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, STEVEN SAPHIRSTEIN,
Plaintiffs-Appellants,

v.

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

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

EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS
FOR INJUNCTION PENDING APPEAL
RELIEF REQUESTED BY 5 P.M. FRIDAY, OCTOBER 23, 2020

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October 21, 2020

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INTRODUCTION

In a series of shocking press conferences during the week of October 5, Defendant Governor Andrew M. Cuomo explained that he was enacting new restrictions on places of worship, in certain neighborhoods that contain many Orthodox Jews, because he believes that this religious minority is to blame for a recent increase in COVID-19 rates. Defendant left no doubt he was targeting Orthodox Jews. He described it as "predominantly an ultra-orthodox cluster,"[1] 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."[2] Defendant also highlighted pictures of Orthodox Jews as purportedly demonstrating "clear violations of social distancing," wrongly claiming that the pictures were from "the recent past" (in fact, one was of a 2006 funeral).[3]

Defendant's targeting of this religious minority is widely understood. A judge in another case brought by the Diocese of Brooklyn against the same Order explained that Defendant "made remarkably clear that this Order was intended to target a

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[1] Carl Campanile, *Cuomo Calls COVID-19 Resurgence an 'Ultra-Orthodox' Jewish Problem*, NYPost (Oct. 9, 2020), https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/.

[2] R.2-4:9. Citations of "R.__:__" are to the district court's docket, No. 1:20-cv-04834-KAM (E.D.N.Y.).

[3] *Id.* at 8.

different set of religious institutions," i.e., Orthodox Jews.[4] National publications have explained that Defendant made "sweeping accusation[s]" and used harmful "rhetoric" against the Orthodox community.[5] Legal commentators have noted that Defendant's discriminatory comments harken back to the "hostility" that Jews have faced for hundreds of years.[6]

The Order that Defendant issued, Executive Order No. 202.68, matched his rhetoric even though it does not mention Orthodox Jews by name (which does nothing to save the Order under *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and *Central Rabbinical Congress of the U.S. & Canada v. N.Y.C. Department of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014)). Defendant created a new "cluster" system, under which all "worship" in disfavored neighborhoods is a non-essential gathering, subject to extreme limitations that do not apply to either an undefined category of "essential" gatherings, or to "essential" businesses like the financial services and manufacturing industries.[7] The restrictions

[4] *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 1:20-cv-04844 (E.D.N.Y. Oct. 9, 2020), Dkt. 15 at 3.

[5] *A Jewish Revolt Against Lockdowns*, Wall Street Journal (Oct. 8, 2020), https://www.wsj.com/articles/a-jewish-revolt-against-lockdowns-11602198987.

[6] Josh Blackman, *Understanding Governor Cuomo's Hostility Toward Jews*, Volokh Conspiracy (Oct. 8, 2020), https://reason.com/2020/10/08/understanding-governor-cuomos-hostility-towards-jews/.

[7] R.2-13:5–6.

on religious practice in those disfavored neighborhoods are punitive, including limiting religious worship to no more than 10 people in *any* house of worship, be it a small church that seats only 50 people, or a large synagogue that can seat 500.

Defendant shaped his Order to impose maximum restraints on the Orthodox community. Not only did he issue his Order two days before major Orthodox holidays, but the neighborhoods within the Order are gerrymandered to fit Defendant's targeting goals, including by rejecting objective measures like zip codes to delineate the zones, in favor of ad hoc and unexplained lines. Indeed, Defendant now concedes there are no objective metrics that establish the areas of his restrictions.[8] Further, Defendant designed his Order to cover neighborhoods where many Orthodox Jews live without providing that other neighborhoods would be subject to the same limitations even if their COVID-19 rates reached the similar or even greater COVID-19 levels than these disfavored areas, admitting that "[t]here is no specific [positivity] percentage or threshold to determine when an area should be designated as" a restricted area.[9]

Defendant's unconscionable targeting of a religious minority cannot stand in a Nation founded on religious tolerance. Defendant's words and actions are plainly

[8] Declaration of Howard A. Zucker ("*Diocese* Zucker Decl."), *Roman Catholic Diocese of Brooklyn*, No. 1:20-cv-04844, Dkt. 29-1 at ¶¶ 12–13, 20.

[9] *Id.* at ¶ 20.

more discriminatory than words and actions found unconstitutional in *Lukumi*, *Masterpiece Cakeshop*, and *Central Rabbinical*. **Plaintiffs request an emergency injunction from this Court by no later than 5PM on Friday, October 23, so that Plaintiffs can celebrate the Sabbath under the generally applicable COVID-19 rules that Defendant had in place before his recent Executive Order**.[10]

BACKGROUND

A. The State of New York is in Phase Four of its reopening from the COVID-19 pandemic. In this Phase, non-essential businesses can reopen under industry-specific health-and-safety guidance from the State Department of Health, which guidance exists for malls, schools, and gyms and fitness centers, among other industries. R.2-11:38–45. Further, Phase Four generally allows any "non-essential gatherings" of up to 50 people for "any lawful purpose or reason," provided certain health protocols are followed. R.12-17:2 (EO No. 202.45 (June 6, 2020)). The State's definition of an "essential" business is broad, including, for example, the "financial services and research" and the manufacturing industries. R.2-13:5–6 (defining "essential" businesses for purposes of EO 202.68); Empire State Dev.,

[10] Plaintiffs waited to file this request today to afford the *Roman Catholic Diocese of Brooklyn* court the opportunity to rule on a related request for preliminary injunctive relief. Both sets of plaintiffs filed their complaints the same day; the judge in *Roman Catholic Diocese of Brooklyn* was unavailable to hold a preliminary injunction hearing until October 15 and ruled on October 16. *Roman Catholic Diocese of Brooklyn*, No. 1:20-cv-04844, Dkt. 32.

Guidance For Determining Whether A Business Enterprise Is Subject To A Workforce Reduction Under Recent Executive Orders (Sept. 25, 2020) (defining "essential" businesses).[11]

For religious services in Phase Four, preexisting rules impose a restriction of "no more than 33% of the maximum occupancy for a particular area as set by the certification of occupancy for services occurring indoor or no more than 50 people for services occurring outdoors." R.2-12:2, 4. In *Soos v. Cuomo*, 2020 U.S. Dist. LEXIS 111808 (N.D.N.Y. June 26, 2020), the court: (1) enjoined Defendant's earlier 25% capacity limitation on houses of worship, concluding that it imposed more restrictive limitations than the 50% limitation on comparable secular activity, such as "offices, retail stores that are not inside of shopping malls, and salons," as well as restaurants; and then the court (2) restrained Defendant from enforcing such limitations greater than those imposed for comparable activity. *Id.* at *29–30, 35.

B. The week of October 5, Defendant instituted new restrictions to target the Orthodox Jewish community, applicable in only certain disfavored neighborhoods. During an October 5 press conference, Defendant 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."

[11] Available at https://esd.ny.gov/guidance-executive-order-2026.

R.2-4:9. "The cluster," Defendant claimed, "is predominantly an ultra-orthodox cluster." Carl Campanile, *Cuomo Calls COVID-19 Resurgence an 'Ultra-Orthodox' Jewish Problem*, NYPost (Oct. 9, 2020).[12] During the meeting the next day, Defendant disclosed that his new restrictions are "not 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[.]" Reuvain Borchardt, *Exclusive Full Recording: Jewish Leaders Say They Were 'Stabbed in the Back' by Cuomo*, Hamodia (Oct. 12, 2020) (recording at 19:10–30).[13]

Near midnight on October 6, Defendant issued Executive Order No. 202.68, which implemented his restrictions targeting the Orthodox Jewish community. R.2-8:2–3 (text of Order). Executive Order No. 202.68's application does *not* extend to all locations in the State based on a generally applicable threshold, or provide set metrics for triggering a neighborhood's inclusion in the restrictions, such as a minimum COVID-19 test positivity rate. *See* R.2-9:2. Indeed, Defendant conceded after issuing his order that the State has no objective criteria for defining these disfavored areas, as discussed further below.[14] Defendant's restrictions apply *only*

[12] Available at https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/.

[13] Available at https://hamodia.com/2020/10/12/exclusive-recording-jewish-leaders-say-stabbed-back-cuomo/.

[14] *Diocese* Zucker Decl. ¶¶ 12–13, 20.

to specific areas in Brooklyn, Queens, Broome, Orange, and Rockland Counties, at times stopping midblock to ensure Defendant encircled only members of the Orthodox Jewish community. R.2-13:9–14; R.2-9:2. While Defendant asserted that these disfavored areas were targeted because they have higher COVID-19 test positivity rates at the time of the order's issuance, *see* Tr. 41, 52; R.11:8, other locations in the State that develop similar or higher rates do not become subject to Executive Order No. 202.68, *see* R.2-9:2.

Defendant explained that Executive Order No. 202.68 "will be in effect for a minimum of 14 days," R.2-9:2; that "[t]he state is going to take over the enforcement oversight in all the hotspot clusters," R.2-9:10; and that "any individual who encourages, promotes or organizes a non-essential gathering as set forth in Department of Health regulation, shall be liable for a civil penalty not to exceed $15,000 per day[.]" R.2-8:2. Executive Order No. 202.68 classifies each disfavored area as a "Red Zone," "Orange Zone," or "Yellow Zone," and imposes different restrictions on each zone.

In the "Red Zone," Defendant restricts houses of worship to no more than a 10-person maximum capacity limit—without regard to the size of the synagogue—and bans all "[n]on-essential" gatherings, whether indoors or outdoors. R.2-8:2–3.

And any "essential" gatherings in this zone—a term that is not defined[15]—as well as the operations of essential businesses, are not subject to the restrictive capacity limitations imposed on houses of worship. *See* R.2-8:2–3. Defendant wields absolute discretion over whether "[a]n area *may* be placed in a 'Red Zone'" if he decides certain factors are met, including "a 7-day rolling average positivity rate of 3% or higher" for an undefined "sustained period of time" and whether "it is in the best interest of public health for the area to be placed in the Red Zone status."[16]

In the "Orange Zone," Defendant restricts houses of worship to a 25-person maximum limit—again, regardless of the size of the synagogue or church—and bans "[n]on-essential" gatherings of more than 10 people, whether indoors or outdoors. R.2-8:3. Defendant exempts most businesses in this zone (as well as "essential" gatherings) from any new restrictions imposed on houses of worship, "[c]losing" only "non-essential businesses[ ] for which there is a higher risk associated with the transmission of the COVID-19 virus[.]" R.2-8:3. Defendant admits "[t]here is no specific [positivity] percentage or threshold to determine whether an area should be designated as an Orange . . . Zone."[17]

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[15] 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." Tr. 43.

[16] *Diocese* Zucker Decl. ¶ 12 (emphasis added).

[17] *Id.* at ¶ 20.

In the "Yellow Zone," Defendant restricts houses of worship to 50% capacity and bans all "[n]on-essential" gatherings of more than 25 people, whether indoor or outdoor. R.2-8:3. Yet Defendant exempts *all* businesses—and, again, "essential" gatherings—from these restrictions on houses of worship, including restaurants for both indoor and outdoor dining services. R.2-8:3. Defendant concedes "[t]here is no specific [positivity] percentage or threshold to determine whether an area should be designated as a[ ] . . . Yellow Zone."[18]

C. Plaintiffs brought this challenge to Defendant's Order immediately after it was issued, R.1, simultaneously filing an Emergency Motion for Order to Show Cause for Temporary Restraining Order and Preliminary Injunction in the district court, R.2. As Plaintiffs' motion explained, Executive Order No. 202.68 violates Plaintiffs' free-exercise rights because it imposes discriminatory, targeted restrictions on Jewish houses of worship. R.2-2. Plaintiffs' synagogues, taken together, serve tens of thousands of Orthodox Jews, with many synagogues having a legal capacity of several hundred worshippers in their building. R.2-2:8. Executive Order No. 202.68's extreme capacity limits make it "impossible to conduct services for all of Plaintiffs' congregants," thereby prohibiting Plaintiffs' synagogues and their congregants from fulfilling their religious obligations. R.2-

[18] *Id.*

2:8–11. And because Orthodox Jews cannot use vehicular travel on Saturdays and religious holidays, they cannot travel to synagogues outside of restricted zones to meet their religious obligations. R.2-2:10–11.

The district court, in an oral ruling, denied Plaintiffs' motion. Tr. 41–66. The court reviewed Defendant's restrictions under "the deferential standard announced by the Supreme Court in *Jacobson v. Massachusetts* [197 U.S. 11 (1905)]," and concluded that Plaintiffs did not have a likelihood of success on their Free Exercise Clause claims. Tr. 47 (also citing, among other authorities, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020)). The court then concluded that the "balance of equities and the public interest weigh strongly in favor of [Defendant]." Tr. 65. Plaintiffs, the court explained, would not suffer irreparable harm—despite loss of their right to worship in synagogue, including on the Sabbath and Jewish holidays—because they have "previously complied with the [State's] total lockdown and ha[ve] continued to comply with the Phase Four restriction," and they "can continue to observe their religion" with "modifications." Tr. 66.

LEGAL STANDARD

A plaintiff seeking an "injunction while an appeal is pending" before this Court, Fed. R. App. P. 8(a)(1)(C); *see also* Fed. R. App. P. 8(a)(2), must satisfy the traditional standard for injunctive relief: (1) likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) balance of the hardships tips in the

plaintiff's favor; and (4) the public interest would not be disserved by the issuance of an injunction. *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015) (citation omitted).[19]

ARGUMENT

I. Plaintiffs Are Likely To Prevail On The Merits Because The Order Discriminates Against Both Orthodox Jews And Religious Exercise

A. The State Generally Cannot Discriminate Against Religious Practice, Including Targeting A Particular Religious Minority

The First Amendment forbids States from enacting laws that unduly burden the free exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). Laws burdening the free exercise of religion that are not neutral are subject to "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. As relevant here, a law can lack neutrality toward religion in two independent ways.

First, a government edict that restricts religious practice because of the decision-maker's *motivation* against a particular religious sect, or religion in general, is not neutral, regardless of its facial text. *Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1729–32; *Lukumi*, 508 U.S. at 534–38. To conduct this inquiry, 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

[19] Plaintiffs satisfied Rule 8(a)(1)'s requirement to "move first in the district court for . . . an order . . . granting an injunction," by first requesting this very preliminary injunction from that court. *See* R.2.

legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540.

The Supreme Court's decision in *Lukumi* and *Masterpiece Cakeshop*, and this Court's decision in *Central Rabbinical*, are instructive. In *Lukumi*, members of the Santeria religion sought to open a house of worship, school, cultural center, and museum. *Id.* at 525–26. Members of the community found it "distressing" that a Santeria church was to open in their area because this church engaged in ritual animal sacrifice, and the 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 527. The Supreme Court held that this violated the Free Exercise Clause, even though its resolution was facially neutral. *Id.* at 534–35. Similarly, in *Masterpiece Cakeshop*, officials violated the First Amendment in enforcing facially neutral anti-discrimination laws when one member of the Colorado Civil Rights Commission expressed "hostility" to a baker's religious beliefs. 138 S. Ct. at 1729. And in *Central Rabbinical*, this Court held that a regulation was not neutral toward Orthodox Jews because the practice it prohibited was "exclusively as ritually practiced by a subset of Orthodox Jews." 763 F.3d at 194.

Second, a law is "not neutral" where "the religious ritual it regulates is 'the only conduct subject to' the" restriction by that restriction's text. *Cent. Rabbinical*,

763 F.3d at 195 (quoting *Lukumi*, 508 U.S. at 535). That is, a law is not neutral "if it is specifically directed at [a] religious practice," *id.* at 193 (alteration in original) (citation omitted), even *if* the state was not "motivated by" anti-religious "animus," *Roberts v. Neace*, 958 F.3d 409, 413, 415 (6th Cir. 2020) (per curiam). Thus, laws that apply "general bans" to religious and secular activity can be discriminatory "when there are exceptions for comparable secular activities" but not religious activities. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (per curiam). This Court in *Central Rabbinical* invoked this principle in applying strict scrutiny where the challenged law failed to regulate secular conduct that should have triggered the same governmental concerns as did the proscribed conduct practiced by Orthodox Jews. 763 F.3d at 196–97.

If an edict is not neutral toward religion, in either of the two ways described above, it can survive only if it clears the "exceptionally demanding" strict scrutiny test. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (citation omitted). Under that test, the State must show the law "advance[s] 'interests of the highest order' and [is] narrowly tailored in pursuit of those interests," *Lukumi*, 508 U.S. at 546 (citation omitted). A law is not narrowly tailored if "less restrictive means [are] available for the Government to achieve its goals." *Holt*, 574 U.S. at 365 (citation omitted). A law's "underinclusiveness suggests . . . that a more tailored policy, less burdensome

to [religious practice], is possible." *Williams v. Annucci*, 895 F.3d 180, 193 (2d Cir. 2018).

B. The Order Discriminates Against Orthodox Jews And Religious Practice And Cannot Satisfy Strict Scrutiny

Defendant's Order delineates three "zones"—Red, Orange, and Yellow—which Defendant claims to have the authority to apply, without any objective, generally applicable trigger, to any areas that he asserts "require enhanced public health restrictions based upon cluster-based cases of COVID-19." R. 2-8:2; *see also Diocese* Zucker Decl. ¶¶ 12–13, 20. The Order limits "houses of worship" to the lesser of 25% capacity or 10 persons in Red Zones, the lesser of 33% capacity or 25 persons in Orange Zones, and 50% capacity in Yellow Zones, while undefined "[ ]essential gatherings" face no limits in any zone, and other secular activities such as the financial services and manufacturing industries, offices, and schools face less restrictive limits. R.2-8:3. The Order is discriminatory under both paths described above, and that discrimination cannot survive strict scrutiny.

1. Defendant made clear that he designed his Order to target Orthodox Jews, contrary to *Lukumi*, *Masterpiece Cakeshop*, and *Central Rabbinical*. 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." R.2-4:8–9 (emphasis added). And he described "[t]he cluster [as] predominantly an ultra-orthodox

cluster," putting any doubt regarding his religious motivation to rest. Carl Campanile, *Cuomo Calls COVID-19 Resurgence an 'Ultra-Orthodox' Jewish Problem*, NYPost (Oct. 9, 2020).

The "contemporaneous statements" Defendant made when issuing his restrictions on houses of worship, as well as the Order's context, plainly show his "discriminatory object" of targeting Orthodox practices. *Lukumi*, 508 U.S. at 533, 540. Defendant's Order required enforcement of his restrictions by October 9—the beginning of the Jewish holidays, R.2-21 ¶ 7; R.2-20 ¶ 6; R.2-19 ¶ 7, ensuring it was "impossible" for Plaintiffs and other Orthodox Jews to conduct and participate in such services. R.2-21 ¶ 5; R.2-20 ¶ 4; R.2-19 ¶ 5. The brunt of Defendant's restrictions fall disparately on Orthodox Jews, who cannot use vehicular travel on the Sabbath or on religious holidays and thus are unable to even travel to houses of worship for religious practice in permitted areas. R.2-21 ¶ 16; R.2-20 ¶ 15; R.2-19 ¶ 16. Defendant's words and actions show that he failed to act as a "neutral decisionmaker" with regard to religious practice and did not act in a manner neutral to religion. *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1732.

If anything, Defendant's contemporaneous comments here are worse than those in *Lukumi*, *Masterpiece Cakeshop*, and *Central Rabbinical*. Defendant did not attack religious belief generally, but singled out a particular religion for blame and retribution for a recent uptick in a society-wide pandemic. R.2-4:8–9. He threatened

"members of the ultra-Orthodox community" and referred to them as a "problem," due to his own perceptions of the Orthodox community's actions in light of COVID-19. *Id.* This maligning went beyond the Commissioner's historical arguments about the harms he believed stemmed from religions in *Masterpiece Cakeshop*. 138 S. Ct. at 1729–31. Defendant also explicitly stated that the Orthodox community and religious worship were the motivations for this Order: "[T]he Governor of New York made remarkably clear that this Order was intended to target [Orthodox Jews]." *Roman Catholic Diocese of Brooklyn*, No. 1:20-cv-04844, Dkt. 15 at 3. Defendant's frank admissions about his impermissible motives should be taken at face value—indeed, "[n]o one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than" Orthodox Judaism in issuing this Order. *Lukumi*, 508 U.S. at 535.

The context of Defendant's actions likewise demonstrates that his Order targeted the Orthodox community. Defendant gerrymandered disfavored neighborhoods by selecting discretionary metrics that he knew would sweep in Orthodox communities. Just like the regulation in *Central Rabbinical* that failed to address secular conduct purportedly triggering similar concerns, 763 F.3d at 196–97, Defendant's Order *does not* provide that if other neighborhoods reach the same or even greater COVID-19 concentration levels, they will be subject to the Order. Rather, Defendant retains absolute discretion whether an area will be placed in a

zone—for the Red Zone, if he determines "it is in the best interest of public health," and for the Orange and Yellow Zones, for unspecified "multiple factors." *Diocese* Zucker Decl. ¶¶ 12–13, 20.

2. Even putting Defendant's targeting of Orthodox Jews aside, Defendant's restrictions are *facially discriminatory* against religious practice. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). Defendant's restrictions expressly impose gathering restrictions on "houses of worship" that Defendant does not impose on other secular conduct. R.2-8:3.

In the "Red Zones," Defendant restricts houses of worship to a 10-person maximum—*no matter the size of the place of worship*—while banning all non-essential gatherings, meaning that religious gatherings must be deemed essential (which comports with the essential nature of communal prayer as core Free Exercise activity). *Id.* Yet an undefined category of "[ ]essential gatherings" is exempted, and thus favored over religious gatherings. *See id.* Further, these "Red Zone" restrictions explicitly do not apply to secular "essential" businesses, thereby allowing (under the Governor's definition of "essential") the "financial services and research" industry, like "banks or lending institution[s]," and the manufacturing industry, R.2-13:5–6, to operate in group settings even in these "most severe[ly]" restricted zones, R.2-8:3.

In the "Orange Zones," Defendant restricts houses of worship to a maximum of 25 people—again, without regard to size of the place of worship—while closing only those specific "non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus." R.2-8:3. Thus, the capacity restrictions on houses of worship in the Orange Zone, like the Red Zone, facially target religious practice. The "non-essential" businesses that Defendant's Order permits to open at greater capacity than houses of worship include offices, malls, and retail stores, which Defendant allows to open at 50% capacity. *See generally* R.2-15, R.2-16. Yet these favored secular activities similarly constitute gatherings of individuals for a prolonged period of time that should trigger the same concerns relating to the spread of COVID-19 that Defendant purports to address, yet Defendant's restrictions selectively impose burdens only on religious conduct. *See Central Rabbinical*, 763 F.3d at 196–97.

Finally, in the "Yellow Zone," Defendant restricts houses of worship to 50% capacity. R.2-8:3. Defendant's Order allows schools, including higher education institutions, to remain open at full capacity in these regions. *See id.*; *see also generally* R.2-14.

3. Defendant's Order cannot satisfy strict scrutiny—an "exceptionally demanding" test. *Holt*, 574 U.S. at 364 (citation omitted). Although the State has an undisputed interest in reducing the transmission of COVID-19, the gathering

restrictions on houses of worship are not narrowly tailored to advance that goal. "[L]ess restrictive means" clearly are available for the State to diminish the transmission of COVID-19, *id.* at 365 (citation omitted), because the regulation is massively "underinclusive in relation to its asserted secular goals," *Cent. Rabbinical*, 763 F.3d at 186. The exempted secular activities—for undefined "essential gatherings" in all zones, "essential businesses" in the Red Zone, all businesses, restaurants, and schools in the Yellow Zone, and most businesses in the Orange Zone—endanger public health "in a similar or greater degree than" do houses of worship. *Lukumi*, 508 U.S. at 543. That plainly proves the regulation's "underinclusive" nature. *Id.* at 543–44; *Roberts*, 958 F.3d at 413–15; *Ward v. Polite*, 667 F.3d 727, 738–39 (6th Cir. 2012). This underinclusiveness illustrates that the State's interest could be furthered by similarly permitting religious services in houses of worship that implement health protocols comparable to those imposed on comparable secular institutions. *See Roberts*, 958 F.3d at 415; *Holt*, 574 U.S. at 367–69; *Lukumi*, 508 U.S. at 546. Thus, Defendant's Order fails strict scrutiny.

C. Neither *Jacobson* Nor *South Bay* Can Save This Order, Because Those Cases Have No Relevance To An Order That Violates *Lukumi* and *Masterpiece Cakeshop*

The district court's reliance on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct.

1613 (2020), and a series of related decisions, *see* Tr. 46–50, does not justify denial of an injunction pending appeal for two independently sufficient reasons.

First, as both a threshold and entirely dispositive matter, none of the cases that the district court cited purported to deal with the fundamental, core defect with Defendant's actions: intentional discrimination against a religious minority, as shown by the decisionmaker's repeated statements. *Supra* Part I.B.1. *Jacobson* considered only a generally applicable, compulsory vaccination law that "was necessary for the public health or the public safety," with no allegations of religious discrimination. 197 U.S. at 27. Likewise, *South Bay* involved no allegations of religious discrimination against a particular religion. 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief). So, rather than attempting to shoehorn this case into *Jacobson* or *South Bay*, this Court should apply the Supreme Court's case law for government actions that discriminate against religion, as evidenced by discriminatory statements from decisionmakers: *Lukumi* and *Masterpiece Cakeshop*. Under those decisions, Defendant's discriminatory Order is unconstitutional. *Supra* Parts I.A., I.B.1.

Second, even if cases like *Jacobson* or *South Bay* were relevant, Defendant's restrictions are still unconstitutional because they facially discriminate against religious gatherings vis-à-vis comparable secular gatherings. In *South Bay*, Chief Justice Roberts explained that an order was likely "consistent with the Free Exercise

Clause" only because "[s]imiliar or more severe restrictions apply to *comparable* secular gatherings," while the order "exempt[ed] or treat[ed] more leniently *only* dissimilar activities." 140 S. Ct. at 1613 (emphases added). And *Jacobson* itself explained that "arbitrary and oppressive" health-and-safety regulations—those that cause "wrong and oppression"—would not survive judicial review. 197 U.S. at 38. This is why courts have found Free Exercise Clause violations during COVID-19, despite recognizing *Jacobson*'s potential relevance, when the State overtly discriminates against religious worship as compared to comparable secular activities. *See Roberts*, 958 F.3d at 413–16; *Maryville Baptist Church*, 957 F.3d at 614–15; *Soos*, 2020 U.S. Dist. LEXIS 111808, at *29–30. The case here is far more analogous to these latter cases, given Defendant's discriminatory favoring of "[ ]essential gatherings"—which sits undefined in the text, beyond the clear implication that religious gatherings are not included. *See supra* Parts I.B.2., I.B.3.

II. An Injunction Pending Appeal Is Necessary To Prevent Irreparable Harm And Protect The Public Interest

Given that the "loss of First Amendment freedoms" "unquestionably constitutes irreparable injury," "the dominant, if not the dispositive, factor in deciding whether to grant a preliminary injunction" in a First Amendment case is the plaintiff's "ability to demonstrate likely success on the merits." *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 181 (2d Cir. 2020) (citations omitted).

As explained above, Plaintiffs are likely to show that the Order violates their First Amendment rights, meaning that "the dominant, if not the dispositive, factor" for injunctive relief supports granting their request. *See id.*

The harms to Plaintiffs from Defendant's Order are particularly acute. Orthodox Jews, unlike other observers, are uniquely blocked from engaging in worship services under the restrictions. Defendant scheduled his religious shutdown to begin on the eve of a Jewish holiday weekend, immediately before Hoshana Rabbah, Shmini Atzeres, and Simchas Torah, holidays which preclude observant Jews from traveling by car to unaffected areas to worship. R.2-21 ¶¶ 16–17; R.2-20 ¶¶ 15–16; R.2-19 ¶¶ 16–17; R.2-17 ¶ 5. While these holidays have passed, the discrimination persists, as Orthodox Jews celebrate the Sabbath *every* weekend, from Friday sundown until Saturday sundown. *See id.* On those days, the same vehicular limitations apply. *Id.* Even without holidays, Defendant's Order prohibits a vast majority of Jews in the affected areas from worshipping at synagogue, while members of other faiths can travel to engage in services.

Defendant and the public interest would suffer no harm from granting Plaintiffs injunctive relief. Even if the Court grants Plaintiffs this relief, they will remain subject to the generally applicable existing 50% capacity restrictions, *Soos*, 2020 U.S. Dist. LEXIS 111808, at *29–30, and requirements to follow public-health guidelines, including masking and distancing rules, *see* R.2-12. Plaintiffs have

guarded against the spread of COVID-19 and have been fully compliant with all State and local mandates during the pandemic, which Defendant does not dispute. R.2-21 ¶¶ 3–4; R.2-20 ¶ 3; R.2-19 ¶¶ 3–4. They have maintained health protocols including, among other things, requiring congregants to wear masks during services and splitting services to ensure proper distancing. *See id.* By rigorously adhering to these protocols, Plaintiffs have ensured no outbreak of COVID-19 has occurred among their congregants. *Id.* Having demonstrated their ability to congregate safely, Plaintiffs seek injunctive relief that "appropriately permits religious services with the same risk-minimizing precautions as similar secular activities." *Roberts*, 958 F.3d at 416.

Granting injunctive relief would benefit the public interest by protecting Plaintiffs' constitutional rights and by treating similar conduct similarly—religious and secular. "Securing First Amendment rights is in the public interest," *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (citation omitted), and treating "similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees," *Roberts*, 958 F.3d at 416; *see also Soos*, 2020 U.S. Dist. LEXIS 111808, at *34. Injunctive relief would serve the public interest, especially given the irreparable injury to Plaintiffs and the lack of constitutionally-sufficient justification for infringing their constitutional rights.

CONCLUSION

This Court should enjoin the order pending appeal.

Dated: October 21, 2020.

Respectfully Submitted,

/s/ Avi Schick

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This emergency motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 5,200 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This emergency motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

Dated: October 20, 2020

/s/ Avi Schick
AVI SCHICK

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2020, I filed the foregoing Emergency Motion with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: October 20, 2020

/s/ Avi Schick
AVI SCHICK