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In the Supreme Court of the United States

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

Applicants,

v.

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK,

Respondent.

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

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF
APPLICANT BY THE MUSLIM PUBLIC AFFAIRS COUNCIL, RELIGIOUS
FREEDOM INSTITUTE'S ISLAM AND RELIGIOUS FREEDOM ACTION
TEAM, AND ASMA UDDIN**

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The Muslim Public Affairs Council (“MPAC”), Religious Freedom Institute’s Islam and Religious Freedom Action Team (“IRF”), and Asma Uddin respectfully move for leave to file an *amicus* brief in support of Applicants’ Emergency Application for Writ of Injunction, without the 10 days’ advance notice to the parties of *amici*’s intent to file as ordinarily required.

In light of the expedited briefing schedule set by the Court, it was not feasible to give 10 days’ notice. Applicants consent to the filing of this brief. Respondent takes no position on this motion.

MPAC, IRF, and Ms. Uddin represent the interests of adherents of the Islam, whose religious freedom and very physical safety are at stake if government officials are allowed to target religious minorities. MPAC is a community-based public affairs nonprofit organization working for the integration of Muslims into American society. MPAC’s view is that America is enriched by the vital contributions of American Muslims. IRF works to amplify Muslim voices on religious freedom and to protect the religious freedom of Muslims by engaging in research, education, and advocacy. IRF believes that the Islamic faith teaches Muslims to want for others what they want for ourselves, and that supporting the Jewish groups is in the interest of the common good. Ms. Uddin is a religious liberty lawyer and scholar working for the protection of religious expression for people of all faiths in the United States and abroad. Ms. Uddin focuses much of her scholarship on religious minorities; her most recent book is *When Islam is Not a Religion: Inside America’s Fight for Religious Freedom* (2019).

MPAC, IRF, and Ms. Uddin write separately to increase the Court's understanding of the ways in which religious minorities have historically been scapegoated in times of fear and uncertainty. This brief will highlight the way that New York's policy fits into that troubling pattern. The *amicus* brief thus includes relevant material not fully brought to the attention of the Court by the parties. See Sup. Ct. R. 37.1.

For the foregoing reasons, proposed *amici* respectfully request that the Court grant this motion to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	3
I. Government often scapegoats religious minorities during times of public fear or uncertainty.	3
II. The City’s policy violates the Free Exercise Clause.	9
CONCLUSION.....	14

TABLE OF AUTHORITIES

Cases

<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935).....	5, 6
<i>Capitol Hill Baptist Church v. Bowser</i> , No. 20-CV-02710 (TNM), 2020 WL 5995126 (D.D.C. Oct. 9, 2020).....	13
<i>Church of the Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993).....	3, 10
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	3, 12
<i>Denver Bible Church v. Azar</i> , No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994 (D. Colo. Oct. 16, 2020).....	12
<i>Elhady v. Kable</i> , 391 F. Supp. 3d 562 (E.D. Va. 2019).....	8
<i>Latif v. Holder</i> , 28 F. Supp. 3d 1134 (D. Ore. 2014).....	8
<i>Minersville Sch. Dist. v. Gobitis</i> , 310 U.S. 586 (1940).....	6, 7
<i>Roberts v. Neace</i> , 958 F.3d 409 (6th Cir. 2020)	13
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , No. 20-CV-4844(NGG)(CLP), 2020 WL 5994954 (E.D.N.Y. Oct. 9, 2020)	11
<i>West Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	7

Other Authorities

<i>Anti-Semitic Incidents Reach 40-Year High With Most Cases In New York, New Jersey</i> , CBS New York (May 12, 2020)	3, 13
Josh Blackman, <i>Understanding Governor Cuomo’s Hostility Towards Jews</i> , Reason (Oct. 8, 2020)	11

Jan Bremmer, <i>Scapegoat Rituals in Ancient Greece</i> , 87 Harv. Stud. Classical Philology (1983)	4
Brief of <i>Amicus Curiae</i> Institute of Justice in Support of Reversal, <i>Gundy v. United States</i> , 139 S. Ct. 2116 (No. 17-6086), 2018 WL 2684384	5
Dep't of Justice, <i>Confronting Discrimination in the Post-9/11 Era</i> ; <i>Challenges and Opportunities Ten Years Later</i> (2011)	8
Kay Dervish, <i>Why Have Anti-Semitic Hate Crimes Risen in New York?</i> , City & State New York (Jan. 29, 2020)	3, 13
Noah Feldman, <i>Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices</i> (2010)	7
The Editorial Board, <i>Andrew Cuomo Takes a 'Hatchet'</i> , Wall Street Journal, October 15, 2020, https://www.wsj.com/articles/andrew-cuomo-takes-a-hatchet- 11602803166	11
Emma Green, <i>Measles Can Be Contained. Anti-Semitism Cannot.</i> , The Atlantic (May 25, 2019).....	13
Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto, New York State (Oct. 9, 2020)	11
<i>Leviticus</i> 16:21–22	4
Howard N. Lupovitch, <i>Jews and Judaism in World History</i> (2012).....	4
David R. Manwaring, <i>Render Unto Caesar</i> ; <i>The Flag Salute Controversy</i> (1962).....	7
O.R. Pilat, <i>Brooklyn Hens to Cackle in Duel With Scream of the Blue Eagle</i> , Brooklyn Daily Eagle, May 1, 1935	5
Mack Rosenberg, WCBS 880 Newsroom, <i>NYC Jewish Community Leaders Worry About Rise in Anti-Semitism Connected to COVID Hot Spots</i> (Oct. 2, 2020).....	13
The Sikh Coalition, <i>Fact Sheet on Post-9/11 Discrimination and Violence against Sikh Americans</i>	9
Amity Shlaes, <i>The Forgotten Man: A New History of the Great Depression</i> (2007)	6
Asma T. Uddin, <i>When Islam is Not a Religion: Inside America's Fight for Religious Freedom</i> (2019)	8

U.S. Department of Justice, <i>Update on the Justice Department’s Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010–2016</i> (2016)	9
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INTERESTS OF AMICI CURIAE¹

The Muslim Public Affairs Council (MPAC) is a community-based public affairs nonprofit organization working for the integration of Muslims into American society. MPAC aims to increase the public understanding of Islam and to improve policies that affect American Muslims, by engaging our government, media, and communities. MPAC's view is that America is enriched by the vital contributions of American Muslims. MPAC works diligently to offer the public a portrayal that goes beyond stereotypes and shows that Muslims are part of a vibrant American pluralism.

The Religious Freedom Institute's Islam and Religious Freedom Action Team ("IRF") amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. IRF engages in research, education, and advocacy on core issues like freedom of religion, and the freedom to live out one's faith, including in the workplace and at school. IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both in places where Muslims are a majority and where they are a minority, and partnering with the Institute's other teams in advocacy. IRF believes that the Islamic faith teaches Muslims to want for others what they want for themselves, and that supporting

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. This brief has been submitted with an unopposed motion for leave to file it.

the Jewish groups in this case is in the interest of the common good.

Asma T. Uddin is a religious liberty lawyer and scholar working for the protection of religious expression for people of all faiths in the United States and abroad. Her most recent book is *When Islam is Not a Religion: Inside America's Fight for Religious Freedom* (2019).

Amici have an interest in bringing to light unfortunate historical examples of government officials targeting religious minorities in times of turmoil or uncertainty, and highlighting the way that New York's policy fits into that troubling pattern.

SUMMARY OF ARGUMENT

Since ancient times, peoples around the world have symbolically vested the perceived wrongdoings of their community onto “scapegoats,” who are sacrificed in the hope that those wrongdoings will be expiated, and the hard times will pass. Too often, religious minorities have served as scapegoats in times of sickness, war, and fear—from Jews during the Black Death, to Jehovah's Witnesses During WWII, to Muslims after 9/11. Latest in a long and troubling line of such incidents are the statements and policies of Governor Cuomo blaming Orthodox Jewish communities for the spread of COVID-19 and specifically targeting them for closures and restrictions, all despite a dearth of evidence.

The Governor's orders impose restrictions on predominantly Jewish communities that are harsher than those on neighborhoods with similar COVID rates. Indeed, the Governor candidly acknowledged that the Jewish community

was the “target” and the “problem.” App. 100, 102. Such a law, targeting religious conduct, is the antithesis of a neutral and generally applicable law. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–33 (1993).

Further, far from being narrowly tailored, Government officials have admitted that the new restrictions are “blunt” and carved with a “hatchet,” as opposed to “a highly nuanced, sophisticated response.” App. 117. And the impetus of the policy is a “fear driven response” meant to manage the “anxiety” of its constituents. App. 117, 389. Thankfully, the Constitution does not sanction religious bigotry as a form of anxiety management. See, e.g., *Lukumi*, 508 U.S. at 531–33; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

The stakes of this Court’s ruling are high. In New York today, hate crimes against Jewish Americans are at their highest levels since 1992.² The Government’s accusatory rhetoric is fanning the flames of an already precarious position for the City’s Orthodox Jews, and this irresponsible behavior can have deadly consequences. This Court should strike down government policies that are rooted in and encourage such dangerous religious hostility. The First Amendment demands nothing less.

ARGUMENT

I. Government often scapegoats religious minorities during times of public fear or uncertainty.

And Aaron shall lay both his hands upon the head of the live goat, and confess over him all the iniquities of the children of Israel, and all their

² See Kay Dervish, *Why Have Anti-Semitic Hate Crimes Risen in New York?*, City & State New York (Jan. 29, 2020), <https://www.cityandstateny.com/articles/politics/ask-experts/why-have-anti-semitic-risen-new-york.html>; see also *Anti-Semitic Incidents Reach 40-Year High With Most Cases In New York, New Jersey*, CBS New York (May 12, 2020), <https://newyork.cbslocal.com/2020/05/12/anti-semitic-incidents-reach-40-year-high-with-most-cases-in-new-york-new-jersey/>.

transgressions in all their sins, putting them upon the head of the goat, and shall send him away by the hand of a fit man into the wilderness: And the goat shall bear upon him all their iniquities unto a land not inhabited: and he shall let go the goat in the wilderness.

Leviticus 16:21–22. This is the purification ritual now known as “scapegoating,” described in the Torah. Similar rituals were found in many ancient cultures—in India, and in Tibet, among the Greeks, the Romans, and the Hittites. Jan Bremmer, *Scapegoat Rituals in Ancient Greece*, 87 Harv. Stud. Classical Philology 299, 299 (1983). The ancient Greeks, for their part, conducted such rituals, in which “the community sacrifices one of its members to save its own skin,” both regularly at a yearly festival and during times of trouble, such as famine, drought, and plague. *Id.* at 300–301. Though at times one finds kings and princesses serving as scapegoats in myths, in actual historical scapegoating rituals the Greeks sacrificed only the poor, the ugly, and criminals, those seen as “lower class” and who were marginalized by the wider society. *Id.* at 303–305.

In striking resemblance to those ancient practices, there is a long and unfortunate history dating back to the Middle Ages of the (albeit less ritualized) scapegoating of religious minorities during times of fear and uncertainty. The anti-Semitism that arose in much of continental Europe during the Black Death provides one shameful example. See Howard N. Lupovitch, *Jews and Judaism in World History* 92 (2012). Fear and uncertainty surrounding the plague led in 1348 to rumors that Jews were intentionally spreading the disease by poisoning wells. *Ibid.* This, in turn, led to rioters burning whole Jewish communities. *Ibid.* Jews were blamed for an outbreak of leprosy and massacred in France around the same period. *Id.* at 94.

Even the most cursory study of history reveals dozens of similar examples, many of which occurred when society was at its most vulnerable.

The United States is not immune from this tradition of religious discrimination. These threats have at times come in the form of allegedly neutral laws meant to address public safety concerns. For example, following the fear and uncertainty of the Great Depression, President Roosevelt enacted the National Industrial Recovery Act to further the “public interest” and public health. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). This Act broadly empowered the President to create “codes of fair competition . . . in furtherance of the public interest,” and for the protection of the public’s health. *Id.* at 521 n.4. As a result of this Act, the “Live Poultry Code” was promulgated to regulate New York City’s poultry industry, which covered selling, purchasing for resale, transporting, handling, and slaughtering. See *id.* at 523–524.³

However, the government selectively enforced this Act against businesses engaging in live-butchered chickens. As it happened, “[a]t the time, minority groups dominated the purchase of live-butchered chickens in New York City: 80 percent of these chickens were sold to Jewish families, the rest to African Americans, Chinese, and Italian residents.” O.R. Pilat, *Brooklyn Hens to Cackle in Duel With Scream of the Blue Eagle*, *Brooklyn Daily Eagle* (May 1, 1935) at 3. Federal prosecutors hoped that their selective prosecution would play on negative public sentiments about the

³ See also Brief of *Amicus Curiae* Institute of Justice in Support of Reversal at 21–26, *Gundy v. United States*, 139 S. Ct. 2116 (No. 17-6086), 2018 WL 2684384.

poultry industry, which would in turn highlight the health benefits of the Act. Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* 203–04 (2007).

Eventually, the government indicted and convicted four Jewish men, the Schechter brothers, for the sale of unfit chickens. *Schechter Poultry*, 295 U.S. at 527–29. The four poultry butchers faced potential prison time, even though agency investigators failed to find a *single* sick chicken at the Schechters’ plant. See Shlaes, *supra* at 223–24. Nevertheless, the government was able to use its prosecution to reinforce the narrative that its regulations were necessary to protection public health. See *id.* at 203. The government succeeded in its goal by scapegoating members of a minority religion.

When government shows hostility towards certain religious groups, or refuses to protect them, this often correlates with an increase in private anti-religious bigotry and violence. One example of this type of hostility came in the aftermath of the Supreme Court’s decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). This case was decided on the brink of World War II; a period filled with fear and uncertainty. Two Jehovah’s Witness children had requested that they be excused from performing a flag salute ceremony in school due to their religious convictions. *Id.* at 591–592. The Court refused, expounding on the importance of patriotism and rejecting the idea that the Constitution provided “exceptional immunity . . . to dissidents.” *Id.* at 599–600. The children were forced to either salute the flag or be expelled from school. *Id.* at 591.

By denying these schoolchildren a religious exemption, many feared the Court “had declared open season on the Witnesses.” Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* 185 (2010). These fears quickly became reality. Within days, Jehovah’s Witnesses were subjected to physical violence and persecution for their religious beliefs. See David R. Manwaring, *Render Unto Caesar: The Flag Salute Controversy* 164–65 (1962). Across the country, Jehovah’s Witnesses were beaten, mutilated, and even killed while angry mobs attacked and burned their homes and places of worship. See *ibid.* They were often arbitrarily imprisoned by public authorities who were complicit in the persecution. *Id.* at 166. Even schoolchildren were subjected to abuse. Local and state governments across the country adopted similar statutes, expelling any non-compliant Witness students. Feldman, *supra* at 185. The government’s casual dismissal of the rights of this minority religion led to an even greater deterioration of their rights to religious freedom and even to peace and safety. Perhaps based in part on this recognition, the Court reversed its approach and offered protections to Jehovah’s Witnesses who objected to flag salutes just three years later. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

This phenomenon is unfortunately not a relic of the past. More recently, religious minorities—including Muslim and Sikh Americans—were scapegoated in the aftermath of the September 11th terrorist attacks. For a decade after the attacks, Muslim religious and community organizations were singled out and subjected to

mass surveillance initiatives by a secret unit of the New York Police Department known as the “Demographic Unit.” See Asma T. Uddin, *When Islam is Not a Religion: Inside America’s Fight for Religious Freedom* 231–32 (2019). Under this program, the NYPD surveilled “at least 20 mosques, 14 restaurants, 11 retail stores, two grade schools and two Muslim student organizations” using remote-controlled surveillance cameras. *Id.* at 232. Undercover officers infiltrated mosques to record imams’ sermons and informants infiltrated Muslim businesses and schools to record conversations in which they deliberately tried to bait Muslims into making inflammatory statements that would bring them under government suspicion. See *id.* at 232–235. All this resulted in not a single terrorism lead. *Id.* at 236. Nationally, Muslims were subjected to unconstitutional federal government screening and monitoring. Many of these practices have since been ruled unconstitutional by federal courts.⁴

In addition to this targeting from government officials, Muslim Americans faced an increase in private threats and acts of violence after the September 11th attacks. The Federal Bureau of Investigation reported that anti-Muslim hate crime incidents increased by 1,600% in 2001.⁵ And, even as the number of violent incidents decreased, they were “soon replaced by other bias-related incidents, including

⁴ See, e.g., *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Ore. 2014) (holding that the federal No-Fly List procedures violated the Due Process Clause); *Elhady v. Kable*, 391 F. Supp. 3d 562, 585 (E.D. Va. 2019) (holding that the federal government’s Traveler Redress Inquiry Program for listings in the Terrorist Screening Database violated the Due Process Clause).

⁵ Dep’t of Justice, *Confronting Discrimination in the Post-9/11 Era: Challenges and Opportunities Ten Years Later* 4 (2011).

discrimination in education employment, and religious land use.”⁶ Sikh Americans have also suffered from this scourge of religious discrimination and hate crimes.⁷ Once again, when those in power chose to use a religious minority as a convenient and popular scapegoat during times of crisis or fear, much more troubling private targeting of these groups was not far behind. As discussed below, the government officials in New York have followed a similar disturbing pattern with respect to the City’s Orthodox Jewish communities.

II. The City’s policy violates the Free Exercise Clause.

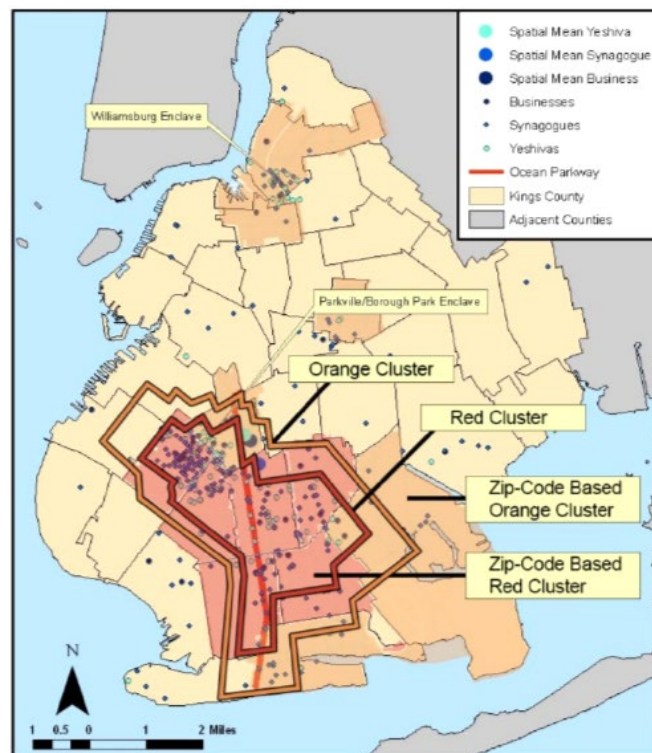
The targeting of religious minorities during times of crisis is nothing new. But this case provides a particularly egregious example. The Governor’s Cluster Initiative for implementing heightened COVID restrictions in certain areas originally did not include criteria for restrictions. App. 322-24. This policy does not require the same draconian restrictions be imposed on areas in New York with similar COVID-19 concentration levels as those in Jewish neighborhoods. App. 196-201, 385. For example, on October 23 the Red Zones in Brooklyn had a 7-day rolling average positivity rate of 4.57%. But the Government did not implement Red Zone restrictions

⁶ *Ibid.* The Justice Department has documented “particularly severe discrimination faced by Muslims in land use.” U.S. Department of Justice, *Update on the Justice Department’s Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010–2016* 6 (2016), <https://www.justice.gov/crt/file/877931/download>.

⁷ Since 2001, there have been thousands of reports of hate crimes, workplace discrimination, school bullying, and racial and religious profiling against the Sikh community. See The Sikh Coalition, *Fact Sheet on Post-9/11 Discrimination and Violence against Sikh Americans*, <https://www.sikhcoalition.org/images/documents/fact%20sheet%20on%20hate%20against%20sikhs%20in%20america%20post%209-11%201.pdf>. Examples of these crimes include the targeted murders of Sikh Americans, the fire-bombing of a Sikh-owned convenience store, verbal and physical abuse, death threats, and intimidation at places of worship. *Ibid.*

on areas with higher rates but without a significant Orthodox Jewish population. App. 313–14; Application at 14-15. Essentially, government officials gerrymandered Jewish neighborhoods for disfavored treatment, and left complete discretion with the government as to how and when to expand these onerous requirements. The Government’s actions are thus not neutral because they lack any neutral criteria. And they are not generally applicable, because officials have not treated institutions in similar COVID-threat zones in a similar way. *See Lukumi*, 508 U.S. at 531–33.

The government gerrymandering of heightened COVID restrictions is highlighted even more clearly in this map that overlays Orthodox institutions with the restrictions:



App. 385.

New York officials didn't just stop with policies that had the effect of targeting the Jewish communities—the Governor described his policy in ways that were, by the Governor's explicit admission, “targeting” certain “unique clusters” with “religious organizations.”⁸ The Governor referred repeatedly to “the ultra-Orthodox community” and the “Jewish community,” and threatened to “close the[ir] institutions down.” App. 96. He also stated, “[w]e're now having issues in the Orthodox Jewish community in New York, where because of their religious practices, etc., we're seeing a spread.” App. 310. And lest there remain any room for doubt, the visual aids the Governor used to illustrate “clear violations of social distancing” in the “recent past” featured gatherings by just one particular group: Orthodox Jews. App. 100. Never mind that at least one of the photos was nearly fifteen years old—it served the purpose of allowing government officials assert that the Jewish community was the “problem” to solve. App. 100, 102. Essentially, the Governor is playing on the old anti-Semitic trope, dating back to the days of the Black Plague, that Jews spread diseases.⁹

Further, this law is a far cry from a narrowly tailored law. Government officials acknowledged that the new restrictions were not “a highly nuanced, sophisticated response” but were instead a “fear driven response” carved with a “hatchet” rather

⁸ *Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto*, New York State (Oct. 9, 2020), <https://perma.cc/LDV2-8EVR/>; see also *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-CV-4844(NGG)(CLP), 2020 WL 5994954, at *1 (E.D.N.Y. Oct. 9, 2020) (“[T]he Governor of New York made remarkably clear that this Order was intended to target [Orthodox Jewish] institutions.”).

⁹ Josh Blackman, *Understanding Governor Cuomo's Hostility Towards Jews*, Reason (Oct. 8, 2020), <https://reason.com/2020/10/08/understanding-governor-cuomos-hostility-towards-jews/>.

than a “scalpel.” App. 4, 117.¹⁰ Indeed, the Governor essentially conceded this law wasn’t narrow tailored, when he stated that New York City had not taken “a smarter, more tailored approach.” App. 389.

Nor does an interest in addressing public health seem to be the driving explanation for the recent heightened COVID-19 restrictions under the Cluster Initiative. Because of the concern that “the fear [was] too high” in the City, Governor Cuomo said that he would use a blunt policy to help “the anxiety come[] down.”¹¹ App. 117. He emphasized that the City has “a real problem with fear and anxiety” and with people “moving out.” App. 389. But “unsubstantiated . . . fears” are not even a legitimate basis for a government policy, much less a compelling one. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

The existence of generalized public health concerns does not mean that the Government’s unfounded judgments in this case are entitled to limitless deference. As one court addressing a similar issue in the COVID-context recently explained, “the existence of an emergency, even one as serious as this one, does not mean that the courts have no role to play, or that the Constitution is any less important or enforceable.” *Denver Bible Church v. Azar*, No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994, *1 (D. Colo. Oct. 16, 2020). Specifically, courts upholding the First Amendment must be vigilant in ensuring that government officials do not “treat religious worship as any less critical or essential than other human endeavors.” *Ibid.*

¹⁰ The Editorial Board, *Andrew Cuomo Takes a ‘Hatchet’*, Wall Street Journal, October 15, 2020, <https://www.wsj.com/articles/andrew-cuomo-takes-a-hatchet-11602803166>.

¹¹ *Ibid.*

Moreover, “the existence of a crisis does not mean that the inalienable rights recognized in the Constitution become unenforceable.” *Id.* at *6. Indeed, “as ‘emergency’ restrictions extend beyond the short-term into weeks and now months, courts may become more stringent in their review.” *Id.* at *8. *See also Capitol Hill Baptist Church v. Bowser*, No. 20-CV-02710 (TNM), 2020 WL 5995126, at *7 (D.D.C. Oct. 9, 2020) (“[W]hen a crisis stops being temporary, and as days and weeks turn to months and years, the slack in the [judicial] leash eventually runs out.”); *Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020) (per curiam) (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”).

Government officials in this case should be particularly cautious of the way in which their actions can fan the flames of an already precarious position for New York’s Orthodox Jewish community. The City is currently experiencing a “record number” of anti-Semitic hate crimes—the highest number since 1992.¹² And in 2019 when New York experienced a measles outbreak, Orthodox Jews were frequently berated in public and blamed for the spread of the sickness.¹³ Continuing down the path of scapegoating the Jewish community, simply to alleviate public fear, could

¹² See Kay Dervish, *Why Have Anti-Semitic Hate Crimes Risen in New York?*, City & State New York (Jan. 29, 2020), <https://www.cityandstateny.com/articles/politics/ask-experts/why-have-anti-semitic-risen-new-york.html>; see also *Anti-Semitic Incidents Reach 40-Year High With Most Cases In New York, New Jersey*, CBS New York (May 12, 2020), <https://newyork.cbslocal.com/2020/05/12/anti-semitic-incidents-reach-40-year-high-with-most-cases-in-new-york-new-jersey/>.

¹³ Emma Green, *Measles Can Be Contained. Anti-Semitism Cannot.*, The Atlantic (May 25, 2019), <https://www.theatlantic.com/politics/archive/2019/05/orthodox-jews-face-anti-semitism-after-measles-outbreak/590311/>.

have deadly consequences for New York's Jews.¹⁴ This Court should not countenance such dangerous religious targeting.

CONCLUSION

This Court should issue the requested injunction.

Respectfully submitted,

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¹⁴ Mack Rosenberg, WCBS 880 Newsroom, *NYC Jewish Community Leaders Worry About Rise in Anti-Semitism Connected to COVID Hot Spots*, October 2, 2020, <https://www.radio.com/wcbs880/news/local/jewish-leaders-worry-about-anti-semitism-connected-to-covid>.