Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25,2020]

PER CURIAM.

The application for injunctive relief presented to JUSTICE BREYER and by him referred to the Court is granted. Respondent is enjoined from enforcing Executive Order 202.68's 10- and 25-person occupancy limits on applicant pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

* * * * * *

This emergency application and another, Agudath Israel of America, et al. v. Cuomo, No. 20A90, present the same issue, and this opinion addresses both cases.

Both applications seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The two applications, one filed by the Roman Catholic Diocese of Brooklyn and the other by Agudath Israel of America and affiliated

entities, contend that these restrictions violate the Free Exercise Clause of the First Amendment, and they ask us to enjoin enforcement of the restrictions while they pursue appellate review. Citing a variety of remarks made by the Governor, Agudath Israel argues that the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included. Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities. And they tell us without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak.

The applicants have clearly established their entitlement to relief pending appellate review. They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential.

Likelihood of success on the merits. The applicants have made a strong showing that the challenged restrictions violate "the minimum requirement of neutrality" to religion. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993). As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the "'ultra-Orthodox [Jewish] community.'" ___ F. 3d ___, ___, 2020 WL 6750495, *5 (CA2, Nov. 9, 2020) (Park, J., dissenting). But even if we put those comments aside, the regulations cannot be viewed

as neutral because they single out houses of worship for especially harsh treatment.[1]

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. See New York State, Empire State Development, Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders, https://esd.ny.gov/guidance-executive-order-2026. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could "literally have hundreds of people shopping there on any given day." App. to Application in No. 20A87, Exh. D, p. 83. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID–19, *id.*, Exh. H, at 3; App. to Application in No. 20A90, pp. 98, 100, but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records.

Because the challenged restrictions are not "neutral" and

---

[1] Compare *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 29) (directive "neutral on its face").

of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. *Church of Lukumi*, 508 U. S., at 546. Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored." They are far more restrictive than any COVID–related regulations that have previously come before the Court,[2] much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services. The District Court noted that "there ha[d] not been any COVID–19 outbreak in any of the Diocese's churches since they reopened," and it praised the Diocese's record in combatting the spread of the disease. ___ F. Supp. 3d ___, ___, 2020 WL 6120167, *2 (EDNY, Oct. 16, 2020). It found that the Diocese had been constantly "ahead of the curve, enforcing stricter safety protocols than the State required." *Ibid.* Similarly, Agudath Israel notes that "[t]he Governor does not dispute that [it] ha[s] rigorously implemented and adhered to all health protocols and that there has been no outbreak of COVID–19 in [its] congregations." Application in No. 20A90, at 36.

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue. Almost all of the 26 Diocese churches immediately affected

---

[2] See *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020) (directive limiting in-person worship services to 50 people); *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020) (Executive Order limiting in-person worship to 25% capacity or 100 people, whichever was lower).

by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.

Irreparable harm. There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976) (plurality opinion). If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance. App. to Application in No. 20A90, at 26–27.

Public interest. Finally, it has not been shown that granting the applications will harm the public. As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not shown that public health would be imperiled if less restrictive measures were imposed.

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious