UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

YITZCHOK LEBOVITS and CHANA SHAPIRO-LEBOVITS, on their own behalf and on behalf of their daughters E.L., a minor, and A.L., a minor; and
BAIS YAAKOV ATERES MIRIAM, a New York religious corporation,

Plaintiffs,

v.

ANDREW M. CUOMO, individually and in his official capacity as Governor of the State of New York;
BILL DE BLASIO, individually and in his official capacity as Mayor of the City of New York;
LETITIA JAMES, in her official capacity as Attorney General of the State of New York;
HOWARD A. ZUCKER, in his official capacity as Commissioner of the New York State Department of Health;
CITY OF NEW YORK; and
NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Defendants.

Civil No. 1:20-cv-01284-GLS-DJS
Hon. Gary L. Sharpe

PLAINTIFFS' COMBINED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Caught violating the law, Defendants seek to evade review. In October 2020, Governor Cuomo announced a new "initiative" designed to impose heightened restrictions on activities in certain "clusters" across the State. As the Governor admitted, some of the "clusters, frankly," were "more religious organizations," and the cluster rules targeted for special disfavor core Orthodox Jewish institutions—houses of worship and schools. The Governor has now twice been told his initiative violates the First Amendment as to houses of worship, since "attending religious services" is "at the very heart of the First Amendment's guarantee of religious liberty." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020). And the initiative will fare no better as to schools like Plaintiffs', since "sending … children to religious schools" is no less "protected." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020).

Aware of this, Defendants seek a way out. *First*, Defendants argue the Court can't reach the merits, because the Governor has now removed Plaintiffs' school from the relevant cluster zone and issued a new executive order modifying the original to no longer "necessarily" require school closures. But *Diocese of Brooklyn* and *Agudath Israel* already rejected similar arguments from the Governor. This Court should follow suit—particularly since Defendants (1) concede the Governor retains the power to revert on school closures, (2) never commit not to do so going forward, and (3) continue to defend the original closure on the merits. In any event, Defendants' arguments, even if accepted, wouldn't help them avoid damages liability for the harm Plaintiffs *already* have suffered because of Defendants' unconstitutional actions.

Second, State Defendants argue that to the extent this case isn't moot, the Court still can't adjudicate Plaintiffs' claims against Governor Cuomo, because his issuance of the challenged *executive* order was in fact a *legislative* act subject to legislative immunity. This argument would fail a Civics 101 exam, and it should fail here, too.

Indeed just months ago, Chief Judge Suddaby explained the obvious: "By nature, executive orders are not legislative," so Governor Cuomo's COVID orders aren't shielded by an immunity meant for legislators. *Ass'n of Jewish Camp Operators v. Cuomo*, 470 F. Supp. 3d 197, 212-13 (N.D.N.Y. 2020).

Finally, City Defendants offer an array of arguments attempting to wriggle themselves (but not the Governor) off the hook, none persuasive. First, both the City and Mayor de Blasio are proper defendants, because both were personally involved in the unconstitutional actions challenged here. Second, Defendant the Department of Health and Mental Hygiene is likewise a proper defendant, because (*contra* City Defendants) no applicable law immunizes that agency from suit. And third, Mayor de Blasio isn't entitled to qualified immunity (a defense Cuomo conspicuously declines to raise) because—according to the Supreme Court itself—the challenged executive order didn't just violate the Constitution, but *indisputably* did so. *See Diocese of Brooklyn*, 141 S. Ct. at 66.

* * *

Defending the cluster initiative three months ago, Defendants persuaded this Court to "defer[]" to their judgment, which supposedly derived from "the State's medical experts" and was based on "science and data." *Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 6384683, at *6-7 (N.D.N.Y. Oct. 30, 2020). Now, however, it's been revealed that Governor Cuomo himself "'do[es]n't really trust the experts,'" and that the cluster initiative—far from being a disinterested application of public-health expertise by the officials supposedly qualified to render it—was instead "shaped largely by the governor's office," with the supporting science and data "match[ed]" to the governor's "announcements" after the fact.[1] "[D]eference does not equal unquestioned acceptance," either on the merits or on mootness—and it's hard to think of facts more

[1] J. David Goodman *et al.*, *9 Top N.Y. Health Officials Have Quit as Cuomo Scorns Expertise*, N.Y. Times (Feb. 1, 2021), https://perma.cc/MR3W-ZEDE.

clearly meriting application of that principle than these. *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 604 (2d Cir. 2016). Defendants have violated the Constitution and harmed Plaintiffs, and they seek an ongoing ability to do more. This case should proceed to discovery and resolution.

BACKGROUND

A. BYAM and its families

Bais Yaakov (also known as "Beys Yankev") is a global movement of Orthodox schools for Jewish girls. Compl. ¶¶24-30. Plaintiff Bais Yaakov Ateres Miriam (BYAM) is a school affiliated with the Bais Yaakov movement and located in Far Rockaway, Queens. *Id.* ¶¶12, 24.

BYAM exists to instill the values and traditions of Orthodox Judaism in the next generation of women. *Id.* ¶¶148-49. In-person education is a critical component of this religious mission. *Id.* ¶42. For example, the study and implementation of Torah is at the heart of a BYAM education, and Jewish law teaches that Torah is acquired only in a group setting, and that Torah study can only be fully experienced face-to-face, from teacher to pupil or between colleagues. *Id.* ¶¶43-44. Likewise, a BYAM student's day is filled with communal prayer and time-honored methods of holistic education, including group projects designed to instill ethical values and ritual food preparation—none of which are replicable outside of a school environment. *Id.* ¶¶45-55.

BYAM has more than 300 students, from nursery school through 8th grade. *Id.* ¶32. Among them are the daughters of Plaintiffs Yitzchok and Chana Lebovits, who send their children to BYAM to ensure they have the foundation they need to continue to learn about their faith throughout their life, as Orthodox Judaism requires. *Id.* ¶¶37-41.

B. BYAM's efforts to combat COVID-19

In the summer of 2020, the State issued a guidance document requiring schools that sought to reopen for in-person instruction in the fall to develop reopening plans

satisfying its health guidance. *Id.* ¶¶60-74. BYAM submitted its plan on July 31, and the plan was approved. *Id.* ¶¶75-84.

On September 8, BYAM reopened. *Id.* ¶85. In doing so, BYAM fully complied with government regulations and its own approved reopening plan, rigorously implementing mitigation measures such as social distancing, hand hygiene, and daily temperature checks. *Id.* ¶¶86-87. These measures worked: BYAM proved to be a safe place for its students to spend their days. *Id.* ¶¶88-89.

C. The Cluster Initiative

Later in the fall, however, Defendants shut BYAM down—despite there having been zero reported cases of COVID-19 in the school. *See id.* ¶88. First, in late September, Defendant Governor Cuomo identified "'20 hotspot ZIP codes'" purportedly with higher positivity rates than the rest of the State. *Id.* ¶90. Cuomo associated these "hotspots" with New York's "'Orthodox community,'" and warned that "'enforcement'" was "'going to be stepped up.'" *Id.* ¶91.

Defendant Mayor de Blasio then proposed heightened restrictions in certain of those ZIP codes. Specifically, the Mayor proposed to close all schools and "nonessential businesses" in 9 of the 20 "hotspot" ZIP codes. *Id.* ¶96. The ZIP codes targeted under the Mayor's plan were the "hotspot" ZIP codes that have "'large populations of Orthodox Jews.'" *Id.* ¶98 (quoting Amelia Nierenberg & Adam Pasick, *N.Y.C. Closes Some Schools … Again*, N.Y. Times (Oct. 5, 2020), https://perma.cc/UL4F-55VP).

Governor Cuomo then sought to (in his words) "sharpen" de Blasio's plan. ECF 6-2 at 7. At an October 5 press conference, the Governor stated that rather than being based on ZIP codes, heightened restrictions should be imposed on "'[n]eighborhoods and communities.'" Compl. ¶101. And the Governor wasn't coy about the particular "community" he had in mind, referring repeatedly to "the Orthodox community," the "Jewish community," and "rabbi[s]," and displaying photographs of gatherings of Orthodox Jews—one of which (*contra* the Governor's statement that the photographs

had been taken "in the recent past") derived from a funeral held in 2006. *Id.* ¶¶103-05.

The next day, Governor Cuomo unveiled the "sharpen[ed]" version of de Blasio's plan: the "Cluster Action Initiative." *Id.* ¶110. The initiative labeled certain geographical areas as "red," "orange," and "yellow" zones, imposing heightened restrictions on these areas relative to the rest of the State. *Id.* ¶111.

The new restrictions discriminated against core Orthodox Jewish religious practices—education and worship. *See id.* ¶¶153-70. In red and orange zones, for example, the initiative closed schools altogether and slashed house-of-worship capacity limits from 50% (as required by this Court's preliminary injunction in *Soos v. Cuomo*, 470 F. Supp. 3d 268 (N.D.N.Y. 2020)) to the lesser of either 25% or 10 people (red zones) or 33% or 25 people (orange zones). *Id.* ¶¶112-13. Yet "essential" businesses—a broad category including everything from "gardening" to "pet food" stores to "child care services"—could remain open without any capacity limitations. *Id.* ¶114. Thus, under the initiative, gathering children to learn Torah at a yeshiva ("school") was forbidden, but gathering the same children to spend the day playing at a daycare ("child care services") was permitted.

The initial "clusters" themselves were also narrowly drawn to capture Orthodox Jewish neighborhoods, and little else. *Id.* ¶116. Indeed, in an October 9 interview, Governor Cuomo admitted as much, acknowledging that "'we have a couple of unique clusters, frankly, which are more religious organizations, *and that's what we're targeting*.'" *Id.* ¶117; *see also id.* ¶131 (map of initial red and orange zones in Brooklyn, superimposed on map of Orthodox Jewish synagogues, yeshivas, and businesses).

The initiative's shuttering of schools was entirely without a public-health basis. By October, nationwide data had already shown that schools were not significantly spreading the virus. ECF 6-2 at 10. And indeed, both Governor Cuomo and Mayor de Blasio had admitted as much, acknowledging that COVID-19 is "'not being spread by

schools.'" Compl. ¶¶4, 99. Yet the initiative closed schools anyway, for reasons Governor Cuomo explained as being driven by "'fear and anxiety,'" and concerns about people "'moving out.'" *Id.* ¶¶107-09.

On October 6, Governor Cuomo signed Executive Order (EO) 202.68, formalizing the cluster initiative and providing that it "'shall be enforced no later than Friday, October 9, 2020, as determined by'" local authorities. *Id.* ¶132. The order also set a penalty for violations: "$15,000 per day." N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *see* N.Y. Exec. Order No. 202.92 (Jan. 27 2021) (extending EO 202.68 (as well as the other order most relevant here, EO 202.79, *see infra*) through Feb. 26, 2021).

The next day, de Blasio announced the Order would be enforced in New York City beginning on October 8. Compl. ¶133. Over the following weekend (consisting of the important Jewish holidays of Hoshana Rabbah (October 9), Shimini Atzeres (October 10), and Simchas Torah (October 11)), City officials "'issued 62 tickets and more than $150,000 in fines'" under the EO. *Id.* ¶134 (quoting Ali Watkins, *Over $150,000 in Fines Issued on First Weekend of New N.Y.C. Lockdown*, N.Y. Times (Oct. 13, 2020), https://perma.cc/UE8L-KDDZ). Then, on October 14, the Governor issued another executive order steepening the penalties specifically with respect to schools, ordering state funding withheld from any "'public or nonpublic school … found to have been in violation of'" the EO. *Id.* ¶141 (quoting N.Y. Exec. Order No. 202.69 (Oct. 14, 2020)).

D. Defendants' attempts to evade review

On October 16, BYAM and its families filed this lawsuit, alleging (*inter alia*) that Defendants' actions unconstitutionally targeted Orthodox Jews and infringed on their First Amendment right to direct "'the religious upbringing of their children.'" Compl. ¶146 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972)). On October 19, BYAM and its families sought a temporary restraining order, or, in the alternative, preliminary injunction, permitting the school to reopen on October 27. ECF 6.

On October 21, this Court set a hearing on the TRO motion and ordered Defendants to file a response. ECF 7. Hours later, however, Governor Cuomo held a press conference at which he announced that BYAM's neighborhood had been changed from "red" to "yellow," ECF 20 at 1 & n.1—based on new "metrics" unveiled that very day.[2] Defendants then asserted the motion was "moot" and sought an extension of their time to respond. *Id.*; *see* ECF 24. BYAM and its families noted that the Governor's reclassification had not made it "[]clear" that Defendants would not "shut BYAM" again, but agreed their ability to reopen meant that this litigation did not need to proceed at the pace originally made necessary by Defendants' actions. ECF 22; *see also* ECF 45 (withdrawing motion).

Meanwhile, other litigation challenging the cluster initiative's house-of-worship restrictions proceeded. *E.g.*, *Agudath Israel of Am. v. Cuomo*, No. 1:20-cv-04834 (E.D.N.Y. filed Oct. 8, 2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 1:20-cv-04844 (E.D.N.Y. filed Oct. 8, 2020). In *Diocese of Brooklyn*, the district court acknowledged that Governor Cuomo had "made remarkably clear that [EO 202.68] was intended to target [Orthodox Jewish] institutions," but denied a TRO for the Catholic plaintiffs there. *Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ F. Supp. 3d ____, 2020 WL 5994954, at *1 (E.D.N.Y. Oct. 9, 2020). After both the *Agudath Israel* and *Diocese of Brooklyn* plaintiffs failed to obtain injunctive relief pending appeal at the Second Circuit, they filed emergency applications with the Supreme Court. *Cf. Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 228-31 (2d Cir. 2020) (Park, J., dissenting).[3]

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[2] *Governor Cuomo Details COVID-19 Micro-Cluster Metrics*, New York State (Oct. 21, 2020), https://perma.cc/93KV-U8VV.

[3] Following the district courts' initial decisions in *Diocese of Brooklyn* and *Agudath Israel*, this Court denied a TRO and preliminary injunction in the related *Soos* case, which like this case includes challenges to EO 202.68's religious-school restrictions. *Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 6384683 (N.D.N.Y. Oct. 30, 2020); *see* Summary Order, *Soos v. Cuomo*, No. 1:20-cv-651 (N.D.N.Y. Nov. 23, 2020), ECF 110. The Court relied on Chief Justice Roberts's concurring opinion in *South Bay*

Before the Supreme Court could rule on the applications, however, Governor Cuomo held another press conference, announcing that the *Agudath Israel* and *Diocese of Brooklyn* plaintiffs' (like BYAM's) neighborhoods had also been changed to "yellow"—even though under the Governor's own October 21 criteria, they didn't qualify for it. *See* Reply Br. at 10-11, *Agudath Israel of Am. v. Cuomo*, No. 20A90 (Nov. 22, 2020). The Governor then filed a letter with the Supreme Court informing it of this development and opposing an injunction. Letter of Respondent Andrew M. Cuomo, *Diocese of Brooklyn*, No. 20A87 (Nov. 19, 2020)

Nonetheless, the Supreme Court enjoined EO 202.68's numerical caps on houses of worship in red and orange zones. *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. at 65. The Court held it was "clear" the matter was "not moot," because the Governor's "regular[] changes" to the cluster initiative meant plaintiffs "remain[ed] under a constant threat that the area in question will be reclassified as red or orange." *Id.* at 68. And the Court held the plaintiffs had likewise "clearly established" their entitlement to relief on the merits, because "the challenged restrictions violate" the Free Exercise Clause's "requirement of neutrality to religion." *Id.* at 66 (internal quotation marks omitted).

With the Court having now affirmed the Free Exercise Clause's vitality "even in a pandemic," *id.* at 68, renewed litigation followed. On December 1, for example, a religious private school sought to reinstate an injunction barring enforcement of a school-closure order like Governor Cuomo's, with the applicant and its *amici* raising many of the same arguments Plaintiffs press here. *See Danville Christian Acad., Inc.*

Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020), as well as the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which this Court understood to require "broad deference … to the elected branches of government" in evaluating Free Exercise claims during the pandemic. 2020 WL 6384683, at *6. In *Diocese of Brooklyn*, the Supreme Court later "ma[de] … plain" that neither "the *South Bay* concurrence" nor *Jacobson* should control going forward. 141 S. Ct. at 70-71 (Gorsuch, J., concurring). This Court's denial of a preliminary injunction has now been vacated. *Soos v. Cuomo*, No. 20-3737, 2021 WL 37592 (2d Cir. Jan. 5, 2021).

v. Beshear, 141 S. Ct. 527, 527-28 (2020). Justice Kavanaugh ordered the Governor of Kentucky to respond. *Danville*, No. 20A96 (Dec. 1, 2020). That same day, the plaintiffs in *Soos*—now including claims involving religious schools—filed an emergency motion with the Second Circuit seeking their own injunction against EO 202.68 pending appeal. Emergency Mot. for Expedited Inj. Pending Appeal, *Soos v. Cuomo*, No. 20-3737 (2d Cir. Dec. 1, 2020), ECF 37. The next day, Governor Cuomo issued a new executive order "modif[ying]" EO 202.68 as to schools, providing that schools within red and orange zones "may conduct in-person instruction, … subject to compliance with guidance and directives of the Department of Health." N.Y. Exec. Order No. 202.79 (Dec. 2, 2020).

Meanwhile, on December 28, the Second Circuit reiterated the Supreme Court's holding in rejecting the Governor's mootness argument as to the challenges to EO 202.68's house-of-worship restrictions. *Agudath Israel*, 983 F.3d at 631 n.16. The court noted that the Governor had "declared a disaster emergency" permitting him to "exercise extraordinary executive powers," so his actions in altering the cluster zones did "not … require legislative consultation or approval." *Id.* at 625. Moreover, although the executive actions "expire after 30 days, … the Governor may renew them an unlimited number of times," and he had already exercised those powers to "issue[] almost 90 executive orders relating to the pandemic" and "change[] the zone designations" under the cluster initiative "at least nine times." *Id.* at 625, 628. Thus, the "constant threat" that the Governor might reimpose the challenged restrictions persisted. *Id.* at 631 n.16.

Back in this case, BYAM has now been "permitted" to open for in-person instruction since it was removed from the initial red zone in October. But Defendants' arbitrary shutdown caused profound harm. BYAM's students lost weeks of in-person time, which is vital to passing along Orthodox Jewish traditions, including the Hebrew language and intricate prayers that cannot be recited communally through

virtual means. Compl. ¶¶40-41, 46-47, 58-59. Moreover, numerous of Defendants' agents visited BYAM for "inspections," during and soon after the closure, including one by armed, bulletproof-vest-wearing officers from the New York City Sheriff's Office. Mayer Decl. (Ex.1) ¶¶9-16. Plaintiffs also suffered financial losses attributable to the shutdown. For example, BYAM lost hours of its senior administrators' time complying with Defendants' unlawful guidelines. *Id.* ¶6. And families like the Lebovitses were forced to pay for childcare and other expenses to facilitate virtual learning for their children. Lebovits Decl. (Ex.2) ¶¶9-12.

E. The current motions and recent developments

On January 15, 2021, State and City Defendants separately moved to dismiss this case under Rules 12(b)(1) and (6). Defendants argue that because the Governor has now reclassified Far Rockaway as outside the red and orange zones and issued EO 202.79, Plaintiffs' claims for injunctive and declaratory relief are moot. State Mem.11-14; City Mem.6-13. State Defendants further argue that the Court can't entertain Plaintiffs' claims for damages against Governor Cuomo in his personal capacity because his actions are shielded by legislative immunity. State Mem.14-16. And City Defendants argue that Plaintiffs fail to state a claim against them for various reasons, including that Mayor de Blasio is entitled to qualified immunity. City Mem.13-19.

Earlier this week, it was reported that "state health officials" had "often found out about major changes in pandemic policy only after Mr. Cuomo announced them at news conferences—and then asked them to match their health guidance to the announcements."[4] In particular, although the Governor had previously told this Court the cluster initiative "was guided by science and data," *Soos*, 2020 WL 6384683, at *7, it appears the initiative was in fact "shaped largely by the governor's office," and

[4] *Supra* n.1.

that the Governor "do[es]n't really trust the experts."[5] Immediately after these revelations, Defendants beat a full-bore retreat on remand in *Agudath Israel*, "consent[ing]" before Judge Matsumoto to the issuance of a preliminary injunction, which would ultimately convert to a permanent injunction, against EO 202.68's percentage caps for houses of worship in red and orange zones. Letter Mot. for Recons., *Agudath Israel*, No. 20-cv-04834 (E.D.N.Y. Feb. 4, 2021), ECF 34.

These revelations suggest discovery in this case (*e.g.*, a deposition of Defendant Zucker) will even further substantiate Plaintiffs' claims that the initiative was a religious gerrymander and that there was never any compelling need to shutter their school.

STANDARD OF REVIEW

A motion to dismiss a case as moot is evaluated under Rule 12(b)(1). *See, e.g.*, *ABN Amro Verzekeringen BV v. Geologistics Ams., Inc.*, 485 F.3d 85 (2d Cir. 2007). "The district court can refer to evidence outside the pleadings when resolving a motion to dismiss under" that Rule, which "may be presented by affidavit or otherwise." *Broidy Cap. Mgmt. LLC v. Benomar*, 944 F.3d 436, 441 (2d Cir. 2019) (cleaned up).

"To survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In applying this standard, the Court "construe[s] the complaint liberally" and "draw[s] all reasonable inferences in the plaintiff's favor." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016).

[5] *Id.* ("'When I say "experts" in air quotes, it sounds like I'm saying I don't really trust the experts,' Mr. Cuomo said at a news conference on Friday, referring to scientific expertise at all levels of government during the pandemic. 'Because I don't. Because I don't.'").

ARGUMENT

I. The claims of BYAM and the Lebovits family are not moot.

Defendants' lead argument is that this case is moot now that the Governor reclassified Far Rockaway as outside the red and orange zones and issued a new executive order allegedly carving out schools from EO 202.68. State Mem.11-14; City Mem.6-13. But well-settled voluntary-cessation principles foreclose the Governor's post-complaint attempt to evade this Court's review of Plaintiffs' claims for forward-looking relief.

At minimum, BYAM and its families' claims seeking damages for the harm already caused by Defendants' arbitrary school shutdown would survive in any event. Those claims aren't barred by legislative immunity because the challenged executive order here is just that—an *executive* order, not legislative action triggering the immunity. So all claims remain fully justiciable.

A. The claims for injunctive and declaratory relief are not moot.

A claim "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU*, 567 U.S. 298, 307 (2012) (cleaned up). Here, the Court could plainly grant "effectual" injunctive relief to Plaintiffs—namely, an order barring Defendants from again shutting down Plaintiffs' school (under EO 202.68 or otherwise). That relief is analogous to the injunction this Court already granted in *Soos*, *see* 470 F. Supp. 3d at 285 (enjoining defendants "from enforcing *any indoor gathering limitations against plaintiffs* greater than imposed for Phase 2 industries, provided that plaintiffs follow social distancing requirements as set forth in the *applicable executive orders and guidance*" (emphasis added)), and Plaintiffs have requested it, *see* Compl. Prayer for Relief (b); *compare* State Mem.10 (quoting relief sought in Plaintiffs' *TRO* motion). So this case isn't moot.

None of this changes just because Defendants responded to this litigation by removing BYAM from the red and orange zones and issuing EO 202.79. "'[T]he court's

power to grant injunctive relief survives discontinuance of the illegal conduct,'" and it's "appropriate to exercise that power when 'there exists some cognizable danger of recurrent violation.'" *Soto-Lopez v. N.Y.C. Civil Serv. Comm'n*, 840 F.2d 162, 168 (2d Cir. 1988) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). This "voluntary cessation" doctrine, *W.T. Grant*, 345 U.S. at 632, applies here and renders this case fully justiciable.

"It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Otherwise, the defendant "could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where it left off, repeating this cycle until it achieves all its unlawful ends." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (cleaned up).

This is the "[o]rdinar[y]" rule, *Seidemann v. Bowen*, 499 F.3d 119, 128-29 (2d Cir. 2007), but there is one exception which does not apply here: if "'subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Trinity Lutheran Church of Columbia, Inc., v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). "This is both a stringent and a formidable" showing, and the burden of carrying it rests with the defendant. *Mhany Mgmt.*, 819 F.3d at 603-04 (cleaned up). And this burden isn't met, for example, by a government defendant's post-litigation "repeal of" a challenged law, if nothing "would … preclude [the defendant] from reenacting precisely the same provision if" the case were dismissed. *City of Mesquite*, 455 U.S. at 289; *cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020) (*NYSRPA*) (case moot where defendant was legally unable to reenact challenged rule because of superseding state law).

Here, the ordinary rule applies: Defendants' voluntary cessation hasn't mooted this case. Indeed, the Supreme Court and Second Circuit have already held as much, in decisions involving the *same Defendants* and the *same Executive Order* at issue in this case.

In *Diocese of Brooklyn*, plaintiffs sought emergency relief from EO 202.68's numerical caps on house-of-worship attendance in red and orange zones. Before the Court ruled, however, Governor Cuomo "reclassified the areas in question from orange to yellow." 141 S. Ct. at 68. The Court nonetheless held it was "clear" the matter wasn't moot, because "[t]he Governor regularly changes the classification of particular areas without prior notice," so plaintiffs "remain[ed] under a constant threat" they would again be subject to the challenged restrictions. *Id.* (citing *Laidlaw*, 528 U.S. at 189). The Second Circuit later agreed, "squarely reject[ing]" the argument that the Governor's "modification of zone boundaries" rendered the case moot. *See Agudath Israel*, 983 F.3d at 631 n.16.

Diocese of Brooklyn and *Agudath Israel* are controlling here. BYAM and its families likewise "remain under a constant threat that" the Governor will reclassify Far Rockaway as red or orange and again shut down schools. And if the Court were to "dismiss[] this case, nothing would prevent the Governor from" doing just that "tomorrow." *Diocese of Brooklyn*, 141 S. Ct. at 72 (Gorsuch, J., concurring). Defendants therefore can't carry their burden of showing it's "absolutely clear" the wrongful conduct won't resume.

Resisting, Defendants say this case is different because the Governor also issued a new order modifying EO 202.68 to no longer "necessarily" require school closures within red and orange zones. State Mem.12-13; City Mem.10-12. But that's a distinction without a difference; it's just as easy for the Governor to tweak the zones as it is for him to tweak the rules that apply within the zones. Just as the Governor had already "changed the zone designations at least nine times" before *Agudath Israel*,

983 F.3d at 628 (now ten[6]), he has also issued at least 96 COVID-19 executive orders since the virus's onset (around two a week),[7] at least one other likewise changing the rules within the zones, *see* N.Y. Exec. Order No. 202.81 (Dec. 11, 2020) (changing orange-zone rules for "gyms" and "personal care services"); State Mem.6, 8 & n.12 (Governor has even changed "the criteria by which zones are designated"). And as to schools specifically, between October 9 and November 3, 2020, State Defendants changed the applicable "guidance" for schools within the zones at least four times, State Mem.6-7—a rate of more than once a week. Further, given the "extraordinary executive powers" the Governor has claimed during the pandemic, none of these actions "require[d] legislative consultation or approval." *Agudath Israel*, 983 F.3d at 625.

So as with the micro-cluster designations themselves, there is no barrier to the Governor deciding to again shutter schools in a manner similar to previous executive orders—and he can do so unilaterally, at any time. Indeed, State Defendants agree, themselves touting the Governor's unfettered power to impose and lift COVID restrictions at will. State Mem.15. This case therefore isn't moot. *See Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018) (distinguishing cessation in "executive action" that can "be easily abandoned or altered" from "statutory change[s]," which involve the "rigors of the legislative process" (internal quotation marks omitted)); *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (case not moot where "the promulgation of [the relevant] rules appears to be solely within the discretion of the" defendant); *compare* City Mem.6 (collecting cases involving "*legislature's* enactment of a superseding" "*statute*" (emphasis added)).

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[6] *See Video, Audio, Photos & Rush Transcript: Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Jan. 27, 2021), https://perma.cc/UBT2-ZXMV.

[7] *See Executive Orders*, Office of the Governor, https://perma.cc/4LKK-RNVB (count as of Jan. 28, 2021).

Nor are *Diocese of Brooklyn* and *Agudath Israel* outliers. To the contrary, courts around the country have likewise refused to dismiss as moot other challenges to COVID-19 restrictions even after those restrictions were revised or repealed. *See, e.g.*:

- *Bayley's Campground, Inc. v. Mills*, ___ F.3d ____, 2021 WL 164973, at *3 (1st Cir. Jan. 19, 2021) (rescission of challenged requirement in executive order didn't moot case because "the Governor has not denied that a spike in the spread of the virus in Maine could lead her to impose" another);
- *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344-45 (7th Cir. 2020) (replacement of challenged executive order didn't moot case because "the Governor could restore the approach of Executive Order 2020-32 as easily as he replaced it");
- *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1230 n.1 (9th Cir. 2020) (case not moot because "Governor Sisolak could restore the Directive's restrictions as easily as he replaced them, or impose even more severe restrictions");
- *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 228 (D. Md. 2020) ("The Governor could amend the executive order to again include religious gatherings in the ban on gatherings of ten or more people.");
- *Dark Storm Indus. LLC v. Cuomo*, 471 F. Supp. 3d 482, 494-95 (N.D.N.Y. 2020) (although Governor Cuomo "voluntarily relaxed the Executive Order's shutdown requirements," case wasn't moot given the "extraordinary circumstances" of COVID-19, which prevented defendants from showing it was "absolutely clear [they] will not resume the challenged conduct" (internal quotation marks omitted));
- *Paradise Concepts, Inc. v. Wolf*, ___ F. Supp. 3d ____, 2020 WL 5121345, at *2 n.1 (E.D. Pa. Aug. 31, 2020) (fact that plaintiffs were "no longer subject to the business closure orders" didn't moot case because "government officials may issue similar closure orders in the future").

These decisions are on all fours: here, too, the Governor "could restore [discriminatory school restrictions] as easily as he replaced them," so here, too, the "case is not moot." *Calvary Chapel*, 982 F.3d at 1230 n.1.

This conclusion is confirmed by other voluntary-cessation considerations. Courts have explained that only an "'unequivocal commitment that'" the defendant "'does not intend to reinstate the'" policy can moot a case. *Dark Storm*, 471 F. Supp. 3d at 495 (quoting *Ciaramella v. Zucker*, No. 18-CV-6945, 2019 WL 4805553, at *4-6 (S.D.N.Y.

Sept. 30, 2019)). A mere statement "that 'there is no reasonable expectation'" doesn't suffice. *NRDC v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 138 (S.D.N.Y. 2019).

Defendants have provided no such "unequivocal commitment" here. *Ciaramella*, 2019 WL 4805553, at *6. Instead, all State Defendants offer is that "Governor Cuomo has consistently eased restrictions on schools, giving no indication that the State would revert to closing schools in red and orange zones." State Mem.13-14. That not only doesn't pass muster for voluntary-cessation purposes; it isn't even true, as the Governor has waffled on schools throughout the pandemic—first insisting they might reopen in spring 2020,[8] then deciding in October that schools are a "main[]" "location[] of transmissions,"[9] then in November concluding that "K-8" schools are safe but that "[j]unior high and high is a different story,"[10] and now, supposedly, determining that all schools are safe again after all.

Likewise, courts have looked to the "timing and circumstances" of the voluntary cessation, viewing "skeptically" changes in conduct traceable to litigation. *Mhany Mgmt.*, 819 F.3d at 604; *see also, e.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 (1987) (voluntary-cessation standard "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform" (internal quotation marks omitted)). This is because "the fact that the voluntary cessation only appears to have occurred in response to … litigation" "shows a greater likelihood that it could be resumed." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342-43 (6th Cir. 2007).

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[8] Sally Goldenberg & Anna Gronewold, *Cuomo Undercuts de Blasio's Efforts to Close Schools Until Fall*, Politico New York (Apr. 11, 2020), https://perma.cc/AJ5V-8XHL.

[9] *Video, Audio, Photos & Rush Transcript: Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Oct. 5, 2020), https://perma.cc/AGW9-2ELD.

[10] *Video, Audio, Photos & Rush Transcript: Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Nov. 22, 2020), https://perma.cc/G9KC-PJ25.

Here, the timeline alone makes abundantly clear that both of the Governor's allegedly case-mooting actions—the redesignation of Far Rockaway and EO 202.79—were rooted in litigation. Again:

- On October 21, 2020, this Court set a hearing on the TRO motion and ordered Defendants to file a response. ECF 7.
- Hours later, however, Governor Cuomo announced that under newly-revealed "metrics," Far Rockaway had now been redesignated as "yellow." *Supra* p.7.
- On November 25, the Supreme Court (in *Diocese of Brooklyn*) enjoined EO 202.68 as to houses of worship, and a week later ordered another Governor to respond to an application in a *Diocese of Brooklyn* follow-on involving—like this case—religious schools. *Danville*, No. 20A96 (Dec. 1, 2020) (Kavanaugh, J.).
- The same day as the request for a response in *Danville*, the *Soos* plaintiffs, which include plaintiffs pressing school claims, moved the Second Circuit for further injunctive relief against EO 202.68 in light of *Diocese of Brooklyn*.
- The next day, Governor Cuomo issued EO 202.79, carving out schools from EO 202.68.

"[S]uspicious timing and circumstances" thus "pervade" the Governor's decision to reopen Plaintiffs' school. *Mhany Mgmt.*, 819 F.3d at 604.

Timing aside, the Governor's own statements demonstrate his actions have been sensitive more to litigation and political pressure than to public health. Plaintiffs agree with Defendants' recognition here of "the low positivity rates in schools." State Mem.7. But the Governor has recognized since at least mid-November that "'we are not seeing spread in the schools'"—yet he didn't issue EO 202.79 until December 2, citing "agreements … with teachers and unions" as a justification for schools being closed.[11] Moreover, even in October the Governor conceded that geography-based school closure was a "'blunt policy,'" not a "'sophisticated'" one—yet he imposed it anyway because of a perceived climate of "'fear.'" Compl. ¶¶107-09. Most recently, we've learned the cluster initiative from the outset has been "shaped largely by the

[11] Brendan Cole, *Gov. Cuomo Will Let New York Schools Close Monday if Infection Rate Surpasses 3 Percent*, Newsweek (Nov. 14, 2020), https://perma.cc/566X-Z4VQ.

governor's office," rather than (as advertised, including to this Court) the "experts."[12] Perhaps the Governor really is "sincere" now about following the science and reopening schools for good—but "given [his] actions up to this point" Defendants haven't "met [their] 'formidable burden' of showing" as much. *Mhany Mgmt.*, 819 F.3d at 605.

Finally, courts have also considered whether the defendant has conceded the merits of the plaintiff's claims. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (applying voluntary-cessation rule where defendant "vigorously defends the constitutionality of its … program"). Here, while Defendants now seem to acknowledge there was never a good reason to shutter schools, they continue to insist the order was "neutral and generally applicable," and thus not subject to heightened scrutiny in the first place. City Mem.17 n.5. "It is precisely [this] insistence on the validity of" their actions "that makes it 'reasonable' to expect that the conduct will be repeated." *Ahrens v. Bowen*, 852 F.2d 49, 53 (2d Cir. 1988).

None of Defendants' cases are to the contrary. First, State Defendants note that the Supreme Court in *Danville* didn't consider the plaintiff's emergency application because the challenged order "expires this week or shortly thereafter." *Danville*, 141 S. Ct. at 527; State Mem.14. But this wasn't a mootness determination; it was an explanation of why the Court declined to exercise its equitable discretion to grant extraordinary relief on an emergency basis. *Id.* at 530 (Gorsuch, J., dissenting) ("no one attempts to suggest this case is moot"); *see Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers) (Supreme Court's power to grant the relief requested in *Danville* is "exercised with the greatest of caution and should be reserved for exceptional circumstances"). It thus has no application to this case, which the Court has an "unflagging obligation" to hear unless Article III dictates otherwise. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

[12] *Supra* n.1.

For their part, City Defendants argue that "[c]ourts around the country have agreed that COVID-19 Executive Orders, once expired or repealed," can no longer be challenged. City Mem.12. But the disjunctive is doing all the work—every one of these cases involved orders (like the one in *Danville*) that were *expired*, not repealed. *Spell v. Edwards*, 962 F.3d 175, 177 (5th Cir. 2020); *Pleasant View Baptist Church v. Beshear*, __ F. App'x ____, 2020 WL 7658397, at *1 (6th Cir. Dec. 21, 2020); *Herndon v. Little*, No. 1:20-cv-00205-DCN, 2021 WL 66657, at *2 (D. Idaho Jan. 7, 2021); *cf. Wright v. Ziriax*, No. CIV-20-00287, 2020 WL 6736427 (W.D. Okla. Nov. 2, 2020) (not challenging a COVID order at all). That distinction matters—unlike with a "postsuit repeal," "a statute that expires by its own terms does not implicate" voluntary-cessation concerns, "[b]ecause its lapse was predetermined and thus not a response to litigation." *Spell*, 962 F.3d at 179. These cases thus can't help Defendants here: a case involving the very sort of "postsuit repeal that might not"—and here, doesn't—"moot [the] case." *Id.*

City Defendants also (at 6, 9) point to *NYSRPA v. City of New York*, but that case only underscores why this one isn't moot. In *NYSRPA*, plaintiffs challenged a City rule, 140 S. Ct. at 1526, but before merits briefing the State Legislature passed a law "abrogating" the rule and any other with the same effect, *id.* at 1532 (Alito, J., dissenting). Given the State law, the City couldn't "revert[] to the prior rules even if [it] wanted to." Suggestion of Mootness 16-17, *NYSRPA*, No. 18-280 (July 22, 2019). *NYSRPA* is thus an example of a case in which there arguably *was* some "'clearly effective barrier that would prevent the [defendant] from reinstating [its] policy in the future.'" *Trinity Lutheran*, 137 S. Ct. at 2019 n.1—and so illustrates by contrast why this case isn't moot. Indeed, this case would only arguably parallel *NYSPRA* if the Legislature were to remove Governor Cuomo's emergency executive-order power, which it has not done.

Finally, apart from voluntary cessation, this case also isn't moot because

Defendants' actions are "capable of repetition, yet evading review." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct 1969, 1976 (2016) (cleaned up). This doctrine applies "where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (cleaned up).

As to the first element, "[a] recurrent dispute will 'evade review' if it [can]not be entirely litigated before again becoming moot, including prosecution of appeals as far as the Supreme Court." *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet*, 260 F.3d 114, 119 (2d Cir. 2001). The Second Circuit has explained that 120 days "is clearly insufficient for full litigation" of a challenged action. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 648 (2d Cir. 1998) (collecting cases). And the Supreme Court has held that even "a period of two years is too short to complete judicial review." *Kingdomware*, 136 S. Ct. at 1976 (citing *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-16 (1911)).

Here, Defendants' actions have an even shorter duration and will therefore evade review. Indeed, as the Second Circuit has explained, pursuant to his emergency powers, the Governor's orders by law "expire after 30 days"—a period far too short to fully litigate any particular order's legality. *Agudath Israel*, 983 F.3d at 625. These multiplying edicts are thus the quintessential examples of challenged actions that are "too short to be fully litigated prior to cessation or expiration." *Kingdomware*, 136 S. Ct. at 1976.

Plaintiffs also meet the second element. To fulfill that requirement, there must be "a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* (cleaned up). Although "mere speculation" or "surmise" is insufficient to satisfy the second element, "a plaintiff need not show a 'demonstrated probability' of recurrence." *Russman*, 260 F.3d at 120-21 (cleaned up).

Here, the Lebovitses and other families intend to continue sending their children to BYAM, and BYAM intends to keep the school open, while assiduously following cleaning and hygiene measures. Compl. ¶144; *see id.* ¶¶75-89 (reopening plan). And although State Defendants contend the cluster initiative currently allows schools in micro-cluster zones to provide in-person instruction, the Governor has never disavowed that he possesses the authority to change those restrictions at any time. *See Agudath Israel*, 983 F.3d at 625 (noting that the Governor may "exercise extraordinary executive powers"; that executive actions "expire after 30 days, but the Governor may renew them an unlimited number of times"; and that the Governor's actions can only be terminated by concurrent resolution and "do not otherwise require legislative consultation or approval").

To the contrary, in their briefing here, State Defendants contend merely that BYAM "would not *necessarily* [be] preclu[ded] … from providing in-person instruction," and that "Governor Cuomo has consistently eased restrictions on schools" in the past—statements that have no bearing on whether that's likely to remain the case in the future. And State Defendants double down on their ability to make unilateral changes to COVID-19 restrictions, arguing that the Governor has such "broad power to make policy and fiscal determinations that affect every resident in the State" that his power rises to the level of "*legislative*." State Mem.12-15 (emphasis added). This assertion of "legislative" power on its face refutes any notion that the Governor is permanently bound to maintain his current, litigation-inspired course. *See Mayor of the City of N.Y. v. Council of the City of N.Y.*, 38 A.D.3d 89, 97 (N.Y. App. Div. 2006) (acts "of the Legislature … do[] not bind future legislatures, which remain free to repeal or modify [their] terms").

All this makes clear that Plaintiffs' "expectation that the dispute will recur [is] reasonable, and not wholly speculative." *Pierre-Paul v. Sessions*, 293 F. Supp. 3d 489, 492 (S.D.N.Y. 2018) (citing *Dennin v. Conn. Interscholastic Athletic Conf., Inc.*, 94

F.3d 96, 101 (2d Cir. 1996)); *see Big Tyme Inv., LLC. v. Edwards*, ____ F.3d ____, 2021 WL 118628, at *5 n.9 (5th Cir. Jan. 13, 2021) (State's inconsistent reopening and "return to a 'modified' Phase 2" demonstrated that restrictions were capable of repetition yet evading review). So this case is not moot.

B. The damages claims are not moot.

Even if the claims for equitable relief were moot (and they aren't), this "suit remains live" because there is a "chance of money changing hands." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). BYAM and the Lebovitses have live demands for compensatory and nominal damages against all defendants. Compl. ¶¶10, 152, 160, 170, 178, 185, 193, 201 & Prayer for Relief (c) and (d). For suits like this one, which "alleg[e] constitutional violations under 42 U.S.C. § 1983," even a request for nominal damages is "enough" to avoid mootness. *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001); *see* Compl. ¶¶145-201 (alleging violations of the First and Fourteenth Amendments under 42 U.S.C. § 1983).

Although loss of prayer and learning with their peers is at the heart of this case, BYAM and the Lebovits family have also requested compensatory damages for the harm caused by Defendants' unconstitutional actions—harm that neither brief filed by either set of Defendants disputes.

First, the Lebovitses incurred hundreds of dollars in expenses for childcare and activities, and Chana Lebovits lost hundreds of dollars of income when she took off extra time to help her daughters with virtual learning. Lebovits Decl. ¶¶9-12. The Lebovitses also lost about $440 worth of in-person instruction, and instead received remote instruction, which is less effective and therefore less valuable. *Id.* ¶7.

BYAM, meanwhile, lost over $1,600 worth of its senior administrators' time reviewing the unconstitutional guidelines, preparing the parents for complying with them, and establishing a remote learning system to endure them. Mayer Decl. ¶7.

And to encourage students who were unable to celebrate their birthdays with their classmates during the closure, Rabbi Neuman spent over $300 to purchase birthday cakes that he personally delivered to BYAM students. *Id.* ¶8. All these costs constitute the "out-of-pocket loss and other monetary harms" for which § 1983 claims afford relief. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986).

If that were not enough, Defendants also harmed the BYAM community through their public statements targeting the Jewish community and through actions harassing BYAM specifically. *Id.* (observing that § 1983 provides recovery for "such injuries as impairment of reputation, personal humiliation, and mental anguish and suffering") (cleaned up). Here, Defendants inflicted such injuries on BYAM and its families through repeated, unannounced, unprecedented site visits by the New York City Department of Health and Mental Hygiene and the New York City Sheriff's office. Mayer Decl. ¶¶9-16.

Never before had these government agencies been dispatched to BYAM. *Id.* ¶16. But they came during the closures. They let themselves into the school. *Id.* ¶10. In the case of the Sheriff's office, the agents were armed and wore bulletproof vests—to inspect a pre-school. *Id.* ¶15. In the case of the Department of Health and Mental Hygiene, its agent let himself into a pre-school classroom and began taking pictures of students—students that the Defendants' own rules allowed to be present. *Id.* ¶10; *see also* ECF 6-4 ¶42. BYAM staff spent hours entertaining intimidating inquiries from these agents, while BYAM was found in full compliance with all regulations. Mayer Decl. ¶¶10-15. The time and distress expended on summoning BYAM for questioning—to say nothing of having to forcibly test healthy, school-aged children—is similarly recoverable under § 1983. *See Memphis Cmty. Sch. Dist.*, 477 U.S. at 307; *see also* Mayer Decl. ¶17 ("That was a dark day.").

C. Governor Cuomo cannot avoid personal liability through legislative immunity.

Aware that Plaintiffs' damages claims would otherwise keep this case alive, State Defendants grasp at other grounds for dismissal. In particular, State Defendants argue that *Governor* Cuomo, when he issues *executive* orders responding to COVID-19, is in fact exercising *legislative* power—and thus is immune from Plaintiffs' damages claims under the doctrine of "legislative immunity." State Mem.15-16.[13]

Yet as Chief Judge Suddaby put it when rejecting this very same argument from Governor Cuomo—in an opinion Cuomo doesn't even mention here—the Governor's "position conflicts with one of the foundational principles of our democracy." *See Ass'n of Jewish Camp Operators*, 470 F. Supp. 3d at 213. It also fails under the Second Circuit's framework for deciding when "high-level *executive* branch officials" can invoke "the protections of an immunity traditionally accorded to members of the *legislative* branch." *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 89 (2d Cir. 2007) (emphasis in original). The Court should therefore reject it.

Separation of Powers. First, as Chief Judge Suddaby has explained, affording Governor Cuomo legislative immunity for his actions under "Executive Order 202 and its continued directives" violates fundamental separation-of-powers principles. *Ass'n of Jewish Camp Operators*, 470 F. Supp.3d at 212. To afford that immunity would mean "the Governor of New York would be able to unilaterally issue executive orders without providing the opportunity for his or her constituents to sue to enjoin these actions." *Id.* at 212-13. This position conflicts with our "system of checks and balances, regardless of" the "extenuating circumstances" of COVID-19. *Id.*

State Defendants' theory that the New York Legislature supposedly conferred this immunity by enabling the Governor to temporarily "suspend[] and modify[] the laws

[13] State Defendants in passing also assert that Plaintiffs can't seek money damages against them in their official capacities. State Mem.14. But Plaintiffs don't seek money damages against them in their official capacities; they seek injunctive and declaratory relief against all State Defendants in their official capacities, *see Ex Parte Young*, 209 U.S. 123 (1908), and money damages against Governor Cuomo in his individual capacity. State Defendants' only argument for why Plaintiffs can't seek the latter is legislative immunity, which fails for the reasons above.

of the State" in responding to the pandemic doesn't change this result. State Mem.15 (citing 2020 N.Y. SB 7919); *see Ass'n of Jewish Camp Operators*, 470 F.3d at 212 (addressing order issued under same suspension authorization). Setting aside whether the New York Legislature even *can* delegate such sweeping authority without violating the non-delegation doctrine, *cf. Citizens for an Orderly Energy Pol'y, Inc. v. Cuomo*, 78 N.Y.2d 398, 410 (1991), the Legislature's enactment makes clear that Governor Cuomo's suspension powers are "[s]ubject to the state constitution, the federal constitution and federal statutes and regulations." *See* 2020 N.Y. SB 7919 § 29-a 1.[14] So even under the plain terms of the very enactment State Defendants invoke, Governor Cuomo isn't shielded from New Yorkers seeking to vindicate their fundamental constitutional rights against him in court.

The Second Circuit's framework. Unsurprisingly given the separation-of-powers problems, there's also no argument "that Defendants' executive order [here is] entitled to legislative immunity under Second Circuit precedent." *Ass'n of Jewish Camp Operators*, 470 F. Supp. 3d at 213. The central precedent is *Rowland*, 494 F.3d 71.

In *Rowland*, the Second Circuit articulated a two-part framework for determining whether "high-level *executive* branch officials … can claim the protections of an immunity traditionally accorded to members of the *legislative* branch." *Id.* at 89 (emphasis in original). Under that framework, such officials must "show that their activities were 'legislative' both in form and in substance." *Id.* "Both elements [are] required," *id.*; here, State Defendants satisfy neither.

First, EO 202.68 is not legislative "in form." An executive action is legislative in form if it was an "integral step[] in the legislative process"—such as advocating for a

[14] Nor could the New York Legislature have said otherwise. State law cannot create immunity from § 1983 liability "over and above" federal law. *Howlett v. Rose,* 496 U.S. 356, 375 (1990).

bill, introducing a budget, or signing or vetoing a bill. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *see also Rowland*, 494 F.3d at 82. But as Chief Judge Suddaby already explained to Governor Cuomo, "[b]y nature, executive orders are not legislative." 470 F. Supp. 3d at 213. "The legislature plays no part in the drafting or passing executive orders, that power is reserved for the executive branch." *Id.* Hence, "executive orders do not qualify as an 'integral step' in the legislative process; in fact, they avoid the legislative process altogether." *Id.*; *see also Rowland*, 494 F.3d at 90 (legislative in form is something "passed by means of established legislative procedures" (cleaned up)).

State Defendants' sole counterargument is (again) that the New York Legislature delegated to Governor Cuomo the authority to issue these executive orders. State Mem.15-16. But there is "no reason why a defendant should be entitled to legislative immunity simply because the harm alleged originated, in some sense, with a legislative act." *Rowland*, 494 F.3d at 89 (citing *Kilbourn v. Thompson*, 103 U.S. 168, 196-205 (1880)). What is at issue is Governor Cuomo's decision to *use* his delegated power to craft an executive order that targeted New York's Orthodox Jewish communities. Nothing about that was authorized by the New York Legislature. *See supra* p.26 (delegation to Governor Cuomo was subject to state and federal constitutional limitations); *see also Ass'n of Jewish Camp Operators*, 470 F. Supp. 3d at 212-13 (another order issued under the same COVID-19 powers was not legislative in form); *Agudath Israel*, 983 F.3d at 625 (describing the Governor's delegated COVID powers as "extraordinary *executive* powers" (emphasis added)).

Second, Governor Cuomo's unconstitutional order also is not legislative "in substance." Qualifying as substantively legislative requires that the challenged actions "'bore all the hallmarks of traditional legislation,' including" that they "'reflected … discretionary, policymaking decision[s] implicating the budgetary priorities of the [government] and the services the [government] provides to its constituents.'"

Rowland, 494 F.3d at 89 (alterations in original). The more an action "is directed at a particular" application, "and is not part of a broader legislative policy," the more it is "administrative in nature" and thus not immune. *Id.* at 91 (cleaned up); *see also Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 8 (1st Cir. 2000) (explaining that "[a]bsolute immunity applies to 'prospective, legislative-type rules' that are general in nature," not "administrative" rules).

The landmark Supreme Court decision invoked by State Defendants, *Bogan*, bears this out. In *Bogan*, the Supreme Court considered the actions substantively legislative not because they were policymaking decisions, but because they "implicat[ed] the budgetary priorities of the city and the services the city provides to its constituents." 523 U.S. at 55-56. And, because the job-termination action at issue had "prospective implications" not merely affecting "the particular occupant of the office," the decision went beyond the case-by-case decisionmaking that is a hallmark of executive or administrative, not legislative, action. *Id.* at 56.

Here, by contrast, Governor Cuomo's unlawful order is, in substance, an exercise of executive or administrative power. The cluster initiative involves block-by-block, zone-based determinations (allegedly) based on specific indicia of COVID-19 spread. Indeed, Governor Cuomo touted his plan as more "precise" than Mayor de Blasio's initial ZIP-code proposal *because* it would: (1) be tailored to certain "micro clusters," based on how specific "neighborhoods" and "communities" are organized; (2) focus on the problems with particular "religious institutions"; (3) and allow for county-based enforcement discretion. *See* Compl. ¶¶101-102, 132, 139-140. Making case-by-case determinations about particular neighborhoods, communities, and religious institutions, applied to particular indicia of retrospective COVID spread, and authorizing

local-level enforcement discretion, is—by definition—*not* broad, prospectively-focused action.[15] It is therefore not legislative in substance. *See Bogan*, 523 U.S. at 55.

Accordingly, BYAM and its families may seek relief—injunctive and monetary alike—against Governor Cuomo for his violations of their First Amendment freedoms.[16]

II. BYAM and its families have adequately alleged claims against the City Defendants.

City Defendants concede BYAM and its families "can accuse the[m] of … enforcing the subject Order." City Def's. Br. 19. Yet in a series of scattershot arguments, City Defendants argue none of them can be sued for it. *Id.* at 13-19. All these arguments fail; each City Defendant is properly sued.

A. The City is a proper defendant.

"Municipal liability may attach under § 1983 when a city policymaker takes action that violates an individual's constitutional rights." *Gronowski v. Spencer*, 424 F.3d 285, 296 (2d Cir. 2005). City Defendants offer two arguments against Plaintiffs' ability to hold the City accountable, both meritless.

First, City Defendants contend the complaint contains a "sole allegation" against the City—"that the City took 'actions to limit Plaintiffs' religious exercise.'" City Mem. 18 (quoting Compl. ¶17). But City Defendants are simply wrong; the complaint also alleges that the City was charged with enforcing EO 202.68, Compl. ¶132, and that its officials in fact did so, "issu[ing] 62 tickets and more than $150,000 in fines during

[15] The neighborhood, community, and religious-institution targeting that is inherent to the cluster initiative here distinguishes it from the order found "arguabl[y]" legislative in substance in *Association of Jewish Camp Operators*, 470 F. Supp. 3d at 213. In any event, as Chief Judge Suddaby explained, "both elements of the *Rowland* test" must be satisfied to enjoy legislative immunity. *Id.* Here, as there, Governor Cuomo has failed to meet both elements.

[16] State Defendants don't argue that their legislative-immunity defense—which, again, fails in any event—has any application to Plaintiffs' requests for injunctive and declaratory relief. *See, e.g.*, *Diocese of Brooklyn*, 141 S. Ct. at 68 (enjoining the Governor without any mention of legislative immunity); *supra* p.11 (Governor's consent to an injunction in *Agudath Israel*). Because those claims aren't moot, *supra* Part I, they survive regardless how the legislative-immunity issue is resolved.

the first weekend the" order was "in effect." Compl. ¶134 (cleaned up); *see also id.* at ¶133 ("On October 7, Mayor de Blasio announced that the Order would be enforced in New York City beginning the next day." (cleaned up)).

And indeed, as City Defendants already know, what was true that first weekend came true for BYAM within a week. *Cf. Twombly*, 550 U.S. at 568 n.13 (holding district court "entitled to take notice of" a quoted news article's "full contents" when evaluating a complaint's sufficiency under Rule 12(b)(6) (citing Fed. R. Evid. 201)). Starting on October 15, BYAM faced unprecedented, intrusive, surprise inspections by City Defendants, including the New York City Department of Health and Mental Hygiene and the New York City Sheriff's Office. Mayer Decl. ¶¶9-16; ECF 6-4 ¶42. "Even one episode" of enforcing illegal policy creates liability. *Gronowski*, 424 F.3d at 296 (citation omitted). Here, there were myriad. This creates § 1983 liability against the City.

Second, City Defendants incorrectly argue that the City cannot be held liable because Governor Cuomo "drafted and issued" the order. City Mem.19. But again, the order said it "may be enforced and shall be enforced … , *as determined by the county* in which the red zones, orange zones, and yellow zones are located." Compl. ¶132 (emphasis added). "Where a city official has final authority over significant matters involving the exercise of discretion, his choices represent government policy." *Gronowski*, 424 F.3d 296 (cleaned up). And here, the City's enforcement actions against BYAM and other religious gatherings manifest its authority and discretion. Plaintiffs' allegations against the City far exceed the low bar of Rule 8.

B. The Department of Health and Mental Hygiene is a proper defendant.

City Defendants next argue that Defendant the Department of Health and Mental Hygiene (DOHMH) is "not a proper defendant for purposes of a Section 1983 damages claim" under a provision of the City Charter. City Mem.13; *see Jenkins v. City of New*

York, 478 F.3d 76, 93 n.19 (2d Cir. 2007) ("N.Y.C. Charter § 396" made NYPD a "non-suable agency of the City"). But this argument fails for a straightforward reason: because the cited Charter provision doesn't apply to DOHMH.

The cited provision says plaintiffs seeking "penalties" must sue "in the name of the city of New York and not in that of any agency, *except where otherwise provided by law*." N.Y.C. Charter Ch. 17, § 396 (emphasis added). Here, however, another Charter provision explicitly provides otherwise—namely, that DOHMH "may sue and be sued in" its own name. *Id.*, Ch. 22, § 564. Courts in this Circuit have therefore repeatedly held that while § 396 may immunize *other* City agencies from suit, plaintiffs *can* sue DOHMH, because "pursuant to § 564, DOH[MH] falls within § 396's exception clause."[17] City Defendants therefore fail to excise DOHMH.[18]

C. Mayor de Blasio is a proper defendant.

Turning to Mayor de Blasio, City Defendants argue he can't be held accountable in his official capacity because EO 202.68 was not the result of his "personal involvement." City Mem.14-15. City Defendants are mistaken.

"In this Circuit," one is "personally involved" for purposes of § 1983 liability if one "authorizes, orders, or helps others to do the unlawful acts, even if he or she does not commit the acts personally." *Terebesi v. Torreso*, 764 F.3d 217, 234 (2d Cir. 2014) (citing *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001)). By proposing

[17] *Kemp v. City of New York Dep't of Health*, No. 16-CV-1080 (BMC), 2017 WL 5468311, at *3 (E.D.N.Y. Feb. 4, 2017); *accord, e.g.*, *Rivera v. Bloomberg*, No. 11 CIV. 4325 PGG, 2012 WL 3655830, at *11 (S.D.N.Y. Aug. 27, 2012) ("Under Chapter 22, Section 564 of the New York City Charter, DOHMH ... is a suable entity."); *Johnson v. N.Y.C. Dep't of Health*, No. 06CIV13699BSJFM, 2008 WL 5378124, at *4 (S.D.N.Y. Dec. 22, 2008) ("In light of [§ 564, plaintiff's complaint] properly names the DOHMH as a defendant.").

[18] Even if § 396 did apply to DOHMH—which it doesn't—it wouldn't follow that DOHMH "must be dismissed from this action." *Cf.* City Mem.13. Section 396's reference to "penalties" by its terms doesn't cover injunctive and declaratory relief, which Plaintiffs also seek against DOHMH. *See SEC v. Graham*, 823 F.3d 1357, 1361 (11th Cir. 2016) (ordinary meaning of "penalty" does not include injunctive relief). And the Second Circuit has already entertained a § 1983 claim seeking injunctive relief against DHMH, ruling against it in a case also important to the merits of Plaintiffs' Free Exercise claims here. *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014); *see* ECF 6-2 at 11, 17.

the initial ZIP-code targeting effort Governor Cuomo would refine, Mayor de Blasio certainly "help[ed] others" violate the Constitution.

City Defendants' counter turns on the notion that it was the Governor's order, not the Mayor's initial ZIP-code-based targeting, that ultimately took effect. City Mem.14. But "[t]he fact that" Mayor de Blasio "did not draft the" ultimate order "is not enough." *Ekupe v. Santiago*, 823 F. App'x 25, 32 (2d Cir. 2020). Mayor de Blasio's ZIP-code plan was conditioned on Governor Cuomo's approval. Compl. ¶100. Citing its "imperfect[ions]" in not precisely targeting religious institutions and neighborhoods, Cuomo took de Blasio's proposal and "sharpen[ed]" it (*supra* p.4) into the final restrictions Plaintiffs challenge. Compl. ¶¶100-02. For personal involvement, this suffices.[19] *See Ekupe*, 823 F. App'x at 31 (personal involvement found because a jury could find that defendant "participated in the initial [report]" and "signed off on" the "report" that would be "use[d]" for fabricated charges (citing *Provost*, 262 F.3d at 155)); *see also Terebesi*, 764 F.3d at 234 ("planners may be liable under § 1983 to the extent that a plan … , as formulated and approved by those defendants, provides for and results in an unconstitutional" act).

D. Mayor de Blasio's unlawful actions are not shielded by qualified immunity.

To avoid liability in his individual capacity, City Defendants claim that Mayor de Blasio enjoys qualified immunity.[20] City Mem.15-18. Specifically, they argue that existing law did not "clearly establish" that it is unconstitutional to religiously-

[19] In a single sentence, City Defendants also purport that the claims against de Blasio (in his official capacity) are "duplicative" of those against the City. *See* City Mem.13. But while Mayor de Blasio did direct the City's unlawful enforcement actions, he also—as discussed above—played an instrumental role in crafting the initial "ZIP code" targeting scheme that would be refined into the final, unconstitutional order. Claims that are rooted in the official having a distinct role are not "duplicative." *See N.Y. Youth Club v. Town of Harrison*, 150 F. Supp. 3d 264, 276 (S.D.N.Y. 2015).

[20] Governor Cuomo did not assert qualified immunity. He instead rests on a flawed understanding of legislative immunity. *Supra* Part I.C. Because he has not "press[ed] a qualified immunity defense during pretrial proceedings," he has waived it. *Stephenson v. Doe*, 332 F.3d 68, 76 (2d Cir. 2003).

gerrymander school closures—"[a]t most," it was only clearly unconstitutional to do that to "houses of worship." *Id.* at 16-17. This argument fails the straight-face test. It also fails the qualified-immunity standard.

Requiring "clearly established" law "is *not* to say that an official action is protected … unless the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (emphasis added). Rather, it is enough that the "unlawfulness" was "apparent." *Id.* And here, decades of Supreme Court precedent—confirmed just months ago in *Diocese of Brooklyn*, *involving this very order*—makes the unconstitutionality (at minimum) "apparent."

When the Supreme Court enjoined EO 202.68's house-of-worship caps in *Diocese of Brooklyn*, it said "the applicants have *clearly established* their entitlement to relief pending appellate review." 141 S. Ct. at 66 (emphasis added). It is no surprise that the Court used the same language as the qualified-immunity standard. The standard for securing a mandatory injunction from the Supreme Court is at least as demanding. *See Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers) ("indisputably clear" right to relief). *Diocese of Brooklyn* found this high hurdle "clearly" met because the order at issue there—and here—violates the Free Exercise Clause's "minimum" requirements: neutrality and general applicability. *See* 141 S. Ct. at 66 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)); *see also id.* at 69 (Gorsuch, J., concurring) (describing these as the Clause's "minimum" guarantees).

For years, the Supreme Court has described these baseline free-exercise guarantees as "essential" (*Lukumi*, 508 U.S. at 543), "basic principles" that "have long guided" the Supreme Court (*Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (many citations omitted)). Moreover, the religious exercise here—sending children to religious schools—is an "enduring American tradition" that the Supreme Court has "long recognized" as part of the free-exercise guarantee. *Id.* at 2261 (citing

Yoder, 406 U.S. at 213-14; *see also id.* at 2284 (Breyer & Kagan, JJ., dissenting) ("the Free Exercise Clause draws upon a history that places great value upon the freedom of parents to teach their children the tenets of their faith"). These "settled [First] Amendment principles" provide the Free Exercise Clause's floor. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (such principles constitute "clearly established" law).

Mayor de Blasio thus had decades of "fair warning" that the "contours" of the "constitutional right" at issue forbid purportedly neutral laws that gerrymander religious gatherings. *Hope*, 536 U.S. at 739-40. Nevertheless, he crafted a "ZIP code" proposal that resulted in a statewide order doing exactly that.[21] He enforced that order even though "statements made in connection with the challenged rules can be viewed as targeting the 'ultra-Orthodox [Jewish] community.'" *Diocese of Brooklyn*, 141 S. Ct. at 66 (citation omitted). He did so despite the order's transparently "disparate treatment" between so-called "essential" activities and religious schools. *Compare id.* (disparate treatment between certain "essential" activities and houses of worship) *with, e.g.*, Compl. ¶114 ("child care services" designated as "essential" while religious schools are closed). And, he did so as the order upended an "enduring American tradition" protected by the Free Exercise Clause: sending children to religious schools. *Espinoza*, 140 S. Ct. at 2261-62.

The Mayor's choice exacted profound cost on BYAM and its families. The Lebovitses did not send their children to BYAM simply to learn reading, writing, and arithmetic. "Prayer is … a central part of BYAM's religious mission." Compl. ¶45; *see*

[21] Tellingly, Mayor de Blasio leaves to a footnote any argument that the order in fact was neutral and generally applicable, arguing that EO 202.68 "applied to all schools," religious or secular. City Mem.17 n.5. The Mayor buries this argument for obvious reasons. First, as *Agudath Israel* explains, the relevant question is whether the order "selected some businesses … for favorable treatment … while imposing greater restrictions on 'non-essential' activities," including (as relevant here) religious education—and the answer is yes. 983 F.3d at 632. Second, the Mayor overlooks that under *Yoder*, Plaintiffs have an affirmative right to direct their children's religious education, regardless whether the challenged law is neutral and generally applicable. ECF 6-2 at 11-13. Third, the Mayor ignores that the Order as a whole "can be viewed as targeting" Orthodox Jews, *Diocese of Brooklyn*, 141 S. Ct. at 66—a flaw infecting its house-of-worship and school provisions alike.

also id. ¶39 (Lebovitses selected BYAM so their children can recite, as a community, "Hebrew prayers that are essential to the practice of their Orthodox Jewish faith."); ECF 6-4 ¶13 ("The Talmud also teaches that Jews should assemble in groups for prayers and rituals"); *id.* at ¶¶14-30 (detailing the religious teachings, rituals, prayers, and celebrations that demonstrates the "Orthodox Jewish education" at BYAM "cannot be fully replicated by telelearning, threatening the vitality of our traditions and the religious messages they convey"). Mayor de Blasio and his co-Defendants took their place of religious worship—and instruction—away.

Far from being shielded from liability, Mayor de Blasio's participation in "effectively barring" activity "at the very heart of the First Amendment's guarantee of religious liberty" is a "drastic measure" requiring "serious examination." *Diocese of Brooklyn*, 141 S. Ct. at 68. Qualified immunity is no defense. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (holding that courts must "draw[] inferences in favor of the nonmovant" in establishing whether a right is "clearly established").

CONCLUSION

The Court should deny Defendants' motions to dismiss.

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Respectfully submitted,

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