No. 20-A___

In The
Supreme Court of the United States

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,

Applicant,

v.

GOVERNOR ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY,

Respondent.

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

Emergency Application for Writ of Injunction

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QUESTIONS PRESENTED

New York Governor Andrew Cuomo's Executive Order 202.68 limits in-person attendance at "houses of worship" to 10 or 25 people in designated geographic zones, without regard to the size of the building and despite allowing numerous secular businesses to operate without any capacity restrictions. The district court found, following an evidentiary hearing, that The Roman Catholic Diocese of Brooklyn, New York "has been an exemplar of community leadership" in fighting COVID-19, "[a]t each step . . . ahead of the curve, enforcing stricter safety protocols than the State required at the given moment," and it is undisputed that "there has not been any COVID-19 outbreak in any of the Diocese's churches since they reopened." Ex. C at 3. The district court nonetheless denied the Diocese's motion to preliminarily enjoin the fixed-capacity caps in Executive Order 202.68 as applied, and the United States Court of Appeals for the Second Circuit declined to issue an injunction pending the Diocese's appeal, over a written dissent from Judge Michael H. Park.

The questions presented are:

1. Whether the provisions of Executive Order 202.68 that limit in-person "house of worship" attendance to 10 or 25 people, but allow numerous secular businesses to operate without any capacity restrictions, violate the Free Exercise Clause of the First Amendment as applied to the Diocese.

2. Whether the courts below erred in concluding that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and the Chief Justice's concurrence in *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020), require the application of a deferential, rational-basis review in all cases challenging government

action taken in response to a public health emergency, even when fundamental rights such as Free Exercise are at stake.

PARTIES AND RULE 29.6 STATEMENT

Applicant is THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK. Applicant is the Plaintiff in the United States District Court for the Eastern District of New York and is the Appellant in the United States Court of Appeals for the Second Circuit. Applicant has no parent corporation, and there is no publicly held corporation owning 10% of more of its stock.

Respondent is ANDREW M. CUOMO, in his official capacity as the Governor of New York. Respondent is the Defendant in the United States District Court for the Eastern District of New York and is the Appellee in the United States Court of Appeals for the Second Circuit.

DECISIONS BELOW

All decisions in this case in the lower courts are styled *The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*. The order of the United States Court of Appeals for the Second Circuit, dated November 9, 2020, denying Applicant's motion for an injunction pending appeal, over the dissent of Judge Park, is attached hereto as Exhibit A (the "Second Circuit Order"). The text order of the United States District Court for the Eastern District of New York, dated October 20, 2020, denying Applicant's motion for an injunction pending appeal is attached hereto as Exhibit B. The order of the United States District Court for the Eastern District of New York, dated October 16, 2020, denying Applicant's motion for a preliminary injunction, which is the order on appeal in the circuit court, is attached hereto as Exhibit C (the

"PI Order") and is also available at 2020 WL 6120167. The transcript of the district court's evidentiary hearing on Applicant's motion for a preliminary injunction is attached hereto as Exhibit D. The order of the United States District Court for the Eastern District of New York, dated October 9, 2020, denying Applicant's motion for a temporary restraining order is attached hereto as Exhibit E (the "TRO Order") and is also available at 2020 WL 5994954. Both the PI Order and the TRO Order have been designated for publication in the Federal Supplement, but reporter citations are not yet available. The docket number in the United States District Court for the Eastern District of New York is 20-cv-4844, and the docket number in the United States Court of Appeals for the Second Circuit is 20-3590.

JURISDICTION

Applicant has a pending interlocutory appeal in the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1292. This Court has jurisdiction, pursuant to 28 U.S.C. § 1651.

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

Pursuant to Rules 20, 22, and 23 of the Rules of this Court, and 28 U.S.C. § 1651, Applicant The Roman Catholic Diocese of Brooklyn, New York ("Applicant" or the "Diocese") respectfully requests a writ of injunction precluding enforcement of fixed-capacity limits imposed by Governor Cuomo on "houses of worship"—and only "houses of worship"—in designated geographic zones in New York, as applied to the Diocese's churches. The Governor's latest restrictions cap church attendance at 10 and 25 people in so-called "red" and "orange" zones, respectively, regardless of the capacity of the "house of worship," and thereby effectively shutter all of the Diocese's churches in those zones. His Executive Order, moreover, expressly singles out "houses of worship" by that name for adverse treatment relative to secular businesses, and does so in a way that is not narrowly tailored to any compelling government interest, in direct violation of the First Amendment's Free Exercise Clause. Absent relief on an as-applied basis, thousands of the Diocese's parishioners in Brooklyn and Queens will continue to be deprived of their core Free Exercise rights on a daily basis until the matter is resolved in the lower courts—even though it is undisputed that the Diocese has complied with all prior public health regulations and operated safely without any COVID-19 spread since being permitted to reopen several months ago.

While this Executive Order effectively closes churches and other houses of worship, all businesses deemed "essential" by the Governor—including everything from supermarkets to pet stores, huge hardware stores to brokers' offices—are

permitted to remain open without any capacity limitations whatsoever, even in the most restrictive "red" zones. In "orange" zones, even the vast majority of non-essential businesses, including department stores, can remain open without limitation—yet churches cannot. At his press conference announcing the new restrictions, the Governor expressly acknowledged that these rules "are most impactful on houses of worship." Ex. H at 8. It is well-settled that "[o]fficial action that targets religious conduct for distinctive treatment" is subject to "strict scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993). And here, the Governor openly admitted that his Executive Order is a "blunt" policy "being cut by a hatchet." Ex. K ¶ 4.

The Diocese initially sought emergency injunctive relief, and later an injunction pending appeal, in the United States District Court for the Eastern District of New York. Those applications were denied, as was the Diocese's subsequent emergency motion for an injunction pending appeal in the Second Circuit. The Second Circuit's decision, issued over a written dissent from Judge Michael H. Park, places that court on the wrong side of circuit conflicts regarding the States' authority to impose these sorts of restrictions on religious worship during the COVID-19 pandemic. Specifically, the lower courts in this case: (1) concluded that restrictions singling out houses of worship for disparate treatment are facially neutral, and therefore not subject to strict scrutiny, as long as *some* secular businesses are treated less favorably than religious institutions, even if many others are treated far better; and (2) misread this Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11

(1905), and Chief Justice Roberts's concurrence in *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020), as establishing a blanket rule of rational basis review—and effective *carte blanche* to impose unfettered restrictions on houses of worship—for the duration of the pandemic, regardless of how circumstances have evolved over time. *Compare, e.g.*, Second Circuit Order at 3-4, *with id.* at Dissent 1-3.

These foundational legal errors, both of which speak to urgent constitutional issues of nationwide importance—indeed, to the most significant and overriding legal issue of the day (*i.e.*, where to draw the line between fundamental individual rights enshrined in the Constitution and a government's emergency powers in a pandemic of unknown duration)—have resulted in the continuing violation of the Free Exercise rights of the Diocese and its parishioners.

The lower courts appear to have disregarded the fundamental principle for which *Jacobson* stands—namely, that States' "discretion" to protect public health and safety is "subject, of course, . . . to the condition that no rule prescribed by a state . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." 197 U.S. at 25. Since then, this Court has expressly recognized that an "[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved," and that constitutional limitations on the powers of the States "are questions which have always been, and always will be, the subject of close examination under our constitutional system." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425-26

(1934); *see also* Second Circuit Order at Dissent 2-3 (explaining that *Jacobson* "specifically noted that 'even if based on the acknowledged police powers of a state,' a public health measure 'must always yield in case of conflict with . . . any right which [the Constitution] gives or secures'" (alterations in original) (quoting 197 U.S. at 25)).

Similarly, the lower courts misapprehended *South Bay*'s significance here. *South Bay* arose during the early days of the pandemic, when there was widespread confusion about how COVID-19 is transmitted and the practices necessary to combat its spread, and it involved far less onerous fixed-capacity restrictions on houses of worship (up to 100 people at a time) than the effective shutdown order at issue here. In a 5-4 decision, with the Chief Justice concurring, the Court declined to issue a writ of injunction at the pandemic's inception. Here, in contrast, there are findings of fact and an evidentiary hearing record establishing the rigorous safety protocols implemented by the Diocese that have resulted in the safe operation of the Diocese's churches, without any COVID-19 outbreaks, for several months before this latest shutdown order. And as the pandemic now approaches its ninth month, it is misguided for lower courts to interpret the Chief Justice's concurrence in *South Bay* as the last word on these issues. *See* Second Circuit Order at Dissent 2. Rather, as circumstances have evolved and track records developed, it is incumbent upon courts to examine closely States' continuing actions, especially when they impose *new* restrictions such as this one curtailing constitutionally protected rights by treating houses of worship disfavorably compared to secular businesses. In short, the pandemic alone cannot justify overbroad, untailored closure orders of indefinite

duration directed at all "houses of worship," that in another time would plainly be found to violate the Constitution.

Even in denying relief below, the district court acknowledged that the Diocese "has met its burden to show irreparable harm" because it "adequately alleged that the State unconstitutionally infringed on its religious practice" by effectively closing its churches and preventing its parishioners in Brooklyn and Queens from being able to attend Mass. PI Order at 9-10. The Governor did not dispute that finding in the court of appeals, and the Second Circuit acknowledged that "the challenged order burdens Appellants' religious practices." Second Circuit Order at 4; *accord id.* at Dissent 3. That irreparable harm grows with each passing day and, absent immediate relief from this Court, will continue unabated indefinitely.

The Diocese acknowledges that the State has a clear interest in combatting the pandemic, and that certain restrictions may be narrowly tailored and hence permissible, depending upon the circumstances. Indeed, the Diocese voluntarily shut its doors *before* the State required it to do so in the early days of the pandemic, when the virus was surging in New York and little was understood about how to limit the spread of COVID-19. And the Diocese does not challenge the entirety of the Governor's Executive Order, or even the entire portion targeting "houses of worship." In fact, the Diocese previously operated safely under a 25% capacity restriction and intends to continue to do so if permitted to reopen its churches' doors. It has implemented what the district court below described as "rigorous safety protocols," PI Order at 3, and it has agreed to accept potential further restrictions (such as

eliminating congregant singing and choirs during Mass) as a condition of injunctive relief. Moreover, as the district court acknowledged following a full evidentiary hearing, the Diocese "[a]t each step . . . has been ahead of the curve, enforcing stricter safety protocols than the State required," and it is undisputed that "there has not been any COVID-19 outbreak in any of the Diocese's churches since they reopened." *Id.* at 3-4. Thus, the as-applied injunction the Diocese seeks poses no risk to public health or safety. Nor has the Diocese challenged any prior executive action taken in response to the pandemic. But this new Executive Order's discriminatory 10- and 25-person fixed-capacity caps are a bridge too far—and are not narrowly tailored at all. *See* Second Circuit Order at Dissent 3 ("Applying strict scrutiny, there is little doubt that the absolute capacity limits on houses of worship are not 'narrowly tailored.'" (quoting *Lukumi*, 508 U.S. at 546)). As the Sixth Circuit observed in enjoining similar restrictions as applied to a compliant church: "While the law may take periodic naps during a pandemic, [courts] will not let it sleep through one." *Roberts v. Neace*, 958 F.3d 409, 414-15 (6th Cir. 2020) (per curiam).

The Diocese therefore respectfully requests that the Circuit Justice grant this application or refer it to the full Court. The Diocese hopes to reopen in time for Sunday Mass this coming weekend, so it requests that an injunction issue as early as Friday, November 13, 2020, or as soon thereafter as practicable, and that it remain in effect until such time as this Executive Order's 10- and 25-person fixed-capacity caps are permanently withdrawn, repealed, or invalidated by a court.

STATEMENT OF THE CASE

A. The Diocese And Its COVID-19 Response.

The Diocese of Brooklyn, founded in 1853, is a Roman Catholic diocese comprised of 186 parishes, and 210 total churches, in Brooklyn and Queens, New York. *See* Dist. Ct. Dkt. No. 7-2. Those boroughs' combined population exceeds 4.9 million, 1.5 million of whom identify as Catholics. *Ibid.* In 2019 alone, the Diocese celebrated 15,885 Baptisms, 11,957 First Communions, 9,549 Confirmations, and 1,951 Marriages, and had an average weekly attendance of almost 230,000 spread across over 1,000 weekly Sunday Masses. *Ibid.* In light of the diverse, multicultural populations in Brooklyn and Queens, Masses are regularly held in 33 different languages across the Diocese. *Ibid.*

By March 2020, the novel coronavirus referred to as COVID-19 had descended upon New York City. At the time, little was known about the virus or its transmission, and the crisis evolved rapidly. The Diocese acted swiftly in response, implementing drastic countermeasures to combat the virus. PI Order at 3; Ex. D at 13:12-21, 18:3-5, 21:9-22:14; Ex. L ¶ 13; Ex. M at 1-2; Dist. Ct. Dkt. No. 7-6. On March 16, ahead of any government shutdown orders, the Diocese elected to cancel all public Masses. PI Order at 3. On March 19, the Diocese ordered all of its parishes and churches shuttered altogether. Ex. D at 13:12-21, 18:3-5, 21:9-22:14; *see also* Ex. M at 8.

Governor Cuomo thereafter issued a series of regulations that, among other things, banned all public gatherings. The Diocese strictly complied with this ban—keeping parishes and churches closed as it had already been doing. PI Order at 3.

This period of closure was extremely painful for the Diocese and its faith community. Ex. L ¶ 7. Among other things, parishioners were denied the ability to attend in-person Mass, which is "absolutely essential" in the Catholic faith tradition. Ex. D at 19:25-21:8, 36:3-37:14; Ex. L ¶ 7. In the words of the Most Reverend Raymond Chappetto, Vicar General for the Diocese, this "was the heartbreak of our people because that's what defines us as Catholics. . . . We are people of the Mass." Ex. D at 21:2-16. Catholics believe that, when they attend Mass, "they are listening to the Word of God and . . . participating in the Lord's Supper" through the receipt of consecrated bread and wine; indeed, "receiving the Holy Communion for a Catholic is the essence of what it means to be a Catholic." *Id.* at 22:9-16. Virtual substitutes—such as livestreaming—are inadequate because "[t]he priest has no way of bringing [Holy] Communion to every household. It's impossible." *Id.* at 20:22-23. The Diocese nonetheless abided by the State's restrictions—and imposed its own exacting restrictions on its parishes in the best interest of the health and welfare of the community. *Id.* at 34:24-35:14, 35:17-36:2; Ex. L ¶ 7.

At the same time, the Diocesan leadership worked to ensure that, when the time came, the Diocese would be able to offer congregants a safe worship space. To that end, it convened a commission focused on creating protocols to address the pandemic while simultaneously ensuring that parishioners' spiritual needs would be met. PI Order at 3; Ex. D at 34:24-35:14; Ex. L ¶ 8; Ex. P ¶ 10. The commission was chaired by Joseph Esposito, former Commissioner of New York City's Office of Emergency Management and former Chief of Department of the New York City Police

Department. PI Order at 3. Commission members consulted closely with medical professionals regarding the protocols, which, once finalized, were sent to each parish (through Bishop Chappetto's office) via weekly memoranda, posted to the Diocese's public website, and transmitted to the public via social media. Ex. D at 35:17-36:2; Ex. L ¶ 9. The committee met numerous times throughout May and June. Ex. L ¶ 8; Ex. P ¶ 10.

Beginning in late May, churches opened in a staged approach conducted in accordance with the iterative regulations promulgated by New York City and New York State. Ex. D at 35:17-36:2; *see also* Ex. P ¶ 11. In so doing, all churches in the Diocese adopted the commission's safety protocols. PI Order at 3; *see also* Ex. D at 39:2-9, 40:11-14, 40:18-41:19; Ex. L ¶ 10; Ex. P ¶ 11. During the initial reopening period, churches within the Diocese did not offer public Mass. Ex. D at 17:21-22; *see also* Ex. M at 31, 36. By June 22, City and State guidelines permitted churches to reopen at 25% capacity. However, at the recommendation of its COVID-19 commission, the Diocese waited until June 29 to reopen for in-person weekday services at the 25% capacity limit, and did not reopen for weekend Mass until July 4 (again at 25% capacity), to ensure that all proper protocols had been implemented by each parish. PI Order at 3; *see also* Ex. D at 39:20-40:10; Ex. L ¶ 10; Ex. M at 37.

In the lead-up to these 25% capacity reopenings, Diocesan leadership assisted parishes in obtaining all essential items they would need to safely reopen, including masks, disinfectants, and hand sanitizer. Ex. D at 16:5-17:2, 36:3-37:14; *see also* Ex. L ¶ 10; Ex. M at 35. Parishes that were unable to secure supplies or otherwise

implement the COVID-19 protocols were instructed to delay their reopenings. Ex. L ¶ 10; *see also* Ex. D at 16:5-23. Prior to reopening, each church was thoroughly sanitized. Ex. L ¶ 11; *see also* Ex. D at 16:18-23. All parishes were advised to report instances of COVID-19, if any, directly to their pastors, who would immediately inform Bishop Chappetto. Ex. D at 18:16-19, 42:3-18; *see also* Ex. L ¶ 15.

Since reopening in early July, each church within the Diocese has had to adhere to strict protocols regarding church practices and services. Among other requirements, churches must: (1) ensure that parishioners wear a mask at all times, except for a brief moment when they receive a socially distanced Holy Communion (discussed below); (2) block off every other pew so congregants cannot sit immediately in front of or behind one another; (3) mark off seats with tape six feet apart within each open pew to ensure appropriate social distancing; (4) provide hand sanitizer stations throughout the church; (5) open only for abridged hours, both on weekdays and for weekend Masses; (6) comply with the 25% capacity restriction, which the Diocese has voluntarily retained even after the State later increased the cap to 33%; (7) keep multiple doors open for various points of entry and exit, and direct traffic in and out of the church, to ensure that worshipers enter and exit in a socially distant manner; (8) sanitize the church before and after each Mass; (9) require additional ushers and security guards to enforce compliance with all of the required procedures and protocols; and (10) post prominent signage about safety protocols. PI Order at 4; Ex. D at 16:3-17:2, 18:3-5, 36:17-40:10; Ex. L ¶ 12; Ex. M at 31-33; Ex. P ¶¶ 11-13. Diocesan leadership and members of the committee, including Bishop Chappetto and

Commissioner Esposito, conducted site checks to confirm compliance with the protocols. Ex. D at 19:7-24, 39:2-9, 40:11-14, 40:18-41:19.

Churches have continued to abide by changes to fundamental church practices instituted at the outset of the pandemic. Most notably, the Diocese has fundamentally altered the manner in which its churches distribute the sacrament of Holy Communion, one of the most central and sacred acts in the Catholic Church. Ex. D at 22:15-23:18; *see also* Ex. L ¶ 13. Ordinarily, parishioners are provided a Communion wafer (or "host") either in their hand or on their tongue, and at many churches those parishioners also have the option of receiving wine. Ex. D at 17:3-18:2, 22:15-23:18. However, in response to the pandemic, Holy Communion in these churches can no longer be taken on the tongue, and wine is no longer distributed at all. *Ibid.* Likewise, priests refrain from greeting congregants in person before or after Mass, and parishioners no longer shake hands, hug, or kiss when offering the "Sign of Peace." *Id.* at 38:2-5, 46:19-47:1.

The Diocese's extensive preventative measures have proven immensely successful. In all the months since the reopening, there has not been a single reported outbreak of COVID-19 stemming from Catholic churches or congregations in Brooklyn or Queens. *Id.* at 18:20-19:6, 42:3-18, 76:14-17 (State's witness's concession); *see also* Ex. L ¶ 15; Ex. P ¶ 14.

B. Governor Cuomo's Executive Order.

On October 6, in response to localized COVID-19 upticks in certain parts of New York, Governor Cuomo announced a "New Cluster Action Initiative." PI Order at 4-5; Dist. Ct. Dkt. No. 7-4. This new initiative—formalized in Executive Order

202.38, the order at issue in this case—identified certain purported at-risk areas, including areas in Brooklyn and Queens. PI Order at 5; *see* Ex. F. The Executive Order divided these at-risk areas into "red," "orange," and "yellow" zones, with red zones representing areas that had the highest number of "cluster-based cases of COVID-19," orange zones representing "warning areas," and yellow zones representing "precautionary areas." Ex. F.

The Executive Order singles out "houses of worship" for categorically different treatment. *Ibid.* In red zones, "houses of worship" are subject to a capacity limit of "25% of maximum occupancy or 10 people, whichever is fewer." *Ibid.* By contrast, all "essential" businesses—a broad category that includes everything from grocery stores to pet shops to accounting and payroll offices—may remain open in red zones without capacity limitations, while "non-essential" businesses are closed. *Ibid.*; *see also* Ex. D at 82:13-83:3, 83:15-18. In orange zones, "houses of worship" are "subject to a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people." Ex. F. Both "essential" and "non-essential" businesses—in other words, almost all commercial enterprises—may remain open in orange zones without capacity limitations. *Ibid.*; *see also* Ex. D at 66:6-9. Only certain "high risk businesses," such as spas and piercing parlors, are required to close in orange zones. Ex. F.[1]

The "house of worship" restrictions do not account for, or make any distinction based on, the size of a church. For example, a church that typically houses 1,000

[1] The Executive Order also imposes various restrictions on restaurants, schools, and an undefined class of "[n]on-essential gatherings." Ex. F.

parishioners must now reduce in-person attendance to 10 (in a red zone) or 25 (in an orange zone). Given the seating capacity of the impacted Diocesan churches—hundreds of people or more—they will all be governed by these fixed caps, rather than the more flexible percentage caps. Ex. L ¶¶ 18-19; Ex. N ¶¶ 2-5.[2] The Executive Order thus effectively bars in-person worship at affected churches—a "devastating" and "spiritually harmful" burden on the Catholic community. Ex. L ¶¶ 20-21; *see also* Ex. D at 21:9-22:14, 24:18-25:1, 43:1-44:5.

At his press conference announcing the new restrictions, Governor Cuomo admitted that "these new rules are most impactful on houses of worship." Ex. H at 8. The Governor has repeatedly stated that this latest Executive Order is motivated by alleged community spread among members of the "ultra-Orthodox" Jewish community. PI Order at 7. For instance, on October 9, the Governor stated on CNN that "the issue is with th[e] ultra-Orthodox community," that "the cluster" where a recent COVID-19 spike had occurred "is a predominantly ultra-Orthodox cluster," and that "Catholic schools are closed because" of their proximity to "that cluster." Ex. I. Likewise, on October 14, the Governor asserted that certain ultra-Orthodox

[2] As of the date of the PI Order, there were 14 Diocesan churches in red zones and 12 Diocesan churches in orange zones, ranging in capacity from 200 to 1,200 people. Ex. L ¶¶ 18-19; Ex. N ¶¶ 3-5. The Governor thereafter modified the zones such that 10 Diocesan churches fell within red zones and none fell within orange zones. *See* Ct. App. Dkt. No. 59 at 18-19 ¶ 4. Following two further modifications to the zone designations, there are currently six Diocesan churches in orange zones and none in red zones. *See* Ct. App. Dkt. Nos. 75, 78. Because the zones are regularly reevaluated, new red and orange zones can be introduced—and the existing zones can expand or contract—at any time. *See* Ct. App. Dkt. No. 59 at 18-19 ¶ 5. For this reason, although the Governor argued in the court of appeals that these rolling modifications to the zones had mooted parts of the Diocese's challenge to the restrictions applied to particular churches at different points in time, all of the issues raised in this case are plainly "capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 462 (2007). Moreover, as noted, as of this filing, six Diocesan churches remain subject to challenged orange zone restrictions.

synagogues were "not even close" to complying with prior "50% of capacity" rules. Ex. J. He also acknowledged that he understood why "[t]he Catholic Church is upset in those areas," given that it had been "following the rules." *Ibid.* During a call with Jewish community leaders, the Governor conceded that the Executive Order is neither "a highly nuanced, sophisticated response" nor "a policy being written by a scalpel"; rather, as he admitted, it is "blunt" policy "being cut by a hatchet." Ex. K.

C. Procedural History.

On October 8, two days after the Executive Order was issued, the Diocese filed this action and moved for a temporary restraining order and preliminary injunction. District Judge Eric Komitee, acting as the assigned Miscellaneous Judge, denied the TRO the next day, but expressly said this was a "difficult decision" and invited the Diocese to renew its preliminary injunction application before Judge Nicholas G. Garaufis, the case's assigned judge, so that "the record may be developed more fully." TRO Order at 3, 5-6. Judge Komitee acknowledged that this was a "difficult decision" for at least two reasons: (1) the Order "contains provisions made expressly applicable to houses of worship," unlike cases involving the "application of facially neutral executive orders," and (2) the Governor has "made remarkably clear that this Order was intended to target a different set of religious institutions," whereas the Diocese "appears to have been swept up . . . despite having been mostly spared . . . from the problem at hand." *Id.* at 3.

Judge Garaufis held a multi-hour evidentiary hearing on October 15, 2020. *See* Ex. D. Bishop Chappetto and Commissioner Esposito testified regarding, *inter alia*, the extensive protocols adopted by the Diocese and the absence of any COVID

outbreak in any of the Diocese's churches. *Id.* at 16:3-18:5, 18:20-19:6, 36:3-38:10, 42:3-18. Bishop Chappetto also testified to the spiritual harm to parishioners who are unable to attend Mass and receive the Eucharist. *Id.* at 21:2-8.

The State called one witness, Mr. Bryon Backenson, an official at the New York State Department of Health, who repeatedly conceded that the "decisions about which areas qualified for which zones . . . were made in the Governor's Office," not by the Department of Health or its epidemiologists. *Id.* at 71:19-22; *see also id.* at 61:9-23, 72:22-24.[3] Backenson also admitted "there have been no outbreaks" in Diocesan churches and that the Diocese has faithfully abided by government guidelines. *Id.* at 76:14-17, 79:18-80:9. He testified that the two key metrics for COVID transmission are "distance and time," *id.* at 91:12-19, and conceded he is aware of no evidence of COVID spread from the ultra-Orthodox community to the Diocesan community and that the State had made no attempt to enforce existing COVID regulations against those members of the ultra-Orthodox community who were allegedly out of compliance, *id.* at 75:3-9, 100:17-22. The next day, the State reported that COVID positivity rates had dropped significantly in the red zones. Dist. Ct. Dkt. No. 29 at 2.

On October 16, Judge Garaufis denied the preliminary injunction motion. In doing so, Judge Garaufis acknowledged that the Diocese had "met its burden to show irreparable harm" because it "adequately alleged that the State unconstitutionally infringed on its religious practice" by effectively closing its churches and preventing

[3] The State's two other witnesses—declarants Deborah Blog, also of the Department of Health, and Health Commissioner Howard Zucker—were not made available for cross-examination, over Plaintiff's objection.

its parishioners from attending Mass. PI Order at 9-10, 24. However, he declined to apply strict scrutiny to the "house of worship" restrictions in the Executive Order, and, as a result, concluded that the Diocese was unlikely to succeed on the merits of its Free Exercise claim. *Id.* at 9-10. Judge Garaufis also found that, "from the beginning, the Diocese has been an exemplar of community leadership" in fighting COVID-19. *Id.* at 3. "At each step, the Diocese . . . has been ahead of the curve, enforcing stricter safety protocols than the State required at the given moment" and only reopening its churches "with rigorous safety protocols"; as a result "there has not been any COVID-19 outbreak in any of the Diocese's churches since they reopened." *Id.* at 3-4. He nevertheless held that the "public interest analysis, and accordingly the balance of equities, cuts in favor of the State" because it is "trying to contain a deadly and highly contagious disease." *Id.* at 23.

On October 19, the Diocese filed a notice of appeal to the Second Circuit and moved before the district court for an injunction pending appeal, which application was denied. Ex. B. On October 21, the Diocese moved for an injunction pending appeal before the Second Circuit. That motion was considered first by a single judge, who declined to enter an "administrative stay" and referred the matter to a motions panel. Ct. App. Dkt. No. 29. The panel heard oral argument on November 3. On November 9, the court denied the motion, over a dissent from Judge Park. Relying principally on the Chief Justice's concurrence in *South Bay*, the court of appeals held that the law is generally applicable and thus not subject to strict scrutiny, because, "while it is true that the challenged order burdens the Appellants' religious practices,"

it has a "greater or equal impact on schools, restaurants, and comparable secular public gatherings." Second Circuit Order at 3-4.

Judge Park disagreed, finding in dissent that the Executive Order's "disparate treatment of religious and secular institutions is plainly not neutral," that "[t]he Governor's public statements confirm that he intended to target the free exercise of religion," and that "there is little doubt that the absolute capacity limits on houses of worship are not 'narrowly tailored.'" *Id.* at Dissent 1, 3. Judge Park also found that the Diocese had "presented unrebutted evidence that the executive order will prevent [its] congregants from freely exercising their religion," and that the public interest favors injunctive relief because the State "may [not] impose greater restrictions only on houses of worship." *Id.* at Dissent 3-4.

In light of the severe, ongoing nature of the Free Exercise violation and the undisputedly irreparable nature of the harm resulting therefrom, the Diocese now seeks emergency equitable relief from this Court.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the full Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). The Court also has discretion to issue an injunction "based on all the circumstances of the case," without its order "be[ing] construed as an expression of the Court's views on the merits" of the underlying claim.

Little Sisters of the Poor Home for the Aged v. Sebelius, 571 U.S. 1171 (2014). This Court has previously granted injunctive relief under the All Writs Act when "[t]he Circuit Courts have divided on whether to enjoin" a disputed government action on religious liberty grounds. *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014). A Circuit Justice or the full Court may also grant injunctive relief "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a "fair prospect" of reversal).

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

The First Amendment provides that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. As this Court has explained, in addition to protecting freedom of religious belief, "the 'exercise of religion'" protected by the First Amendment "often involves not only belief and profession but the performance of (or abstention from) physical acts," including "assembling with others for a worship service" and "participating in sacramental use of bread and wine." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The Free Exercise Clause "bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. ---, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 534). Although the Court has held that religious exercise concerns do not generally

"relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" *Smith*, 494 U.S. at 879 (citation omitted), "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny," *Lukumi*, 508 U.S. at 546. "Strict scrutiny is a searching examination, and it is the government that bears the burden" of proof. *Fisher v. University of Tex. at Austin*, 570 U.S. 297, 310 (2013). Specifically, the government must establish that the law is "justified by a compelling governmental interest and . . . narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32.

This Court's precedents are clear that, when government actions "target[] religious conduct for distinctive treatment," they are neither neutral nor generally applicable, and strict scrutiny applies. *Lukumi*, 508 U.S. at 534, 546. That is the case here, as made plain by the Executive Order's text and effect, and by the Governor's surrounding comments: The plain text of the order expressly singles out "houses of worship," subjecting them to uniquely burdensome restrictions that do not apply to many secular businesses, and the Governor has acknowledged that these new rules "are most impactful on houses of worship." Ex. H at 8; *see also* Ex. F; Second Circuit Order at Dissent 1-2.

It is equally clear that the 10- and 25-person capacity limits cannot withstand strict scrutiny. Given that many secular businesses in the same neighborhoods are not subject to any capacity restrictions at all, the attendance caps imposed upon "houses of worship" cannot possibly be the least restrictive means of advancing the State's asserted public health interest. Moreover, to the extent the Governor seeks

to address alleged non-compliance among certain individuals, *see* Ex. I, the less restrictive alternative is self-evident: The Governor can enforce existing law against the violators. In any event, the undisputed evidentiary record in this case confirms that the fixed-capacity restrictions are not narrowly tailored at least as applied to the Diocese and its churches. The lower courts found that the Diocese has been an "exemplar of community leadership" when it comes to implementing "rigorous [COVID-19] safety protocols" that outpace even those imposed by the State. PI Order at 3. There is no evidence of any COVID spread in any of the Diocese's churches at any time since they reopened several months ago. *See id.* at 4; Ex. D at 76:14-17, 79:18-80:9, 100:17-22; *see also* Ex. J at 3. The Governor cannot justify an across-the-board shutdown of *all* "houses of worship" in broadly (and unscientifically) drawn geographic areas. *See* Ex. D at 71:19-22. As the Governor himself has acknowledged, this Executive Order was not "written by a scalpel," but instead is a "blunt" policy "being cut by a hatchet." Ex. K ¶ 4.

This is an indisputably clear violation of the Free Exercise rights of the Diocese and its parishioners. Yet the courts below held otherwise, and thereby deepened the widespread confusion among the lower courts on two key constitutional issues—how, if at all, to apply this Court's decision in *Jacobson* in Free Exercise cases and how to assess whether such a law is generally applicable. Especially given the split among circuits and lower courts on those questions, which are of immense national significance in the midst of an ongoing pandemic, it is likely that at least four Justices of this Court would vote to grant certiorari. Indeed, four Justices would have granted

writs of injunction in *South Bay* and *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020)—even though those cases presenting similar constitutional questions arose at earlier stages of the pandemic, involved less restrictive capacity caps, and were decided without the benefit, as here, of a full evidentiary hearing at which a government witness was subject to cross-examination and made key, damaging admissions. And because the lower courts in this case fell on the wrong side of the circuit splits, it is also likely that a majority of the Court would hold that this Executive Order impermissibly infringes on the Diocese's Free Exercise rights here.

A. On Its Face, The Governor's Executive Order Targets Religious Institutions For Adverse Treatment Such That Strict Scrutiny Plainly Applies.

To determine whether a law burdening religion is "neutral" or "generally applicable," "we must begin with its text, for the minimum requirement of neutrality is that a law must not discriminate on its face." *Lukumi*, 508 U.S. at 533. The Court must also assess whether it is neutral in "operation," as assessed in "practical terms." *Id.* at 536; *cf. Smith*, 494 U.S. at 884 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason"). Finally, the Court should consider "the specific series of events leading to the enactment or official policy in question, . . . including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (citation omitted). Here, the

Executive Order is subject to strict scrutiny under each of these three independent tests.[4]

First, the text of the Executive Order expressly targets religious practice. Ex. F. The order restricts attendance at "houses of worship" in the designated "zones," subjecting religious spaces to 10- or 25-person fixed-capacity limits not applicable to a vast array of secular businesses. *Ibid.* Using the term "houses of worship"—a term that, on its face, is "without a secular meaning"—makes clear that the law is neither neutral nor generally applicable. *Lukumi*, 508 U.S. at 533. As the district court recognized below when ruling on the Diocese's TRO application, the order "applies differently to religious exercise," with "provisions made expressly applicable to houses of worship" alone, unlike cases involving the "application of facially neutral executive orders." TRO Order at 2-3.

Second, the Executive Order's disparate treatment of secular entities confirms that it unconstitutionally targets religion. "As a rule of thumb, the more exceptions to a prohibition, the less likely it will count as a generally applicable, non-discriminatory law." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (per curiam). Indeed, an "exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny." *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012).

[4] If the Court overrules *Smith* in *Fulton v. City of Philadelphia*, No. 19-123, strict scrutiny would apply simply because the Executive Order substantially burdens religious exercise.

The exceptions here are many. Even in the most restrictive "red" zones, the Governor's unique capacity limitations on "houses of worship" do not apply to vast swaths of secular institutions: All so-called "essential" businesses—a designation conferred by the Governor upon a wide range of enterprises, including supermarkets and grocery stores, hardware stores, convenience stores, pet food stores, banks, brokers' offices, and accounting firms—can remain open without any capacity restrictions whatsoever. Ex. G at 4, 5, 8; *see* Ex. D at 81:12-85:2. These include, for example, a 225,000-square-foot Target in a Brooklyn "red" zone that "can literally have hundreds of people shopping there." Ex. D at 81:12-85:2; Ex. J ¶ 6; Dist. Ct. Dkt. No. 22-5 at 1. And in "orange" zones, even the vast majority of businesses designated "non-essential" can open without capacity restrictions. Ex. F; *see* Ex. D at 66:6-9.

Houses of worship, by contrast, are limited to 10 and 25 people in the "red" and "orange" zones, respectively. The State has thus made a "value judgment" that certain secular activities, ranging from supermarket shopping to working in a nine-to-five office job, are more worthy of maintaining in times of crisis than is religious worship. *See Fraternal Order of Police Network Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). The State permits, for example, a local bodega or hardware store to remain open without "any . . . occupancy limitation," while the Diocese "must comply with numerical occupancy caps, no matter how many people their sanctuaries might accommodate while maintaining six feet of distance between non-household members." *Denver Bible Church v. Azar*, 2020 WL 6128994, at *10 (D.

Colo. Oct. 15, 2020).[5] And it assumes that "someone [can] safely walk down a grocery store aisle but not a pew." *Roberts*, 958 F.3d at 414; *see also Maryville Baptist*, 957 F.3d at 614 (strict scrutiny applied where order exempted "life-sustaining operations" from COVID closures but not "soul-sustaining" ones); *Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651, 661 (E.D.N.C. May 16, 2020) ("These glaring inconsistencies between the treatment of religious entities and individuals and non-religious entities and individuals take [the Executive Order] outside the safe harbor for generally applicable laws." (citation and quotation marks omitted)); *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020). This "double standard" is not a neutral or generally applicable one. *Ward*, 667 F.3d at 740.

Third, if there were any doubt that the Governor's order impermissibly targets religion for disparate and adverse treatment, this Court need only look to the Governor's own words. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731. The Governor has stated, at a public press conference and in no uncertain terms, that his Executive Order is "most impactful on houses of worship." Ex. H at 8. As the district court found, "the Governor of New York made remarkably clear that this Order was intended to target . . . religious institutions," albeit "a different set" of such institutions than the Diocese, which has been "swept up in that effort." TRO Order

[5] Although the Tenth Circuit has administratively stayed the injunction in *Denver Bible*, its order expressly provides that the stay "has no bearing on the ultimate merits of the motion for stay." Order, No. 20-1377 (10th Cir. Oct. 22, 2020).

at 3. Strict scrutiny must therefore be applied to determine this Executive Order's constitutionality.

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

Because the 10- and 25-person attendance caps are subject to strict scrutiny, the government must prove they are narrowly tailored to a compelling government interest in order for them to survive. *Lukumi*, 508 U.S. at 531-32. It clearly cannot. Granting the government's interest in protecting public health, the restrictions in question are not narrowly tailored at all. *See* Second Circuit Order at Dissent 3 (finding "little doubt" on this point).[6] As the Governor himself put it, this Executive Order is "not a policy being written by a scalpel, this is a policy being cut by a hatchet," Ex. K ¶ 4—that is, it is not a tailored approach.

First, the fact that numerous comparable secular business are not subject to the fixed-capacity restrictions made applicable to "houses of worship" shows that these are not the least restrictive means of combatting the spread of COVID-19. If many secular businesses can be trusted to operate safely without onerous capacity restrictions, so, too, can churches. *See First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670-71 (5th Cir. 2020) (Willett, J., concurring in grant of injunction pending appeal) ("Singling out houses of worship—and *only* houses of worship, it seems—cannot possibly be squared with the First Amendment." (emphasis in original)); *see also S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J. dissenting)

[6] Because the majority and the district court below did not apply strict scrutiny, they did not conduct this analysis.

("The Church and its congregants simply want to be treated equally to comparable secular businesses."); *Tabernacle Baptist*, 2020 WL 2305307, at *5 ("If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection."). The Governor recently, and similarly, permitted schools to reopen without capacity restrictions in the red and orange zones, as long as they comply with COVID testing requirements, while houses of worship remain closed.[7] The Diocese "simply want[s] the Governor to afford [it] the same treatment as . . . non-religious citizens receive when they work at a plant, clean an office, ride a bus, shop at a store, or mourn someone they love at a funeral." *Berean Baptist*, 460 F. Supp. 3d at 662-63; *see Roberts*, 958 F.3d at 416. That the house-of-worship-only fixed-capacity restrictions bear no relationship at all to the physical size of the church or synagogue building—instead capping attendance in a 1,000-seat church, for example, at 10 people (the same as if the church had seated 40)—further belies their alleged necessity in combatting COVID-19, as well as their purported rationality. "Such a blunderbuss approach is plainly not the 'least restrictive means' of achieving the State's safety goal." Second Circuit Order at Dissent 3.

Although the State argues that the appropriate "comparators" are movie theaters and event spaces, which are closed in "red" and "orange" zones, the facts established at the evidentiary hearing prove otherwise (and distinguish this case

[7] *See* https://www.governor.ny.gov/news/governor-cuomo-releases-guidelines-testing-protocol-schools-reopen-red-or-orange-micro-cluster.

from *South Bay* and *Calvary Chapel*, which were decided without a robust evidentiary record). Specifically, the State's witness below testified that "distance" and "time" are the key metrics in evaluating risk of exposure to COVID-19 and, therefore, in establishing rules for different categories of businesses and uses. Ex. D at 91:14-19. By those measures, it is clear that the Diocese's churches are at least comparable to, if not safer than, a litany of businesses in "red" zones that are permitted to stay open without any capacity restrictions whatsoever, including mega-stores like Target and Staples. The Diocese has successfully implemented extensive social distancing measures in its spacious churches (as well as 25% capacity caps) that ensure an appropriate distance is maintained between parishioners at all times. PI Order at 3-4. Meanwhile, many secular businesses that can open without restrictions, such as pet stores and broker's offices and banks and bodegas, are generally located in much smaller spaces where distancing is a far greater challenge. As for "time," even a *pre*-COVID Catholic Mass—typically lasting less than an hour on Sundays, less on weekdays—was shorter than many trips to a supermarket or big-box store, not to mention a nine-to-five office job. Ex. O ¶¶ 2-4. Mass is now even shorter, thanks to measures undertaken proactively and voluntarily by the Diocese. *Id.* ¶¶ 3-4.

Second, to the extent the impetus for this Executive Order is alleged non-compliance with existing regulations, the Governor can simply enforce existing law. *See, e.g.*, N.Y. Pub. Health L. § 12-B (penalties up to $10,000 or one year in prison for violating public health regulations); N.Y. Gov. Exec. Orders 202.8 & 202.14 (Executive Orders enforceable as violations of PBH § 12-B). As the Sixth Circuit put

it in enjoining similar COVID-19 restrictions on religious free exercise, if "[s]ome groups in some settings . . . fail to comply with social-distancing rules," the government "is free to enforce the social-distancing rules against them for that reason and in that setting, whether a worship setting or not," but the government cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Roberts*, 958 F.3d at 414. Holding the actual, specific wrongdoers to account under generally applicable safety requirements—whether they are Presbyterian, Jewish, Catholic, Muslim, Sikh, atheist, or otherwise—is a less restrictive, but more effective, means of advancing the State's asserted interests. Indeed, no legitimate interest is advanced by broad-brush orders targeting the entire faith community for effective closure. *See* Second Circuit Order at Dissent 3.

Third, given the Diocese's adoption of extensive COVID-19 safety protocols and its proven track record of successfully combatting the virus, application of the fixed-capacity restrictions to the Diocese cannot possibly be the least restrictive means of serving the purported public health interest. *See Berean Baptist*, 460 F. Supp. 3d at 662. As the district court found, after a full evidentiary hearing, "the Diocese has been an exemplar of community leadership. At each step, the Diocese . . . has been ahead of the curve, enforcing stricter safety protocols than the State required at the given moment." PI Order at 3. The undisputed evidence confirms that there was not a single COVID-19 outbreak at any of the Diocese's churches at any time after they reopened. *See, e.g.*, PI Order at 4; Ex. L ¶¶ 10-15; Ex. M; Ex. P ¶¶ 10-14; Ex. Q. The

Governor's counsel twice conceded the point—first at the TRO argument, *see* Dist. Ct. Dkt. No. 16-1 at 31:21-25, and again before the Second Circuit, Ct. App. Dkt. No. 52 at 27—and the State's witness at the evidentiary hearing likewise admitted that he was not "aware of any evidence of spread of COVID" from the ultra-Orthodox community (which the Governor has blamed for the outbreaks) "to the [D]iocese's churches in Brooklyn." Ex. D at 100:17-22; *accord id.* at 76:8-20, 103:8-12. The Diocese has pledged, moreover, to continue to adhere to all recommended COVID-19 social distancing and personal hygiene safety guidelines. It has even agreed to adopt *more* precautionary measures—including restricting singing during Mass, *see* Ex. N ¶¶ 10-13—as a condition of any injunctive relief in this action. Holding the Diocese to these measures is the least restrictive means of advancing the State's asserted interest. *See* Second Circuit Order at Dissent 3 & n.4. The Executive Order's fixed-attendance caps unquestionably fail strict scrutiny, as applied.

C. The Lower Courts Committed Two Fundamental Legal Errors And Thereby Exacerbated Circuit Splits On Urgent Constitutional Issues Of Nationwide Importance.

A proper understanding of First Amendment jurisprudence leads inexorably to the conclusion that the Free Exercise violation in this case is indisputably clear. But the lower courts nevertheless denied injunctive relief without applying strict scrutiny. They did so based on two fundamental legal errors, both of which are the subjects of circuit splits and increasing confusion in the lower courts that implicate issues of critical national importance.

1. Neither *Jacobson* Nor *South Bay* Requires Deference To All COVID-19 Restrictions, Especially When Fundamental Rights Are At Stake.

The courts below misread *Jacobson* and Chief Justice Roberts's concurrence in *South Bay* as calling for heightened judicial deference simply because the Executive Order seeks to combat COVID-19. Second Circuit Order at 4; PI Order at 20. Courts applying this "principle," as the district court called it, have concluded that the ongoing public health emergency confers on the States broad powers to restrict individual liberty—no matter the circumstances of the case, the particulars of the law under review, or the fundamental nature of the constitutional right at issue. *See In re Abbott*, 954 F.3d 772, 783 (5th Cir. 2020) (interpreting *Jacobson* as the authoritative "framework governing emergency exercises of state authority during a public health crisis"). Such flawed reasoning is wrong and dangerous, and it has resulted in a circuit split and misapplication of *Jacobson* by multiple lower courts.[8]

[8] *Compare In re Rutledge*, 956 F.3d 1018, 1031 (8th Cir. 2020) (interpreting *Jacobson* broadly), *In re Abbott*, 954 F.3d at 783 (same), *Soos v. Cuomo*, 2020 WL 6384683, at *6 (N.D.N.Y. Oct. 30, 2020) (applying *Jacobson* without considering general applicability or neutrality of challenged law at all), *Bimber's Delwood, Inc. v. James*, 2020 WL 6158612, at *8 (W.D.N.Y. Oct. 21, 2020) ("[U]ntil the Supreme Court overrules *Jacobson*, it remains good law, and it governs here."), *and 4 Aces Enterprises, LLC v. Edwards*, 2020 WL 4747660, at *9 n.9 (E.D. La. Aug. 17, 2020) (concluding *Jacobson* applies but noting disagreement in this Court and among the circuit courts), *with Roberts*, 958 F.3d at 414 (applying traditional Free Exercise jurisprudence), *Robinson v. Attorney Gen.*, 957 F.3d 1171, 1180-81 (11th Cir. 2020) (declining to stay the district court's grant of injunctive relief where the district court read *Jacobson* "together" with modern constitutional case law), *First Baptist Church v. Kelly*, 455 F. Supp. 3d 1078, 1086 (D. Kan. 2020) (explaining that *Jacobson* involved a law that "did not expressly purport to interfere with rights secured by the Constitution"), *Denver Bible*, 2020 WL 6128994, at *8, *County of Butler v. Wolf*, 2020 WL 5510690, at *8 (W.D. Pa. Sept. 14, 2020) ("[A]n extraordinarily deferential standard based on *Jacobson* is not appropriate."), *and Bayley's Campground Inc. v. Mills*, 2020 WL 2791797, at *8 (May 29, 2020) (criticizing courts that have applied *Jacobson* as a "rule [that] floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review"), *reconsideration denied*, 2020 WL 3037252 (D. Me. June 5, 2020).

First, this purported "principle" is a fundamental misapplication of *Jacobson*, which itself expressly cautions that a State's "discretion" to protect public health and safety is "subject, of course, . . . to the condition that no rule prescribed by a state . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument." 197 U.S. at 25. The plaintiff in that case had alleged that a generally applicable vaccination law violated his liberty interests under the Constitution's Preamble and the Fourteenth Amendment, *id.* at 22, 25-26, 29-30, an ill-defined claim that did not implicate any fundamental right such as Free Exercise. *See Calvary Chapel*, 140 S. Ct. at 2608 (Alito, J., dissenting) (noting that "*Jacobson* must be read in context" and that "it is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic"). Although generalized liberty interests could not override the lawful exercise of state police powers, this Court was crystal clear in *Jacobson* that where, as here, a law "violate[s] rights secured by the Constitution," it remains the "duty" of the courts "to hold such laws invalid." 197 U.S. at 11; *accord* Second Circuit Order at Dissent 2-3 ("*Jacobson* does not call for indefinite deference to the political branches exercising extraordinary emergency powers, nor does it counsel courts to abdicate their responsibility to review claims of constitutional violations.").

Jacobson, then, does not stand for the proposition that the normal modes of constitutional analysis—such as strict scrutiny—are somehow supplanted in the context of an "emergency," let alone "long-term and open-ended emergencies like the one in which we currently find ourselves." Lindsay F. Wiley & Stephen I. Vladeck,

Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, 133 Harv. L. Rev. F. 179, 182-83 (2020). "[T]he better view is that *Jacobson* fits within existing constitutional doctrine," requiring deployment of the normal tiers of scrutiny. *Denver Bible*, 2020 WL 6128994, at *7-8 & n.15 (collecting cases). Indeed, *Jacobson* was decided before the Free Exercise Clause was even incorporated against the States. *See Twining v. New Jersey*, 211 U.S. 78, 100 (1908) (recognizing certain fundamental rights may be incorporated), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating Free Exercise Clause). And it was decided decades before the emergence of the modern "tiers of scrutiny" framework. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938).

Nor should this Court's denial of an application for an injunction in *South Bay* be understood to compel blanket deference to States' pandemic response. The Court considered the application in *South Bay* at a far earlier stage in the pandemic, when less was known about the virus's spread. *See Denver Bible*, 2020 WL 6128994, at *7 n.14. Moreover, *South Bay* was decided without the benefit, as here, of an evidentiary hearing establishing a proven track record of compliance and successful mitigation over several months. More still, the Executive Order in *South Bay* allowed up to 100 people to attend church at any given time—a far cry from the *de facto* shutdown order here. *See* 140 S. Ct. at 1613. The lower courts are erring now by applying a one-size-fits-all approach these many months later. *See Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J. dissenting).

Second, the lower courts' flawed application of *Jacobson* is dangerous. Emergency powers are anathema to our constitutional structure. As Justice Jackson famously explained, the Framers intentionally "omitted" the "existence of inherent powers ex necessitate to meet an emergency." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649 (1952) (Jackson, J., concurring). "They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation." *Id.* at 650. For this reason, aside from the Suspension Clause, the Framers "made no express provision for exercise of extraordinary authority because of a crisis." *Ibid.* "We may [] suspect that they suspected that emergency powers tend to kindle emergencies." *Ibid.*

Justice Jackson was not alone. Two decades earlier, in the midst of the Great Depression, Chief Justice Hughes wrote for the Court:

> Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-26 (1934) (upholding challenged law on its merits, rather than deferring to the government); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) (rejecting notion that invocation of "national defense" alone justifies restriction of "the democratic ideals enshrined in [our] Constitution" and particularly "in the First Amendment").

Put simply, the federal courts should not be permitted to "distort the Constitution to approve all that [government officials] may deem expedient." *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting), *adopted by a majority of the Court in Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Indeed, "[t]he court of history has rejected [such] jurisprudential mistakes and cautions . . . against an unduly deferential approach." *Calvary Chapel*, 140 S. Ct. at 2615 (Kavanaugh, J., dissenting). Even in times of crisis, the States must be put to their proof of having to justify restrictions placed upon fundamental constitutional rights like the free exercise of religion by demonstrating that they are the most narrowly tailored means of addressing a compelling governmental interest.

2. Strict Scrutiny Applies To Laws That Expressly Target Religion For Disparate Treatment.

The courts below also concluded that strict scrutiny was inapplicable because the Executive Order purportedly subjects "religious services" to restrictions that are "similar to or, indeed, *less severe than* those imposed on" a subset of "comparable secular gatherings." Second Circuit Order at 3-4 (emphasis in original); *see also* PI Order at 18-19. The courts deemed irrelevant the undisputed fact that *many other* secular businesses are treated more favorably, reasoning that they were "distinguishable from religious services." PI Order at 20; *see also* Second Circuit Order at 3-4. But as the dissent below explained, "the executive order does not impose neutral public-health guidelines, like requiring masks and distancing or limiting capacity by space or time. Instead, the Governor has selected some businesses (such as news media, financial services, certain retail stores, and construction) for favorable

treatment, calling them 'essential,' while imposing greater restrictions on 'non-essential' activities and religious worship. Such targeting of religion is subject to strict scrutiny." Second Circuit Order at Dissent 2. Thus, this case squarely presents the question whether strict scrutiny applies to a law that "on its face favors or exempts some secular organizations as opposed to religious organizations." *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting). It does.

This issue has created a circuit split and substantial confusion in the lower courts.[9] Contrary to the lower courts' conclusions in this case, it is immaterial that the Governor's Executive Order treats some secular institutions (like theaters) worse than houses of worship: "The point 'is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is not regulated.'" *Id.* at 2613 (citation omitted). In other words, a judge's subjective views as to "whether a church is more akin to a factory or more like a museum" are immaterial to the threshold level-of-scrutiny inquiry, *ibid.*, because strict scrutiny applies whenever a law "devalues religio[n]," *Lukumi*, 508 U.S. at 537; *see Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193, 197 (2d Cir. 2014); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir.

[9] *Compare Roberts*, 958 F.3d at 414-15 (applying strict scrutiny where law firms and liquor stores were treated more favorably), *Maryville Baptist*, 957 F.3d at 614 (same), *Denver Bible*, 2020 WL 6128994, at *10-11 (deeming COVID-19 restrictions subject to strict scrutiny even where some secular businesses are treated worse than houses of worship), *and First Baptist*, 455 F. Supp. 3d at 1089-90 (finding likelihood of success on the merits because presence of multiple better-treated secular businesses "le[d] the court to conclude that [the challenged executive orders] are not neutral laws of general applicability"), *with Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344 (7th Cir. 2020) (applying rational basis review), *Harvest Rock Church, Inc. v. Newsom*, --- F.3d ---, 2020 WL 5835219, at *1-2 (9th Cir. Oct. 1, 2020) (finding "lectures and movie theaters" to be better comparators and denying injunction without mentioning strict scrutiny), *and Murphy v. Lamont*, 2020 WL 4435167, at *14 (D. Conn. Aug. 3, 2020).

2002); *Fraternal Order of Police*, 170 F.3d at 366. Nor does that inquiry turn on whether the "value judgment" was motivated by *animus* toward religion, as the Governor and the lower courts appear to have erroneously believed. *See* PI Order at 20-21; Ct. App. Dkt. No. 52 at 25. "The constitutional benchmark is 'government *neutrality*,' not 'governmental avoidance of bigotry.'" *Roberts*, 958 F.3d at 415 (emphasis in original); *see also* Laycock & Collins, *Generally Applicable Law & the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 15 (2016) ("Secular exceptions defeat general applicability no matter how important, justified, or sensible.").

Faithfully applied, the constitutional inquiry should proceed in two straightforward steps: (1) "does the law create a favored or exempt class of organizations"; and (2) "if so, do religious organizations fall outside of that class?" *Calvary Chapel*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting). Where, as here, the answers to those questions are "yes and yes," lower courts should be applying strict scrutiny. Because the lower courts here did not do so, they failed to protect the Diocese's indisputably clear constitutional rights.

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

A. It Is Undisputed That The Diocese Will Be Irreparably Harmed Absent Injunctive Relief.

It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also* Second Circuit Order at Dissent 3. Here, the district court expressly found that the Diocese "establish[ed] irreparable harm" arising from the State's infringement on its Free Exercise rights. PI Order at 10. The

Governor did not dispute that finding in the court of appeals, and the Second Circuit did not disturb it, instead acknowledging "the impact the executive order has had on houses of worship throughout the affected zones." Second Circuit Order at 3. The irreparable harm here will be particularly severe. Prohibiting in-person celebrations of Mass makes receiving Holy Communion "impossible," which, as Bishop Chappetto testified, is "the heartbreak of our people because [receiving Communion is] what defines us as Catholics." Ex. D at 20:22-23, 21:4-6; Ex. L ¶ 21. Parishioners are "devastated" by the shuttering of churches, with some literally "crying" "at the front door" when they were told they could not enter. Ex. D at 43:4-7. And because this irreparable harm to the Diocese and its parishioners continues to compound with each passing day, the need for relief here is indisputably "critical and exigent."[10]

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

When compared with the "seriousness of [the Diocese's] constitutional harm, which is unlikely to be remedied" absent an injunction, the government's interest pales in comparison, especially considering the Diocese's "exemplar[y]" record of operating safely and without any COVID-19 outbreaks during the several months before this latest ban. Pl Order at 3, 24. As a threshold matter, the government simply "does not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2010) (quotation

[10] The Executive Order was originally set to expire on November 5, *see* Ex. F, but the Governor has extended the restrictions through at least December 3 and retained the authority to order further extensions, *see* Ct. App. Dkt. No. 70-2. Thus, absent immediate equitable relief from this Court, the Diocese and its parishioners will continue to be subjected to these onerous restrictions on their free exercise rights.

marks omitted). And although public health interests are undoubtedly important, the record is clear that enforcing the 10- and 25-person restrictions against the Diocese will not advance that interest in any way. The Governor's witness conceded that the Diocese's safety measures prevented any COVID-19 outbreaks stemming from its churches, and that he is unaware of any evidence of COVID spread from the ultra-Orthodox community—the "insular" community that the Governor blamed for the COVID spikes—to the Diocesan community. Dist. Ct. Dkt. No. 7-10; Ex. D at 76:14-17, 100:17-22; Ex. L ¶ 15; Ex. P ¶ 14.

The Governor's arguments below, largely adopted by the lower courts, centered around concerns that religious services might function as "super-spreader" events where even just one asymptomatic parishioner could trigger "infection spikes." *See, e.g.*, PI Order at 21-22; Ct. App. Dkt. No. 52 at 26-28. But such arguments, and the lower courts' conclusions based on them, cannot be squared with the evidentiary record in this as-applied challenge. Although both the Governor and the district court referenced various risk factors supposedly common to religious services generally, *see, e.g.*, Ct. App. Dkt. No. 52 at 8-9; PI Order at 12-13, the unrebutted evidence demonstrates that each of these risk factors has been addressed through the Diocese's existing safety protocols, which the Diocese is willing to accept as a condition of any injunction, Ex. D at 16:3-19:6, 37:1-38:10; Ex. L ¶¶ 12-13; Ex. N ¶ 13; Ex. P ¶¶ 11-13.[11] Thus, even the hypothetical asymptomatic parishioner would have to wear a

[11] Conversely, the Governor's purported evidence of public health risks attendant to religious worship relies on wholly irrelevant COVID-19 incidents in disparate parts of the country (and around the world) that have nothing to do with the Diocese and did not include its safety protocols.

(Cont'd on next page)

mask at all times, socially distance, and abide by all other safety protocols that the State's witness admitted prevent the spread of COVID. *See* Ex. D at 27:21-28:13, 36:3-37:14, 79:18-80:14; Ex. L ¶ 12; Ex. P ¶ 12. And the evidence those protocols work is the fact that, here, in operating for months under them, the Diocese's churches experienced no spread of COVID-19 whatsoever. Ex. D at 18:20-19:6, 42:3-18, 76:11-17; *see also* Ex. L ¶ 15; Ex. P ¶ 14.

No public health interest is served by enforcing arbitrary 10- and 25-congregant limits inside spacious churches where masks, social distancing, and other measures are already in place, especially when a huge superstore like Target or Staples in these same "red" and "orange" zones "can literally have hundreds of people shopping there." Ex. D at 83:15-18; *see* Second Circuit Order at Dissent 4 ("The question is not whether the State may take generally applicable public-health measures, but whether it may impose greater restrictions only on houses of worship. It may not."). The only equity remaining on the ledger is the right to Free Exercise.

The relief the Diocese seeks is extremely narrow—and yet extremely meaningful for thousands of Catholics in the Diocese. The Diocese accepts the Executive Order's percentage capacity limitations (indeed, the Diocese had already voluntarily imposed on itself an earlier 25% capacity limit) and asks this Court to enjoin, on an as-applied basis, a total of just *twelve words* in the Executive Order—

See, e.g., Ct. App. Dkt. No. 52 at 27-28; Dist. Ct. Dkt. No. 20 ¶¶ 65-68, 87-88; Dist. Ct. Dkt. No. 20-21 at 2 (describing outbreak in Arkansas, at the very beginning of the pandemic, following a multiday series of activities including children's competitions and buffet-style food); Dist. Ct. Dkt. No. 20-29 at 1-4 (discussing outbreak linked to an event that involved not just a church service—presided over by a minister who publicly "questioned the wisdom of masks"—but also an over-capacity indoor reception at which "many attendees didn't wear masks or socially distance").

"or 10 people, whichever is fewer" in red zones and "the lesser of . . . or 25 people" in orange zones. Moreover, "the Church, its [clergy], and its congregants [would] adhere to the [existing] public health requirements mandated" by the State and its own COVID-19 protocols. *Maryville Baptist*, 957 F.3d at 616; *accord Roberts*, 958 F.3d at 416. The Governor's ability to protect the public will remain unimpeded, as will his ability to enforce and promulgate regulations. What he cannot do—what the Constitution forbids him from doing—is to "swe[ep] up" compliant parties "in that effort," TRO Order at 3, and run roughshod over their Free Exercise rights.

CONCLUSION

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

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Respectfully submitted,

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