No. 20A87

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

MOTION BY FIRST LIBERTY INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF APPLICANT'S EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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MOTION BY FIRST LIBERTY INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF APPLICANT'S EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

First Liberty Institute hereby respectfully moves for leave to file the attached brief as amicus curiae in support of Applicant's emergency application for writ of injunction. The day after the case was docketed, all counsel of record were timely notified of First Liberty's intent to file this brief.[1] Counsel for Applicant Roman Catholic Diocese of Brooklyn consented; counsel for Respondent Governor Cuomo responded that they did not take a position on our request for consent.

As a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans, First Liberty maintains a strong interest in the outcome of this case. First Liberty provides pro bono legal representation to individuals and institutions of all faiths — Catholic, Jewish, Muslim, Native American, Protestant, the Falun Gong, and others. Throughout the COVID-19 pandemic, First Liberty has advised and successfully sought relief for religious congregations seeking to practice their faith safely and without discrimination. *See, e.g.*, *On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. Apr. 11, 2020) (granting temporary relief against discriminatory restrictions on drive-in worship services); *Capitol Hill Baptist Church v. Bowser*, 2020 U.S. Dist. LEXIS 188324 (D. D.C. Oct. 9, 2020)

[1] This motion will be filed earlier than 10 days before the due date, consistent with the notice requirement of Supreme Court Rule 37.2(a).

(granting temporary relief against discriminatory restrictions on outdoor worship services).

As an amicus, First Liberty maintains an interest both in seeking clarification in the law relating to religious liberty and COVID-19 and in preserving religious liberty in New York for our many New York clients of various faiths who must navigate the challenges of COVID-19 and its associated restrictions while continuing to practice their faith.

Respectfully submitted,

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No. 20A87

IN THE

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THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,
Applicant,
v.
GOVERNOR ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY,
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To the Honorable Stephen Breyer, Associate Justice of the United States Supreme Court and Acting Circuit Justice for the Second Circuit

BRIEF OF AMICUS CURIAE FIRST LIBERTY INSTITUTE IN SUPPORT OF APPLICANT'S EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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November 17, 2020

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INTEREST OF AMICUS CURIAE

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans.[2] First Liberty provides pro bono legal representation to individuals and institutions of all faiths — Catholic, Jewish, Muslim, Native American, Protestant, the Falun Gong, and others.

Throughout the COVID-19 pandemic, First Liberty has advised and successfully sought relief for religious congregations seeking to practice their faith safely and without discrimination. *See, e.g.*, *On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. Apr. 11, 2020) (granting temporary relief against discriminatory restrictions on drive-in worship services); *Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710 (TNM), 2020 U.S. Dist. LEXIS 188324 (D. D.C. Oct. 9, 2020) (granting temporary relief against discriminatory restrictions on outdoor worship services). Even during times of crisis, federal courts have a continuing duty to protect constitutional rights.

As an amicus, First Liberty maintains an interest in preserving religious liberty in New York for our many New York clients of various faiths who seek to navigate the challenges of COVID-19 while continuing to practice their faith.

[2] Attorneys from First Liberty Institute authored this brief as amicus curiae. No attorney for any party authored any part of this brief, and no one apart from amicus curiae made any financial contribution toward the preparation or submission of this brief. All parties were timely notified. Counsel for Applicant Roman Catholic Diocese of Brooklyn consented; counsel for Respondent Governor Cuomo responded that they did not take a position on our request.

SUMMARY OF ARGUMENT

For too long during this current crisis, the State of New York has forced religiously-motivated activity to play by a different set of rules than everyone else. *See, e.g.*, *Soos v. Cuomo*, No. 1:20-cv-651 (GLS/DJS), 2020 U.S. Dist. LEXIS 111808, at *29–33 (N.D.N.Y. June 26, 2020). Governor Cuomo's latest Executive Order imposes the most obvious double standard yet, preferencing well over one hundred secular, for-profit activities over religiously-motivated activities. Attendance at houses of worship is capped at 10 or 25 people within red or orange zones, while a wide range of for-profit activity in these zones are not subject to any capacity limitations at all. Restrictions that apply only to "Houses of Worship" are, by definition, not religion-neutral or generally applicable across the board. Therefore, under straightforward Free Exercise principles, the Order must receive strict scrutiny. The lower court erred by avoiding the proper level of scrutiny.

An emergency injunction must be granted, not only because it is necessary on the facts of this case, but more importantly, because it is urgently necessary to correct lower courts' widespread misinterpretation of *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in the denial of application for emergency injunctive relief). Lower courts across the country are misconstruing the concurring opinion to hold that normal principles of constitutional law do not apply during a prolonged pandemic. Courts have granted an unprecedented level of deference to government officials to impose unequal and

discriminatory restrictions on religious exercise, functionally holding that decades of religious liberty precedents are indefinitely on hold. *South Bay*, of course, stands for no such thing.

It is indisputably clear that courts are to uphold the constitution and that they cannot abrogate their duty to protect constitutional rights. There is no more pressing constitutional concern than to ensure that federal courts understand their responsibilities during this time of crisis. The Court should grant the injunction and require lower courts to undertake a meaningful constitutional analysis of any infringement on individual liberty.

ARGUMENT

I. Ordering "Houses of Worship" to Abide by Different COVID Rules Than Any Other Activity Is Not Religion-Neutral and Not Generally Applicable; Therefore, Strict Scrutiny Applies.

Employment Division v. Smith, 494 U.S. 872 (1990), shields generally applicable laws that incidentally happen to burden religion. Singling out "Houses of Worship" for unique restrictions, Governor Cuomo's Executive Order is transparently not such a law. Therefore, the Order is not entitled to rational basis review under *Smith*. It must instead face strict scrutiny.

The purpose of the strict scrutiny analysis is to ensure that governments do not unnecessarily or improperly infringe upon sacred individual rights, such as religious liberty. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious

motivation will survive strict scrutiny only in rare cases." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). The Second Circuit erred by avoiding strict scrutiny analysis.

A. Free Exercise Legal Standards

Under current precedent, Free Exercise Clause claims face a threshold inquiry: whether the law that substantially burdens the plaintiff's religious exercise is "neutral or generally applicable."[3] *Smith*, 494 U.S. at 881; *Lukumi*, 508 U.S. at 531. A law that fails either criterion must face strict scrutiny, requiring the government to demonstrate that it seeks a compelling interest through narrowly tailored means. *Lukumi*, 508 U.S. at 531–32.

Although neutrality and general applicability are related concepts, they are distinct questions. *See Lukumi*, 508 U.S. at 531, 542. The neutrality inquiry proceeds in two parts—1) whether the law is facially religion-neutral, and, if so, 2) whether the law is substantively religion-neutral. *Id.* at 533–35. Facial neutrality is a textual question, asking whether the text of law "refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 533. For example, to determine whether the law at issue in *Lukumi* was facially neutral, the Court assessed whether the law's use of terms with religious connotations ("sacrifice" and "ritual") rendered it discriminatory on its face. *Id.* at 534. If the law

[3] In *Fulton v. City of Philadelphia*, No. 19-123, this Court is currently considering whether to return Free Exercise jurisprudence to the legal standard set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which is more protective of religious liberty than *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court need not resolve that issue here because even the minimum legal standards of *Smith* require strict scrutiny.

is not facially neutral, the inquiry ends and strict scrutiny applies. *Id.* at 533 ("[T]he minimum requirement of neutrality is that a law not discriminate on its face.").

If a law is facially religion-neutral, then the Court proceeds to assess whether the law is substantively religion-neutral; that is, whether in operation the law targets religious conduct for distinctive restrictions. *Id.* at 534–35. At this stage, a law that does not refer to religious activity on its face will nevertheless fail to demonstrate neutrality where its provisions operate overinclusively or underinclusively, employing a system of prohibitions or exemptions to create a gerrymander designed to target religious activity without expressly saying so. *See id.* at 535–38, 540 (concluding that "the ordinances were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice").

Finally, if the law is both facially and substantively religion-neutral, then the Court asks whether the law is generally applicable—that is, whether the law actually applies to everyone. This criterion is distinct from neutrality; the neutrality criterion asks whether the government's goal is legitimate (that is, whether the government is targeting religious activity), whether that goal is explicit (facial neutrality) or implicit (substantive neutrality). *See Lukumi*, 508 U.S. at 533–40. In contrast, general applicability asks whether the government, "in pursuit of legitimate interests," imposes selective burdens on religious activity. *Id.* at 542–43 ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."). Even

a law that does not necessarily target religious activity will not be generally applicable where it is underinclusive to its goal or incorporates a system of exceptions or exemptions. *See id.* at 543–44. *Compare Smith*, 494 U.S. at 876 (considering a controlled substances law generally prohibiting all peyote use) *with Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 363 (3d Cir. 1999) (finding plaintiffs entitled to a religious exemption to a police department grooming policy because the policy provided secular exemptions) *and Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) ("At some point, 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.").

B. Application of Free Exercise Legal Standards

In the present case, the Second Circuit failed at the first step—facial neutrality. The Order fails this bare minimum requirement, because its text specifically addresses religious activity as such, crafting a distinctive restriction that expressly applies *only* to Houses of Worship. The Order operates by creating several distinctions: first, for all zones, it distinguishes between essential activities and nonessential activities.[4] Essential activities are allowed to remain open without

[4] E.O. 202.68 (Oct. 6, 2020), *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.68.pdf; *Guidance for Determining Whether a Business Enterprise is Subject to Workforce Reduction Under Executive Order 202.68, Related to New York's Cluster Action Initiative to Address COVID-19 Hotspots*, Empire State Development (Oct. 7, 2020, 4:10 PM), https://esd.ny.gov/ny-cluster-action-initiative-guidance (hereinafter Workforce Reduction Guidance).

capacity restrictions in all zones.[5] Then, the Order divides nonessential activities into the following categories: gatherings (subsequently further divided into residential and nonresidential gatherings), businesses, houses of worship, dining (restaurants and taverns), and schools.[6] Each category receives a different restriction within each zone. The term "Houses of Worship" patently "refers to a religious practice without a secular meaning discernible from the language or context," *see Lukumi*, 508 U.S. at 533, and the restrictions that apply to Houses of Worship apply to no other category of activity. Thus, the Order lacks facial neutrality. The inquiry should end here and proceed to strict scrutiny. *See id.*

However, even if it were facially neutral and did not refer to Houses of Worship as such, the Order is neither substantively neutral nor generally applicable because of its broad exemption for "essential" activities. The slate of exempt essential activities is a voluminous list of fourteen categories with numerous subcategories, including everything from acupuncture to farmer's markets, pool maintenance to childcare, landscaping and horticulture to construction and convenience stores.[7] Yet, the Governor decided that religious activity was not important enough to be considered essential. Exempting a sweeping array of activities while deeming Houses of Worship nonessential is not neutral in operation. In *Lukumi*, the Court addressed a similar problem—one of the

[5] *See* E.O. 202.68; Workforce Reduction Guidance.
[6] *Cluster Action Initiative: Restrictions Within Clusters*, New York Forward, https://forward.ny.gov/cluster-action-initiative; *see* E.O. 202.68.
[7] *See Guidelines for Workforce Reduction* (listing over 100 activities deemed "essential").

ordinance's provisions incorporated the Florida animal cruelty statute, which prohibited the unnecessary killing of animals. *Lukumi*, 508 U.S. at 537. The Court rejected arguments that this prohibition was neutral, because its application turned on the government's judgment that religious killings were unnecessary, while other kinds of killings were necessary. *Id.* In the same way, the Order's "application of the . . . test of necessity devalues religious [activities] by judging them to be of lesser import than nonreligious [activities]." *See id.* at 537–38. Such a comparative value determination is not neutral under the First Amendment, which constitutionally places a high value on religious exercise. *See id.*; *Fraternal Order of Police*, 170 F.3d at 365 ("[I]t is clear from [*Smith* and *Lukumi*] that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection."). And Governor Cuomo's statements surrounding the Order demonstrate that this impact is intentional, imposing restrictions because of, not in spite of, their effect on religious exercise.[8] *See Lukumi*, 508 U.S. at 540.

[8] *See, e.g.*, Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces New Cluster Action Initiative (Oct. 6, 2020), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-announces-new-cluster-action-initiative ("I am informing all houses of worship today. Obviously these new rules are most impactful on houses of worship because this virus is not coming from nonessential businesses. That's not what this is about. . . . This is about mass gatherings. And one of the prime places of mass gatherings are houses of worship.").

For each of these reasons, the Order's restrictions on Houses of Worship are subject to strict scrutiny, where the government must demonstrate that it seeks a compelling interest by narrowly tailored means. *Lukumi*, 508 U.S. at 531–32. For the reasons the Applicant explains, the record below reflects that the government cannot make this showing. *See* Emergency Application for Writ of Injunction at 25–29, *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87.

Importantly, the strict scrutiny framework is not blind to the significant risk a pandemic poses; rather, it provides a mechanism to weigh the government's assessment of the comparative risk Houses of Worship pose (the compelling interest)[9] against the methods available to mitigate that risk (narrow tailoring). But the Free Exercise Clause does not allow the government to circumvent this inquiry altogether where its regulatory scheme specifically identifies religious activity for particularized restrictions while exempting broad categories of secular activities based on comparative necessity, not comparative risk. By evading these principles, the court below, relying on *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), effectively held that the government is entitled to circumvent the Free Exercise inquiry altogether if its general interest is sufficiently pressing. This is not the law.

[9] *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (noting that strict scrutiny requires the government to demonstrate more than "broadly formulated interests").

II. Injunctive Relief Is Justified, Not Only to Correct for the Specific Unconstitutional Action Here, but Also to Correct Lower Courts' Widespread Misinterpretation of *South Bay*.

By denying the emergency application for injunctive relief in *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), this Court did not create a new blanket rule of rational basis review for all pandemic-related restrictions on religious exercise, no matter the circumstances. Yet, several lower courts have cited the concurring opinion as justification to avoid their responsibility to undertake a true constitutional analysis, opting instead simply to defer to government officials so long as the action has a "real or substantial relation" to the crisis.[10] *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). The panel below relied upon *South Bay* to grant rational basis review. *Agudath Israel of Am. v. Cuomo*, Nos. 20-3572, 20-3590, 2020 U.S. App. LEXIS 35354, at *7–9 (2d Cir. Nov. 9, 2020). Without courts willing to act as a constitutional check, some government actors are no longer incentivized to respect the fundamental rights of citizens. This Court need not accept every pandemic-related case, but, in light of lower courts' widespread side-stepping of binding constitutional law, it is imperative that this Court clarify that "there is no pandemic exception to the Constitution"[11] and pre-existing legal standards remain in effect.

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[10] *See, e.g.*, *Spell v. Edwards*, No. 20-00282-BAJ-EWD, 2020 U.S. Dist. LEXIS 210530, at *14 (M.D. La. Nov. 10, 2020); *Columbus Ale House, Inc. v. Cuomo*, No. 20-cv-4291 (BMC), 2020 U.S. Dist. LEXIS 207410, at *3 (E.D.N.Y. Nov. 5, 2020); *Young v. James*, No. 20 Civ. 8252 (PAE) 2020 U.S. Dist. LEXIS 198392, at *6 (S.D.N.Y. Oct. 26, 2020); *Bimber's Delwood, Inc. v. James*, No. 20-CV-1043S, 2020 U.S. Dist. LEXIS 195823, at *22–24 (W.D.N.Y. Oct. 21, 2020) (collecting cases); *Carmichael v. Ige*, No. 20-00273 JAO-WRP, 2020 U.S. Dist. LEXIS 116860, at *13 (D. Haw. July 2, 2020) (collecting cases).

[11] United States' Statement of Interest at 10, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204-AWA-RJK, (E.D. Va. May 3, 2020), ECF No. 19.

In *South Bay*, the Court declined to enjoin a California order restricting church attendance to 25% of building capacity or 100 attendees during the early days of the pandemic. Chief Justice Roberts' opinion concurring in the denial was not a decision of the Court issued on the merits. *See Teague v. Lane*, 489 U.S. 288, 296 (1989), *superseded by statute on other grounds* ("[O]pinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits."). The concurrence did not purport to re-write constitutional law and did not specify that Free Exercise Clause claims during a pandemic are subjected to a lower level of scrutiny. Instead, Chief Justice Roberts wrote that he believed that restrictions at issue "appear[ed] consistent with the Free Exercise Clause of the First Amendment." *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). The concurrence was not intended to resolve all future Free Exercise claims in favor of the government, but rather emphasized the "dynamic and fact-intensive" nature of the inquiry. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved."). The opinion did not overturn decades of existing legal precedent.

South Bay's citation of *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) has fueled lower courts' push to disregard strict scrutiny. For the past several months, government officials have invoked *Jacobson* to argue that pandemic-related actions should be afforded rational basis review for actions that would otherwise warrant

strict scrutiny. In *Jacobson*, the State of Massachusetts exercised its police powers to require vaccinations in the city of Cambridge in light of a smallpox outbreak. 197 U.S. at 24–25. The Supreme Court declined to create a new substantive constitutional right allowing exceptions from the generally applicable law. *See id.* at 39. No Free Exercise claim was alleged. At the time, the Free Exercise Clause had not been incorporated to apply to the states. Although it is sometimes cited for the proposition that governments may disregard pre-existing constitutional legal standards in an emergency, *Jacobson* itself holds the opposite. According to *Jacobson*, states may only exercise their police powers in a way that does not violate the Constitution:

> The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police power of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.

Id. at 25. In short, neither *South Bay* nor *Jacobson* stand for the novel idea that longstanding First Amendment legal standards disappear in a crisis.

It would be particularly inappropriate to substitute a more deferential form of review when the challenged government action itself bypassed the normal legislative process. In *Jacobson*, the smallpox vaccine requirement was adopted

pursuant to a specific delegation from the state legislature. 197 U.S. at 27 (writing "the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety"). By contrast, today, state governors and other executive branch officials ask for rational basis review or its equivalent while wielding unconstrained emergency powers normally reserved for the legislative branch in order to impose unprecedented restrictions on the citizenry. Separation of powers concerns are heightened under these circumstances and courts must be vigilant to protect fundamental individual liberties. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) ("This Court's history is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes and cautions us against an unduly deferential judicial approach, especially when questions of racial discrimination, religious discrimination, or free speech are at stake.").

Requiring courts to apply heightened or strict scrutiny when it is warranted does not, of course, necessitate any outcome in any particular case. Certainly, *South Bay* highlighted that government actions taken in response to health emergencies will often further compelling interests. "Our Constitution principally entrusts '[t]he

safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' *S. Bay*, 140 S. Ct. at 1613 (quoting *Jacobson*, 197 U. S. at 38). Each case must be reviewed based upon its facts.

An injunction should be granted here because the particular facts and circumstances of this case are more clearly violative of the Free Exercise Clause than *South Bay*. First, the burden on religious exercise is more severe than in *South Bay*. The Order imposes maximum capacity caps of just 10 or 25 people as opposed to 100, effectively shuttering the Diocese's churches within the affected zones. Second, although there is evidence that the Order was intended to target the Orthodox Jewish community, it is written such that it subsumes all Houses of Worship within its restrictions. *See* Emergency Application for Writ of Injunction at 13–14, *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87. Finally, the Governor functionally admits that the rule is not narrowly tailored, having been crafted with a "hatchet" rather than a "scalpel." *Id.* at 14. For at least these reasons, the facts of this case exceed those in *South Bay* and warrant granting emergency injunctive relief.

It is indisputably clear that lower courts cannot abandon decades of binding legal precedent. Failing to apply strict scrutiny when required is reversible error. The Supreme Court has "a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility." *Calvary Chapel*, 140 S. Ct. at 2604 (Alito, J., dissenting from denial of application for injunctive relief).

CONCLUSION

For these reasons, the Court should grant emergency relief.

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