AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Roman Catholic Diocese of Brooklyn v. Cuomo, \_\_\_ St. Ct. \_\_\_** (2020)

*Governor Andrew Cuomo of New York on October 6, 2020 issued an executive order responded to a spike in COVID-19 cases. In “red zones,” all non-essential businesses were closed “houses of worship” limited “to a capacity of 25% of maximum occupancy or 10 people, whichever is fewer. In orange zones, such businesses as “gyms, fitness centers, . . . and all person care services” were closed and “houses of worship” limited to “a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people.” “Houses of worship” in “yellow zones” had a “capacity had of 50% of maximum occupancy. The Roman Catholic Diocese of Brooklyn sought an injunction against the implementation of the rules for red and orange zones on the ground that they unconstitutionally discriminated against religion. The local trial court denied motions for a temporary restraining order and that decision was affirmed by the Court of Appeals for the Second Circuit, which did, however, agree to expedite the process for making a ruling on the merits. The Diocese appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-4 vote issued a temporary restraining order. The per curiam opinion maintained that Roman Catholic Church was likely to succeed on the merits because the executive order discriminated against houses of worship. The executive order placed fewer limits on essential businesses, but more limits on non-essential businesses. Why do the justices in the majority think this discriminates against religion? Justice Brett Kavanaugh insists that churches most always receive the most favored treatment. Does that mean if there is a fire in the neighborhood, the fire department must first put out the fire in religious establishments? The liberal dissenting justices insist that differential treatment is justified. Why do they reach that conclusion? Do they imply that the fire department could decide the last house to protect is a house of worship? Who has the better argument and how would that effect the priority for putting out fires on a city block?*

Roman Catholic Diocese *was Justice Amy Barrett’s first substantive vote on the court. Does her decision to side with the majority auger anything about the future path of the Supreme Court’s religion jurisprudence?*

Per Curiam.

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*Likelihood of success on the merits*. The applicants have made a strong showing that the challenged restrictions violate “the minimum requirement of neutrality” to religion. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah* (1993). As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the “‘ultra-Orthodox [Jewish] community.’” But even if we put those comments aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as “essential” may admit as many people as they wish. And the list of “essential” businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could “literally have hundreds of people shopping there on any given day.” Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID–19,  but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records.

Because the challenged restrictions are not “neutral” and of “general applicability,” they must satisfy “strict scrutiny,” and this means that they must be “narrowly tailored” to serve a “compelling” state interest.  Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as “narrowly tailored.” They are far more restrictive than any COVID–related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants’ services. . . .

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. . . . It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.

*Irreparable harm*. There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”  If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance.

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

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

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It is clear that this matter is not moot. And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange. The Governor regularly changes the classification of particular areas without prior notice. If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained. . . . The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another reclassification.

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Justice [Gorsuch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I9bbde8792fd711ebacd9f1f20ec17be0&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9bbde8792fd711ebacd9f1f20ec17be0), concurring.

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

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. . . . [I]t turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?

As almost everyone on the Court today recognizes, squaring the Governor's edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of “essential” businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as “essential” as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all “essential” while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.

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. . . . *Jacobson* v. *Massachusetts* (1905) hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction. . . . . Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing [smallpox](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ib159aa79475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) pandemic, required individuals to take a vaccine, pay a $5 fine, or establish that they qualified for an exemption. . . .  *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest.

Next, consider the right asserted. Mr. Jacobson claimed that he possessed an implied “substantive due process” right to “bodily integrity” that emanated from the Fourteenth Amendment and allowed him to avoid not only the vaccine but *also*the $5 fine (about $140 today) *and* the need to show he qualified for an exemption.  This Court disagreed. But what does that have to do with our circumstances? Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise.

Finally, consider the different nature of the restriction. In *Jacobson*, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors.  Here, by contrast, the State has effectively sought to ban all traditional forms of worship in affected “zones” whenever the Governor decrees and for as long as he chooses. Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson*explained that the challenged law survived only because it did not “contravene the Constitution of the United States” or “infringe any right granted or secured by that instrument.”

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. . . . It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow.

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It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

Justice [Kavanaugh](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I9bbde8792fd711ebacd9f1f20ec17be0&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9bbde8792fd711ebacd9f1f20ec17be0), concurring.

. . . . On this record, temporary injunctions are warranted because New York's severe caps on attendance at religious services likely violate the First Amendment. Importantly, the Court's orders today are not final decisions on the merits. Instead, the Court simply grants *temporary* injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

To begin with, New York's 10-person and 25-person caps on attendance at religious services in red and orange zones (which are areas where COVID–19 is more prevalent) are much more severe than most other States’ restrictions. . . .In New York's red zones, most houses of worship are limited to 10 people; in orange zones, most houses of worship are limited to 25 people. Those strict and inflexible numerical caps apply even to large churches and synagogues that ordinarily can hold hundreds of people and that, with social distancing and mask requirements, could still easily hold far more than 10 or 25 people.

Moreover, New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all.

\*8 The State's discrimination against religion raises a serious First Amendment issue and triggers heightened scrutiny, requiring the State to provide a sufficient justification for the discrimination. But New York has not sufficiently justified treating houses of worship more severely than secular businesses.

The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some*secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class. . . .

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For those reasons, I agree with THE CHIEF JUSTICE that New York's “[n]umerical capacity limits of 10 and 25 people ... seem unduly restrictive” and that “it may well be that such restrictions violate the Free Exercise Clause.”  I part ways with THE CHIEF JUSTICE on a narrow procedural point regarding the timing of the injunctions. THE CHIEF JUSTICE would not issue injunctions at this time*.*As he notes, the State made a change in designations a few days ago, and now none of the churches and synagogues who are applicants in these cases are located in red or orange zones. . . . But the State has not withdrawn or amended the relevant Executive Order. And the State does not suggest that the applicants lack standing to challenge the red-zone and orange-zone caps imposed by the Executive Order, or that these cases are moot or not ripe. In other words, the State does not deny that the applicants face an imminent injury *today*. In particular, the State does not deny that some houses of worship, including the applicants here, are located in areas that likely will be classified as red or orange zones in the very near future. I therefore see no jurisdictional or prudential barriers to issuing the injunctions now.

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Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I9bbde8792fd711ebacd9f1f20ec17be0&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9bbde8792fd711ebacd9f1f20ec17be0), dissenting.

I would not grant injunctive relief under the present circumstances. There is simply no need to do so. After the Diocese and Agudath Israel filed their applications, the Governor revised the designations of the affected areas. None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions. At these locations, the applicants can hold services with up to 50% of capacity, which is at least as favorable as the relief they currently seek.

Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause. It is not necessary, however, for us to rule on that serious and difficult question at this time. The Governor might reinstate the restrictions. But he also might not. And it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic. . . .

. . . . To be clear, I do not regard my dissenting colleagues as “cutting the Constitution loose during a pandemic,” yielding to “a particular judicial impulse to stay out of the way in times of crisis,” or “shelter[ing] in place when the Constitution is under attack.”  They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution.

. . . . [W]hile *Jacobson* occupies three pages of today's concurrence, it warranted exactly one sentence in *South Bay*. What did that one sentence say? Only that “[o]ur Constitution principally entrusts ‘[t]he safety and the health of the people’ to the politically accountable officials of the States ‘to guard and protect.’” It is not clear which part of this lone quotation today's concurrence finds so discomfiting. . . .

Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I9bbde8792fd711ebacd9f1f20ec17be0&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9bbde8792fd711ebacd9f1f20ec17be0), with whom Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I9bbde8792fd711ebacd9f1f20ec17be0&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9bbde8792fd711ebacd9f1f20ec17be0) and Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I9bbde8792fd711ebacd9f1f20ec17be0&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9bbde8792fd711ebacd9f1f20ec17be0) join, dissenting.

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. . . . [T]here is no need now to issue any such injunction. Those parts of Brooklyn and Queens where the Diocese's churches and the two applicant synagogues are located are no longer within red or orange zones. . . . [T]he applicants point out that the State might reimpose the red or orange zone restrictions in the future. But, were that to occur, they could refile their applications here, by letter brief if necessary. And this Court, if necessary, could then decide the matter in a day or two, perhaps even in a few hours. . . . We have previously said that an injunction is an “extraordinary remedy.”  That is especially so where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts’ determination. Here, we consider severe restrictions. Those restrictions limit the number of persons who can attend a religious service to 10 and 25 congregants (irrespective of mask-wearing and social distancing). And those numbers are indeed low. But whether, in present circumstances, those low numbers violate the Constitution's Free Exercise Clause is far from clear, and, in my view, the applicants must make such a showing here to show that they are entitled to “the extraordinary remedy of injunction.”

. . . . [M]embers of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, [cough](https://1.next.westlaw.com/Link/Document/FullText?entityType=gdrug&entityId=Ife6b157b6c7111e18b05fdf15589d8e8&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), or breathe near each other Thus, according to experts, the risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces.  The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants’ First Amendment challenges. That fact, along with others that JUSTICE SOTOMAYOR describes, means that the applicants’ claim of a constitutional violation (on which they base their request for injunctive relief) is far from clear. . . . At the same time, the public's serious health and safety needs, which call for swift government action in ever changing circumstances, also mean that it is far from clear that “the balance of equities tips in [the applicants’] favor,” or “that an injunction is in the public interest.”

Relevant precedent suggests the same. We have previously recognized that courts must grant elected officials “broad” discretion when they “undertake to act in areas fraught with medical and scientific uncertainties.”  That is because the “Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.”  The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to “changing facts on the ground.” And they can do so more quickly than can courts. That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings. It is true even more so where, as here, the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing.

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Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I9bbde8792fd711ebacd9f1f20ec17be0&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9bbde8792fd711ebacd9f1f20ec17be0), with whom Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I9bbde8792fd711ebacd9f1f20ec17be0&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I9bbde8792fd711ebacd9f1f20ec17be0) joins, dissenting.

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*South Bay United Pentecostal Church* v. *Newsom* (2020) and  *Calvary Chapel Dayton Valley* v. *Sisolak* (2020) provided a clear and workable rule to state officials seeking to control the spread of COVID–19: They may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict. New York's safety measures fall comfortably within those bounds. Like the States in *South Bay* and *Calvary Chapel*, New York applies “[s]imilar or more severe restrictions ... to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time.”  Likewise, New York “treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.” That should be enough to decide this case.

The Diocese attempts to get around *South Bay*and *Calvary Chapel*by disputing New York's conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores. But the District Court rejected that argument as unsupported by the factual record. \_\_\_, Undeterred, JUSTICE GORSUCH offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York's rules (*e.g.,* going to the liquor store or getting a bike repaired). But JUSTICE GORSUCH does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID–19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. Unlike religious services, which “have every one of th[ose] risk factors,” bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time.  Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.

In truth, this case is easier than *South Bay* and *Calvary Chapel*. While the state regulations in those cases generally applied the same rules to houses of worship and secular institutions where people congregate in large groups, New York treats houses of worship far more favorably than their secular comparators. And whereas the restrictions in *South Bay* and *Calvary Chapel* applied statewide, New York's fixed-capacity restrictions apply only in specially designated areas experiencing a surge in COVID–19 cases.

The Diocese suggests that, because New York's regulation singles out houses of worship by name, it cannot be neutral with respect to the practice of religion. Thus, the argument goes, the regulation must, *ipso facto*, be subject to strict scrutiny. It is true that New York's policy refers to religion on its face. But as I have just explained, that is because the policy singles out religious institutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them. Surely the Diocese cannot demand laxer restrictions by pointing out that it is already being treated better than comparable secular institutions.

Finally, the Diocese points to certain statements by Governor Cuomo as evidence that New York's regulation is impermissibly targeted at religious activity—specifically, at combatting heightened rates of positive COVID–19 cases among New York's Orthodox Jewish community. . . . The Governor's comments simply do not warrant an application of strict scrutiny under this Court's precedents. Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a “Muslim Ban,” originally conceived of as a “ ‘total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.’ ”  If the President's statements did not show “that the challenged restrictions violate the ‘minimum requirement of neutrality’ to religion,” it is hard to see how Governor Cuomo's do.