Accordingly, *Phillips* applied *Jacobson* to resolve a substantive due

process claim, but applied standard free exercise principles to the free exercise claim. 775 F.3d at 542-43.[2]

Echoing *Phillips*, several other justices and judges reject treating *Jacobson* as "a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review." *Bayley's Campground, Inc. v. Mills*, No. 20-cv-00176, 2020 WL 2791797, *8 (D. Me. May 29, 2020); *accord Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting); *Denver Bible Church v. Azar,* No. 1:20-cv-02362, Dkt. 65 at *16 (D. Colo. Oct. 15, 2020), *temporarily stayed,* No. 20-1377 (10th Cir. Oct. 22, 2020); *Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710, 2020 WL 5995126, at *7 (D.D.C. Oct. 9, 2020).

Nor does the Chief Justice's *South Bay* concurrence change *Phillips*. No other justice joined his opinion. And *South Bay* involved only a denial of emergency relief under the heightened standard required under the All Writs Act. Indeed, "other Justices, and even a majority of the Court, may very well have agreed with Justice Alito's suspicion of *Jacobson* and its application to the issues facing the Court." *Capitol Hill Baptist*, 2020

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[2] *Phillips* cited what it called the "persuasive dictum" in *Prince* that "'[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.'" *Phillips*, 775 F.3d at 543 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)). But *Phillips* held that this dictum is "consonant" with standard free exercise analysis, not a new, more deferential analysis. 775 F.3d at 543.

WL 5995126, at *7 n.9. Finally, even if *Jacobson* authorizes vaccine regulations "applicable equally to all in like condition," 197 U.S. at 30, it surely cannot displace judicial review where, as here, the government admits to fear-based targeting and extinguishing constitutional rights over COVID levels that would be "safe zones" elsewhere nationwide.

CONCLUSION

In *Korematsu*, Justice Jackson warned against allowing a "passing incident [to] become[] the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does . . . this case." *Korematsu*, 323 U.S. at 246, (Jackson, J., dissenting). Singling out a minority group for collective blame should be stopped at the outset.

This Court should enjoin Governor Cuomo's Order pending appeal.

Respectfully submitted,

/s/ Eric C. Rassbach

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Rule 29.1(c), which sets the length of amicus briefs as one-half the length of the supported party's briefing. Here, the supported party's motion is limited to 5,200 words, *see* Fed. R. App. P. 27(d)(2), and the foregoing brief contains 2,573 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5)-(6), because it has been prepared using Microsoft Word Century Schoolbook font measuring no less than 14 points.

October 26, 2020

/s/ Eric C. Rassbach
Eric C. Rassbach

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 26, 2020.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

October 26, 2020

/s/ Eric C. Rassbach
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