

IN THE
Supreme Court of the United States

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

Applicants,

v.

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

Respondent.

TO THE HONORABLE STEPHEN BREYER ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES AND ACTING CIRCUIT JUSTICE FOR THE SECOND CIRCUIT

**APPENDIX TO EMERGENCY APPLICATION
FOR WRIT OF INJUNCTION
VOLUME I (Pages App. 1 to App. 252)**

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TABLE OF CONTENTS

Order Denying Motion for Injunction Pending Appeal, <i>Agudath Israel of Am. et al. v. Cuomo</i> , No. 20-3572 (2d Cir. Nov. 9, 2020), Dkt. 97	App. 1
Judge Michael H. Park, Dissenting from Order Denying Motion for Injunction Pending Appeal, <i>Agudath Israel of Am. et al. v. Cuomo</i> , No. 20-3572 (2d Cir. Nov. 9, 2020), Dkt. 98	App. 6
Transcript of Hearing on Preliminary Injunction, <i>Agudath Israel of Am. et al. v. Cuomo</i> , No. 1:20-cv-04834 (E.D.N.Y. Oct. 9, 2020)	App. 10
Plaintiff's Reply Brief in Support of Motion for Injunction, R. 13	App. 79
Andrew M. Cuomo, <i>Governor Cuomo Updates New Yorkers On State's Progress During COVID-19 Pandemic</i> , R. 2-4	App. 94
Plaintiffs' Emergency Motion for Injunction Pending Appeal, Dkt. 21-1	App. 106
Brief Amicus Curiae of the Muslim Public Affairs Council <i>et al.</i> in Support of Plaintiffs-Appellants and Reversal, Dkt. 57	App. 138
Affidavit of Steven Saphirstein, R. 2-19	App. 167
Affidavit of Rabbi Menachem Feifer, R. 2-20	App. 172
Affidavit of Rabbi Yisroel Reisman, R. 2-21	App. 177
Affidavit of Aharon Weisenfeld, R. 2-17	App. 182
Executive Order No. 202, R. 2-10	App. 184
Empire State Development, <i>Guidance for Determining Whether A Business Enterprise is Subject to A Workforce Reduction Under Executive Order 202.68, Related to New York's Cluster Action Initiative to Address COVID-19 Hotspots</i> , R. 2-13	App. 188
New York Forward, <i>Phase One, Two, Three, and Four Industries</i> , R. 2-11	App. 202
N.Y. State, Dep't of Health, <i>Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency</i> , R. 2-15	App. 253

N.Y. State, Dep’t of Health, <i>Interim Guidance for Essential & Phase II Retail Business Activities During the COVID-19 Public Health Emergency</i> , R. 2-16	App. 266
N.Y. State, Dep’t of Health, <i>Interim Guidance for Religious & Funeral Services During the COVID-19 Public Health Emergency</i> , R. 2-12	App. 292
Plaintiffs-Appellants’ Reply Brief in Support of Emergency Motion for Injunction Pending Appeal, Dkt. 79	App. 303
Executive Order No. 202.68, R. 2-8	App. 322
Andrew M. Cuomo, <i>Governor Cuomo Announces New Cluster Action Initiative</i> , R. 2-9	App. 325
N.Y. State, Dep’t of Health, <i>Interim Guidance for In-Person Instruction At Pre-K to Grade 12 Schools During the COVID-19 Public Health Emergency</i> , R. 2-14	App. 336
Brief Amicus Curiae of the Becket Fund for Religious Liberty and the Jewish Coalition for Religious Liberty in Support of Plaintiffs-Appellants and Injunction Pending Appeal, Dkt. 49-2	App. 374
Plaintiffs’ Complaint for Declaratory and Injunctive Relief, R. 1	App. 395
Plaintiffs’ Motion for a Temporary Restraining Order and a Preliminary Injunction, R. 2	App. 420
Declaration of Howard A. Zucker, M.D., J.D., R. 12	App. 425
Supplemental Declaration of Howard A. Zucker, M.D., J.D., <i>The Roman Catholic Diocese of Brooklyn, New York v. Cuomo</i> , No. 1:20-cv-04844 (E.D.N.Y. Oct. 16, 2020), Dkt. 29-1	App. 449
Defendant-Appellee’s Memorandum of Law In Opposition to Plaintiffs-Appellants’ Emergency Motion for an Injunction Pending Appeal, Dkt. 60	App. 457
Plaintiffs’ Letter Motion for Injunctive Relief Pending Appeal, R. 22	App. 495
Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of the Plaintiff, <i>Cap. Hill Baptist Church v. Bowser</i> , 1:20-CV-02710 (D.D.C. Oct. 7, 2020), Dkt. 28	App. 497

E.D.N.Y. – Bklyn.
20-cv-4834
Matsumoto, J.
20-cv-4844
Garaufis, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of November, two thousand twenty.

Present:

Raymond J. Lohier, Jr.,
Michael H. Park,
Circuit Judges,
Jed S. Rakoff,*
Judge.

Agudath Israel of America, Agudath Israel of Kew Garden Hills,
Agudath Israel of Madison, Agudath Israel of Bayswater, Rabbi
Yisroel Reisman, Rabbi Menachem Feifer, Steven Saphirstein,

Plaintiffs-Appellants,

v.

20-3572

Andrew M. Cuomo, Governor of the State of New York, in his
official capacity,

Defendant-Appellee.

The Roman Catholic Diocese of Brooklyn, New York,

Plaintiff-Appellant,

v.

20-3590

Governor Andrew M. Cuomo, in his official capacity,

Defendant-Appellee.

* Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

These appeals, which are being heard in tandem, arise from the ongoing COVID-19 pandemic. The pandemic has caused more than 25,000 deaths in New York State and more than 10,000 deaths in Brooklyn and Queens alone. In response to a recent spike in cases concentrated in parts of Brooklyn, Queens, and other areas, Governor Andrew Cuomo issued an executive order to limit further spread of the virus in these COVID-19 “hotspots.”

The executive order directs the New York State Department of Health to identify yellow, orange, and red “zones” based on the severity of outbreaks, and it imposes correspondingly severe restrictions on activity within each zone. For example, the order provides that in “red zones,” non-essential gatherings of any size must be cancelled, non-essential businesses must be closed, schools must be closed for in-person instruction, restaurants cannot seat customers, and houses of worship may hold services but are subject to a capacity limit of 25 percent of their maximum occupancy or 10 people, whichever is fewer.

The Appellants—Agudath Israel of America, Agudath Israel of Kew Garden Hills, Agudath Israel of Madison, Agudath Israel of Bayswater, Rabbi Yisroel Reisman, Rabbi Menachem Feifer, Steven Saphirstein (collectively, “Agudath Israel”), and The Roman Catholic Diocese of Brooklyn, New York (the “Diocese”)—each challenged the executive order as a violation of the Free Exercise Clause of the First Amendment. In each case, the district court denied the Appellants’ motion for a preliminary injunction against the enforcement of the order. The Appellants now move for emergency injunctions pending appeal and to expedite their appeals, after an applications Judge on our Court denied their requests for an administrative stay, No. 20-3572, doc. 30; No. 20-3590, doc. 29.

Preliminarily, we conclude that Agudath Israel did not “move first in the district court for” an order “granting an injunction while an appeal is pending” before filing with this Court its present motion for an injunction pending appeal. Fed. R. App. P. 8(a)(1)(C). Instead, Appellant moved for a preliminary injunction pending the district court’s final judgment. In its briefs and at oral argument before this panel, moreover, Agudath Israel has not explained or otherwise justified its failure to comply with the straightforward requirement of Rule 8(a). Agudath Israel also has failed to demonstrate that “moving first in the district court would be impracticable,” Fed. R. App. P. 8(a)(2)(A), or even futile, particularly in light of the fact that a full eleven days elapsed after the district court’s ruling before Agudath Israel sought relief from this Court. We deny Agudath Israel’s motion for these procedural reasons. *See Hirschfeld v. Bd. of Elections in N.Y.*, 984 F.2d 35, 38 (2d Cir. 1993).

We deny the Diocese’s motion for an injunction pending appeal—and would deny the motion filed by Agudath Israel if it were properly before us—for the reasons that follow.

As an initial matter, an injunction is “an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). To obtain an injunction from a district court, movants generally bear the burden of showing that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Id.* at 20.

To obtain a stay of a district court’s order pending appeal, more is required, including a “strong showing that [the movant] is likely to succeed on the merits.” *New York v. U.S. Dep’t of Homeland Sec.*, 974 F.3d 210, 214 (2d Cir. 2020). The motions at issue here seek a remedy still more drastic than a stay: an injunction issued in the first instance by an appellate court. “Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.” *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (quotation marks omitted).

“The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status.” *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quotation marks omitted); see *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014) (“[T]he Free Exercise Clause . . . protects the performance of (or abstention from) physical acts that constitute the free exercise of religion: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.”) (quotation marks omitted)). But the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability,” *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (quotation marks omitted), “even if the law has the incidental effect of burdening a particular religious practice,” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

“A law burdening religious conduct that is *not* both neutral and generally applicable, however, is subject to strict scrutiny.” *Cent. Rabbinical*, 763 F.3d at 193 (citing *Lukumi*, 508 U.S. at 531–32). “A law is not neutral if it is specifically directed at a religious practice.” *Id.* (cleaned up). Similarly, a law is “not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it.” *Id.* at 197.

The Court fully understands the impact the executive order has had on houses of worship throughout the affected zones. Nevertheless, the Appellants cannot clear the high bar necessary to obtain an injunction pending appeal. The challenged executive order establishes zones based on the severity of the COVID-19 outbreaks in different parts of New York. Within each zone, the order subjects religious services to restrictions that are similar to or, indeed, *less severe than* those imposed on comparable secular gatherings. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, *C.J.*, concurring) (denying emergency injunctive relief to houses of worship that were subject to similar or less severe restrictions than those applicable to comparable secular gatherings); see also *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 342, 346–47 (7th Cir. 2020) (upholding an order that capped religious gatherings at ten people where the most comparable activities—those “that occur in auditoriums, such as concerts and movies”—had been banned completely); cf. *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210–11 (2d Cir. 2011) (holding that a Kosher food labeling act was a neutral and generally applicable law subject to rational basis review because it applied

to “food purchased by individuals of many different religious beliefs” and impacted consumers who purchased kosher products “for reasons unrelated to religious observance”).

Thus, while it is true that the challenged order burdens the Appellants’ religious practices, the order is not “substantially underinclusive” given its greater or equal impact on schools, restaurants, and comparable secular public gatherings. *Cf.* No. 20-3590, doc. 20, Ex. L at 2 (Governor Cuomo criticizing the order’s policy of “clos[ing] every school” as “a policy being cut by a hatchet,” not “a scalpel”). To the contrary, the executive order “extend[s] well beyond isolated groups of religious adherents” to “encompass[] both secular and religious conduct.” *Cent. Rabbinical*, 763 F.3d at 195.

In a dissent from this Court’s order, our colleague asserts that the executive order is subject to strict scrutiny because it violates the minimum requirement of neutrality. The fact that theaters, casinos, and gyms are more restricted than places of worship, the dissent reasons, “only highlights the fact that the order is not neutral towards religion.” But this view is undermined by recent precedent, which makes clear that COVID-19 restrictions that treat places of worship on a par with or more favorably than comparable secular gatherings do not run afoul of the Free Exercise Clause. *See, e.g., S. Bay*, 140 S. Ct. at 1613 (Roberts, *C.J.*, concurring) (guidelines that “place[d] restrictions on places of worship” less severe than those on comparable gatherings “appear consistent with the Free Exercise Clause”); *see also Elim*, 962 F.3d at 347 (same).

The dissent attempts to distinguish *South Bay* as having been decided during the early stages of the pandemic while local governments were actively shaping their response to changing facts on the ground. But here, too, the executive order is a response to rapidly changing facts on the ground. For several months, New York’s “limits and restrictions lessen[ed] and evolve[d] as the curve continue[d] to flatten,” and the State’s “limits and restrictions . . . increase[d]” only when “a review of the data indicate[d] a trend of increasing COVID-19 cases or spikes of cases in [the] cluster areas” targeted by the challenged executive order. No. 20 Civ. 4834 (KAM) (E.D.N.Y. 2020), doc. 12 at 14, 18–19. In any event, *South Bay* did not draw a distinction between the pandemic in its early or late stage. Its central relevant facts exist in New York in November 2020 just as they existed in California in May 2020: There is no vaccine or known cure for COVID-19; the pandemic has killed hundreds of thousands of Americans; and “[b]ecause people may be infected but asymptomatic, they may unwittingly infect others.” *S. Bay*, 140 S. Ct. at 1613 (Roberts, *C.J.*, concurring).

Upon due consideration, and for the foregoing reasons, it is hereby ORDERED that the Appellants’ motions for injunctions pending appeal are DENIED. Among other infirmities in their arguments, the Appellants have failed to meet the requisite standard for an injunction pending appeal. *See New York v. U.S. Dep’t of Homeland Sec.*, 974 F.3d at 214. It is further ORDERED that the motion to expedite the appeals is GRANTED.

We address here only the Appellants’ motions for injunctions pending appeal and to expedite their appeals, not their underlying appeals challenging the district courts’ refusals to provide preliminary injunctive relief. With respect to the underlying appeals, the parties have agreed to the following

merits briefing schedule: Appellants' briefs are due Tuesday, November 17, 2020; Appellee's brief is due Tuesday, December 8, 2020; Appellants' reply briefs are due Monday, December 14, 2020, and the matter is to be calendared as early as the week of December 14, 2020.

Judge Park dissents from the denial of the motions for injunctions pending appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A handwritten signature in cursive script that reads "Catherine O'Hagan Wolfe". The signature is written in black ink and is positioned over a circular official seal.

The seal of the United States Second Circuit Court of Appeals. It is a circular emblem with a red outer ring containing the text "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in the center, flanked by two small stars on either side.

Park, *Circuit Judge*, dissenting:

In response to the COVID-19 pandemic, the Governor of New York issued an executive order imposing strict capacity limits on “houses of worship” in certain specified “zones.” Those restrictions apply only to religious institutions; in the same zones, pet shops, liquor stores, and other businesses the Governor considers “essential” remain open, free from any capacity limits. By singling out “houses of worship” for unfavorable treatment, the executive order specifically and intentionally burdens the free exercise of religion in violation of the First Amendment. I would thus grant the motions for injunctive relief pending appeal.

I

Discrimination against religion is “odious to our Constitution.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). “Official action that targets religious conduct for distinctive treatment” must thus satisfy “the most rigorous of scrutiny.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993).

A

First, the executive order fails the “minimum requirement of neutrality” towards religion, which means that a government policy may “not discriminate on its face.” *Id.* at 533. The order authorizes the New York State Department of Health to designate “areas in the State that require enhanced public health restrictions” as red, orange, or yellow zones. N.Y. Exec. Order No. 202.68. In each zone, the order subjects only “houses of worship” to special “capacity limit[s]”: in red zones, “25% of maximum occupancy or 10 people, whichever is fewer”; in orange zones, “the lesser of 33% of maximum occupancy or 25 people”; and in yellow zones, “50% of . . . maximum occupancy.” *Id.* But in the very same zones, numerous businesses deemed “essential” may operate with no such restrictions.¹ This disparate treatment of religious and secular institutions is plainly not neutral.

The Governor’s public statements confirm that he intended to target the free exercise of religion. The day before issuing the order, the Governor said that if the “ultra-Orthodox [Jewish] community” would not agree to enforce the rules, “then we’ll close the institutions down.”² *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018) (factors relevant to the assessment of neutrality include “the specific series of events leading to the enactment or

¹ *See Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Recent Executive Orders*, N.Y. State Dep’t of Econ. Dev. (updated Oct. 23, 2020), <https://esd.ny.gov/guidance-executive-order-2026>; *Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Executive Order 202.68*, N.Y. State Dep’t of Econ. Dev. (updated Oct. 7, 2020), <https://esd.ny.gov/ny-cluster-action-initiative-guidance>; Hearing Tr. at 81–82, No. 20-cv-4844 (E.D.N.Y. Oct. 15, 2020).

² *Governor Cuomo Updates New Yorkers on State’s Progress During COVID-19 Pandemic*, Off. of the Governor (Oct. 5, 2020), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1>.

official policy in question” and “contemporaneous statements made by members of the decisionmaking body”).

The Governor argues that the executive order should nonetheless be subject to only rational-basis review because it treats houses of worship “more favorably” than “non-essential” secular businesses, like theaters, casinos, and gyms. But this only highlights the fact that the order is not neutral towards religion. Rational-basis review applies when a generally applicable policy incidentally burdens religion, but a policy that expressly *targets* religion is subject to heightened scrutiny. *See Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 194 (2d Cir. 2014). Here, the executive order does not impose neutral public-health guidelines, like requiring masks and distancing or limiting capacity by space or time. Instead, the Governor has selected some businesses (such as news media, financial services, certain retail stores, and construction) for favorable treatment, calling them “essential,” while imposing greater restrictions on “non-essential” activities and religious worship. Such targeting of religion is subject to strict scrutiny.

South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.), is not to the contrary. Summary decisions of the Supreme Court are precedential only as to “the precise issues presented and necessarily decided.” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Petitioners in *South Bay* sought a writ of injunction, which is granted only when “the legal rights at issue are indisputably clear.” *Id.* at 1613 (Roberts, *C.J.*, concurring) (citation omitted). Here, Appellants seek injunctions pending appeal, for which they need to show, at most, a “‘substantial’ likelihood” of success on the merits. *United for Peace & Just. v. City of New York*, 323 F.3d 175, 178 (2d Cir. 2003). In addition, the motions before this Court arise from quite different circumstances. *South Bay* was decided during the early stages of the pandemic, when local governments were struggling to prevent the healthcare system from being overwhelmed and were “actively shaping their response to changing facts on the ground.” 140 S. Ct. at 1614 (Roberts, *C.J.*, concurring). By contrast, the Governor’s stated concern here is maintaining localized containment. In April, New York reported a seven-day average of nearly 1,000 deaths per day from COVID-19.³ Six months later, that average has not exceeded 20 for months. *See id.*

Finally, the Governor overstates the import of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld a mandatory vaccination law against a substantive due process challenge. *Jacobson* was decided before the First Amendment was incorporated against the states, and it “did not address the free exercise of religion.” *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). Indeed, the Court specifically noted that “even if based on the acknowledged police powers of a state,” a public health measure “must always yield in case of conflict with . . . any right which [the Constitution] gives or secures.” 197 U.S. at 25. *Jacobson* does not call for indefinite

³ *See New York Covid Map and Test Count*, N.Y. Times (updated Nov. 4, 2020), <https://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html>.

deference to the political branches exercising extraordinary emergency powers, nor does it counsel courts to abdicate their responsibility to review claims of constitutional violations.

B

Applying strict scrutiny, there is little doubt that the absolute capacity limits on houses of worship are not “narrowly tailored.” *Lukumi*, 508 U.S. at 546. As the Governor himself admitted, the executive order is “not a policy being written by a scalpel,” but rather is “a policy being cut by a hatchet.” See Appellant’s Br., No. 20-3590, at 4.

First, the fixed capacity limits do not account in any way for the sizes of houses of worship in red and orange zones. For example, two of the Diocese’s churches in red or orange zones as of October 8, 2020 seat more than a thousand people. But the order nonetheless subjects them to the same 10-person limit in red zones applicable to a church that seats 40 people. Such a blunderbuss approach is plainly not the “least restrictive means” of achieving the State’s public safety goal. *Lukumi*, 508 U.S. at 578.

The fixed capacity limits also bear little relation to the particular COVID-19 transmission risks the Governor identifies with houses of worship, such as “singing or chanting” and mingling before and after services. Churchgoers and daveners remain subject to generally applicable distancing and mask requirements, so the additional capacity limits assume that worshippers—unlike participants in “essential” activities—will not comply with such restrictions. The Governor may not, however, “assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings.” *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020). Here, Appellants have made clear that they would follow any generally applicable public-health restrictions.⁴

II

The remaining injunction factors also support granting the motions. Appellants presented un rebutted evidence that the executive order will prevent their congregants from freely exercising their religion. And “[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.)).⁵

⁴ For example, the Diocese presented evidence that, even before the order, it had voluntarily restricted attendance to 25% of building capacity and required masks during Mass; it has also “agreed to accept potential further restrictions (such as eliminating congregant singing and choirs during Mass) as a condition of injunctive relief.” Appellant’s Br., No. 20-3590, at 4.

⁵ The district court in the *Agudath Israel* case found that plaintiffs had not demonstrated irreparable harm because “the Orthodox community has previously complied with the total lockdown” and they could “continue to observe their religion” with “modifications.” Tr. of Proceedings at 66, No. 20-cv-04834 (E.D.N.Y. Oct. 9, 2020). This was error, in light of which plaintiffs reasonably believed that another motion for injunction in the district court would be futile. See, e.g., *Hernandez v. Comm’r*, 490 U.S. 680, 699

Finally, the balance of equities and public interest favor Appellants. The question is not whether the State may take generally applicable public-health measures, but whether it may impose greater restrictions only on houses of worship. It may not.

I respectfully dissent from the denial of the motions for injunctions pending appeal.

(1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”).

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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AGUDATH ISRAEL OF AMERICA,
et al.,

Plaintiffs,

-against-

ANDREW M. CUOMO, Governor
of the State of New York,
in his official capacity,

Defendant.

:
: 20-CV-04834(KAM)
:
:
: United States Courthouse
: Brooklyn, New York
:
:
: October 9, 2020
: 1:30 p.m.

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TRANSCRIPT OF CIVIL CAUSE FOR ORDER TO SHOW CAUSE VIA
TELECONFERENCE
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff: TROUTMAN PEPPER HAMILTON SANDERS LLP
875 Third Avenue
New York, New York 10022

BY: AVI SCHICK, ESQ.

For the Defendant: NEW YORK STATE
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BY: TODD SPIEGELMAN, ESQ.

Court Reporter: DENISE PARISI, RPR, CRR
Official Court Reporter
Telephone: (718) 613-2605
E-mail: DeniseParisi72@gmail.com

Proceedings recorded by computerized stenography. Transcript
produced by Computer-aided Transcription.

1 (All parties present via teleconference.)

2 THE COURTROOM DEPUTY: This is a civil order to show
3 cause for 20-CV-4834, Agudath Israel of America, et al.,
4 versus Cuomo.

5 Will counsel on behalf of plaintiff state your
6 appearance, please?

7 MR. SCHICK: Yes. Avi Schick, Troutman Pepper. Our
8 firm represents all plaintiffs. My colleagues, Misha Tseytlin
9 and Alex Smith, and perhaps Sean Dutton, might be dialed in as
10 well.

11 THE COURT: All right. Thank you.

12 Counsel, please, again, mute your phones if you are
13 not speaking. There is no recording permitted. We have a
14 court reporter here.

15 Defense? Who is here for the defendant, please?

16 MR. SPIEGELMAN: Todd Spiegelman from the Attorney
17 General's Office for defendant, Governor Andrew Cuomo.

18 THE COURT: All right. Thank you.

19 So in this case, the plaintiffs allege that Governor
20 Cuomo's most recent Executive Order that was issued late on
21 October 6th of this year will impair their ability to practice
22 their religion in the manner in which they traditionally and
23 customarily and would prefer to. This was filed -- this
24 application for order to show cause why its TRO should not be
25 entered -- was filed yesterday afternoon, literally giving the

1 Court and the defendant barely 24 hours to respond to this; so
2 we've done our best, and sorry about the lack of video, but we
3 are doing our best to deal with this because we understand
4 that there are three very significant Jewish holidays that
5 start this evening and continue for the next three days.

6 As we know --

7 (Court reporter requested clarification.)

8 THE COURT: I will speak as loudly as I can. I'm
9 sorry.

10 As we know, the parties seeking injunctive relief
11 have the burden to meet the requirements of the injunction
12 under Rule 65. Specifically, plaintiffs bear the burden of
13 establishing that it is likely to succeed on the merits; that
14 they are likely to suffer irreparable harm in the absence of
15 preliminary relief; that the balance of equities tip in its
16 favor; and that an injunction is in the public interest.
17 Because the defendant in this case is the opposing party --
18 the party opposing the injunctive relief -- the final two
19 factors are merged.

20 Now, the plaintiffs have submitted documents,
21 including affidavits from the rabbis and officials of the
22 various congregations, that are affected by this order; and
23 they've explained in detail how their religious practices and
24 observance of the three holidays that begin tonight are
25 practiced; and they contend that the Executive Order -- I

1 believe the number of it was 2 -- sorry -- it's Executive
2 Order 202.68, impairs their ability to practice their religion
3 in the manner in which they would like.

4 They also point out that the red zone requirements
5 are overly restrictive and that members of the congregation
6 are unable to attend or partake because in the red zone, the
7 occupancies are based on a cap of ten individuals, or, I
8 believe, it was 25 percent occupancy.

9 Now, the defendants make a pretty interesting
10 argument that some of these facilities can occupy as many as
11 300 or 400 -- significant numbers -- and that limiting a
12 facility to ten people maximum in the red zone, or 25 people
13 maximum in the orange zone, will deprive many -- will deprive
14 many members of their congregation the ability to worship in
15 the manner in which they would like.

16 Now, the defendants -- you know, I don't want to
17 make all the arguments for the parties, but as we know, the
18 defendants dispute that the plaintiffs have been able to
19 satisfy their burden to obtain injunctive relief, and they
20 rely on two Supreme Court cases -- one from 1905 and one
21 issued this year in 2020 -- and claim that the cases are
22 dispositive of the issues.

23 So does Mr. Schick want to be heard any further in
24 his arguments on behalf of his clients in favor of the
25 injunctive relief?

1 MR. SCHICK: Yes, I would like to, Your Honor.

2 THE COURT: All right. Please proceed.

3 MR. SCHICK: Thank you, Your Honor.

4 Again, I appreciate how quickly the Court responded
5 to our filing. I note that our filing itself was made less
6 than 36 hours -- or about 36 hours after the Executive Order
7 was issued, so everybody has been under the gun, and we're all
8 in the same boat there, and we're very grateful for how
9 quickly the Court took this up and set the schedule.

10 I want to start by noting that the plaintiff
11 congregations' individuals have not previously challenged any
12 of the Governor's orders that restrict houses of worship.
13 There were full lockdowns in March, April, and May, which were
14 painful for religious adherent, and others, but it was --
15 those rules were one city, one state, one set of rules, and
16 everybody abided by them, as they should. Even after the
17 total lockdown was lifted after Memorial Day, there were
18 restrictions that were imposed and are still in place that are
19 being abided by and were never challenged. There are
20 restrictions on occupancy, and those restrictions -- we think
21 much more logically -- speak to a percentage of otherwise
22 legal occupancy as opposed to what the red zone does, which is
23 a hard number. As Your Honor noted, it says, you know,
24 25 percent or ten people, whichever is less. So, you know, a
25 building that holds hundreds is limited to ten people under

1 the new rules.

2 Under the rules that are existing until -- until
3 today -- until yesterday, there was, you know, capacities of
4 occupancies of 33 to 50 percent which were permitted, and the
5 synagogue -- plaintiffs' synagogues, and many others like
6 them, did what was necessary to comply with those rules. They
7 split up their services from one large service to multiple
8 services; they required and enforced masking requirements and
9 distancing requirements; and we've abided by all those rules.

10 The reason there's a challenge today is not only
11 because these rules are draconian, come on the eve of these
12 holidays, and make observance of the holidays impossible, it's
13 because they were specifically targeted at this religious
14 community. There's no dispute about that.

15 This morning, publicly, on CNN, defendant said,
16 "This is an Orthodox Jewish problem. This is an Orthodox
17 Jewish infection rate." Your Honor, there is no such thing as
18 that. This is targeted at us, at synagogues, at Orthodox
19 Jewish adherents; and, so, it is unprecedented -- there's been
20 a lot of COVID litigation across the country over these last
21 difficult, terrible months, but this is the first time there's
22 a case in which -- reported anywhere because a specific
23 religious community was targeted.

24 Your Honor, if one looks, there's a red zone,
25 there's a yellow zone, there's an orange zone. We know

1 they -- after our reply brief was filed, the Zucker
2 declaration was submitted, but even that declaration and
3 State's -- and the State's brief this morning, nowhere did
4 they contain any definition of what defines, what qualifies a
5 neighborhood to be designated red, yellow, or orange --
6 nowhere. There's nothing anywhere in the State, including in
7 the papers filed today, which says if your neighborhood --
8 anywhere, whether you're in Brooklyn with Orthodox Jews, or in
9 another neighborhood anywhere -- if any metrics are hit,
10 whether it's an incidence rate or prevalence rate, whatever it
11 is -- it's objectively figured and -- and -- and you're red,
12 yellow, or orange. It doesn't exist.

13 What happened here, candidly, is the Governor
14 identified a target -- the Orthodox Jewish cluster, as he
15 called it -- and then he drew a bull's-eye around it, and
16 that's just entirely inappropriate.

17 So the targeting here, the messaging by the Governor
18 at his press conferences on the 5th, and on the 6th, and
19 through this morning: I'm going to speak to the rabbis, I'm
20 going to deliver a message to the rabbis. It's houses of
21 worship. That's just inappropriate. It's -- it's -- it makes
22 these restrictions embodied in the Executive Order facially
23 discriminatory and nonneutral. In --

24 THE COURT: Sir, what is facially discriminatory
25 about the Executive Order? The order addresses different

1 types of gatherings, whether it's worship, a general mass
2 gathering, business, dining, or schools. In the red zone,
3 schools are closed; dining is take out only; businesses are
4 limited to only having essential businesses opened. And the
5 Governor's website -- or the New York State website -- does
6 define essential businesses, businesses you would expect:
7 health care operations, including laboratories, hospitals,
8 clinics, et cetera, nursing homes; essential infrastructure,
9 which includes public and private utilities, water and waste
10 water, telecommunication, airlines and airports, commercial
11 shipping, public and private transportation, and hotels; then
12 essential manufacturing; essential retail, which includes
13 grocery stores, pet stores, pharmacies, gas stations, hardware
14 stores, et cetera; and then essential services, and so on.

15 So if one looks at the charts that you attach, which
16 I understand is taken from the State of Governor Cuomo's
17 office, in the red zone, houses of worship, they have either
18 25 percent capacity or ten people max, but other mass
19 gatherings are completely prohibited, only essential
20 businesses may be open, subject to the certain safety measures
21 that are employed, including limited occupancy,
22 mask-wearing -- many establishments take your temperature and
23 require hand sanitizers. Dining in the red zone is
24 nonexistent in the establishment, it's limited to takeout
25 only; and, as I said, schools are closed.

1 So if you look at the red zone, the red zone
2 probably grants the most latitude to places of worship.

3 MR. SCHICK: I think that -- if I can respond, Your
4 Honor?

5 THE COURT: Of course.

6 MR. SCHICK: Thank you.

7 I think there is an important difference that
8 defendant tried to allude over in its papers between the chart
9 that the Governor put up when he announced his rules before
10 the order was issued and the order itself.

11 So Your Honor referred to the chart, which does, as
12 you noted, say that mass gatherings are entirely prohibited.
13 However -- however, if one looks at the executive order
14 itself, which we have as Exhibit E to the declaration we
15 submitted in connection with our papers yesterday -- it's a
16 two-page order -- and the categories red, yellow, and orange
17 are delineated on the second page of that two-page order, and
18 red first; and there's an important change between the way it
19 was listed on the chart and the way it was embodied in law as
20 an order; and that's the very first sentence of the first
21 bullet point on the second page of the order when it describes
22 the red zone, and it has -- it doesn't say, all mass
23 gatherings are prohibited. It says, nonessential gatherings
24 have been cancelled, leaving an entirely undefined category of
25 essential gatherings, which are permitted; and this goes on

1 throughout categories in the order; and, in fact, it was noted
2 this morning by Professor Laycock in an opinion piece in the
3 *New York Times*. This very point where we noted in our papers
4 yesterday -- we are not just picking up a point that we have
5 not made previously -- there's an entire category of
6 gatherings -- nonessential gatherings and essential
7 gatherings. In their papers, defendant, in Footnote 11, said
8 we don't know what they're talking about, of course businesses
9 are defined, nonessential businesses by ESD. And they go on
10 at length to read the list, and we're aware of that, but
11 whether it was by mistake or design -- and things are moving
12 quickly here, so I understand -- they did not respond to the
13 notion, to the point, to the argument, to the problem, that in
14 red zones, essential gatherings are permitted while worship,
15 in any way -- indoor; outdoor; large building; St. Patrick's
16 Cathedral, if it were in a red zone -- is limited to ten
17 people. So that, itself, is facially not neutral.

18 If I can return for a moment to the theme I was on
19 previously, which is, when an order is issued, the way the
20 Governor issued this order saying -- we're not suggesting or
21 implying that it's targeted to Orthodox Jews. He said so.
22 And he should be taken at his word. He talks this morning in
23 the interview about others being caught up in the Orthodox
24 Jewish cluster. That's what he says. Because of that, as we
25 noted in our reply brief, there were Orthodox Jews in

1 non-affected zones who were denied permission to engage in
2 activities just a day or two ago after the Governor's press
3 conference. Orthodox Jews in non-affected zones attempting to
4 engage in permitted -- not First Amendment activity --
5 permitted activity were told you may not enter; you are
6 disease carriers. That's Exhibit B to our reply papers today.
7 It's one example. And so it's not facially neutral because
8 the Governor, himself, said so, both in the press conferences
9 leading up to and announcing it, and through this morning.
10 Two hours before this hearing, the Governor told the world,
11 Catholics are caught up in this because they might be in
12 Jewish neighborhoods. This is --

13 THE COURT: Sir -- Mr. Schick, I think you misstated
14 what your Exhibit B says.

15 MR. SCHICK: Exhibit B in --

16 THE COURT: Yes.

17 MR. SCHICK: -- the State's reply papers? I'm
18 sorry.

19 THE COURT: Yes. You put in -- (Teleconference
20 interruption.) -- saying you cannot come in because you're
21 Orthodox Jews. That is not what this Exhibit B says --

22 (Court reporter requested clarification.)

23 THE COURT: Okay. What the article says, and this
24 is Yeshiva World News, they were told that the lanes are not
25 available because they had a league event planned at five

1 o'clock --

2 MR. SCHICK: Well, Your Honor --

3 THE COURT: -- told you can't come because you're
4 Orthodox Jews. That's a misstatement of your own exhibit,
5 sir -- (Teleconference interruption.) -- a bowling league
6 event occurred and that's why they couldn't come in at the
7 time they showed up, whatever time that was, they showed up in
8 the afternoon --

9 MR. SCHICK: Your Honor, if I can -- again, I don't
10 want to get -- get -- take too much of your time on this, but
11 what it says is that they'll tell you --

12 THE COURT: What I'm saying is, as an officer of the
13 court, you need to be accurate, especially when you are
14 quoting your own exhibit. That's all I'm asking you to do.

15 MR. SCHICK: Understood, Your Honor.

16 So I will return to -- to, you know, defendant's
17 Footnote 11, which stated that essential -- that there's no
18 mention of essential and nonessential gathering and said,
19 look, there's only essential businesses, and they are defined,
20 so what are plaintiffs talking about.

21 So, again, for the reasons that both because of --
22 of the permitted activity where it says, prohibited ten
23 people, and because of the Governor's own targeting, you know,
24 we believe it's not facially neutral. Again, we don't believe
25 that there's a single case of COVID-related litigation, which

1 has been, you know, dozens -- or perhaps maybe more -- cases
2 across the country in which an elected official, let alone a
3 governor, has said this is about a specific community, this is
4 about a specific religious group, this is about a specific
5 religious practice; and for that reason alone, we think it's
6 subject to scrutiny, which they cannot meet.

7 I think it's important to note that defendant,
8 himself, says that -- and concedes -- that the existing rules,
9 which plaintiffs, in their affidavits, all three clearly they
10 comply with, and defendants don't dispute that. Defendant
11 does not dispute that. I think that the lack of
12 enforcement -- the conceded lack of enforcement is also fatal
13 to defendants here, Your Honor, because this is not an
14 instance which defendants can say we started and we said,
15 well, let's see if 33 percent works, 50 percent works, and it
16 didn't. What they said is, we put out rules, and we are going
17 to enforce them. And maybe there wasn't, but it was
18 sufficient compliance, but the answer, then, is to enforce the
19 existing rules, not to decide on draconian and, frankly, the
20 way they were rolled out, punitive rules. It's the eve of
21 these three holidays, there's no basis to suggest that the
22 problem is limiting it to ten people. Maybe the problem is
23 people should comply -- full compliance with the existing
24 rules. But these synagogues, and the vast majority like them,
25 comply with the rules. They state in the affidavits they have

1 gone from a single service to multiple services; they've
2 imposed and implemented and require distancing; they require
3 and enforce masking. So if -- if some religious intuitions
4 don't do that, the answer is to enforce the existing rules.
5 If no one is going to enforce rules, then even more draconian
6 rules are not going to have an impact. And by concept --

7 THE COURT: Mr. Schick, I think the problem is the
8 rabbis who have submitted affidavits said that they do comply
9 with the protocols that were in place prior to the executive
10 order; they did have masking requirements; they did, you know,
11 break the congregation into smaller groups and hold multiple
12 services to accommodate the occupancy limitations and to
13 enforce social distancing. But yet the Governor has
14 identified through his experts -- his epidemiologist, his
15 public health experts, and medical personnel -- certain
16 hotspots, you know, certain brush fires that he wants to
17 target.

18 Now, I have no doubt that the rabbis have done
19 everything they can to enforce CDC-recommended practices like
20 mask-wearing, social distancing, and they've gone through
21 extra work to hold extra services to accommodate the needs of
22 their congregation, yet there are still hotspots. So I think
23 the argument that, well, we did comply is -- it's fine. Even
24 accepting that to be true, we still have hotspots in certain
25 areas of our city.

1 MR. SCHICK: I'm sorry, if I could -- if I could --
2 the point I was trying to make -- and my apologies if I was
3 not sufficiently clear -- is the Governor conceded that the
4 requirements and the compliance that were done by plaintiffs
5 in other synagogues were not done universally; and, you know,
6 he said that straight out, so the problem is, the spread is
7 because there was a lack of compliance with the existing
8 rules, and if that's the case, the answer is to enforce
9 universally the existing rules. The Governor said the problem
10 is not -- right -- this truly cannot be a Jewish virus; it
11 doesn't impact Jews differently than others; and so if -- the
12 problem may be that there was not sufficient compliance
13 universally with the existing capacity, masking, and
14 distancing restrictions. The Governor has said he hasn't
15 enforced them and that the mayor didn't enforce them.

16 Now, what we're saying is, before you impose
17 draconian restrictions that make the fulfilment of First
18 Amendment rights possible, enforce the existing restrictions.

19 THE COURT: All right. Is there anything else you
20 wanted to add to your papers, sir?

21 MR. SCHICK: Yes, Your Honor. I just want to note
22 that, you know, while defendants have a footnote that, you
23 know, the Soos decision in the Northern District is different,
24 frankly, they give no reason why it was different in terms of
25 the Court there enjoining --

1 THE COURT: I think, sir, you identified the
2 difference in your papers. The judge in that case found that
3 the secular restrictions were less onerous than the
4 restrictions on houses of worship. Here, what we have is less
5 restriction on houses of worship than we do for secular
6 activities.

7 MR. SCHICK: Your Honor, you know, I don't want to
8 repeat myself on the red zones, but that's not true with
9 respect to the red zones because of the exemption of essential
10 gatherings, and it's surely not true on the yellow zones, Your
11 Honor, where there's -- as there was in *Soos*, there's a
12 special category that simply exists only for houses of
13 worship.

14 So I don't think it's accurate in any of the zones,
15 but it's certainly most pronounced in both the red -- both the
16 red zone and in the yellow zone.

17 THE COURT: All right. Is there anything else, sir,
18 because I think plaintiff would like an opportunity to be
19 heard.

20 Do you want to talk about the balance of hardship?

21 MR. SCHICK: Sure. I just --

22 THE COURT: Wait. This is my specific question.

23 The balance of hardship. The restrictions for the
24 new mandates of the governor do not prohibit religious
25 practice, they do not prohibit any particular religion from

1 doing certain things that I understand that the rabbis have
2 explained how the executive order might impact and make more
3 difficult certain practices that are traditional to your faith
4 and to the congregation, but on the other hand, the balance of
5 the hardships are 16,000 -- one six -- 16,000 New Yorkers who
6 passed away from COVID. Significant numbers of New York City
7 residents who are still ill with COVID and who are falling ill
8 every day in a state where we've had some of the highest COVID
9 rates in the country. So the hardship on the citizens of
10 New York, which include your clients that are congregants, is
11 significant. Nobody wants loss of human life. Nobody wants
12 the after effects of a very aggressive, easily-spread illness
13 that has long-term detrimental effects on one's vital organs
14 like the lungs, and the brain, and the heart, and the
15 pulmonary functions, and the blood. You know, there are a lot
16 of very, very serious complications that arise from this
17 illness. How does one justify a balance of hardship when you
18 are talking about the human life and health of all
19 New Yorkers, including the members of the congregations of
20 your clients?

21 MR. SCHICK: Couple of things -- a couple of things,
22 Your Honor.

23 First, I'll say, I do want to just emphasize that it
24 doesn't just impact -- it doesn't just impact religious
25 worship and religious activities; it makes them impossible.

1 Those are the uncontradicted affidavits, and they're just the
2 truth, Your Honor, because activities done in worship
3 services, done in groups, done in a synagogue, done with a
4 Torah scroll, done with a rabbi leading it, done with a
5 cantor, it's just simply impossible to do it, and it is -- we
6 can get to the other half of that in a moment, but -- the
7 other half of the balancing test, and I will get to that in a
8 moment -- but it must be understood that this order makes it
9 impossible for Orthodox Jews to fulfill their religious
10 obligation, to perform the religious ritual, and to continue
11 the religious tradition that they have done for 2,000 years.

12 THE COURT: Are you saying -- sir, you used the
13 word "impossible." There's "impossible" meaning not capable
14 of being performed, or is it more onerous?

15 MR. SCHICK: No, it's impossible, Your Honor.
16 Absolutely -- sorry. I'm sorry to interrupt you. I'm sorry.

17 THE COURT: The other question I have is whether
18 the -- you know, you argue repeatedly that you were fine under
19 the existing guidelines, so -- "we were able to manage," and
20 you made adjustments; and my understanding is that certain
21 adjustments can be made when human lives and health are at
22 stake, which they are. We cannot deny that fact in this
23 pandemic tragedy that we all find ourselves in. I think it is
24 wonderful that your clients have been able to, as I said,
25 perform more services, to open up different areas of their

1 temples so that people can be socially distanced, there's the
2 option for outdoor worship, and I understand that there are
3 certain practices that you say aren't going to be able to be
4 observed until Passover. This year, Passover fell during the
5 time of total lockdown -- and I'm not suggesting that you
6 should continue to be deprived of the opportunity to engage in
7 the rituals that are so important to your faith -- my question
8 is, when you say "it's impossible" -- you know, I think
9 throughout human times, society has found ways to deal with
10 difficult circumstances and to move forward and to accommodate
11 the demands of our time, which are, currently, a worldwide
12 pandemic that has struck New York particularly harder than,
13 you know, anywhere else in the United States, and the
14 Government -- of course in New York -- wanting to keep those
15 numbers below pandemic levels, which I think we all should
16 agree, are important goals. As you note, COVID crosses
17 racial, religious, economic lines and anyone is susceptible.

18 So I understand that singing is important to many
19 religions. Singing happens to be one of the activities that
20 CDC and health experts have identified as particularly, you
21 know, concerning because they release those aerosols into the
22 room that can hang in the air for several hours and be
23 breathed by other people, even with masks.

24 So I think that, again, it's a balance of
25 hardship --

1 MR. SCHICK: If I can continue and address that,
2 Your Honor. I appreciate it.

3 Of course nowhere in our papers did we mention
4 singing as a ritual that is necessary; and what we do mention
5 as a ritual, as a requirement that's necessary, are congregate
6 services.

7 If one looks, Your Honor, at Exhibit A of our reply
8 brief just today, right, a statement from the rabbi at what's
9 called the White Shul in Nassau County, a shul with hundreds,
10 and hundreds, and hundreds of members in an enormously large
11 building, in an enormously large congregation, we were visited
12 by the DOH, we could have ten people in the building -- that's
13 it -- indoors or outdoors. So it is impossible to conduct the
14 services; it was impossible to fulfill the tradition; it is
15 impossible to observe the ritual. It is simply impossible.
16 The vast majority of Orthodox Jews on these holidays will be
17 prohibited by virtue of the State's order from observing the
18 holidays, from fulfilling the religious requirements. That's
19 just a flat out -- it will not happen; it cannot happen.

20 One of --

21 THE COURT: Is it your position that the religious
22 practices of any particular group here in the Orthodox Jewish
23 community, that those should trump any public health concerns
24 that a state may have because --

25 MR. SCHICK: Not at all, Your Honor. And as we note

1 in our papers, one of the great anomalies here, of course, is,
2 you know, when there's a total lockdown order as -- as I said
3 at the beginning, nobody challenged anything. Here we have
4 these, you know, loosely defined neighborhoods and zones.
5 Nothing prohibits an Orthodox Jew in any of the zones to go
6 about any other part of his or her life except for worship
7 services, because the fact that in some relatively small
8 geographic area you close this or that store, or this or that
9 building, has really no impact because you can just get in
10 your car on six days of the week, generally, and visit a
11 neighboring business, a proximate neighborhood, a different
12 store, you can travel to your office, you can take the subway.
13 You can do every other activity in every other zone with loads
14 of other people with simply no restriction. The only thing
15 that the Orthodox Jew can't do is fulfill his religious
16 dictate, because on the Sabbath and holidays, vehicular travel
17 is flat out prohibited, and, therefore, they walk to
18 synagogue -- synagogues that are, for that reason, proximate
19 to their homes.

20 So if you live in a red zone, you just simply can't
21 go to any other synagogue. Whereas -- put aside that this
22 week is a holiday -- Sunday as well, which has requirements --
23 Monday morning, you're in a red zone, you can't go to -- you
24 can -- you know, your synagogue closed, you can go to Cosco
25 two miles away, hang out with people there, no restrictions at

1 all because it's not in any of the zones; you can take the
2 subway, be in a subway car with lots of people and go to the
3 office. You can do all those things. The only thing you
4 can't do is worship and religious practice and tradition,
5 because that, on your Sabbath and holiday, you have to walk
6 to. And that's why, Your Honor, all we're asking here for
7 today is this thing -- this order was dropped 48 hours before
8 the holiday targeting Orthodox Jews --

9 THE COURT: What proof do you have that the order
10 was dropped in a time frame to target Orthodox Jews?

11 MR. SCHICK: Well, the time frame is indisputable.
12 I think Your Honor, herself, mentioned that the order came out
13 about midnight on Tuesday night --

14 THE COURT: How can you ascribe -- are you saying
15 that the State deliberately dropped the order at midnight on
16 the 6th of October in order to target the religious worship of
17 Orthodox Jews? Is that your contention here?

18 MR. SCHICK: The Governor, at his press conference,
19 said: I'm sending a message to the rabbis about houses of
20 worship. I'm not putting that in quotes, whatever, but that's
21 what he said. Our papers are replete with those statements.
22 He said it this morning, that's what he's targeting. I'm not
23 imputing a motive to him. We are simply quoting his words
24 about what he is trying to do, and the fact that I can do any
25 other activity in a red zone, other than worship on important

1 holidays and the Sabbath, is -- is -- is problematic. It's
2 constitutionally problematic, Your Honor. It doesn't say,
3 right, that people in red zones can't go in subway cars.
4 Obviously, with distancing, but so what. It doesn't say they
5 can't go to their offices; it doesn't say they can't go to
6 Cosco; it doesn't say they can't --

7 THE COURT: It doesn't say they can't go to their
8 temples. It says ten at a time.

9 MR. SCHICK: As a practical matter, if you have a
10 two-hour service, or an hour service even, Your Honor, and you
11 have a synagogue with a legal capacity and a membership of
12 several hundred, you cannot have services. You simply cannot,
13 in a 24-hour day, putting aside that there are time frames for
14 each various services, you simply cannot have groups of ten
15 perform 90-minute services on the holiday, and they can't
16 drive anywhere else. They don't -- they simply don't drive.

17 I can tell you, Your Honor, my -- my father -- great
18 man, passed away right after Passover -- not from COVID. He
19 was in that kind of class -- he wouldn't -- he wouldn't die
20 like everybody else who was dying at the time -- and my mother
21 lives a little more than two and a half miles away from me,
22 and they were married 58 years. She got married at 18, had no
23 parents and siblings, and every Saturday, I visit my mother,
24 and I walked each way. I'm not saying that to impress Your
25 Honor or anybody else; I'm telling -- I'm saying that to

1 impress upon the Court the seriousness with which the
2 restriction on vehicular travel is taken.

3 THE COURT: Sir, this isn't -- okay. Let's focus on
4 the impact on the exercise of religion.

5 MR. SCHICK: Absolutely.

6 THE COURT: I understand that part of the Sabbath,
7 and probably the holidays, prohibit the use of vehicular
8 vehicles and other electronics, but what I'm looking at is, is
9 the executive order facially neutral? Is there irreparable
10 harm here? Is it truly impossible to observe your religion?
11 Or is it more difficult or more onerous?

12 MR. SCHICK: And I'm saying --

13 THE COURT: I understand that more onerous may also
14 violate the Constitution, but --

15 MR. SCHICK: Right.

16 THE COURT: -- when you look at irreparable harm,
17 you admit that during the initial phase of lockdown, no
18 religious services were being held because they couldn't.
19 Certain prayers could not be said during this year's Passover
20 because some congregations were limited as to how many.

21 So my point is is that even though you have the
22 capacity to have everybody in the temple at the same time, as
23 many as 300, these restrictions don't prohibit anyone from
24 coming into the temple or observing. What it does is it
25 limits. And there's a rational basis, it's not a compelling

1 interest in this in that where the red zones have been
2 imposed, there's an 8 percent positive COVID rate, and that is
3 concerning. If we are worried about a second wave, which we
4 should be, when public health experts and scientists are
5 telling us it is coming, where the testing indicates that it
6 has started, you know, how can we ignore the compelling
7 State's interest in protecting the health and lives of all
8 New Yorkers?

9 MR. SCHICK: Your Honor, I don't believe anybody is
10 suggesting that we ignore that. I want to just briefly
11 address two of the things -- two of the points that Your Honor
12 just made.

13 First, with respect to the -- at the onset of the
14 pandemic, it is a difference, constitutionally and otherwise,
15 when somebody could not engage in any activity, so there was
16 no special bereaving for houses of worship; you couldn't go to
17 a store, you couldn't go to an office, you couldn't do
18 anything, and you couldn't worship. That -- that truly made
19 worship impossible, but it was because you couldn't go
20 anywhere or do anything, Your Honor.

21 Now it is just the opposite. Worship has the
22 restriction, and it is impossible, Your Honor -- I don't want
23 to go around in circles on this. I'm sorry if I'm taking too
24 much time, but it is -- it is impossible. There are services
25 that are done by group, people sacrifice in all sorts of ways

1 to go to synagogue, to participate in group services. As you
2 saw in Exhibit A, only ten people are permitted in the
3 building out of hundreds. The DOH visited them. They
4 threaten a \$15,000 fine to dozens, to hundreds.

5 So when we talk about -- it's truly impossible.
6 It's truly impossible, and it's impossible while every other
7 thing can be done.

8 And then to the last point, Your Honor, there are
9 ways to address this because, again, there's nothing --
10 there's no reason in logic or public health or else -- or
11 anything else to say that these activities -- that a synagogue
12 building, or a church building, or a mosque building are all
13 the same for public health purposes. Right? We've heard from
14 Dr. Fauci and others about the importance of distancing, which
15 is why a percentage limitation is surely rational, and surely
16 a discussion could be had about percentage limitations. It's
17 why -- but for a St. Patrick's Cathedral and a small mosque to
18 have the same occupancy limit, in this case, makes no sense
19 from any basis. So if one were to modify the order, and so it
20 was 25 percent, 33 percent, 50 percent, for the holidays, even
21 on days, Your Honor, on weekdays when there's more ability for
22 Orthodox Jews to travel and the services are shorter and the
23 ritual is fewer, there are ways to deal with this, but on the
24 holidays, they're not. The holidays assume to start, and
25 they're unbelievably meaningful to religious adherence.

1 Children spend weeks learning about them, people go to great
2 extents to observe them, and so what we're seeking is a TR0
3 that will be in effect just through Monday, and that might
4 impose capacity percentage limitations, but not the ten people
5 in a building of any size.

6 THE COURT: All right. Let me ask the State's
7 representative why a percentage restriction, as set forth in
8 202.68, that is the 25 percent restriction, especially in a
9 temple that has a capacity to seat 300 people, starting now
10 through Monday, would not be a huge burden or present a public
11 health risk if, in fact, the rabbi will strictly enforce
12 social distancing within the facilities and mask-wearing,
13 sanitizing, hand washing, et cetera.

14 Mr. Spiegelman?

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16 (Continued on the following page.)

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1 MR. SPIEGELMAN: Yes, this is Mr. Spiegelman.

2 Well, as your Honor said, we're in a spiked
3 circumstance while New York state flattened the curve, the
4 governor is concerned about these cluster areas where there
5 are an alarming level of Covid-positive cases, 8 percent,
6 which are numbers where you get to more and more spread. This
7 is lock-down territory. This is not that dissimilar from what
8 you would want to do in March or April, where the virus was
9 spreading through the community. You see that in the order
10 itself.

11 As your Honor pointed out, other businesses, schools
12 are closed. It doesn't matter the size of the school, we're
13 not allowing five kids in the school. Restaurants and bars
14 are closed for anything except take-out. We're not allowing
15 customers in there because we need to clamp down on the
16 spread.

17 We accommodated, the State already accommodated
18 religious observances in the order by setting, by allowing
19 ten, 25 person, minyan number. And to ask for a further
20 accommodation in the midst of rising curve and public health
21 crisis and the possibility of further death and sickness in
22 this state is not reasonable.

23 Our decision is certainly rational here to take a
24 hard line in these Covid-impacted areas, which I don't think
25 plaintiff claims that there is a temple in the middle of each

1 of these five areas, this is where the spike is.

2 THE COURT: They said two in the red zone, one in
3 the orange zone, if I'm not mistaken. Am I right about that,
4 Mr. Schick?

5 MR. SCHICK: Yes, your Honor. But it's also the
6 case that Agudath of America has 70 affiliate synagogues
7 throughout the states throughout the zones; but individual
8 synagogue plaintiffs, your Honor is correct in terms of two in
9 red and the third in Far Rockaway in the orange.

10 THE COURT: Mr. Spiegelman, you haven't answered my
11 question. Is it rational to have a temple with 300-seat
12 capacity be limited to ten; when another temple or church or
13 other religious house of worship has a congregation maybe of
14 15 and they are still allowed to have ten people in it. Or is
15 it the lesser of 25 percent or ten?

16 MR. SPIEGELMAN: I believe it is 25 percent or ten,
17 yes.

18 THE COURT: Either or. Is it either or, or is it
19 ten?

20 MR. SPIEGELMAN: Whichever is fewer.

21 THE COURT: Whichever is fewer. A small
22 congregation of 15 or 20, and they do exist in small churches
23 or small mosques or religious houses of worship, if they have
24 a smaller congregation then they will not be limited as long
25 as they have ten or fewer, correct?

1 MR. SPIEGELMAN: Correct.

2 THE COURT: Why wouldn't a 300-seat congregation be
3 able to serve the interest of the space and social distancing
4 by having the 25 percent capacity? For example, if you were
5 here in court you would see that we have the capacity to seat
6 probably 60 spectators. We taped off benches. We require
7 spectators to sit in a social-distanced manner at one end of
8 the bench, opposite ends of the bench and wear a mask. Why
9 wouldn't the state's interest in -- because it is inconsistent
10 with the medical guidelines and the public health experts if
11 you maintain that distance and require face coverings the
12 threat is he mitigated. It's not necessarily ten people.
13 It's how socially distanced the persons can maintain
14 themselves and whether they can maintain or will be willing to
15 wear face coverings over their nose and mouth.

16 MR. SPIEGELMAN: Well, I'd say the state's
17 regulation, we regulate for the entire state and so I think
18 there is a lot of case law that says we don't have to have
19 pinpoint precision on everything.

20 I think my point about the schools is true. We in
21 abundance of safety and caution we closed the school. We
22 don't allow five children in, even if it's a large school.
23 And these temples are -- the rule is more liberal for them.

24 But if you look at plaintiffs' own claim, they are
25 saying these festivals are about togetherness and everyone

1 reads, everyone speaks aloud, and there is a lot of emotion.
2 Even in a bigger space, you could imagine with everyone
3 talking, every congregant has to speak, there could be a risk
4 of spread. And the state is unwilling to take that risk. Not
5 all over the state, not everywhere, but where there already
6 has been a spike.

7 I think you know this is -- is it rational, yes. We
8 need to take hard, strong measures. We don't want to spread;
9 in these services, there is a risk of spread.

10 THE COURT: Do you want to discuss your client's
11 statements which the Jewish community feels indicates an
12 intent to target and unfairly penalize them by issuing an
13 Executive Order that restricts their ability to worship in the
14 manner in the way in which they would like on the eve of
15 important holidays. They do quote extensively comments that
16 appear to have been made by Governor Cuomo; specifically
17 calling out the Orthodox Jewish community and whether that is
18 an appropriate factor for me to consider whether there has
19 been an intent to target and restrict religious practices
20 here.

21 MR. SPIEGELMAN: I think the key point here is that
22 the order itself, what is actually the governing law here, is
23 facially neutral, as your Honor pointed out. I don't think
24 the Governor's comments should feed into this because the
25 order speaks for itself.

1 I'm sorry I don't have the case in front of me, but
2 I believe it's recent Supreme Court precedent discussing the
3 President's statements saying, well, we look at the four
4 corners of the order. And that is what should be done here.
5 Also --

6 THE COURT: Trump V. Hawaii, is that the one?

7 MR. SPIEGELMAN: I believe so.

8 THE COURT: Where much was made about President
9 Trump's derogatory comments and statements about people of the
10 Muslim faith. As I understand it, ultimately the Court found
11 because the statutory itself is facially neutral that the
12 President's comments were not nearly the deciding dispositive
13 factor. Is that the case you're thinking of?

14 MR. SPIEGELMAN: That is the case you, your Honor.

15 I would also say that I wouldn't compare the
16 Governor's comments to the President's Muslim ban.

17 The Governor, if you read the press release in full,
18 is really focused on mass gatherings. He does mention that
19 Orthodox Jews are having mass gatherings, but he mentioned
20 other mass gatherings that cause the spread, he mentions
21 colleges and bars. And there is no evidence and it's just not
22 the case that these cluster areas are based where the temples
23 are. These are five clusters. Plaintiff has said there is a
24 Orthodox temple in the center of each one. This is the spikes
25 are. Yes, there may be a temple or two in each area, but it's

1 hardly targeted at temples, Orthodox temples. There are
2 Orthodox temples outside the cluster too.

3 The plaintiff mentioned something about the timing
4 of the Executive Order. The timing of the Executive Order is
5 not driven by the holidays. It's not the case. There is no
6 evidence of that. The timing of Executive Order is driven by
7 this well-known common knowledge surgent here in New York.

8 THE COURT: Did the Governor and his staff even
9 think about looking at religious holidays that might be
10 adversely effected by the order? Is it your position that the
11 Governor is unaware of the holiday?

12 MR. SPIEGELMAN: I don't know.

13 THE COURT: All right.

14 MR. SPIEGELMAN: The intent of the Executive Order
15 is clear, the focus is on mass gatherings, it's on closing
16 businesses, restaurants, other types of gatherings or
17 postponing them during this difficult time. As your Honor
18 pointed out, the key really is, especially in the red/orange
19 zone the plaintiff complains of, the Executive Order is more
20 liberal for houses of worship.

21 THE COURT: May I ask you, plaintiffs' counsel also
22 brought up the vague, what does it mean to say an essential
23 gathering or non-essential gathering?

24 MR. SPIEGELMAN: I believe the terms are defined in
25 the Empire States Development Corporation's Guidance.

1 THE COURT: It was dated October 7 at 4:10 p.m.:
2 The guidance for determining whether a business enterprise is
3 subject to a work force reduction under Executive Order 202.68
4 related to New York's Cluster Action Initiative to address
5 Covid-19 hot spots.

6 It does define essential businesses, but Mr. Schick
7 was talking about essential gatherings. What is that?
8 Honestly, I didn't see it here.

9 MR. SPIEGELMAN: I understand. Look, candidly I
10 think there might be a lack of clarity there. But that could
11 be read as gatherings taking place in the businesses that are
12 essential. If you're in the hospital and there is a gathering
13 or I think there is a reference to recreation areas, those
14 could be seen as essential gatherings. But I agree with your
15 Honor, there is a little bit of a disconnect there.

16 Even taking mass gathering out, you're still left
17 with very clear, severe restrictions on other type of conduct,
18 schools, bars, restaurants, businesses, sleeping, sleeping if
19 there is a lock down. I would also take that into account.

20 THE COURT: Is there anything else that any party
21 wishes to bring to my attention or argument they would like me
22 to consider?

23 MR. SCHICK: If I can just, extraordinarily briefly?

24 THE COURT: Yes, of course.

25 MR. SCHICK: Thank you, your Honor. I want to begin

1 by saying that defendant's counsel talked about the inability
2 of the state to pinpoint, that things don't have to make sense
3 for each community, but of course this is pinpointed
4 enforcement. This is not a case where it's statewide and
5 somebody says, not in my neighborhood. This was done
6 specifically for these neighborhoods. I think whatever
7 argument can be made in a statewide or citywide lock down
8 cannot be made here with respect to the need for getting it
9 right.

10 I want to address the factual point, it's in the
11 affidavit, I want to call your Honor's attention to it. There
12 are dozens and dozens and dozens of Orthodox synagogues in
13 these zones. There are plaintiffs here who are representative
14 of those, but there are tens of thousands of orthodox Jews who
15 will be impacted. There are dozens of synagogues in the
16 affidavit. And if the Court needs more precision on that very
17 quickly, I can give. But it's not the case where we located
18 these synagogues in the neighborhood. As your Honor saw from
19 the Exhibit A, Rabbi Feifer, his synagogue closed down. He's
20 not here as a particular plaintiff, but he's here as an
21 impacted party and with the Agudath of America speaking on
22 behalf of all the impacted synagogues. I wanted to clarify
23 that point.

24 THE COURT: Sir, I did read as much of the
25 affidavits I can. I do recognize and note for the record that

1 there is more than one synagogue, Orthodox synagogue, in the
2 red zone at issue here. But I'm looking at the plaintiffs who
3 are named here, where the impact is on their particular
4 congregation, okay.

5 MR. SCHICK: Understood, your Honor, I appreciate
6 that. I wanted to clarify that point. I appreciate it.

7 Just to very quickly, I do think, I don't want to
8 belabor of Trump V. Hawaii, I'm sure the Governor wouldn't
9 find it flattering, but I do think this is more -- than the
10 Trump V. Hawaii in terms of the statement that was said and
11 the impact. The United States Supreme Court says that
12 statements discriminatory towards religion have on Government
13 action.

14 Finally, your Honor, while we've been talking
15 primarily, and I think Mr. Spiegelman perhaps exclusively
16 about the red zones, it is the case that in orange and yellow
17 certainly there are loads of activity with larger number of
18 people, schools and others, that are impacted -- that are not
19 impacted and there are special categories for houses of
20 worship.

21 So I wanted with that conclude where I concluded in
22 my initial remarks, which is that I think here the solution is
23 for a TR0 that would take us through these holidays that would
24 impose -- we would hope would stick with the capacity limits
25 that exist now; but if not, that would impose rational

1 capacity limits that could add the distancing, the masking,
2 the things that Dr. Fauci and his colleagues have been trying
3 to get the country to understand and follow, that would work
4 for all.

5 THE COURT: What capacity limits are you
6 specifically referring to? Because your papers repeatedly
7 state, we're fine and have been observing the current
8 limitations. Can you be more specific what it is your
9 referring to, that the current limitations that pose no
10 hardship that you are fine with observing? What is capacity,
11 is it 33 percent? 25 percent? What is it?

12 MR. SCHICK: So I think it's -- I think putting
13 aside the confusion people think may exist with respect to the
14 Soos decision and its impact, and I think 33 percent is
15 something that people have, if you look at the affidavit they
16 talk not about not splitting the congregants in half, but into
17 multiples. So certainly I'm here to say, if one looks at the
18 Phase Four regularly and what has been done, 33 percent is
19 something that we think is reasonable, can live with, and
20 would be strictly enforced.

21 THE COURT: Was that what was in effect before the
22 Executive Order 202.68? Maybe Mr. Spiegelman, you can
23 clarify. Because as I said, the plaintiffs are merely asking
24 that whatever was in effect before the Executive Order on
25 October 6 remain in effect at least through the end of this

1 three-day holiday.

2 MR. SPIEGELMAN: I believe it was the, limit was
3 higher than that. I think it was a stage -- I may be wrong --
4 a stage four limit that would have been 50 percent.

5 THE COURT: Did you say 50 or 60?

6 MR. SPIEGELMAN: Fifty, five-oh.

7 If I can respond to this? This is the problem with
8 an individual plaintiff here or there second guessing the
9 reason, judgment, of the state and its epidemiologist.

10 Plaintiff has a 300-person temple, well, maybe there
11 is a church that has a hundred people or 50 and why don't you
12 draw the line here or there? But the state has a stable of
13 experts. It drew the line in a rational way as our affidavit
14 shows.

15 This is really right in the line of that South Bay
16 case, which says, in a pandemic when there are lots of moving
17 factors, lots of uncertainties, medical and scientific
18 uncertainties, you refer to the political branches which have
19 the experts. You don't go on a case by case basis.

20 We have four cases, there is a law firm, a church,
21 I'm sure they all have other reasons why it should be
22 15 percent or 18 percent. That's not how you govern the state
23 particularly during a pandemic. We have these clusters and
24 these restrictions for a reason. Plaintiffs really shouldn't
25 be able to come into court and second guess the Department's

1 expertise.

2 MR. SCHICK: If I can answer the question. The
3 factual question that your Honor asked about what is in place
4 is contained in Exhibit I to the declaration we submitted with
5 our brief yesterday, which is DOH guidelines for religious
6 services, page two, talks about Phase Four 33 percent as
7 repeated on page four.

8 I'm sorry I just wanted to point to the record cite.

9 THE COURT: Thank you, I appreciate that. I was
10 understanding it was currently 33 percent in Phase Four.

11 MR. SCHICK: Correct.

12 THE COURT: Currently what the plaintiffs are asking
13 is that they be allowed to maintain 33 percent maximum
14 occupancy until the end of the holiday on Monday night. Is
15 that when it ends, Mr. Schick?

16 MR. SCHICK: No, it ends late Sunday night. It
17 started today, here we are today. Without getting into
18 details, today is a day is a holiday with which we hold
19 services, I can be on the phone and engage in vehicular
20 traffic. Starting at sundown to tonight for 49 hours, none of
21 that is doable. Therefore, I suggested until Monday is
22 because given the lateness of the day, to be implemented first
23 thing Monday is more difficult, but sometime as we get into
24 Monday easier.

25 THE COURT: I just want to make sure I'm operating

1 from a particular phase. And my understanding is Phase Four
2 no more than 33 percent of the maximum occupancy. And that is
3 the occupancy that the plaintiffs are asking for between now
4 and end of the three-day holiday.

5 The state says no, it must be no more than ten
6 people or 25 percent occupancy, whatever is less, starting
7 today. It didn't start yesterday, whatever it is, it's in
8 effect. Is that right, Mr. Spiegelman?

9 MR. SPIEGELMAN: That's correct, it's been in
10 effect, yes. To be clear, those numbers are in the red zone,
11 and your Honor knows there are other numbers in orange zone
12 and yellow zone spread out.

13 THE COURT: Plaintiffs' congregations are in the red
14 zone, a third in the orange zone, and I take notice that there
15 are other congregations in the red and orange and yellow zone,
16 and outside of all the zones.

17 The Phase Four reopening plan provides for
18 restrictions of no more than 33 percent of maximum occupancy
19 for a particular area as set forth by certification of
20 occupancy for services occurring indoors.

21 Now, Mr. Spiegelman, are they allowed to have
22 outdoor services? Under this regimen, this new Executive
23 Order because some of the congregations the Rabbis said they
24 do have outdoor capability. Mr. Spiegelman, did you hear my
25 question?

1 MR. SPIEGELMAN: Yes, I did, your Honor. I believe
2 the order refers to indoor and outdoor gatherings.

3 THE COURT: Okay. So outdoors then you don't talk
4 about occupancy for outdoors; you're talking about ten people
5 in a red zone, correct? Not 25 percent of the occupancy of
6 outdoor area, which could be, congregations of various sizes,
7 ten people top, right?

8 MR. SPIEGELMAN: I think whether it's outdoors or
9 indoors it still depends on the size of the congregation.

10 THE COURT: So on October 6, 2020, Governor Cuomo
11 issued Executive Order 202.68 in response to the surging
12 Covid-19 positivity rate in certain Brooklyn and Queens
13 neighborhoods, which he defined as hot spots or clusters, as
14 well as part of other counties, Broome, Orange and Rockland.

15 202.68 implements New York Cluster Action Initiative
16 to address the concerns that Covid will, our numbers will
17 begin to climb and consequently more people will fall ill, and
18 tragically more people will die. There are various degrees of
19 restrictions on permissive gatherings depending on area status
20 in the Covid-19 cluster or proximity thereto.

21 The Governor's order defines three zones. The red
22 zone, that is the cluster zone itself provides that for houses
23 of worship they are limited to either 25 percent capacity or
24 ten people, whichever is fewer. Mass gatherings are
25 prohibited out right. Essential businesses may remain open.

1 Restaurants may only accommodate outside dining. And all
2 schools are closed.

3 The orange zone is a warning area surrounding the
4 cluster. The orange zone houses of worship are limited to
5 33 percent or 25 people, whichever is less. Mass gatherings
6 are limited to ten people, whether indoor or outdoor.
7 High-risk, non-essential businesses like gyms and personal
8 care facilities remain closed. And only outdoor dining is
9 permitted, with only four people allowed at a table at any
10 given time. Schools will remain closed in orange areas.

11 Yellow zone is a precautionary area usually around
12 these red and orange zones. Yellow zone houses of worship are
13 limited to the lesser of 50 percent occupancy or 25 people.
14 Businesses are open, patrons may dine indoor or outdoor but
15 they only sit in groups of four. And schools although open,
16 must administer weekly testing.

17 I have determined 202.68 takes affect immediately
18 and will be enforced no later than today, October 9, 2020.
19 Any individual who violates the Executive Order is subject to
20 a \$15,000 fine per day in violation.

21 Plaintiffs commenced this action yesterday afternoon
22 on October 8, 2020. The complaint seeks to enjoin Executive
23 Order 202.68 issued by New York Governor Andrew Cuomo on
24 October 6, which imposes substantial fines on any individual
25 who encourages, promotes or organizes non-essential gathering

1 as set forth in the Department of Health regulation.

2 Non-essential gathering, the State seems to concede
3 is not clearly defined in the Executive Order or on the New
4 York Governor's website. Non-essential activities and
5 essential activities are defined however.

6 Can somebody mute their mic? I'm hearing heavy
7 breathing.

8 Plaintiffs include Agudath Israel of America, an
9 organization that promotes the rights and and interests of the
10 Orthodox Jewish community, the Rabbis of several Orthodox
11 Jewish synagogues, three in particular that are impacted by
12 the Executive Order 202.68. For the record those are, Agudath
13 Israel of Kew Gardens, Agudath Israel of Madison and Agudath
14 Israel of Bayswater. And it looks like two Rabbis, Rabbi
15 Yisroel Reisman and Rabbi Menachem Feifer and Steven
16 Saphirstein, who I think is an executive in one of the
17 synagogues but he may be a Rabbi, I don't know.

18 In any event, plaintiffs are arguing that 202.68
19 infringes on their free exercise of religion under the First
20 Amendment and will make it impossible for Orthodox Jews in
21 affected areas to observe three Jewish holidays which commence
22 October 9 and turn through October 11.

23 According to the plaintiff, Governor Cuomo's remarks
24 in the days leading up to his issuance of 202.68 indicates
25 selective targeting of the Orthodox Jewish community.

1 Moreover, plaintiffs assert the restrictions imposed by the
2 Executive Order are facially discriminatory toward religious
3 practices when compared to similar secular activity.

4 Plaintiffs further allege that they will suffer
5 imminent irreparable harm because the Executive Order will
6 thwart their ability to observe the holidays as they
7 customarily do during this three-day holiday period.

8 The standards for entree of a TRO are the same as
9 for preliminary injunction. Generally in the Second Circuit
10 the parties seeking a preliminary injunction must establish
11 and carry their burden of establishing three elements.

12 First, that is either a likelihood of the success on
13 the merits and a balance of equities tipping in the party's
14 favor; or sufficiently serious questions as to the merits of
15 the case to make a fair ground for litigation and a balance of
16 the hardship, tipping decidedly in the party's favor.

17 And second, that the party will likely experience
18 irreparable harm if the preliminary injunction is not issued.

19 And third, that the public interest would not be
20 disturbed by the relief.

21 The second serious questions prong is also
22 frequently termed the fair grounds for litigation standard.
23 Where the moving party seeks to stay Government action in the
24 public interest pursuant to a statutory or regulatory scheme,
25 the District Court should not apply the less rigorous fair

1 ground for litigation standard, and should not grant the
2 injunction unless the moving party establishes along with
3 irreparable injury, a likelihood of success on the merit of
4 the claim.

5 The movant's burden is further heightened when the
6 requested injunction would provide the movant with all the
7 relief that is sought and could not be undone by a judgment
8 favorable to non-movant on the merits at trial.

9 And the case is the Second Circuit that I've
10 referred to and quoted from are Jolly V. Coughlin, 76 F.3rd 468
11 at 473 decided in 1996; Able V. United States 44 F.3rd 128 at
12 131, decided by the Second Circuit in 1995; and CitiGroup
13 Glob. Markets Incorporated V. VCG Special Opportunities Master
14 Limited, 598 F.3rd 30 at 35 note four, decided in 2010,
15 quoting Mastrovincenzo V. City of New York, 435 F.3rd 78 page
16 79 decided in 2006. In such circumstances the party seeking
17 an injunction must demonstrate both a clear or substantial
18 likelihood of success and a strong showing of irreparable.

19 With regard to the second element, irreparable harm,
20 it is certain and imminent and it must be a harm for which
21 monetary awards do not adequately compensate. Irreparable
22 harm exists where but for the grant of equitable relief there
23 is a substantial chance that upon final resolution of the
24 action the parties cannot be returned to the positions they
25 previously occupied. Brenntag International Chemical V. Bank

1 of India 175 F.3rd 245 at page 249 decided in 1999.

2 With regard to the third element, the public
3 interest, that is defined as the general welfare of the public
4 that warrants recognition and protection, and/or something in
5 which the public as a whole has a stake, especially an
6 interest that justifies Governmental regulation.

7 Now, as we know, the Supreme Court has issued
8 decisions that govern my decision. There are two decisions
9 which I'll cite here, Jacobson V. Massachusetts, 197 U.S. 11,
10 decided 1905. There the Supreme Court stated that, quote, "A
11 community has the right to protect itself against an epidemic
12 of disease which threatens its members, and in such
13 circumstances judicial scrutiny is reserved for measure that
14 has no real or substantial relation to the object of
15 protecting the public, or is beyond all question of plain
16 palpable invasion of rights secured by the fundamental law."

17 In addition, the Second Circuit has held Phillips V.
18 City of New York, 775 F.3rd 538 at 543, decided in 2015, the
19 right to practice religion freely does not include liberty to
20 expose the community to communicable disease. Quoting the
21 Supreme Court in Prince V. Massachusetts, 321 U.S. 158 decided
22 in 1943.

23 More recently the Supreme Court in South Bay United
24 Pentecostal Church V. Newsom 140 Supreme Court, page 1613,
25 decided in 2020, a case in which Chief Justice Roberts

1 concurred. That case is challenged by the plaintiffs of an
2 Executive Order issued by Governor Newsom of California that
3 limited attendance at places of worship to 25 percent of
4 building capacity or a maximum of 100 attendees. In curing
5 with the Court's denial of plaintiff's application for a
6 preliminary injunction, Chief Justice Roberts noted, "The
7 precise question of when restrictions on particular social
8 activities should be lifted during a pandemic is a dynamic and
9 fact intensive matter, subject to reasonable disagreement.
10 Our Constitution principally entrusts the safety and the
11 health of the people to the political accountable officials of
12 this state, to guard and protect when those officials
13 undertake to act in areas fraught with medical and scientific
14 uncertainties, their latitude must be especially broad."

15 Those same facts and considerations I believe apply
16 here. As public officials have adopted public health measures
17 to address the Covid-19 outbreak, which was devastating to the
18 State of New York and particularly in New York City, the
19 judicial consensus has emerged with respect to Constitutional
20 challenges to such measures. Courts across this country and
21 in this circuit have applied the deferential standard
22 announced by the Supreme Court in *Jacobson V. Massachusetts*.

23 And there are a number of cases, *Association of*
24 *Jewish Camp Operators V. Cuomo*, 120-CV-687, at 2020 Westlaw
25 3766496, at note eight, decided in the Northern District in

1 July of 2020. And citing other cases In Re Abbott 954 F.3d
2 772, at page 786, decided in the Fifth Circuit, quote,
3 "Jacobson instructs that all Constitutional rights may be
4 reasonably restricted to combat a public health emergency."

5 In Jacobson the Supreme Court pronounced that a
6 community has the right to protect its members against an
7 epidemic. In such times the Courts should only overturn
8 regulations that have no real or substantial relation to the
9 object of protecting the public health.

10 Here I find that these regulations have a very real
11 and substantial relation to protecting the public health.
12 Because the red zone and the orange zone and the other zones
13 look at the epidemiological data, and the Covid spikes in
14 certain areas. And have focused its attention on taking steps
15 to reduce the risk that the Covid virus will spread to the
16 heights that we experienced tragically this past year.

17 The Supreme Court broadly construed the expanse of
18 the State's police holding that the rights of the individual
19 in respect to his liberty may the times under the pressure of
20 great dangers be subject to such restraint to be enforced by
21 reasonable regulations as the safety of the general public may
22 demand, page 29.

23 Generally, Courts throughout this country in
24 response to Covid-related regulations imposed by state have
25 referred, as prescribed by Jacobson, have generally ruled in

1 favor of the state.

2 In addition, to the cases I previously cited Geller
3 V. DeBlasio, 20-CV-3566, 2020 Westlaw 2520711, at note four,
4 decided in May of 2020 in the Southern District of New York.
5 That case denied a TR0 and rejecting plaintiff's First
6 Amendment claim after concluding that New York City's ban on
7 non-essential gatherings was content-neutral, reasonable and
8 narrowly tailored given the public health crisis.

9 Further, in Amato V. Elicker 20-CV-464 reported at
10 2020 Westlaw 2542788, page 13, the District Court in
11 Connecticut denied a TR0 and preliminary injunction after
12 concluding that orders limiting the number of persons who
13 could gather for social or recreational purposes do not
14 violate plaintiff's First Amendment rights of assembly and
15 association.

16 I know that Jacobson does not give the state carte
17 blanche to trample on Constitutional rights under the cover of
18 public health exigency. The Courts may ask whether the
19 state's emergency measures lack basic exceptions for extreme
20 cases. A lot of the measures are pre-textual; that is,
21 arbitrary or oppressive, In Re Abbott 954 F.3d at 785.

22 Here the record is absent of any evidence that the
23 state's measures lack -- are a pretext or otherwise arbitrary.

24 (Continued on next page.)

25

1 THE COURT: The state cites medical, epidemiological
2 and other expertise in formulating the recent executive order
3 and all the other orders that preceded it. The governor had,
4 as we know, launched a reopening, we were in Phase IV but
5 unfortunately certain areas of the state indicated that the
6 COVID was spiking up again in dangerous numbers. In the red
7 zones here I believe the record reflects an 8 percent positive
8 and that is approaching dangerous levels and could quickly
9 launch the city and the state back into a very critical
10 situation.

11 Courts may not second guess the wisdom and efficacy
12 of public health measures and rational basis review will
13 govern the analysis of the state's restriction. I find that
14 E0202.68 has a real and substantial relation to the effort to
15 commit -- to combat and suppress the COVID-19 pandemic. It is
16 beyond dispute that the COVID-19 pandemic is the most
17 significant health crisis in living memory, including for
18 those communities impacted by the executive order. The
19 COVID-19 pandemic has caused over 25,000 deaths in New York
20 State and 16,000 deaths in New York City alone. And the
21 national levels are at heart-breaking levels exceeding 212,000
22 lost lives.

23 Although New York was the global epicenter of the
24 pandemic throughout the spring of 2020, the state's daily
25 death toll was reduced from a peak of approximately 800 people

1 per day dying to an average of less than 10 per day, which is
2 a number that is still far too high. This was due in large
3 part to the governor's action and the citizens of the state
4 understanding that we had a collective interest in quelling
5 this virus, and we cannot ignore the individual heroism of
6 medical professionals, essential workers and first responders
7 in getting this terrible pandemic under control, at least for
8 now and at least in this state and city.

9 In his declaration submitted in support of the
10 state, Howard Zucker, Commissioner of New York State
11 Department of Health, which is filed at ECF number 12, refers
12 to the World Health Organization and other public health
13 authority guidance explaining that COVID-19 can be transmitted
14 through direct, indirect or close contact with infected people
15 through among other things respiratory droplets that are
16 expelled when an infected person coughs, sneezes, talks or
17 sings. In order to limit exposure to COVID-19 and slow its
18 spread, the CDC recommends keeping at least six feet away from
19 other people and limiting close contact with others outside of
20 one's household in indoor and outdoor spaces, including
21 avoiding groups and crowded places. Social distancing is one
22 of the best tools we have, he says, to avoid being exposed to
23 this virus and slowing its spread locally and across the
24 country and world because it helps limit contact with infected
25 people and contaminated surfaces.

1 It is also reasonably clear that New York City is
2 now experiencing a resurgence in the rate of COVID-19
3 infections nationwide. The plaintiffs don't dispute this.
4 The plaintiffs don't dispute that there are sites in certain
5 areas in New York City and they are in the 8 percent range and
6 those are concerning. The disproportionate surge of the
7 COVID-19 spikes have occurred in the communities impacted and
8 in which plaintiffs operate. Since the beginning of September
9 the Department of Health has seen the number of cluster spikes
10 in a few areas around the state, Broome County has in one
11 area, which is in the yellow zone; Brooklyn which has one area
12 in the red, orange and yellow zone each; Orange County which
13 has one area in the red and yellow zone; Queens which has two
14 areas red and -- two areas in red, orange and yellow zones;
15 and Rockland County which has one area with red and yellow
16 zones. According to Dr. Zucker, the data indicated that
17 immediate action is required to contain the virus and to
18 prevent the superspreader event.

19 Most of the New York City has a rate of positive
20 tests around 1 percent, however, the red zone areas within our
21 city had a positivity rate of approximately 8 percent, which
22 is cause for alarm for the safety of the public. The CDC
23 states that a high positivity rate means COVID-19 transmission
24 is elevated in the jurisdiction and community mitigation
25 measurements -- I'm sorry let me start over. The CDC states

1 that a high positivity rate means that COVID-19 transmission
2 is elevated and the jurisdiction and community mitigation
3 measures are warranted to reduce transmission. Dr. Zucker
4 explains that the cluster initiative by the governor is
5 designed as a mitigation measure to curb surging COVID-19
6 rates. Notably, the capacity restrictions in the zones
7 largely correspond to the criteria for prior reopening phases.
8 This is critical because it shows that the zone criteria is
9 not the result of an arbitrary number pulled out of a hat, but
10 rather a reasonable, rational decision in the state's effort
11 to reimpose restrictions that previously yielded successful
12 results in flattening the curve.

13 I find that these measures bear a real and
14 substantial relation to the objectives of controlling surging
15 COVID-19 infection rates and protecting the health and safety
16 not only of New York State and New York City residents but
17 more directly the welfare of all residents within. And I
18 think that there's also evidence in the record that all of the
19 health experts predict that there will be a second wave which
20 will start to -- we'll start to see evidence of that as the
21 weather becomes colder and people spend more time indoors.
22 That coupled with the flu, which is also expected during this
23 cold season, will present serious public health concerns.

24 I further find that the executive order does not
25 violate the Free Exercise Clause of the Constitution. The

1 First Amendment provides, in part, that, quote, Congress shall
2 make no law respecting an establishment of religion or
3 prohibiting the free exercise thereof. The Free Exercise
4 Clause protects religious observers against unequal treatment
5 and laws that target religious individuals based on their
6 religious status are subject to strict scrutiny. *Trinity*
7 *Lutheran of Columbia Church versus Comer*, 137 Supreme Court
8 2012 at page 2019 decided in 2017. The Free Exercise Clause
9 does not relieve an individual of the obligation to comply
10 with a valid and neutral law of general applicability on the
11 ground that the law proscribes (or prescribes) conduct that
12 his religion prescribes (or proscribes).

13 *Central Rabbinical Congregation of the United States*
14 *and Canada versus New York City Department of Health and*
15 *Mental Hygiene*, 763 F.3d 183 at page 193 decided by the Second
16 Circuit in 2014 and quoting *Employment Decision Department of*
17 *Human Resources of Oregon versus Smith*, 494 U.S. 872, decided
18 in 1990.

19 Also Church of Lukumi L-U-K -- well, *Church of*
20 *Lukumi*, L-U-K-U-M-I, *Babalu*, B-A-B-A-L-U, *Aye, Inc. Versus*
21 *City of Hialeah*, 508, U.S. 520 at page 31 decided by the
22 Supreme Court 1993. There the Court said, a law that is
23 neutral and of general applicability need not be justified by
24 a compelling governmental interest even if the law has the
25 incidental effect of burdening a particular religious

1 practice, end of quote. The law burdening religious conduct
2 that is not both neutral and generally applicable, however, is
3 subject to strict scrutiny. Neutrality and general
4 applicability are interrelated and failure to satisfy one
5 requirement means that it is likely that the other has not
6 been established.

7 Plaintiff discussed at length how the executive
8 order banned thousands of Orthodox Jewish people from
9 fulfilling core religious traditions and disproportionately
10 impacts Orthodox Jews. Quoting the plaintiffs' memo ECF 2-2.
11 As evidence of the hardship executive order imposes on
12 Orthodox Jews in an affected community, the plaintiff has
13 furnished the declarations of Rabbis Yisroel Reisman and
14 Steven Saphirstein, both of whom lead synagogue congregations
15 located in the red zone. And Rabbi Menachem Feifer, whose
16 congregation is located in the orange zone. Plaintiffs
17 explain that the executive order renders it impossible for
18 plaintiffs' synagogue to observe three Jewish holidays
19 starting today October 9 through October 11: Hoshana Rabbah,
20 October 9th; Shmini Atzeres on October 10th; Simchas Torah on
21 October 11. And please forgive me if I'm mispronouncing the
22 names of the holidays, I'm trying my best. For example, on
23 Friday, October 9th, Hoshana Rabbah worshippers would say
24 seven additional prayers followed by the waving or beating of
25 a willow branch, and reading from a Torah scroll. In all,

1 services take at least 90 to 150 minutes. With the executive
2 order's capacity restrictions, which in the red zone is
3 limited to 10 attendees, more than 20 separate services would
4 have to be held each lasting 90 to 120 minutes.

5 The following day, October 10th, is Shmini Atzeres.
6 Those observing this holiday recite the Prayer for the
7 Departed Relatives, one of only four occasions that the prayer
8 is recited annually. This prayer usually takes an extra 15
9 minutes to recite, and is deeply emotional for the
10 congregants. Plaintiff attests that congregants would be
11 deprived of this opportunity under the executive order because
12 the prayer is only offered for groups and not for individuals.
13 And I don't know whether that's the required and whether there
14 is a number that is required for the group prayer, but in any
15 event, plaintiffs state that Executive Order 202.68 will
16 prevent synagogues from reading Ecclesiastes, which Orthodox
17 Jews accept as the Book of Wisdom and which apparently must be
18 read in a congregant setting.

19 Finally, on Sunday, October 11th, Simchas Torah,
20 which translates to the Joy of the Torah. Each congregant is
21 called to the Torah for a short reading culminating in the
22 Rabbi himself reading the final Torah portion. Plaintiffs
23 explained that this ritual takes a significant amount of time
24 under normal circumstances, but that the executive order's
25 capacity restriction will effectively preclude the

1 congregation completing the ritual before the end of the
2 holiday. The burdens imposed by the order on Orthodox Jews
3 are compounded further because they are prohibited from
4 vehicular travel on Saturdays, I think starting Friday at
5 Sunday down, and religious holidays. Thus, congregants who
6 belong to a synagogues in one of the red, orange or yellow
7 zones cannot simply travel to a synagogue a non-cluster area
8 to evade the order's restrictions.

9 Although I do highly sympathize with plaintiffs, the
10 Orthodox Jewish congregants whose religious observance will be
11 impacted by the executive order, the record indicates that the
12 hardship they will incur were not the object of Executive
13 Order 202.68, but rather what the Supreme Court considers to
14 be the incidental burdening of a particular religious
15 practice. As stated in *Lukumi*, 508 U.S. at 531. So long as
16 the government's executive order is mutual and generally
17 applicably, impact described by the plaintiffs and the
18 rabbi-declarants does not state a violation of the Free
19 Exercise Clause under the First Amendment.

20 As discussed below, the Court finds that Executive
21 Order 202.68 is neutral and generally applicable. The Court,
22 therefore, cannot conclude that the order's objective is to
23 unconstitutionally burden religious observance.

24 You know, and I note that Governor Cuomo's comments
25 if taken out of context or if heard by somebody who is

1 understandably going to be sensitive to those comments,
2 especially a member of the Orthodox Jewish community, those
3 could be troubling and could reasonably lead one to believe
4 that the objective of this order was to burden the Orthodox
5 Jewish communities' religious observances, however, I find no
6 evidence that that was the motive behind the governor's order.
7 I believe that he's established with sound medical and
8 scientific evidence that the executive order was necessary
9 to -- in the interest of the public, including the members of
10 the congregations of the plaintiff.

11 To determine neutrality, the Court begins with the
12 order's text "for the minimum requirement of neutrality is
13 that a law not discriminate on its face." That's *Central*
14 *Rabbinical*, 763, F.3d 193, (quoting *Lukumi* 508 at U.S. 533.)
15 A neutral law that "targets the practice of a particular
16 religion" is not neutral. That is not what we have here. A
17 regulation that "purposefully singles out religious conduct
18 performed" by a particular religious group is not neutral.
19 Again, that is not what we have here. When determining the
20 neutrality of a law, courts primarily focus on the historical
21 background of the decision under challenge, the specific
22 series of events leading to the enactment or official policy
23 in question, and the legislation or administrative history,
24 including contemporaneous statements made by members of the
25 decision-making body. *Lukumi*, 508 U.S. at 540.

1 Now, getting back to the comments of the decision
2 maker here, Governor Cuomo, which the plaintiff cites as
3 evidence of the lack of neutrality, as I said, I think that
4 those comments could be misunderstood or misconstrued. It
5 appears that the comments were focusing on the red zone which
6 happen to have within them a large number of Orthodox Jewish
7 citizens of our state.

8 I quote here the *Central Rabbinical Congress* decided
9 by the Second Circuit as follows: The general applicable
10 requirement prohibits the government from "in a selective
11 manner imposing burdens only conduct motivated by religious
12 belief. It protects religious observers against unequal
13 treatment and inequality that results when a legislature
14 decides that the governmental interests it seeks to advance
15 are worthy of being pursued only against conduct with a
16 religious motivation." A law is not yen generally applicable
17 if it is, quote, substantially underinclusive such that it
18 regulates religious conduct while failing to regulate secular
19 conduct that is at least as harmful to legitimate governmental
20 interests purportedly justifying it.

21 Executive Order 202.68 is both neutral and generally
22 applicable. There's nothing on the face of the order's text
23 that singles out religious rituals per se, or even religion.
24 The gravamen of the order, rather, concerns the nature of the
25 public gathering. The order applies to all non-essential

1 industries, activities, and gatherings. To the extent the
2 executive order singles out religious activities is to
3 accommodate worship not to thwart it. Within each zone,
4 houses of worship are accorded more lenient restrictions than
5 other venues. In the red zones schools are closed, public
6 gatherings are prohibited outright, restaurants and bars
7 cannot seat patrons. It's only take out at those
8 establishments. Houses of worship on the other hand, such as
9 plaintiffs' synagogues, are not to closed under the order, and
10 need only reduce capacity. In the orange zone, schools remain
11 closed, restaurants may seat no more than four people at an
12 outdoor table, and general public gatherings are limited to 10
13 people, whereas houses of worship may accommodate as many as
14 25 people. In the yellow zone, yet again, houses of worship
15 are allowed 50 percent occupancy, where as non-essential
16 gatherings are limited to 25 people, and restaurants and bars
17 may seat no more than four at a table. Schools are open in
18 yellow zones but must test their students and personnel, a
19 requirement that does not seem to apply for houses of worship.

20 We discussed *the South Bay United Pentecostal Church*
21 decision decided by the Supreme Court denying injunctive
22 relief to a California-based executive order that limited
23 religious gatherings, finding that the restrictions were
24 consistent with the Free Exercise Clause. That order limited
25 attendance at places of worship at 25 percent of building

1 capacity or a maximum of 100 people.

2 The Supreme Court found that the restrictions
3 appeared consistent with the Free Exercise Clause of the First
4 Amendment and Chief Justice Roberts noted that "similar or
5 more severe restrictions apply to comparable secular gathers,
6 including lectures, concerts, movie showings, spectator
7 sports, and theatrical performances, where large groups of
8 people gather in close proximity for extended periods of
9 time." The same holds true under the circumstances presented
10 to the Court.

11 Chief Justice Roberts noted that the order at issue
12 in that case to the extent that it treated more leniently only
13 dissimilar activities such as operating grocery stores, banks
14 or laundromats, in which people neither congregant in large
15 groups nor remain in close proximity for extended periods.
16 Finally, Chief Justice Roberts concluded that the precise
17 question of when restrictions on particular social activities
18 should be lifted during the pandemic are a dynamic and
19 fact-intensive matter subject to reasonable disagreement.
20 Here the same is true.

21 The governor and the people of New York fought very
22 hard to bring the COVID levels down and flatten the curve here
23 in the state. Suddenly, we're starting to see spikes in
24 certain areas across the state and the governor then had to
25 implement measures to make sure that those spikes do not

1 blossom into a full blown pandemic again.

2 Thus, as Chief Justice Roberts noted, when elected
3 officials act in areas with fraught with medical and
4 scientific uncertainties, the latitude must be especially
5 broad. "When those broad limits are not exceeded they should
6 not be subject to second guessing by unelected federal
7 judiciary, which lacks the background, competence and
8 experience to assess public health and is not accountable to
9 the people." That is a quote from the decision.

10 The executive order here affords more lenient
11 treatment to certain non-religious activities in some
12 instances, but I find that those activities are not similar to
13 the circumscribed religious activities. To illustrate the
14 point, in the yellow zone religious gatherings are limited
15 50 percent capacity while schools and restaurants are open.
16 In the yellow zone there is somewhat more leniency indicated
17 for secular activities. Ignoring the restrictions otherwise
18 placed on indoor dining, which is limited to 25 percent
19 capacity, and must end by midnight, defendant persuasively
20 argues that dining is distinct from religious service because
21 customers arrive and leave at different times, they tend not
22 to mingle together outside of the tables or their groups, and
23 religious services generally feature congregants arriving at
24 the same time, intermingling, jointly praying, singing or
25 chanting. Critically, the state represents that it maintains

1 similar or more onerous restrictions to similar activities
2 than secular settings. According to the state, all music
3 performances and theater venues have been and remain closed
4 throughout the entire state due to the attendant risks of
5 individuals arriving at the same time, intermingling during
6 the event and leaving together. Likewise, numerous weddings
7 are subject to numerical restrictions and theaters have yet to
8 reopened movie theaters have not reopened.

9 Defendant also has persuasively distinguished
10 offices, malls, and retail stores, which are subject to 50%
11 capacity limits in orange zones, from houses of worship, which
12 must limit attendance to 25 percent of their capacity. The
13 former venues generally do not involve individuals arriving
14 and departing simultaneously and intermingling en masse.
15 Offices are also more amenable to social distances, in a way
16 that houses of worship are not, especially during times in
17 which congregants are raising their voices during song or
18 prayer. This reasoning has been echoed and endorsed by the
19 Seventh Circuit, in a case called *Elim Romanian Pentecostal*
20 *Church v. Pritzker*, 962 F.3d 341, 346 decided by the Seventh
21 Circuit in 2020. There the court observed:

22 It would be foolish to pretend that worship services
23 are exactly like any of the possible comparisons, but they
24 seem most like other congregate functions that occur in
25 auditoriums, such as concerts and movies. Any of these indoor

1 activities puts members of multiple families close to one
2 another for extended periods, while invisible droplets
3 containing the virus may linger in the air. Functions that
4 include speaking and singing by the audience increase the
5 chance that persons with COVID-19 may transmit the virus
6 through the droplets that speech or song inevitably produce.

7 Chief Justice Roberts similarly observed that
8 concerts and church services differ from grocery stores and
9 pharmacies, "in which people neither congregate in large
10 groups nor remain in close proximity for extended periods."

11 Plaintiffs cite *Soos, S-0-0-S, versus Cuomo, 2020*
12 *Westlaw 3488742*, at 12 decided in the Northern District of New
13 York, in June 2020, in which the court found that an executive
14 order limited houses of worship to 25 percent indoor capacity,
15 whereas as many as 150 people could attend indoor, in-person.

16 *Soos* is distinguishable however. Plaintiffs have
17 not shown that religious activities are subject to more
18 restrictive criteria, as in *Soos*. And as noted above, houses
19 of worship that have been afforded more lenient treatment by
20 the executive order than their secular and comparable
21 counterparts within each respective cluster zone.

22 Plaintiffs attack the 202.68 neutrality based on
23 certain comments by Governor Cuomo and, again, I find that he
24 has recognized that certain COVID spikes have occurred within
25 these areas where there is a large Orthodox Jewish community.

1 There is no evidence that these comments reflect an animus for
2 those Orthodox Jewish communities or deliberate imposition of
3 a requirement directed at thwarting the religious practices of
4 the Orthodox Jewish community. Some of the quotes, frankly,
5 if looked at in the full context I believe were taken
6 selectively out of context. Governor Cuomo talks about the
7 entire State of New York of which we are all citizens. He
8 generally refers to the importance of every citizen in the
9 State of New York contribute and do his or her part to ensure
10 the devastating impact of the COVID virus does not revisit
11 itself within our state. We have COVID spikes enraging out of
12 control in many states within our country. And I think that
13 the governor has tried very hard with the help, as we said, of
14 the medical first responders, police, fire, ambulance and the
15 citizens of the state to flatten the curve and bring it under
16 control and he has lawfully exercised his power without
17 religious animus or targeting to make sure that we don't find
18 ourselves back where we were in March.

19 The balance of equities and the public interest
20 weigh strongly in favor of New York's mission to protect its
21 citizens from this global pandemic which continues to be of
22 great concern. Not just in specific areas of New York, but
23 throughout our country and throughout the world.

24 Moreover, it seems that the irreparable harm to the
25 public is great when one balances hardship, death or permanent

1 injuries to one's organs that can impair or change one's life
2 as opposed to having to observe religion, one's religion in a
3 different way. I find that in this instance the balance of
4 hardship tip decidedly in favor of the defendants.

5 I believe given the fact that the Orthodox community
6 has previously complied with the total lockdown and has
7 continued to comply with the Phase Four restriction, I find
8 that the injuries that it brings to the Court's attention are
9 not irreparable, they are unfortunate, and certainly our
10 country was founded on the concept of religious freedom, but
11 in times of great national alarm over a very lethal pandemic,
12 I think that the harm, the irreparable harms that plaintiffs
13 assert are not sufficient and are not irreparable. They can
14 continue to observe their religion but there will have to be
15 modifications.

16 So respectfully, I deny the request for a TR0 and
17 unless the parties have anything further, we are adjourned.
18 Does anybody want to speak about where we go from here?

19 MR. SCHICK: Yes, Your Honor. This is Avi Schick on
20 behalf of plaintiffs. The first question is whether the
21 decision that Your Honor has read is going to be entered as an
22 order or is just going to exist in the transcript.

23 THE COURT: Well, we have a court reporter who made
24 a transcript of my decision so it will be available if you
25 wish to order the transcript from her. Would you like her

1 name?

2 MR. SCHICK: I've been in touch with her, I was
3 wondering if it was going to be also as a written order or
4 would it just be part of the transcript.

5 THE COURT: The order is in the transcript, yes,
6 sir. It will not be a separate written order.

7 MR. SCHICK: Okay. And obviously I have to consult
8 with my clients, but I do believe we are going to want some
9 immediate discovery on the issue of, you know, both the
10 irrationality and other issues mentioned by Your Honor, I
11 don't want to belabor this but to the extent there was not
12 sufficient evidence in the public record of whether, you know,
13 various of the statements or some of the other issues
14 mentioned here, that's what discovery is for, so we do hope to
15 be able to proceed very quickly toward discovery of various
16 state officials that, you know, the lack of public evidence of
17 them is not a barrier if in fact there is evidence of them.
18 We hope, Your Honor -- we can follow up on Monday but we would
19 hope Your Honor would allow us to proceed quickly there as
20 today. I surely have to consult with my clients, but that's
21 an issue I just wanted to raise.

22 THE COURT: I'll tell you something, sir. Judge
23 Robert M. Levy has been assigned as the magistrate judge in
24 this case. He will be reasonable for supervising discovery,
25 so depending on what you decide to do regarding discovery, he

1 will be the person who will set a discovery schedule and will
2 rule on any discovery disputes. Okay?

3 MR. SCHICK: Understood, Your Honor.

4 THE COURT: You have a magistrate judge assigned.

5 MR. SCHICK: Understood, Your Honor, thank you.

6 THE COURT: All right. Well, I wish everybody a
7 good holiday. I'm sorry that I understand the plaintiffs are
8 disappointed but I believe on this record that I cannot enjoin
9 the Governor's Executive Order 202.68. And unless there's
10 anything else, we're adjourned.

11 MR. SCHICK: I guess the only other thing, if I can
12 ask, is can -- it's not part of the discovery point so I
13 understood what you Your Honor said about the magistrate, but
14 counsel and Your Honor and others all noted that there is a
15 category of essential gathering that's permitted and it would
16 be useful for the state to define that, so that the impact of
17 communities here can understand what they're permitted to do
18 in an essential gathering under the order even in a red zone.

19 THE COURT: Well, I'm sure Mr. Spiegelman will be
20 right on it. The answer may exist, he didn't have it before
21 today.

22 MR. SPIEGELMAN: Counsel, you can follow up with me
23 after the call.

24 THE COURT: All right. Thank you, counsel. You
25 both did excellent papers despite the short time frame.

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Have a nice day everybody.

MR. SCHICK: Thank you.

THE COURT: All right, take care.

(Matter concluded.)

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

Plaintiffs,

vs.

GOVERNOR ANDREW CUOMO

Defendant.

Civil No. 1:20-cv-04834 (KAM)

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Given the press of time, Plaintiffs raise the following four brief points in response to Defendant's opposition.¹

First, that Defendant chose to impose these restrictions just two days before three important Jewish holidays calls out for immediate relief in time for Plaintiffs to be able to celebrate these holidays. Defendant's brief entirely ignores the devastating burden his restrictions impose on members of the Jewish community, fails to acknowledge that he announced his order only days before these sacred religious holidays, and does not explain the timing of his order as it impacts the only religious minority singled out in his press conference. In announcing the restrictions, Defendant repeatedly singled out by name *only* the Orthodox Jewish community. That targeting of a religious minority on the eve of its holidays is reason enough to reject all of Defendant's arguments and allow Plaintiffs to celebrate their holidays this weekend as they have for over 2,000 years. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). According to Defendant this morning, "[t]he cluster is predominantly an ultra-orthodox cluster." Carl Campanile, *Cuomo Calls COVID-19 Resurgence an 'Ultra-Orthodox' Jewish Problem*, NYPost (Oct. 9, 2020), <https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/>.

Again, Defendant singled out "the ultra-Orthodox community" repeatedly, threatening to "close the [religious] institutions down" if the community "do[es] not agree to enforce the rules." Schick Decl. Ex. A at 8. Defendant openly admits that his red-lined restricted zones apply to "communities [that] have a large Orthodox population," Schick Decl. Ex. F at 8, discrimination

¹ Plaintiffs note that Defendant relies extensively on the declaration of Howard Zucker in his opposition. As of 12:50 pm, Defendant has neither filed nor served that declaration on Plaintiffs, depriving Plaintiffs the opportunity to review and respond to any of the assertions therein.

that is all the more blatant as Defendant has failed to identify the objective metrics that define when a neighborhood is placed into a red, orange or yellow zone that restricts religious practice.

Members of the Jewish faith already are feeling the grave effects of Defendant's last-minute restrictions. Because of Defendant's strict gathering limitations on houses of worship, synagogues must choose which congregants can participate in religious prayer and ritual under Defendant's strict limitations, which render it impossible for all congregants to participate in services. As Rabbi Eytan Feiner of the White Shul announced to his congregants late last night, Jews are "hurting beyond words" because of Defendant's restrictions, as he, like numerous others, "must inform all our dear members and *mispallelim* [worshippers] that our beloved Shul will not be available" for more than "a single Minyan of just ten (pre-authorized) people." Exhibit A, Rabbi Eytan Feiner, *Closed White Shul Closes Ahead of New Restrictions Effective Friday Morning* (Oct. 8, 2020), <https://5townscentral.com/2020/10/08/closed-white-shul-closed-ahead-of-new-restrictions-effective-friday-morning/>.

The singling out of the Orthodox community in announcing the restrictions also has spurred other acts of discrimination, as businesses have begun to discriminate against Orthodox Jews even outside the restricted zones. See Exhibit B, *THANKS CUOMO: Hasidic Jews Refused Entry at Newburgh, NY Bowling Alley* (Oct. 8, 2020), <https://www.theyeshivaworld.com/news/featured/1907891/thanks-cuomo-hasidic-jews-refused-entry-at-newburgh-ny-bowling-alley.html>.

Second, even beyond Defendant's targeting of Orthodox Jews, in particular, and contrary to the inaccurate claims in his Opposition, Def. Br. 19, Defendant's restrictions discriminate on their *face* against all religious practice by imposing certain restrictions on "houses of worship" and different rules on secular conduct. Despite admitting that mass gatherings, in general, present risks

to the spread of COVID-19, Defendant singled out “[r]eligious institutions” as “the greatest potential” risk and posted pictures of religious gatherings—not even from during the pandemic. Schick Decl. Ex. A at 6–7, Ex. F at 8.

Incredibly, Defendant argues that his restrictions are *more* favorable to religion than secular conduct, Def. Br. 16, but his order proves otherwise. Defendant’s restrictions afford more favorable rules to schools, offices, malls, and other “*essential*” gatherings where individuals congregate and remain in close proximity for extended periods of time.² Pls. Br. 15–16. *Indeed, Defendant’s order fails to define the “essential gatherings” that are exempted from any limitations*, even in a red zone where houses of worship of any size are limited to occupancy of 10. Schick. Decl. Ex. E at 2.

Defendant wrongly states in his brief that the restrictions exempt only essential businesses, Def. Br. 12 n.11, but the plain language of his order restricts only “*non-essential gatherings*,” thereby affording Defendant carte blanche authority to allow an undefined category of gatherings in unspecified numbers of individuals if Defendant decides the gathering is “essential.” Moreover, in the “Orange Zone” houses of worship are limited to 25 individuals, while offices, malls, and retail stores can open at 50% of capacity. Pls. Br. 15–16. And schools can open at 100% capacity in the “Yellow Zone”—a much more favorable rule than the 50% capacity imposed on houses of worship. Pls. Br. 15. Such permitted secular conduct that “threaten defendants’ interest in slowing the spread of COVID-19 to a similar or greater degree than those of” houses of worship

² *Association of Jewish Camp Operators v. Cuomo*, 2020 U.S. Dist. LEXIS 117765 (N.D.N.Y. July 6, 2020), involved a distinguishable challenge to restrictions to overnight camps. Defendant’s restrictions on their face applied equally to religious and non-religious camps, and the court decided permitted secular activity was dissimilar to overnight camps, which involve close sleeping quarters.

demonstrates that, as in *Soos*, 2020 U.S. Dist. LEXIS 111808, *29–30, Defendant’s restrictions discriminate on the basis of religious practice.

Third, Plaintiffs wrongly argue that *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), do not permit this Court to invalidate discriminatory restrictions on religious practice, including ones—like those here—designed to target a religious minority.

Jacobson did not address a Free Exercise Clause challenge at all and does not free the Court from deciding whether the statute is discriminatory against religious practice. Numerous courts considering the issue have applied traditional First Amendment scrutiny to such challenges, and a court *must* determine whether a restriction discriminates against religion. *See Roberts v. Neace*, 958 F.3d 409, 413–16 (6th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *Soos v. Cuomo*, 2020 U.S. Dist. LEXIS 111808, *29–30 (N.D.N.Y. June 26, 2020); *On Fire Christian Ctr. v. Fischer*, 2020 U.S. Dist. LEXIS 65924 (W.D. Ky. Apr. 11, 2020).

Nor is *South Bay* “dispositive,” Def. Br. 10, as Defendant wrongly argues. The case was before the Court on a request for injunctive relief after the district court refused to enjoin the challenged conduct. 140 S. Ct. at 1613–14. As the Chief Justice emphasized in his concurring opinion, the Court’s decision in *South Bay* was based upon the highly deferential approach the Supreme Court takes to district court decisions that deny a motion for a preliminary injunction: “Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but *grants judicial intervention that has been withheld by lower courts.*” *Id.* (citation omitted) (emphasis added). The present case is the moment to which the Supreme Court said it would defer: a decision by a “lower court” *whether* to give relief.

Further, the discrimination here is far clearer than in *South Bay*, such that the decision by the *South Bay* district court should not guide this Court's analysis. As explained in Plaintiffs' brief and above, Defendant's actions here discriminate against religious gatherings vis-à-vis the undefined category of "essential gatherings." Pls. Br. 16; Schick Decl. Ex. E at 2. Nor was the explicit singling out of religion in imposing restrictions at issue in *South Bay*, as is present here and is discussed further below.³

Finally, Defendant's discriminatory restrictions fail strict scrutiny; indeed, they are so irrational that they would fail even *Jacobson's* "arbitrary and oppressive" standard, if that standard applied here. Defendant has shown no criteria whatsoever for the metrics that trigger his gerrymandered zones that would even begin to prove that the restrictions are narrowly tailored. Nor has Defendant even attempted to set forth evidence that Plaintiffs' synagogues have not complied with his existing gathering and health regulations or that Plaintiffs have caused spread of COVID-19. The only evidence proves the opposite. Pls. Br. 11. Defendant's massively underinclusive restrictions favoring comparable secular activity show that less restrictive means

³ Defendant also erroneously relies upon *Calvary Chapel Dayton Valley v. Sisolak*, 2020 WL 4260438 (D. Nev. June 11, 2020), but that case is inapplicable. In *Calvary Chapel*, the plaintiff challenged an order that limited in-person church services to 50 persons or less, the same capacity limitation that applied to *all* public gatherings in any indoor or outdoor spaces and movie theaters, while casinos were permitted to operate at 50% capacity. *Id.* at *1. But casinos also faced substantial government-issued restrictions and limitations "*in addition to*" the requirements of the Emergency Directive. *Id.* at *3. On this basis, the court concluded the order was "neutral and generally applicable," and did not treat secular activity more favorably than religious services. *Id.* Here, Defendant's order omits from its regulatory sphere any "[e]ssential gatherings," instead limiting only "[n]on-essential gatherings" in each of the "zones." Schick Decl. E at 2. Thus, by its very text the order permits open-ended "essential gatherings" even in areas where religious observers are severely regulated. The order never explains why it "permit[s] people who practice social distancing and good hygiene in one place but not another for similar lengths of time," *Roberts*, 958 F.3d at 416, and such a distinction disfavoring religion is plainly contrary to the First Amendment. Therefore, unlike in *Calvary Chapel*, where Nevada's officials at least arguably placed religious practice and secular activity on equal footing, Defendant's discrimination here merits this Court's entering a temporary restraining order.

are available to curb the spread of COVID-19 than an arbitrary cap on the number of protectioners allowed to attend religious services. Defendant's patent targeting religious conduct for restriction smacks of arbitrariness and oppression, which is particularly true given Defendant's admission that such restrictions purportedly are necessary because of the *government's* lack of enforcement of prior laws, reasoning that "[m]oving forward, I'm not going to pass more laws that are not enforced." Schick Decl. Ex. F at 7. Draconian shutdown measures against religious institutions cannot possibly be narrowly tailored, and are arbitrary and oppressive, where even Defendant concedes less restrictive means are available but may not have worked because of the government's (and not Plaintiffs') inaction.

This 9th day of October, 2020.

/s/ Avi Schick

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EXHIBIT A

CLOSED: White Shul Closes Ahead of New Restrictions Effective Friday Morning

By **5TC Team** - October 8, 2020

Hoshana Rabba 5781/Erev Shabbos and Yom Tov, October 8, 2020

Lichvod Dearest White Shul Members, amu"sh:

Shalom U'vrachah, Good Evening, and wishing you all a Gutten Kvittel this Hoshana Rabba.

We sincerely apologize for the delay in sending this message.

Times are extremely difficult these days, and the governor's recent severe restrictions are weighing on us quite heavily. Rabbonim have been putting in a great deal of time and energy (and tefillos...) to deal with the many issues at hand. While we are davening fervently that we hear of a favorable ruling tomorrow afternoon (for a temporary restraining order) in response to Agudath Israel of America's request, we must also deal appropriately and responsibly with the present reality on hand.

We at the White Shul- along with other Rabbonim- feel strongly that it is incumbent upon us to adhere to the current guidelines issued by the governor- which sadly mandate that only a single Minyan of just ten people is permitted in our building at any one time.

Compounding the difficulty is the governor's current restriction that only one small Minyan is allowed on the entire Shul premises, thereby disallowing use of the outdoor davening areas as well.

To summarize our paramount concerns and the need for full compliance:

1. We must do our part in helping stem the current uptick, flatten the curve, and keep everyone safe and healthy so Yeshivos and Shuls can all fully open soon— and safely remain open.
2. We must do our absolute utmost to prevent any slight Chillul Hashem and also preclude any and all possible *ei'vah*, any animosity, from all those scrutinizing the actions and behavior of Orthodox Jews at this time.
3. We have already been recently visited by officials from the Department of Health (DOH), and have been warned that both the mayor and governor will likely be sending representatives to our neighborhood— with a threat of imposing fines up to \$15,000 for any violations of the governor's executive order. In addition to the primary concerns of preventing any Chillul Hashem and not arousing any animosity, we are also *על ממונ של ישראל*.

Even having to pen this e-mail pains us immeasurably. We are hurting beyond words. *Hashem Yerachem Aleinu*. We most certainly must continue to daven as passionately as possible for a *yeshuah gedolah bi'karov* and a quick end to all our *tzaros* and difficulties. But we also must do that which we feel is the right thing to do at this time, and work endlessly to always be *שמם שמים תמיד ולעולם*.

In light of the above, we sadly must share with you the following:

- **Beginning TOMORROW morning, Hoshana Rabba Shacharis, there will only be a single Minyan of just ten (pre-authorized) people taking place on our Shul's premises.** We are still working on details, but must inform all our dear members and *mispallelim* that our beloved Shul will not be available for any additional Minyanim tomorrow and until further notice. Most unfortunately, there will not be regular Minyanim on the Shul grounds at this time.
- Those individuals who need to retrieve Tallis/Tefillin, Seforim, or any other personal belongings, please feel free to enter the Shul for the sole purpose of retrieving those items, but please ensure there are no more than five people inside the Shul at any time. We remind everyone that masks (covering both mouth and nose) must be worn whenever one enters the Shul building, and we reiterate our previous strong recommendation for all to don a mask anytime you are in any public area.
- We daven and ask for your understanding, patience, and compliance, and implore you to seek other available options for Tefillah B'Tzibbur. One may daven at a safe (mask mandatory) and legal outdoor Minyan (backyard/porch) at this time, and indeed one may daven B'yechidus if Tefillah B'Tzibbur proves too difficult or impractical at this juncton.

May HaKB"H answer all of our heartfelt *tefillos* and *bakashos* in the very near future, and may we merit to share only *besuros tovos* in this and all areas henceforth *ה"א*.

We will certainly keep you updated and informed of any important details and changes as they arise. Please always feel free and comfortable to contact either one of us for questions or *Chizzuk*— it is our pleasure to assist in any way possible.

With warmest regards and very best wishes for a Gut Kvittel and only Kol Tuv always,

Rabbi Eytan Feiner

Rabbi Motti Neuburger

EXHIBIT B

THANKS CUOMO: Hasidic Jews Refused Entry at Newburgh, NY Bowling Alley

October 8, 2020 1:18 am



Special to YWN News:

The repercussions of NY Governor Cuomo's verbal assault Wednesday on the Hasidic and other Orthodox Jewish communities are already beginning to appear.

A Newburg based bowling alley refused service to a number of Orthodox Jewish families on Wednesday afternoon. This was less than 24 hours after the governor's controversial speech and draconian measures limiting synagogue services to ten people per synagogue in what he termed "red zones."

Approximately twenty un-related and un-connected families tried to go bowling when rain forced them to change their Chol HaMoed plans. Slightly after 2:15PM near Newburgh, NY, it began to rain.

One family related their version of what had transpired:

"We had planned a hike for today, when we got to the jump off point of the hike it started to raining," the father in one group reported.

They called a nearby bowling alley called Pat Tarsio Lanes at about 2:30 PM and were told that there were plenty of lanes open and that they should come down. They arrived between 3:00 and 3:15.

The bowling alley is located at 173 South Plank Road (Rt. 52) in Newburgh.

According to the family, when they arrived and staff members saw that they were orthodox Jews, they were refused lanes.

"There must have been twenty families. Every single person was wearing a mask, and we were socially distancing," the father said.

Upon their arrival at Pat Tarsio Lanes, the family met some Hasidic families who warned them what would happen.

"They will tell you that lanes are not available because they have leagues at 5:00 PM. We also called beforehand, and were told to come down and that there were plenty of lanes.

"If the facts of what is alleged are true, it would be very troubling if this bowling alley was discriminating against Orthodox Jews who merely wished to bowl. This calls for an explanation by the owners as to why they were initially given permission to come and refused later on," remarked Charles Miller, a New York City-based attorney.

Pat Tarsio Lanes has been open for over sixty years. Their website states: Originally constructed in 1959 by Pat Tarsio Sr., and Lou "Wrongfoot Louie" Campi, Campi-Tarsio Lanes quickly became a household name. Soon thereafter, Pat took sole ownership of the lanes, which was then re-named "Pat Tarsio Lanes." Located on route 52 in Newburgh, NY, this local spot developed into a neighborhood favorite for serious bowlers and amateurs alike.

And now, over 50 years later, his sons Tony and Pat continue to operate Tarsio lanes, preserving the same core values it was built on and valuing their customers as friends."

A phone call made to Pat Tarsio Lanes went unanswered.

JOIN THE TENS OF THOUSANDS WHO ALREADY ARE ALERTED OF BREAKING NEWS LIKE THIS IN LIVE TIME:

YWN WHATSAPP STATUS UPDATES: [CLICK HERE to join the YWN WhatsApp Status.](#)

YWN WHATSAPP GROUPS: [CLICK HERE to be added to an official YWN WhatsApp Group.](#)

(YWN World Headquarters – NYC)

EXHIBIT A



OCTOBER 5, 2020 Albany, NY

Video, Audio, Photos & Rush Transcript: Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic

Directs Schools in Hot Spot Zip Codes Identified by New York City to Temporarily Close In-Person Learning Beginning Tomorrow

Governor to Meet with Communities in Brooklyn, Queens and Rockland, Orange and Nassau Counties to Discuss Religious Gatherings

New York State to Oversee Enforcement in Statewide Hot Spot Clusters

20 ZIP Codes in Areas with Hot Spots - Brooklyn, Queens and Rockland and Orange Counties - Have 5.5 Percent Positivity Rate

Statewide Positivity Excluding Hot Spot ZIP Codes is 1.01 Percent; 1.22 Percent with Hotspot ZIP Codes Included

8 COVID-19 Deaths in New York State Yesterday

SLA and State Police Task Force Visits 587 Establishments; Observes 0 Establishments Not in Compliance

Governor Cuomo: “On schools, my number one concern has always been schools. I said to the parents of this state, I will not send—I will not allow your child to be sent to any school that I would not send my child, period. And you have my personal word on that. I’ve spoken to thousands of parents who have called up and said, I’m worried about sending my child to school. I said, I won’t allow a school to open that I wouldn’t send my child to. That’s my test.”

Cuomo: “If we’re going to keep religious institutions open, it can only be with two conditions. One, the community must agree, whether it’s the Jewish community, whether we’re talking about Black churches, whether we’re talking about Roman Catholic churches, the religious community has to agree to the rules and they have to agree that they are going to follow the rules. And they have to agree that they are going to be a full partner in the enforcement of the rules. That’s condition one. I’m going to meet with members of the ultra-Orthodox community tomorrow. I want to have that conversation directly, myself. This cannot happen again. If you do not agree to enforce the rules, then we’ll close the institutions down. I am prepared to do that. Second, after we receive the agreement, and agreement is only as good as the enforcement.”

Earlier today, Governor Andrew M. Cuomo updated New Yorkers on the state's progress during the COVID-19 pandemic and directed schools in hot spot ZIP codes identified by New York City to temporarily close in-person learning beginning tomorrow. The governor noted that New York State needs more data on the threat COVID-19 poses in those schools.

Governor Cuomo also announced he will meet with the communities in Brooklyn, Queens, and Rockland, Orange and Nassau Counties to address religious gatherings. New York State will oversee enforcement in statewide hot spot clusters. Yesterday, Governor Cuomo announced that New York State is deploying personnel to directly enforce state guidance

within the hot spot ZIP codes. New York State will review the data in affected ZIP codes, gather more school data and determine criteria for reopening the schools.

In the top 20 ZIP codes in areas that have seen recent outbreaks - Brooklyn, Queens and Rockland and Orange Counties - 3,473 tests were conducted, yielding 193 positives or a 5.5 percent positivity rate. In the remainder of the state, 72,931 tests were conducted yielding 740 positives or a 1.01 percent positivity rate.

VIDEO of the Governor's remarks is available on YouTube [here](#) and in TV quality (h.264, mp4) format [here](#).

AUDIO of today's remarks is available [here](#).

PHOTOS are available on the Governor's Flickr [page](#).

A rush transcript of today's remarks is available below:

Good morning. Sorry for the delay. I pride myself on my punctuality, but some of the issues that we are going to discuss today we were just working on resolving, and that's the reason for the delay. From my far right, Mr. Gareth Rhodes. To his left, Dr. James Malatras. To my right, Melissa DeRosa, secretary to the governor. To my left, Dr. Howard Zucker, health commissioner extraordinaire. To his left, the ever smiling and jovial Rob Mujica, budget director. Thank you and again I apologize for being late.

Today is day 219, but it feels like just yesterday that this started, doesn't it? Have that same freshness and energy. Groundhog Day, remember that movie, Groundhog Day? These are the numbers for today. Again, we're looking at two different universes now. It's a little different than the past. We're looking at the statewide numbers and we are hyper focused on what we call hot spots. Where was the first hot spot in the United States of America? Trivia contest. Yay. You win. Three questions today. We had the first hot spot cluster in the United States. New Rochelle, New York. So we know this well.

We're oversampling in the hot spots and we're testing all across the state. The 20 hot spot zip codes, 5.5 percent, okay. Our hot spot zip codes are where many states are right now. And you'll see it in some of the numbers. Statewide positivity rate is 1.01 outside of the hot spot zip

codes. 1 percent is an unbelievably low infection rate. And as we're going into the fall, I believe it's going to be practically unsustainable, but it's remarkable that we're that low right now. If you roll in the hot spot ZIP codes, which now distorts the balance of the sample, it's 1.2. Number of deaths, 8. They are in our thoughts and prayers. Statewide hospitalizations, 636, ICU, 140, statewide intubations, 70.

Context first. We're coming into the fall. We have been told since early March, beware the fall, beware the fall. Weather gets colder, more people move indoors, flu season, schools open. Schools opening are almost a predictor of increased infection rate. Colleges opening, turned out to be more problematic than we thought, colleges opening. SUNY's doing a great job. That's why Dr. Jim Malatras is here today. If SUNY was not doing a great job, Dr. Jim Malatras would not be here today. That's how you know that. So the fall is a challenging period, as we know. And we expect to see the infection rate go up in the fall.

Context, all over the globe, the infection rate is going up. All over the globe. Countries that were doing remarkably well are now seeing spikes. USA overall is going up, Israel has a real problem, EU has a real problem, Canada has a problem, Argentina has a problem, the UK has a problem. And the UK, remember, they were up, they were down, they're up again. You look across the nation, states are all going up. So context, beware the fall, has been right.

New York is the outlier in all of these international and national trajectories. We are the exception to the rule. This is the one situation where we want to be the exception to the rule, right. Other states up, other countries up. That in and of itself is a complicating factor, because New York State is not hermetically sealed. We put a quarantine in effect. I know, but people still drive in, it's still water through a screen, people are still coming in on flights, international flights, people in Texas are coming in, people in California are coming in, people in New Jersey are coming in, so that's an added problem for us. If you look at the hot spot infection rate yesterday, Western New York is a hot spot. Yesterday was a good day, 1.2 percent. Broome has a hot spot. Came out of a pub restaurant. But Broome has a hot spot. Orange County, Rockland County, Brooklyn, Nassau could be on there with a hot spot in one section of Nassau. These clusters have to be attacked. Picture that map as a map of dry grass, and picture those hot spots as embers within the field of dry grass, okay? That's how I think of it.

the only course is to run to those embers and stamp them out immediately and dramatically. That's why I don't sleep at night.

So you have to attack the clusters. How do you attack the clusters? Testing, testing, testing, testing. Get the facts. Follow the data. Contact tracing off the testing. Testing in itself doesn't tell you anything, just that you have a problem. Contact tracing helps you solve the problem.

And enforcement. Enforcement. Oh, that's so harsh, enforcement. Yeah. It's not. Enforcement is kind. You know why? Because enforcement saves lives. That's what enforcement does. Lack of enforcement is not kind. I believe that. I believe that and I have said that from day one and the State has been bullish on this and it has worked. It's worked. It's not like I'm putting forth a proposition. Enforcement works. Any rule is only as good as the enforcement. Don't speed. Are you enforcing it? Don't litter. Are you enforcing it? Any rule is only as good as the enforcement, especially when it's a rule that people don't want to follow. Seat belts – only as good as you enforce them. Don't text and drive – only as good as you enforce it. I say to people when I see them texting and driving, I say to them, I pull up, I roll down my window, I say hi, you are texting and driving, that is a violation of the law. I know because I passed that law. It's only as good as the enforcement.

We're New York Tough. What's within tough? Smart – follow the data, follow the analytics. Disciplined – do the enforcement, stick to the rules, stick to what's working. I've said this 100 times but at this point in my life I've said everything 100 times. Too many local governments are not doing enforcement. Warnings are not enforcement. "Put a mask on or I will ticket you" is not enforcement. "Store owner, you're not supposed to have this many people in your store" – we are past that. Everybody knows the rules. You don't have to pull over a car today and say, you know you're not supposed to text and drive. They know that. They know that. What you wind up saying is, I got away with it. We've been saying you get away with it for too long and we have lived through this repeatedly.

This was bars and restaurants. How many times did I come before you and say bars and restaurants are a problem. We have gatherings in front of bars and restaurants. Local governments have to do the enforcement. Week after week after week and it got worse and it got worse and it got worse. I then said forget it, I give up, the State government will do bars and restaurants and we put together a task force, we did over 1,000 violations, and you know

what? Compliance with bars and restaurants is markedly better than it has been. When was the last time any of you wrote a story about bars and restaurants and gatherings in front of bars and restaurants? Why? Because the owners know they'll lose their license. Oh, that's tough. No. We saved lives. I believe that. We saved lives.

New York City has clusters, Queens, Brooklyn. We also have clusters akin to this in Orange, Rockland, a little bit in Nassau. I just got off the telephone with Mayor de Blasio, Comptroller Stringer, Council Speaker Johnson, UFD President Mike Mulgrew. We had a very good conversation. It was a collaborative, positive conversation. It's a complex situation, worked on a number of levels, a number of issues and we talked through them. We have clusters where the viral infection rate is higher, about 3 percent. Where does the virus mainly transmit? Dr. Zucker was on the phone we asked him that question. Schools, which are also the place where different communities come together. So, my child goes to a private school, your child goes to a public school, but our children are on the same hockey team or on the same soccer team or they play together in the playground. Schools can be locations of transmissions. Religious gatherings, especially in these communities, New Rochelle, first hot spot, was an Orthodox Jewish man who went to a temple, hundreds of people, and a wedding, hundreds of people. Orthodox Jewish gatherings often are very, very large and we've seen what one person can do in a group. Look at this Rose Garden with the President, by the way. Outdoor event, oh, those are safe, outdoor events. No, no, no. Safer than indoor. Nobody ever said safe. Safer than indoor. And look at that growing list of people at a presidential Rose Garden event who are theoretically tested before they came in. How many people could have been infected? One, two? And look at the spread in the Rose Garden. You know what happens here. You've seen it over and over again. Third, public spaces. These are basically in priority order. Fourth are businesses where consumers may interact but that is way down on the list relatively. And the key to all of these areas is enforcement. All of them. We have rules for all of these areas. We have rules for all these areas in place now. Well then how's it increasing? Because people are not following the rules. That's why.

On schools, my number one concern has always been schools. I said to the parents of this state, I will not send—I will not allow your child to be sent to any school that I would not send my child, period. And you have my personal word on that. I've spoken to thousands of parents who have called up and said, I'm worried about sending my child to school. I said, I won't

allow a school to open that I wouldn't send my child to. That's my test. On the schools in these areas, not all of them have been tested. So we don't have data on all of the schools in these hotspot clusters. That troubles me. And on the telephone call we were all basically in agreement. They have sampled some schools in the clusters, but not all the schools. And these are the hotspot clusters, right? So if you have to prioritize testing, you want to go to these schools first because you know they are in hotspot clusters. So some schools in those clusters we have not yet done testing on. Better safe than sorry. I would not send my child to a school in a hotspot cluster that has not been tested. Where I did not have proof that the infection rate was low in that school. I would not send my child. I am not going to recommend or allow any New York City family to send their child to a school that I wouldn't send my child. We're going to close the schools in those areas tomorrow. And that's that.

Religious gatherings—the city's proposal does not close religious institutions. We know religious institutions have been a problem. We know mass gatherings are the superspreader events. We know there have been mass gatherings going on in concert with religious institutions in these communities for weeks. For weeks. I don't mean little violations. You're only supposed to have 50, they had 55. I'm talking about you're only supposed to have 50 outdoors, they had 1,000. These are pictures from the past couple of weeks. And these are just emblematic. You've all seen pictures like this for weeks. What did you think was going to happen? What did you think was going to happen? Religious institutions are mass gatherings and raise the greatest potential. It's schools and it's large mass gatherings. Schools, frankly, because they're students and that's where our heart goes, our priority goes. But in terms of numbers, it's large gatherings and large religious gatherings are large gatherings. These have been going on for weeks. You don't see masks. And you see clear violations of social distancing. When were these pictures from?

Gareth Rhodes: The one on the right is more recent than the one on the left.

Governor Cuomo: Okay, but they're in the recent past. So this has been going on for weeks. We've been talking about it for weeks. If we're going to keep religious institutions open, it can only be with two conditions. One, the community must agree, whether it's the Jewish community, whether we're talking about Black churches, whether we're talking about Roman Catholic churches, the religious community has to agree to the rules and they have to agree

that they are going to follow the rules. And they have to agree that they are going to be a full partner in the enforcement of the rules. That's condition one. I'm going to meet with members of the ultra-Orthodox community tomorrow. I want to have that conversation directly, myself. This cannot happen again. If you do not agree to enforce the rules, then we'll close the institutions down. I am prepared to do that. Second, after we receive the agreement, and agreement is only as good as the enforcement.

We have to have real enforcement. In these clusters and the other statewide clusters, the enforcement will help the community. If the rule is no more than 50 percent of the people in a Black church, I want someone at that door when 50 percent enter the church, a person there who says to the pastor, you agree to follow the rules. That's 50 percent. That's it, or we close it down. It does not work without enforcement, but both of those conditions have to be in place. And if I do not have the agreement from the religious community directly as a starting point then we will close down the religious institutions. If they do agree to do it in partnership, then I want a real enforcement capacity. We're not going to make the same mistake twice.

Tomorrow I'm going to meet with the larger congregations. New York City, Rockland, Orange, Nassau and have that conversation. That's step one. If we get past step one, then we need enforcement in place. Enforcement is enforced. I've said this to you I have this conversation with local officials all day long. "Well we issue warnings." That's not enforcement. "Well, we do public education." That's not enforcement. There is no person in the state of New York who needs you to tell them at this point, "you must wear a mask." They know that they must wear a mask. There is no need for public education. Find me the person who says, "I never heard that. Really, you have to wear a mask?" Find me the person in the state who says that. Enforcement is enforcement, okay? New York City only did 26 enforcement actions. Enforcement is, "here's a violation." New York City deployed 1,000 people for three days, 1,000 people for three days is what- 24,000 personnel hours. 24,000 personal hours you only did 26 enforcement actions? That's not enforcement.

We have to be more aggressive. I understand that it's impolitic. I understand the sensitivity in the community now. I also understand that you will see people die if we don't do more enforcement. I also understand that we have learned this experience before. This is the bars and restaurants story. Week after week after week we have to do the enforcement; nobody's

doing the enforcement. Week after week after week nothing changes; the state took it over: I did 1,200 enforcement action; 228 immediate license revocations, just on bars and restaurants. Now, was I happy about doing 1,200 enforcement actions? No. Immediate license revocation is very difficult. That business basically closes. People lose their jobs. You don't want to do this, but life has options, my friends. You don't do this, the virus spreads, and people die. You tell me which is the nice and kind and responsible course of conduct? 1,200 enforcement actions just on bars and restaurants: that's enforcement.

The state is going to take over the enforcement oversight in all the hotspot clusters, okay? Local governments will need to provide us with personnel, but the state will take over the enforcement with the local personnel. I do not have enough state personnel to supplement every local police department in the state. To give you an idea, we have about 5,000 state troopers; there are about 35,000 NYPD. Most of this enforcement is also going to be done by Health Department officials, other agency-type officials. I said from day one for the local officials, I understand this is all tough stuff and politicians like to make people happy, as a general rule. I like to make people happy as a general rule too. I just have a superseding rule, which is I like to keep people alive. I'd rather you be alive and angry at me, then have people happy with me. I'm elected to do a job and be responsible and that's what I want to do. I said from day one, blame me. If you have to revoke a bar owners license? Blame me. We have to close a temple because it's over 50 percent? I'll do it. We have to close a Roman Catholic Church? I'll do it. I had closed the Saint Patrick's Day parade. I did it. But none of these rules are going to make a darn, if you don't have the enforcement.

Another issue that came up on the phone which is right: targeting by zip codes is imperfect. The virus doesn't travel by zip code. Neighborhoods and communities aren't organized by zip codes. Zip codes can be arbitrary and can leave out some communities that are infected. Zip codes can include communities that have a low infection rate. This is a zip code in Brooklyn. The white areas are inside the zip code, but we have the infection rate by address. You have areas in that zip code that aren't infected, so the ZIP code as a template is rough justice, but only rough justice and we can refine that. It takes some review and analysis, but look at the actual cases that you have again by address and make sure you're including the relevant zone, not just the ZIP code. If you have to go a little bigger, you go a little bigger. If you have to, if you don't have an infection rate in certain communities, don't include those infection

rates, so the ZIP codes as a starting place, but we then want to have a team of epidemiologists and demographics people actually look at the maps and where the infection rate is and make sure we're drawing the right circle, or the right borders. And the Comptroller raised that point, and it's a good point, and the health officials agree.

When we did New Rochelle, we did a circle. Every other state, every other country, does a political subdivision: a county, a city, a town. So, the ZIP codes are not the best template to use and we want to refine that template. For example, we're closing schools in ZIP codes, but the school district is different than the ZIP code — so just because a school is located in that ZIP code doesn't mean the students come from that ZIP code. The catchment area can go opposite direction from the ZIP code, but right now that's the best we have with the New York City data but we're going to refine this.

Non-essential businesses, public spaces — remember it's mass gatherings. Public spaces, schools should close, but we need to have the right template designed before we can do that with full accuracy. The only action we're taking today on this data — we are using the ZIP codes to close those schools tomorrow. If we expand the regions and that then includes other schools, we'll then notify people as soon as we know. But for today, all we have is the ZIP code data, so it's the schools in those ZIP codes, and as we refine it, we'll let you know.

So in total, schools close tomorrow. I'm going to be meeting with the Orthodox community tomorrow, see if they will agree to live and abide by the rules and advocate compliance. If the rabbi advocates compliance, that would be a very positive start. If the communities don't agree with the rules, which is possible — I had some conversations where some religious leaders believe they have herd immunity, which is not true. Some people believe, that, followed politics, and think that masks are ineffective and this is all a hoax. That's not true. But if they don't agree, then the state will take action. If they do agree and we have the ability to enforce, then we will go with reduced guidance: 50 percent rules, primarily outdoors, etc. We're going to do statewide enforcement, state supervised with local resources, but enforcement has to be enforcement. We need better templates, geographic templates, than ZIP codes. We also need better data on these schools in these hotspot ZIP codes, more testing, faster testing so we find out exactly where we are, and we need to establish criteria

for reopening. When do the areas reopen? What testing data, what percent over what period of time? That has to be established.

So, in closing, New York City is not unique. We have this all across the state. Again, we started with the first hotspot and it's going to continue. It is the way of the world; it's the way this virus moves. It starts in a cluster; it always starts in a cluster wherever, and the question always becomes, "can you stop it in the cluster?" Can you stamp out the embers before it's a fire out of control. That's always the question. That was the question in Wuhan, China. Can you get to Wuhan and stamp it out before it spread? That was the question in New Rochelle and we did stamp it out in New Rochelle by the way, and every state is dealing with it. But's a statewide issue. It's testing and it's enforcement. That's what we're down to. We're New York tough, smart, disciplined. Just to reiterate, the fall is perilous. We have to stay vigilant.

When we talk about 1 percent, I understand that it is a hyper-ambitious goal. You have to remember we were at a 20 percent infection rate at one time and I understand that we are surrounded by higher infection rates. New Jersey is 2.1; they were 3 last week, OK? Connecticut is 1.3; they were 1.5 and Connecticut has always been a relatively easier situation than New York. I'm envious of my friend Governor Ned Lamont. Pennsylvania's at 7.9 percent. We have people coming in and out of here every day from these states. We have people flying in from other countries. So, 1 percent. Hyper ambitious, unrealistic. Keep the bar high, raise the goal, and we do the best we can. But, I'm also realistic and these are the facts that surround us. That's why right now, you take out our hot spots, we have one of the lowest infection rates in the United States of America, and that is the gold standard, and that's what we want to try to achieve, even if it is not fully realistic. But, New Yorkers have done an amazing job, highest infection rate at one time, lowest in the nation. God bless New Yorkers, and I want to make sure as governor I'm doing everything I can to honor and fulfill their sacrifice and their toughness and their love for each other, and we're doing that.



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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3572-CV Caption [use short title]

Motion for: Injunction Pending Appeal Agudath Israel of America et al. v. Cuomo

Set forth below precise, complete statement of relief sought:
Plaintiffs request this Court enjoin the decision and order by Judge
Kiyo A. Matsumoto denying Plaintiff's motion for a temporary
restraining order and preliminary injunction

MOVING PARTY: Agudath Israel of America et al. OPPOSING PARTY: Governor Andrew M. Cuomo

Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Avi Schick OPPOSING ATTORNEY: Todd A. Spiegelman

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: USDC EDNY, Judge Kiyo A. Matsumoto

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
Yes No (explain):

Opposing counsel's position on motion:
Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency:

Plaintiffs request an emergency injunction from this Court

by no later than 5PM on Friday, October 23, 2020, so that

Plaintiffs can celebrate the Sabbath under the generally applicable COVID-19

rules that Defendant had in place before N.Y. Executive Order No. 202.68.

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: s/ Avi Schick Date: October 20, 2020 Service by: CM/ECF Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

ANDREW M. CUOMO, in his official capacity as Governor of
New York,

Defendant-Appellee.

Case No. 20-3572

**PLAINTIFFS-APPELLANTS' DISCLOSURE STATEMENT PURSUANT TO
FED. R. APP. P. 26.1**

Pursuant to Fed. R. App. P. 26.1, the undersigned, as attorneys for Plaintiffs-Appellants, certify that, to the best of our knowledge, Agudath Israel of America, Agudath Israel of Kew Garden Hills, and Agudath Israel of Madison have no parent corporations, and there is no publicly held corporation owning 10% of more their stock.

Dated: New York, New York
October 21, 2020

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20-3572-CV

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

v.

ANDREW M. CUOMO, in his official capacity as Governor of New York,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of New York
No. 1:20-cv-04834-KAM

EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS FOR INJUNCTION PENDING APPEAL RELIEF REQUESTED BY 5 P.M. FRIDAY, OCTOBER 23, 2020

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October 21, 2020

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	4
LEGAL STANDARD.....	10
ARGUMENT	11
I. Plaintiffs Are Likely To Prevail On The Merits Because The Order Discriminates Against Both Orthodox Jews And Religious Exercise	11
A. The State Generally Cannot Discriminate Against Religious Practice, Including Targeting A Particular Religious Minority	11
B. The Order Discriminates Against Orthodox Jews And Religious Practice And Cannot Satisfy Strict Scrutiny	14
C. Neither <i>Jacobson</i> Nor <i>South Bay</i> Can Save This Order, Because Those Cases Have No Relevance To An Order That Violates <i>Lukumi</i> and <i>Masterpiece Cakeshop</i>	19
II. An Injunction Pending Appeal Is Necessary To Prevent Irreparable Harm And Protect The Public Interest	21
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>Benihana, Inc. v. Benihana of Tokyo, LLC</i> , 784 F.3d 887 (2d Cir. 2015)	11
<i>Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene</i> , 763 F.3d 183 (2d Cir. 2014)	<i>passim</i>
<i>Church of Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993).....	<i>passim</i>
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015).....	13, 18, 19
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905).....	10, 19, 20, 21
<i>Maryville Baptist Church, Inc. v. Beshear</i> , 957 F.3d 610 (6th Cir. 2020) (per curiam)	13, 21
<i>Masterpiece Cakeshop v. Colo. Civil Rights Comm’n</i> , 138 S. Ct. 1719 (2018).....	<i>passim</i>
<i>N.Y. Progress & Prot. PAC v. Walsh</i> , 733 F.3d 483 (2d Cir. 2013)	23
<i>New Hope Family Servs., Inc. v. Poole</i> , 966 F.3d 145 (2d Cir. 2020)	21
<i>Roberts v. Neace</i> , 958 F.3d 409 (6th Cir. 2020)	13, 19, 21, 23
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<i>S. Bay United Pentecostal Church v. Newsom</i> , 140 S. Ct. 1613 (2020).....	10, 19, 20
<i>Soos v. Cuomo</i> , 2020 U.S. Dist. LEXIS 111808 (N.D.N.Y. June 26, 2020)	5, 21, 22, 23
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	17
<i>Ward v. Polite</i> , 667 F.3d 727 (6th Cir. 2012)	19

Williams v. Annucci,
895 F.3d 180 (2d Cir. 2018)14

Wisconsin v. Yoder,
406 U.S. 205 (1972).....11

Rules

Executive Order No. 202.68 2, 6, 7, 9

Fed. R. App. P. 8 10, 11

Other Authorities

A Jewish Revolt Against Lockdowns, Wall Street Journal (Oct. 8, 2020)2

Reuvain Borchardt, *Exclusive Full Recording: Jewish Leaders Say They
Were ‘Stabbed in the Back’ by Cuomo*, Hamodia (Oct. 12, 2020)6

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Jewish Problem*, NYPost (Oct. 9, 2020) 1, 6, 15

Empire State Dev., *Guidance For Determining Whether A Business
Enterprise Is Subject To A Workforce Reduction Under Recent
Executive Orders* (Sept. 25, 2020).....5

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Volokh Conspiracy* (Oct. 8, 2020)2

INTRODUCTION

In a series of shocking press conferences during the week of October 5, Defendant Governor Andrew M. Cuomo explained that he was enacting new restrictions on places of worship, in certain neighborhoods that contain many Orthodox Jews, because he believes that this religious minority is to blame for a recent increase in COVID-19 rates. Defendant left no doubt he was targeting Orthodox Jews. He described it as “predominantly an ultra-orthodox cluster,”¹ adding that he planned to “meet with members of the ultra-Orthodox community tomorrow,” to let them know that “we’ll close the [religious] institutions down” if “you do not agree to enforce the rules.”² Defendant also highlighted pictures of Orthodox Jews as purportedly demonstrating “clear violations of social distancing,” wrongly claiming that the pictures were from “the recent past” (in fact, one was of a 2006 funeral).³

Defendant’s targeting of this religious minority is widely understood. A judge in another case brought by the Diocese of Brooklyn against the same Order explained that Defendant “made remarkably clear that this Order was intended to target a

¹ Carl Campanile, *Cuomo Calls COVID-19 Resurgence an ‘Ultra-Orthodox’ Jewish Problem*, NYPost (Oct. 9, 2020), <https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/>.

² R.2-4:9. Citations of “R.__:__” are to the district court’s docket, No. 1:20-cv-04834-KAM (E.D.N.Y.).

³ *Id.* at 8.

different set of religious institutions,” i.e., Orthodox Jews.⁴ National publications have explained that Defendant made “sweeping accusation[s]” and used harmful “rhetoric” against the Orthodox community.⁵ Legal commentators have noted that Defendant’s discriminatory comments harken back to the “hostility” that Jews have faced for hundreds of years.⁶

The Order that Defendant issued, Executive Order No. 202.68, matched his rhetoric even though it does not mention Orthodox Jews by name (which does nothing to save the Order under *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), and *Central Rabbinical Congress of the U.S. & Canada v. N.Y.C. Department of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014)). Defendant created a new “cluster” system, under which all “worship” in disfavored neighborhoods is a non-essential gathering, subject to extreme limitations that do not apply to either an undefined category of “essential” gatherings, or to “essential” businesses like the financial services and manufacturing industries.⁷ The restrictions

⁴ *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 1:20-cv-04844 (E.D.N.Y. Oct. 9, 2020), Dkt. 15 at 3.

⁵ *A Jewish Revolt Against Lockdowns*, Wall Street Journal (Oct. 8, 2020), <https://www.wsj.com/articles/a-jewish-revolt-against-lockdowns-11602198987>.

⁶ Josh Blackman, *Understanding Governor Cuomo’s Hostility Toward Jews, Volokh Conspiracy* (Oct. 8, 2020), <https://reason.com/2020/10/08/understanding-governor-cuomos-hostility-towards-jews/>.

⁷ R.2-13:5–6.

on religious practice in those disfavored neighborhoods are punitive, including limiting religious worship to no more than 10 people in *any* house of worship, be it a small church that seats only 50 people, or a large synagogue that can seat 500.

Defendant shaped his Order to impose maximum restraints on the Orthodox community. Not only did he issue his Order two days before major Orthodox holidays, but the neighborhoods within the Order are gerrymandered to fit Defendant's targeting goals, including by rejecting objective measures like zip codes to delineate the zones, in favor of ad hoc and unexplained lines. Indeed, Defendant now concedes there are no objective metrics that establish the areas of his restrictions.⁸ Further, Defendant designed his Order to cover neighborhoods where many Orthodox Jews live without providing that other neighborhoods would be subject to the same limitations even if their COVID-19 rates reached the similar or even greater COVID-19 levels than these disfavored areas, admitting that "[t]here is no specific [positivity] percentage or threshold to determine when an area should be designated as" a restricted area.⁹

Defendant's unconscionable targeting of a religious minority cannot stand in a Nation founded on religious tolerance. Defendant's words and actions are plainly

⁸ Declaration of Howard A. Zucker ("*Diocese* Zucker Decl."), *Roman Catholic Diocese of Brooklyn*, No. 1:20-cv-04844, Dkt. 29-1 at ¶¶ 12–13, 20.

⁹ *Id.* at ¶ 20.

more discriminatory than words and actions found unconstitutional in *Lukumi*, *Masterpiece Cakeshop*, and *Central Rabbinical*. **Plaintiffs request an emergency injunction from this Court by no later than 5PM on Friday, October 23, so that Plaintiffs can celebrate the Sabbath under the generally applicable COVID-19 rules that Defendant had in place before his recent Executive Order.**¹⁰

BACKGROUND

A. The State of New York is in Phase Four of its reopening from the COVID-19 pandemic. In this Phase, non-essential businesses can reopen under industry-specific health-and-safety guidance from the State Department of Health, which guidance exists for malls, schools, and gyms and fitness centers, among other industries. R.2-11:38–45. Further, Phase Four generally allows any “non-essential gatherings” of up to 50 people for “any lawful purpose or reason,” provided certain health protocols are followed. R.12-17:2 (EO No. 202.45 (June 6, 2020)). The State’s definition of an “essential” business is broad, including, for example, the “financial services and research” and the manufacturing industries. R.2-13:5–6 (defining “essential” businesses for purposes of EO 202.68); Empire State Dev.,

¹⁰ Plaintiffs waited to file this request today to afford the *Roman Catholic Diocese of Brooklyn* court the opportunity to rule on a related request for preliminary injunctive relief. Both sets of plaintiffs filed their complaints the same day; the judge in *Roman Catholic Diocese of Brooklyn* was unavailable to hold a preliminary injunction hearing until October 15 and ruled on October 16. *Roman Catholic Diocese of Brooklyn*, No. 1:20-cv-04844, Dkt. 32.

Guidance For Determining Whether A Business Enterprise Is Subject To A Workforce Reduction Under Recent Executive Orders (Sept. 25, 2020) (defining “essential” businesses).¹¹

For religious services in Phase Four, preexisting rules impose a restriction of “no more than 33% of the maximum occupancy for a particular area as set by the certification of occupancy for services occurring indoor or no more than 50 people for services occurring outdoors.” R.2-12:2, 4. In *Soos v. Cuomo*, 2020 U.S. Dist. LEXIS 111808 (N.D.N.Y. June 26, 2020), the court: (1) enjoined Defendant’s earlier 25% capacity limitation on houses of worship, concluding that it imposed more restrictive limitations than the 50% limitation on comparable secular activity, such as “offices, retail stores that are not inside of shopping malls, and salons,” as well as restaurants; and then the court (2) restrained Defendant from enforcing such limitations greater than those imposed for comparable activity. *Id.* at *29–30, 35.

B. The week of October 5, Defendant instituted new restrictions to target the Orthodox Jewish community, applicable in only certain disfavored neighborhoods. During an October 5 press conference, Defendant stated that he planned to “meet with members of the ultra-Orthodox community tomorrow,” threatening that “we’ll close the [religious] institutions down” if “you do not agree to enforce the rules.”

¹¹ Available at <https://esd.ny.gov/guidance-executive-order-2026>.

R.2-4:9. “The cluster,” Defendant claimed, “is predominantly an ultra-orthodox cluster.” Carl Campanile, *Cuomo Calls COVID-19 Resurgence an ‘Ultra-Orthodox’ Jewish Problem*, NYPost (Oct. 9, 2020).¹² During the meeting the next day, Defendant disclosed that his new restrictions are “not a highly nuanced, sophisticated response. This is a fear driven response. You know, this is not a policy being written by a scalpel, this is a policy being cut by a hatchet[.]” Reuvain Borchardt, *Exclusive Full Recording: Jewish Leaders Say They Were ‘Stabbed in the Back’ by Cuomo*, Hamodia (Oct. 12, 2020) (recording at 19:10–30).¹³

Near midnight on October 6, Defendant issued Executive Order No. 202.68, which implemented his restrictions targeting the Orthodox Jewish community. R.2-8:2–3 (text of Order). Executive Order No. 202.68’s application does *not* extend to all locations in the State based on a generally applicable threshold, or provide set metrics for triggering a neighborhood’s inclusion in the restrictions, such as a minimum COVID-19 test positivity rate. *See* R.2-9:2. Indeed, Defendant conceded after issuing his order that the State has no objective criteria for defining these disfavored areas, as discussed further below.¹⁴ Defendant’s restrictions apply *only*

¹² Available at <https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/>.

¹³ Available at <https://hamodia.com/2020/10/12/exclusive-recording-jewish-leaders-say-stabbed-back-cuomo/>.

¹⁴ *Diocese Zucker Decl.* ¶¶ 12–13, 20.

to specific areas in Brooklyn, Queens, Broome, Orange, and Rockland Counties, at times stopping midblock to ensure Defendant encircled only members of the Orthodox Jewish community. R.2-13:9–14; R.2-9:2. While Defendant asserted that these disfavored areas were targeted because they have higher COVID-19 test positivity rates at the time of the order’s issuance, *see* Tr. 41, 52; R.11:8, other locations in the State that develop similar or higher rates do not become subject to Executive Order No. 202.68, *see* R.2-9:2.

Defendant explained that Executive Order No. 202.68 “will be in effect for a minimum of 14 days,” R.2-9:2; that “[t]he state is going to take over the enforcement oversight in all the hotspot clusters,” R.2-9:10; and that “any individual who encourages, promotes or organizes a non-essential gathering as set forth in Department of Health regulation, shall be liable for a civil penalty not to exceed \$15,000 per day[.]” R.2-8:2. Executive Order No. 202.68 classifies each disfavored area as a “Red Zone,” “Orange Zone,” or “Yellow Zone,” and imposes different restrictions on each zone.

In the “Red Zone,” Defendant restricts houses of worship to no more than a 10-person maximum capacity limit—without regard to the size of the synagogue—and bans all “[n]on-essential” gatherings, whether indoors or outdoors. R.2-8:2–3.

And any “essential” gatherings in this zone—a term that is not defined¹⁵—as well as the operations of essential businesses, are not subject to the restrictive capacity limitations imposed on houses of worship. *See* R.2-8:2–3. Defendant wields absolute discretion over whether “[a]n area *may* be placed in a ‘Red Zone’” if he decides certain factors are met, including “a 7-day rolling average positivity rate of 3% or higher” for an undefined “sustained period of time” and whether “it is in the best interest of public health for the area to be placed in the Red Zone status.”¹⁶

In the “Orange Zone,” Defendant restricts houses of worship to a 25-person maximum limit—again, regardless of the size of the synagogue or church—and bans “[n]on-essential” gatherings of more than 10 people, whether indoors or outdoors. R.2-8:3. Defendant exempts most businesses in this zone (as well as “essential” gatherings) from any new restrictions imposed on houses of worship, “[c]losing” only “non-essential businesses[] for which there is a higher risk associated with the transmission of the COVID-19 virus[.]” R.2-8:3. Defendant admits “[t]here is no specific [positivity] percentage or threshold to determine whether an area should be designated as an Orange . . . Zone.”¹⁷

¹⁵ The district court found that “the State seems to concede [‘non-essential gatherings’] is not clearly defined in the Executive Order or on the New York Governor’s website.” Tr. 43.

¹⁶ *Diocese Zucker Decl.* ¶ 12 (emphasis added).

¹⁷ *Id.* at ¶ 20.

In the “Yellow Zone,” Defendant restricts houses of worship to 50% capacity and bans all “[n]on-essential” gatherings of more than 25 people, whether indoor or outdoor. R.2-8:3. Yet Defendant exempts *all* businesses—and, again, “essential” gatherings—from these restrictions on houses of worship, including restaurants for both indoor and outdoor dining services. R.2-8:3. Defendant concedes “[t]here is no specific [positivity] percentage or threshold to determine whether an area should be designated as a [] . . . Yellow Zone.”¹⁸

C. Plaintiffs brought this challenge to Defendant’s Order immediately after it was issued, R.1, simultaneously filing an Emergency Motion for Order to Show Cause for Temporary Restraining Order and Preliminary Injunction in the district court, R.2. As Plaintiffs’ motion explained, Executive Order No. 202.68 violates Plaintiffs’ free-exercise rights because it imposes discriminatory, targeted restrictions on Jewish houses of worship. R.2-2. Plaintiffs’ synagogues, taken together, serve tens of thousands of Orthodox Jews, with many synagogues having a legal capacity of several hundred worshippers in their building. R.2-2:8. Executive Order No. 202.68’s extreme capacity limits make it “impossible to conduct services for all of Plaintiffs’ congregants,” thereby prohibiting Plaintiffs’ synagogues and their congregants from fulfilling their religious obligations. R.2-

¹⁸ *Id.*

2:8–11. And because Orthodox Jews cannot use vehicular travel on Saturdays and religious holidays, they cannot travel to synagogues outside of restricted zones to meet their religious obligations. R.2-2:10–11.

The district court, in an oral ruling, denied Plaintiffs’ motion. Tr. 41–66. The court reviewed Defendant’s restrictions under “the deferential standard announced by the Supreme Court in *Jacobson v. Massachusetts* [197 U.S. 11 (1905)],” and concluded that Plaintiffs did not have a likelihood of success on their Free Exercise Clause claims. Tr. 47 (also citing, among other authorities, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020)). The court then concluded that the “balance of equities and the public interest weigh strongly in favor of [Defendant].” Tr. 65. Plaintiffs, the court explained, would not suffer irreparable harm—despite loss of their right to worship in synagogue, including on the Sabbath and Jewish holidays—because they have “previously complied with the [State’s] total lockdown and ha[ve] continued to comply with the Phase Four restriction,” and they “can continue to observe their religion” with “modifications.” Tr. 66.

LEGAL STANDARD

A plaintiff seeking an “injunction while an appeal is pending” before this Court, Fed. R. App. P. 8(a)(1)(C); *see also* Fed. R. App. P. 8(a)(2), must satisfy the traditional standard for injunctive relief: (1) likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) balance of the hardships tips in the

plaintiff's favor; and (4) the public interest would not be disserved by the issuance of an injunction. *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015) (citation omitted).¹⁹

ARGUMENT

I. Plaintiffs Are Likely To Prevail On The Merits Because The Order Discriminates Against Both Orthodox Jews And Religious Exercise

A. The State Generally Cannot Discriminate Against Religious Practice, Including Targeting A Particular Religious Minority

The First Amendment forbids States from enacting laws that unduly burden the free exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). Laws burdening the free exercise of religion that are not neutral are subject to “the most rigorous of scrutiny.” *Lukumi*, 508 U.S. at 546. As relevant here, a law can lack neutrality toward religion in two independent ways.

First, a government edict that restricts religious practice because of the decision-maker's *motivation* against a particular religious sect, or religion in general, is not neutral, regardless of its facial text. *Masterpiece Cakeshop*, 138 S. Ct. at 1724, 1729–32; *Lukumi*, 508 U.S. at 534–38. To conduct this inquiry, a court should analyze “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the

¹⁹ Plaintiffs satisfied Rule 8(a)(1)'s requirement to “move first in the district court for . . . an order . . . granting an injunction,” by first requesting this very preliminary injunction from that court. *See* R.2.

legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Lukumi*, 508 U.S. at 540.

The Supreme Court’s decision in *Lukumi* and *Masterpiece Cakeshop*, and this Court’s decision in *Central Rabbinical*, are instructive. In *Lukumi*, members of the Santeria religion sought to open a house of worship, school, cultural center, and museum. *Id.* at 525–26. Members of the community found it “distressing” that a Santeria church was to open in their area because this church engaged in ritual animal sacrifice, and the council passed a resolution “declar[ing] the city policy ‘to oppose the ritual sacrifices of animals’ within [city limits] and announc[ing] that any person or organization practicing animal sacrifice ‘will be prosecuted.’” *Id.* at 527. The Supreme Court held that this violated the Free Exercise Clause, even though its resolution was facially neutral. *Id.* at 534–35. Similarly, in *Masterpiece Cakeshop*, officials violated the First Amendment in enforcing facially neutral anti-discrimination laws when one member of the Colorado Civil Rights Commission expressed “hostility” to a baker’s religious beliefs. 138 S. Ct. at 1729. And in *Central Rabbinical*, this Court held that a regulation was not neutral toward Orthodox Jews because the practice it prohibited was “exclusively as ritually practiced by a subset of Orthodox Jews.” 763 F.3d at 194.

Second, a law is “not neutral” where “the religious ritual it regulates is ‘the only conduct subject to’ the” restriction by that restriction’s text. *Cent. Rabbinical*,

763 F.3d at 195 (quoting *Lukumi*, 508 U.S. at 535). That is, a law is not neutral “if it is specifically directed at [a] religious practice,” *id.* at 193 (alteration in original) (citation omitted), even if the state was not “motivated by” anti-religious “animus,” *Roberts v. Neace*, 958 F.3d 409, 413, 415 (6th Cir. 2020) (per curiam). Thus, laws that apply “general bans” to religious and secular activity can be discriminatory “when there are exceptions for comparable secular activities” but not religious activities. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (6th Cir. 2020) (per curiam). This Court in *Central Rabbinical* invoked this principle in applying strict scrutiny where the challenged law failed to regulate secular conduct that should have triggered the same governmental concerns as did the proscribed conduct practiced by Orthodox Jews. 763 F.3d at 196–97.

If an edict is not neutral toward religion, in either of the two ways described above, it can survive only if it clears the “exceptionally demanding” strict scrutiny test. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (citation omitted). Under that test, the State must show the law “advance[s] ‘interests of the highest order’ and [is] narrowly tailored in pursuit of those interests,” *Lukumi*, 508 U.S. at 546 (citation omitted). A law is not narrowly tailored if “less restrictive means [are] available for the Government to achieve its goals.” *Holt*, 574 U.S. at 365 (citation omitted). A law’s “underinclusiveness suggests . . . that a more tailored policy, less burdensome

to [religious practice], is possible.” *Williams v. Annucci*, 895 F.3d 180, 193 (2d Cir. 2018).

B. The Order Discriminates Against Orthodox Jews And Religious Practice And Cannot Satisfy Strict Scrutiny

Defendant’s Order delineates three “zones”—Red, Orange, and Yellow—which Defendant claims to have the authority to apply, without any objective, generally applicable trigger, to any areas that he asserts “require enhanced public health restrictions based upon cluster-based cases of COVID-19.” R. 2-8:2; *see also Diocese Zucker Decl.* ¶¶ 12–13, 20. The Order limits “houses of worship” to the lesser of 25% capacity or 10 persons in Red Zones, the lesser of 33% capacity or 25 persons in Orange Zones, and 50% capacity in Yellow Zones, while undefined “[]essential gatherings” face no limits in any zone, and other secular activities such as the financial services and manufacturing industries, offices, and schools face less restrictive limits. R.2-8:3. The Order is discriminatory under both paths described above, and that discrimination cannot survive strict scrutiny.

1. Defendant made clear that he designed his Order to target Orthodox Jews, contrary to *Lukumi*, *Masterpiece Cakeshop*, and *Central Rabbinical*. He threatened “members of the ultra-Orthodox community” that “[i]f you do not agree to enforce the rules, then we’ll close the [religious] institutions down.” R.2-4:8–9 (emphasis added). And he described “[t]he cluster [as] predominantly an ultra-orthodox

cluster,” putting any doubt regarding his religious motivation to rest. Carl Campanile, *Cuomo Calls COVID-19 Resurgence an ‘Ultra-Orthodox’ Jewish Problem*, NYPost (Oct. 9, 2020).

The “contemporaneous statements” Defendant made when issuing his restrictions on houses of worship, as well as the Order’s context, plainly show his “discriminatory object” of targeting Orthodox practices. *Lukumi*, 508 U.S. at 533, 540. Defendant’s Order required enforcement of his restrictions by October 9—the beginning of the Jewish holidays, R.2-21 ¶ 7; R.2-20 ¶ 6; R.2-19 ¶ 7, ensuring it was “impossible” for Plaintiffs and other Orthodox Jews to conduct and participate in such services. R.2-21 ¶ 5; R.2-20 ¶ 4; R.2-19 ¶ 5. The brunt of Defendant’s restrictions fall disparately on Orthodox Jews, who cannot use vehicular travel on the Sabbath or on religious holidays and thus are unable to even travel to houses of worship for religious practice in permitted areas. R.2-21 ¶ 16; R.2-20 ¶ 15; R.2-19 ¶ 16. Defendant’s words and actions show that he failed to act as a “neutral decisionmaker” with regard to religious practice and did not act in a manner neutral to religion. *Masterpiece Cakeshop*, 138 S. Ct. at 1729, 1732.

If anything, Defendant’s contemporaneous comments here are worse than those in *Lukumi*, *Masterpiece Cakeshop*, and *Central Rabbinical*. Defendant did not attack religious belief generally, but singled out a particular religion for blame and retribution for a recent uptick in a society-wide pandemic. R.2-4:8–9. He threatened

“members of the ultra-Orthodox community” and referred to them as a “problem,” due to his own perceptions of the Orthodox community’s actions in light of COVID-19. *Id.* This maligning went beyond the Commissioner’s historical arguments about the harms he believed stemmed from religions in *Masterpiece Cakeshop*. 138 S. Ct. at 1729–31. Defendant also explicitly stated that the Orthodox community and religious worship were the motivations for this Order: “[T]he Governor of New York made remarkably clear that this Order was intended to target [Orthodox Jews].” *Roman Catholic Diocese of Brooklyn*, No. 1:20-cv-04844, Dkt. 15 at 3. Defendant’s frank admissions about his impermissible motives should be taken at face value—indeed, “[n]o one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than” Orthodox Judaism in issuing this Order. *Lukumi*, 508 U.S. at 535.

The context of Defendant’s actions likewise demonstrates that his Order targeted the Orthodox community. Defendant gerrymandered disfavored neighborhoods by selecting discretionary metrics that he knew would sweep in Orthodox communities. Just like the regulation in *Central Rabbinical* that failed to address secular conduct purportedly triggering similar concerns, 763 F.3d at 196–97, Defendant’s Order *does not* provide that if other neighborhoods reach the same or even greater COVID-19 concentration levels, they will be subject to the Order. Rather, Defendant retains absolute discretion whether an area will be placed in a

zone—for the Red Zone, if he determines “it is in the best interest of public health,” and for the Orange and Yellow Zones, for unspecified “multiple factors.” *Diocese Zucker Decl.* ¶¶ 12–13, 20.

2. Even putting Defendant’s targeting of Orthodox Jews aside, Defendant’s restrictions are *facially discriminatory* against religious practice. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017). Defendant’s restrictions expressly impose gathering restrictions on “houses of worship” that Defendant does not impose on other secular conduct. R.2-8:3.

In the “Red Zones,” Defendant restricts houses of worship to a 10-person maximum—*no matter the size of the place of worship*—while banning all non-essential gatherings, meaning that religious gatherings must be deemed essential (which comports with the essential nature of communal prayer as core Free Exercise activity). *Id.* Yet an undefined category of “[]essential gatherings” is exempted, and thus favored over religious gatherings. *See id.* Further, these “Red Zone” restrictions explicitly do not apply to secular “essential” businesses, thereby allowing (under the Governor’s definition of “essential”) the “financial services and research” industry, like “banks or lending institution[s],” and the manufacturing industry, R.2-13:5–6, to operate in group settings even in these “most severe[ly]” restricted zones, R.2-8:3.

In the “Orange Zones,” Defendant restricts houses of worship to a maximum of 25 people—again, without regard to size of the place of worship—while closing only those specific “non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus.” R.2-8:3. Thus, the capacity restrictions on houses of worship in the Orange Zone, like the Red Zone, facially target religious practice. The “non-essential” businesses that Defendant’s Order permits to open at greater capacity than houses of worship include offices, malls, and retail stores, which Defendant allows to open at 50% capacity. *See generally* R.2-15, R.2-16. Yet these favored secular activities similarly constitute gatherings of individuals for a prolonged period of time that should trigger the same concerns relating to the spread of COVID-19 that Defendant purports to address, yet Defendant’s restrictions selectively impose burdens only on religious conduct. *See Central Rabbinical*, 763 F.3d at 196–97.

Finally, in the “Yellow Zone,” Defendant restricts houses of worship to 50% capacity. R.2-8:3. Defendant’s Order allows schools, including higher education institutions, to remain open at full capacity in these regions. *See id.*; *see also generally* R.2-14.

3. Defendant’s Order cannot satisfy strict scrutiny—an “exceptionally demanding” test. *Holt*, 574 U.S. at 364 (citation omitted). Although the State has an undisputed interest in reducing the transmission of COVID-19, the gathering

restrictions on houses of worship are not narrowly tailored to advance that goal. “[L]ess restrictive means” clearly are available for the State to diminish the transmission of COVID-19, *id.* at 365 (citation omitted), because the regulation is massively “underinclusive in relation to its asserted secular goals,” *Cent. Rabbinical*, 763 F.3d at 186. The exempted secular activities—for undefined “essential gatherings” in all zones, “essential businesses” in the Red Zone, all businesses, restaurants, and schools in the Yellow Zone, and most businesses in the Orange Zone—endanger public health “in a similar or greater degree than” do houses of worship. *Lukumi*, 508 U.S. at 543. That plainly proves the regulation’s “underinclusive” nature. *Id.* at 543–44; *Roberts*, 958 F.3d at 413–15; *Ward v. Polite*, 667 F.3d 727, 738–39 (6th Cir. 2012). This underinclusiveness illustrates that the State’s interest could be furthered by similarly permitting religious services in houses of worship that implement health protocols comparable to those imposed on comparable secular institutions. *See Roberts*, 958 F.3d at 415; *Holt*, 574 U.S. at 367–69; *Lukumi*, 508 U.S. at 546. Thus, Defendant’s Order fails strict scrutiny.

C. Neither *Jacobson* Nor *South Bay* Can Save This Order, Because Those Cases Have No Relevance To An Order That Violates *Lukumi* and *Masterpiece Cakeshop*

The district court’s reliance on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct.

1613 (2020), and a series of related decisions, *see* Tr. 46–50, does not justify denial of an injunction pending appeal for two independently sufficient reasons.

First, as both a threshold and entirely dispositive matter, none of the cases that the district court cited purported to deal with the fundamental, core defect with Defendant’s actions: intentional discrimination against a religious minority, as shown by the decisionmaker’s repeated statements. *Supra* Part I.B.1. *Jacobson* considered only a generally applicable, compulsory vaccination law that “was necessary for the public health or the public safety,” with no allegations of religious discrimination. 197 U.S. at 27. Likewise, *South Bay* involved no allegations of religious discrimination against a particular religion. 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief). So, rather than attempting to shoehorn this case into *Jacobson* or *South Bay*, this Court should apply the Supreme Court’s case law for government actions that discriminate against religion, as evidenced by discriminatory statements from decisionmakers: *Lukumi* and *Masterpiece Cakeshop*. Under those decisions, Defendant’s discriminatory Order is unconstitutional. *Supra* Parts I.A., I.B.1.

Second, even if cases like *Jacobson* or *South Bay* were relevant, Defendant’s restrictions are still unconstitutional because they facially discriminate against religious gatherings vis-à-vis comparable secular gatherings. In *South Bay*, Chief Justice Roberts explained that an order was likely “consistent with the Free Exercise

Clause” only because “[s]imilar or more severe restrictions apply to *comparable* secular gatherings,” while the order “exempt[ed] or treat[ed] more leniently *only* dissimilar activities.” 140 S. Ct. at 1613 (emphases added). And *Jacobson* itself explained that “arbitrary and oppressive” health-and-safety regulations—those that cause “wrong and oppression”—would not survive judicial review. 197 U.S. at 38. This is why courts have found Free Exercise Clause violations during COVID-19, despite recognizing *Jacobson*’s potential relevance, when the State overtly discriminates against religious worship as compared to comparable secular activities. See *Roberts*, 958 F.3d at 413–16; *Maryville Baptist Church*, 957 F.3d at 614–15; *Soos*, 2020 U.S. Dist. LEXIS 111808, at *29–30. The case here is far more analogous to these latter cases, given Defendant’s discriminatory favoring of “[]essential gatherings”—which sits undefined in the text, beyond the clear implication that religious gatherings are not included. See *supra* Parts I.B.2., I.B.3.

II. An Injunction Pending Appeal Is Necessary To Prevent Irreparable Harm And Protect The Public Interest

Given that the “loss of First Amendment freedoms” “unquestionably constitutes irreparable injury,” “the dominant, if not the dispositive, factor in deciding whether to grant a preliminary injunction” in a First Amendment case is the plaintiff’s “ability to demonstrate likely success on the merits.” *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 181 (2d Cir. 2020) (citations omitted).

As explained above, Plaintiffs are likely to show that the Order violates their First Amendment rights, meaning that “the dominant, if not the dispositive, factor” for injunctive relief supports granting their request. *See id.*

The harms to Plaintiffs from Defendant’s Order are particularly acute. Orthodox Jews, unlike other observers, are uniquely blocked from engaging in worship services under the restrictions. Defendant scheduled his religious shutdown to begin on the eve of a Jewish holiday weekend, immediately before Hoshana Rabbah, Shmini Atzeres, and Simchas Torah, holidays which preclude observant Jews from traveling by car to unaffected areas to worship. R.2-21 ¶¶ 16–17; R.2-20 ¶¶ 15–16; R.2-19 ¶¶ 16–17; R.2-17 ¶ 5. While these holidays have passed, the discrimination persists, as Orthodox Jews celebrate the Sabbath *every* weekend, from Friday sundown until Saturday sundown. *See id.* On those days, the same vehicular limitations apply. *Id.* Even without holidays, Defendant’s Order prohibits a vast majority of Jews in the affected areas from worshipping at synagogue, while members of other faiths can travel to engage in services.

Defendant and the public interest would suffer no harm from granting Plaintiffs injunctive relief. Even if the Court grants Plaintiffs this relief, they will remain subject to the generally applicable existing 50% capacity restrictions, *Soos*, 2020 U.S. Dist. LEXIS 111808, at *29–30, and requirements to follow public-health guidelines, including masking and distancing rules, *see* R.2-12. Plaintiffs have

guarded against the spread of COVID-19 and have been fully compliant with all State and local mandates during the pandemic, which Defendant does not dispute. R.2-21 ¶¶ 3–4; R.2-20 ¶ 3; R.2-19 ¶¶ 3–4. They have maintained health protocols including, among other things, requiring congregants to wear masks during services and splitting services to ensure proper distancing. *See id.* By rigorously adhering to these protocols, Plaintiffs have ensured no outbreak of COVID-19 has occurred among their congregants. *Id.* Having demonstrated their ability to congregate safely, Plaintiffs seek injunctive relief that “appropriately permits religious services with the same risk-minimizing precautions as similar secular activities.” *Roberts*, 958 F.3d at 416.

Granting injunctive relief would benefit the public interest by protecting Plaintiffs’ constitutional rights and by treating similar conduct similarly—religious and secular. “Securing First Amendment rights is in the public interest,” *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (citation omitted), and treating “similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees,” *Roberts*, 958 F.3d at 416; *see also Soos*, 2020 U.S. Dist. LEXIS 111808, at *34. Injunctive relief would serve the public interest, especially given the irreparable injury to Plaintiffs and the lack of constitutionally-sufficient justification for infringing their constitutional rights.

CONCLUSION

This Court should enjoin the order pending appeal.

Dated: October 21, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This emergency motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 5,200 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This emergency motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

Dated: October 20, 2020

/s/ Avi Schick

AVI SCHICK

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2020, I filed the foregoing Emergency Motion with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: October 20, 2020

/s/ Avi Schick

AVI SCHICK

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-3572 Caption [use short title]

Motion for: Leave to file amicus brief

Set forth below precise, complete statement of relief sought:

Leave to file amicus brief

Agudath Israel of America, et al., v. Cuomo

MOVING PARTY: Amici MPAC, IRF, & Asma Uddin OPPOSING PARTY: N/A - Appellee takes no position on the motion

- Plaintiff Defendant Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Stephanie Hall Barclay OPPOSING ATTORNEY: N/A - Appellee takes no position on the motion

Stephanie Hall Barclay 801-361-0401 Notre Dame Law School Religious Liberty Initiative stephanie.barclay@nd.edu 3120 Eck Hall of Law, Notre Dame, IN 46556

Court- Judge/ Agency appealed from: U.S. District Court for the Eastern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Has this relief been previously sought in this court? Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know

Does opposing counsel intend to file a response: Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

/s/Stephanie H. Barclay Date: 10/27/2020 Service by: CM/ECF Other [Attach proof of service]

20-3572-CV

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellant,

v.

ANDREW M. CUOMO, in his official capacity as Governor of New York,

Defendant-Appellees,

Appeal from the United States District Court for the Eastern District
of New York, No. 1:20-cv-04834-KAM

MOTION FOR LEAVE TO FILE BRIEF *FAMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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MOTION

The Muslim Public Affairs Council (“MPAC”), Religious Freedom Institute’s Islam and Religious Freedom Action Team (“IRF”), and Asma Uddin respectfully move for leave to file an *amicus curiae* brief in support of Appellants Agudath Israel of America, et al. MPAC, IRF, and Ms. Uddin have conferred with counsel for the parties. Appellants consent to this filing of the proposed *amicus* brief. Counsel for Appellee takes no position on this motion.

INTEREST

MPAC, IRF, and Ms. Uddin represent the interests of adherents of the Islam, whose religious freedom and very physical safety are at stake if government officials are allowed to target religious minorities. MPAC is a community-based public affairs nonprofit organization working for the integration of Muslims into American society. MPAC’s view is that America is enriched by the vital contributions of American Muslims. IRF works to amplify Muslim voices on religious freedom and to protect the religious freedom of Muslims by engaging in research, education, and advocacy. IRF believes that the Islamic faith teaches Muslims to want for others what they want for ourselves, and that supporting the Jewish school is in the interest of the common good. Ms. Uddin is a religious liberty lawyer and scholar working for the protection of religious

expression for people of all faiths in the United States and abroad. Ms. Uddin focuses much of her scholarship on religious minorities; her most recent book is *When Islam is Not a Religion: Inside America's Fight for Religious Freedom* (2019).

PURPOSE

MPAC, IRF, and Ms. Uddin write separately to increase the Court's understanding of the ways in which religious minorities have historically been scapegoated in times of fear and uncertainty. *Amici's* brief will highlight the way that New York's policy fits into that troubling pattern.

CONCLUSION

MPAC, IRF, and Ms. Uddin respectfully request that they be granted leave to file the attached *amicus* brief.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2), because it contains 315 words, and the typeface and style requirements of Fed. R. App. P. 32(a)(5)-(6), because it has been prepared using Microsoft Word Century Schoolbook font measuring no less than 14 points.

October 27, 2020

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 27, 2020.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

October 27, 2020

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

20-3572-CV

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

ANDREW M. CUOMO, in his official capacity as Governor of New York,

Defendant-Appellee,

On appeal from the United States District Court for the Eastern
District of New York, No. 1:20-cv-04834-KAM

**BRIEF *AMICUS CURIAE* OF THE MUSLIM PUBLIC AFFAIRS
COUNCIL, RELIGIOUS FREEDOM INSTIUTE'S ISLAM AND
RELIGIOUS FREEDOM ACTION TEAM, AND ASMA UDDIN IN
SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Muslim Public Affairs Council and the Religious Freedom Institute's Islam and Religious Freedom Action Team state that they have no parent corporation and that no publicly held corporation owns any part of these entities.

TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS</i>	1
ARGUMENT	3
I. Government often scapegoats religious minorities during times of public fear or uncertainty.	5
II. The Governor’s policy violates the Free Exercise Clause.	11
CONCLUSION.....	15
CERTIFICATE OF COMPLIANCE	1
CERTIFICATE OF SERVICE.....	2

TABLE OF AUTHORITIES

CASES

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).6, 7

Capitol Hill Baptist Church v. Bowser, No. 20-CV-02710 (TNM), 2020 WL 5995126, at *7 (D.D.C. Oct. 9, 2020) 13

Central Rabbinical Congress v. New York City Dep’t of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014) 3

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531–33 (1993) 4, 11

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) 13

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INTEREST OF *AMICUS*¹

The Muslim Public Affairs Council (MPAC) is a community-based public affairs nonprofit organization working for the integration of Muslims into American society. MPAC aims to increase the public understanding of Islam and to improve policies that affect American Muslims, by engaging our government, media, and communities.

The Religious Freedom Institute's Islam and Religious Freedom Action Team ("IRF") amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. IRF engages in research, education, and advocacy on core issues like freedom of religion, and the freedom to live out one's faith, including in the workplace and at school. IRF believes that the Islamic faith teaches Muslims to want for others what they want for themselves, and that

¹ Appellants have consented to the filing of this brief. Appellees take no position on the filing of this brief. *Amicus* has filed a motion for leave to file this brief. No party's counsel has authored this brief in whole or in part; no party nor party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. Proc. 29(a)(4)(E).

supporting the Jewish community in this case is in the interest of the common good.

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

Amici have an interest in bringing to light unfortunate historical examples of government officials targeting religious minorities in times of turmoil or uncertainty.

ARGUMENT

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

The Governor’s orders impose restrictions on predominantly Jewish communities that are harsher than those on neighborhoods with similar COVID rates. Indeed, the Governor candidly acknowledged that the Jewish community was the “target” and the “problem.” Such a law, targeting religious conduct, is the antithesis of a neutral and generally applicable law. *See Central Rabbinical Congress v. New York City Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014) (quoting *Smith*, 494 U.S. at 878).

Further, far from being narrowly tailored, Government officials have admitted that the new restrictions are “blunt” and carved with a “hatchet,” as opposed to “a highly nuanced, sophisticated response.” And the impetus of the policy is a “fear driven response” meant to manage the “anxiety” of its constituents. Thankfully, the First Amendment does not sanction religious bigotry as a form of anxiety management. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–33 (1993).

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

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

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

And Aaron shall lay both his hands upon the head of the live goat, and confess over him all the iniquities of the children of Israel, and all their transgressions in all their sins, putting them upon the head of the goat, and shall send him away by the hand of a fit man into the wilderness.

Leviticus 16:21–22. This is the purification ritual now known as “scapegoating,” described in the Torah. Similar rituals were found in many ancient cultures—in India, and in Tibet, among the Greeks, the Romans, and the Hittites. Jan Bremmer, *Scapegoat Rituals in Ancient Greece*, 87 *Harv. Stud. Classical Philology* 299, 299 (1983). The ancient Greeks, for their part, conducted such rituals, in which “the community sacrifices one of its members to save its own skin,” during times of trouble, such as famine, drought, and plague. *Id.* at 300–301. In historical scapegoating rituals, the Greeks sacrificed only the poor, the ugly, and criminals—those seen as “lower class” and who were marginalized by the wider society. *Id.* at 303–05.

In striking resemblance to those ancient practices, there is a long and unfortunate history dating back to the Middle Ages of the (albeit less ritualized) scapegoating of religious minorities during times of fear and uncertainty. The anti-Semitism that arose in much of continental Europe

during the Black Death provides one shameful example. *See* Howard N. Lupovitch, *Jews and Judaism in World History* 92 (2012). Fear and uncertainty surrounding the plague led in 1348 to rumors that Jews were intentionally spreading the disease by poisoning wells. *Id.* This, in turn, led to rioters burning down or massacring whole Jewish communities. *Id.* at 92-94.

The United States is not immune from this tradition of unjustly targeting minority religious communities for political gain in times of crisis. These threats can come in the form of allegedly neutral laws meant to address public safety concerns. For example, following the fear and uncertainty of the Great Depression, President Roosevelt enacted the National Industrial Recovery Act to further the “public interest” and public health. *A.L.A. Schechter Poultry Corp. v. United States* provides an example of this type of threat. 295 U.S. 495 (1935). As a result of this Act, the “Live Poultry Code” was promulgated to regulate New York

City's poultry industry, which covered selling, purchasing for resale, transporting, handling, and slaughtering. *See id.* at 523–24.³

However, the government selectively enforced this Act against businesses engaging in live-butchered chickens. As it happened, at the time, almost all of the live-butchered chickens in New York City were purchased by members of minority groups: 80 percent of these chickens were sold to Jewish residents, the rest to African American, Chinese, and Italian residents. O.R. Pilat, *Brooklyn Hens to Cackle in Duel With Scream of the Blue Eagle*, *Brooklyn Daily Eagle*, May 1, 1935 at 3.

Eventually, the government indicted and convicted four Jewish men, the Schechter brothers, for the sale of unfit chickens. *Schechter Poultry*, 295 U.S. at 527–29. The four poultry butchers faced potential prison time, even though agency investigators failed to find a *single* sick chicken at the Schechters' plant. *See* Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* 223–24 (2007). Nevertheless, the government was able to use the prosecution of these Jewish men to

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

reinforce the narrative that its regulations were necessary to protection public health. *See id.* at 203–04.

When government shows hostility towards certain religious groups, or refuses to protect them, this often correlates with an increase in private anti-religious discrimination and violence. The Supreme Court’s decision in *Minersville School District v. Gobitis* provides one example. 310 U.S. 586 (1940). This case was decided on the brink of World War II; a period filled with fear and uncertainty. The Court refused protect Jehovah’s Witness children who expressed religious objections to performing a flag salute. *Id.* Expounding on the importance of patriotism, the Court rejected the idea that the Constitution provided “exceptional immunity . . . to dissidents.” *Id.* at 599–600. Instead, the children were forced to either salute the flag or be expelled from school. *Id.* at 591.

By denying these schoolchildren a religious exemption, many feared the Court “had declared open season on the Witnesses.” Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* 185 (2010). These fears quickly became reality. Across the country, Jehovah’s Witnesses across the country were beaten and even killed, while angry mobs attacked and burned their homes and places of

worship. See David R. Manwaring, *Render Unto Caesar: The Flag Salute Controversy* 164–65 (1962). The government’s casual dismissal of the rights of this minority religion led to an even greater deterioration of their peace and safety. Perhaps based in part on this recognition, the Court quickly reversed its approach in *Gobitis* just three years later. See *W. Va. State Bd of Educ. v. Barnette*, 319 U.S. 624 (1943).

This phenomenon is unfortunately not a relic of the past. More recently, religious minorities—including Muslim and Sikh Americans—were scapegoated in the aftermath of the September 11th terrorist attacks. For a decade after the attacks, Muslim religious and community organizations were singled out and subjected to mass surveillance initiatives by a secret unit of the New York Police Department known as the “Demographic Unit.” See Asma T. Uddin, *When Islam is Not a Religion: Inside America’s Fight for Religious Freedom* 231–32 (2019). Under this program, the NYPD surveilled “at least 20 mosques, 14 restaurants, 11 retail stores, two grade schools and two Muslim student organizations” using remote-controlled surveillance cameras. *Id.* at 232. All this resulted in not a single terrorism lead. *Id.* at 236. Nationally, Muslims were subjected to unconstitutional federal government

screening and monitoring. Many of these practices have since been ruled unconstitutional by federal courts. *See, e.g., Latif v. Holder*, 28 F. Supp. 3d 1134, 1161 (D. Ore. 2014); *Elhady v. Kable*, 391 F. Supp. 3d 562, 585 (E.D. Va. 2019).

In addition to this targeting from government officials, Muslim Americans faced an increase in private threats and acts of violence after the September 11th attacks. The Federal Bureau of Investigation reported that anti-Muslim hate crime incidents increased by 1,600% in 2001.⁴ Sikh Americans have also suffered from this scourge of religious discrimination and hate crimes.⁵ Once again, when those in power chose to use a religious minority as a convenient and popular scapegoat during times of crisis or fear, much more troubling private targeting of these groups was not far behind. As discussed below, the government officials in New York have followed a similar disturbing pattern with respect to the City's Orthodox Jewish communities.

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

⁵ *See* The Sikh Coalition, *Fact Sheet on Post-9/11 Discrimination and Violence against Sikh Americans*, <https://www.sikhcoalition.org/images/documents/fact%20sheet%20on%20hate%20against%20sikhs%20in%20america%20post%209-11%201.pdf>.

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

The targeting of religious minorities during times of crisis is nothing new. But this case provides a particularly egregious example. This policy imposes more onerous restrictions on predominantly Jewish neighborhoods, but not on other similarly situated neighborhoods. ECF 21-1 at 5–7; *Lukumi*, 508 U.S. at 531–33. Essentially, government officials gerrymandered Jewish neighborhoods for disfavored treatment. *Id.* at 535. The Government’s actions are thus not “generally applicable,” because officials have not treated institutions in similar COVID-threat zones in a similar way. *Id.*

Nor is this policy anything close to neutral, because the officials admit their actions are “specifically directed” at the Orthodox Jewish community.⁶ *Central Rabbinical Congress*, 763 F.3d at 193 (quoting *Smith*, 494 U.S. at 878). Government officials here didn’t just stop with policies that had the *effect* of targeting the Jewish communities—the Governor explicitly *described* his policy in ways that were “targeting”

⁶ *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-CV-4844(NGG)(CLP), 2020 WL 5994954, at *1 (E.D.N.Y. Oct. 9, 2020) (“[T]he Governor of New York made remarkably clear that this Order was intended to target [Orthodox Jewish] institutions.”).

certain “members of the ultra-Orthodox community.” ECF 21-1 at 16. The Governor referred repeatedly to “ultra-orthodox” clusters and communities, threatening to “close [their] institutions down” if they would not follow the “rules.” *Id.* at 5. And lest there remain any room for doubt, the visual aids the Governor used to illustrate the threats from COVID featured gatherings by just one particular religion: Orthodox Jews.⁷ Never mind that at least one of the photos was nearly fifteen years old—it served the purpose of allowing government officials to act as though the Jewish community was the “problem” to be solved. *Id.* at 16. Essentially, the Governor is playing on the old anti-Semitic trope, dating back to the days of the Black Plague, that Jews spread diseases.⁸

Further, this law is a far cry from a narrowly tailored law advancing a compelling government interest. Government officials acknowledged that the new restrictions were not “a highly nuanced, sophisticated

⁷ Bernadette Hogan, Cuomo used 14-year-old photo to show mass Orthodox gatherings during pandemic, NY Post, Oct. 5, 2020, <https://nypost.com/2020/10/05/cuomo-used-14-year-old-photo-to-show-orthodox-gatherings-during-pandemic/>.

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

response” but were instead a “fear driven response.” *Id.* at 6. Governor Cuomo said that he would use a blunt policy carved with a “hatchet[]” to help “the anxiety come[] down.” *Id.* at 7. But “unsubstantiated . . . fears” are not even a legitimate basis for a government policy, much less a compelling one. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

The existence of public health concerns does not mean that the Government’s unfounded judgments in this case are entitled to deference. As one court addressing a similar issue recently explained, “the existence of an emergency, even one as serious as this one, does not mean that the courts have no role to play.” *Denver Bible Church v. Azar*, No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994, *1 (D. Colo. Oct. 16, 2020). And “as ‘emergency’ restrictions extend beyond the short-term into weeks and now months, courts may become more stringent in their review.” *Id.* at *8; *see also Capitol Hill Baptist Church v. Bowser*, No. 20-CV-02710 (TNM), 2020 WL 5995126, at *7 (D.D.C. Oct. 9, 2020); *Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020) (per curiam).

Government officials in this case should be particularly cautious of the way in which their actions can fan the flames of existing religious

hostility. New York is currently experiencing a “record number” of anti-Semitic hate crimes—the highest number since 1992.⁹ And when the city recently experienced a measles outbreak, Orthodox Jews were frequently berated in public for the sickness.¹⁰ Continuing down the path of scapegoating the Jewish community, simply to alleviate public fear, could have deadly consequences. This Court should not countenance such dangerous religious bigotry.

⁹ *See supra* n. 2.

¹⁰ Emma Green, *Measles Can Be Contained. Anti-Semitism Cannot.*, *The Atlantic*, May 25, 2019, <https://www.theatlantic.com/politics/archive/2019/05/orthodox-jews-face-anti-semitism-after-measles-outbreak/590311/>.

CONCLUSION

This Court should enjoin the order pending appeal.¹¹

Respectfully submitted,
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¹¹ *Amici* thank Daniel Judge, Daniel Loesing, Alyson Cox, and Alexandra Howell for their work on this brief as student participants in the Notre Dame Religious Liberty Initiative.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Rule 29.1(c), because it contains 2,586 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The brief also complies with the requirements of Fed. R. App. P. 32(a)(5)-(6), because it has been prepared using Microsoft Word Century Schoolbook font measuring no less than 14 points.

October 27, 2020

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 27, 2020.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

October 27, 2020

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AGUDATH ISRAEL OF AMERICA, AGUDATH ISRAEL OF
KEW GARDEN HILLS, AGUDATH ISRAEL OF MADISON,
AGUDATH ISRAEL OF BAYSWATER, RABBI YISROEL
REISMAN, RABBI MENACHEM FEIFER, and STEVEN
SAPHIRSTEIN,

Plaintiffs,

vs

GOVERNOR ANDREW CUOMO

Defendant.

Civil Action No. 1:20-cv-04834

AFFIDAVIT OF STEVEN SAPHIRSTEIN

1. I am a Plaintiff in this action, and I serve as the Secretary of Agudath Israel of Kew Gardens Hills, which is also a Plaintiff in this lawsuit.

Our Synagogue

2. Agudath Israel of Kew Gardens Hills is a synagogue that was founded in 1970. I have been its Secretary since March 2018. Our synagogue serves more than 150 men and women each week. Our primary activities are worship services, which are conducted every day. The services on Saturdays and on Jewish holidays are particularly important. Our main sanctuary has a legal capacity of 400.

3. Our synagogue has been fully compliant with all mandates issued by New York State and New York City since the onset of the pandemic. We suspended services in mid-March, and remained closed until permission was granted to resume services on Friday, June 12, 2020. Since then, we have at all times operated in conformity with all health requirements. We are pleased that we have not had a congregant with COVID for many, many months.

4. We have altered services to comply with the restrictions. Seating was arranged throughout the facility to ensure maximum social distancing, even beyond the regulations set forth. Services were shortened to the minimum, enabling worshippers to spend the least amount of time indoors. Additionally, protocols were instituted for other parts of services to reduce interaction and a partition was built to protect others when around the Torah scroll. Lastly, medical gloves are required for those who touch the Torah scroll or Torah alter. Additional services are held in the outdoor parking lot with proper social distancing measures and face coverings. Every congregant wears a mask, properly, at every service without exception.

The Governor's New Executive Order

5. The recently enacted executive order makes it impossible for me and my congregants to comply with both their religious obligations and the limitations of the new Order.

6. For synagogues in the "red zone," as mine is, worship services are limited to 10 people. For the Jewish holidays that we will observe this Friday, Saturday and Sunday, it is simply not possible to conduct services for all of our congregants.

7. This Friday, October 9, is the holiday of Hoshana Rabbah. It marks the conclusion of the Days of Judgment that began with Rosh Hashona. There are special, additional services and rituals that are required on that day. In particular, there are seven additional prayers followed by the traditional beating of a willow branch in the synagogue. This tradition dates back two thousand years, to the times of the Temple. Services also require reading from a Torah scroll.

8. Hoshana Rabbah services take at least ninety to one hundred and twenty minutes. It is not possible to have services for my congregants on Hoshanna Rabba in groups limited to ten. Even if only one hundred people came to services, that would require ten different services, each lasting at least ninety to one hundred twenty minutes, on Friday morning.

9. By contrast, under the existing rules, we could utilize all the various spaces of our synagogue to have three or four services, using indoor and outdoor spaces.

10. This Saturday, October 10, is the holiday of Shmini Atzeres. Among the special features of the holiday is the Yizkor service, which is the Prayer for Departed Relatives. This prayer is only recited four times a year. The next recitation is not until Passover, in April. These additional prayers by men and woman alike are particularly emotional, are led by a congregation elder, take an additional fifteen minutes and are only offered only in group (rather than individual) prayer. It would be particularly devastating for congregants to be deprived of this prayer on Saturday. Yet under the Governor's order, it is impossible for them to recite it as they traditionally do.

11. Shmini Atzeres is also the only day of the year when we read Eccelasties, which Orthodox Jews accept as the Book of Wisdom. In my and many other synagogues, it requires a trained cantor. Again, it is impossible to comply with both the Jewish law requirements to read Eccelasties in a congregate setting and the Governor's new Order. We should not be forced to choose which mandate to follow. That is especially so when the existing capacity and other safety restrictions have been implemented and work.

12. The next day, Sunday October 11, is Simchas Torah. Its literal translation is the Joy of the Torah. In celebration of the completion of the annual cycle of Torah readings, each congregant is called to the Torah for a short reading. The Rabbi is then traditionally called to read the final portion of the Torah, after which the first portion of the Torah is read. These Torah readings, in addition to the regular services, take time.

13. Again, it is impossible to conduct services for all of our congregants on Simchas Torah if we are limited to ten worshippers. There simply is not enough time to do even the Torah readings required of the day, let along the prayer services.

14. By contrast, we would be able to comply with both our religious and civil dictates if the existing capacity restrictions remain in place through this holiday period.

The Disproportionate Impact of the Executive Order on Orthodox Worship Services

15. In addition to being targeted at Orthodox Jews (or perhaps because of that) the Order essentially only truly limits Orthodox worship services. Here is why:

16. This Order covers limited geographic areas. There are no restrictions in adjacent areas. Thus, the Orthodox Jew in a red zone can continue to shop at the supermarket ten minutes away that he regularly drives to and can continue to go to the office in other areas of Queens, Brooklyn, or Manhattan that he regularly commutes to. But since Orthodox Jews are prohibited from vehicular travel on Saturdays and Holidays, they worship in synagogues close to their homes that they can walk to. For that reason, Orthodox synagogues are clustered in the residential neighborhoods of their congregants. The effect of this is that the only activity of my congregants that the Order makes impossible is their worship on the upcoming holidays.

17. For the same reasons, it is only Orthodox Jews who will experience the full effects of this Order. There is no doubt that other religious worshippers and ministers fall into these zones as well. But the worshipper and officiant who attends Friday services at their mosque at least retains the option to travel to a nearby mosque for services. Similarly, the Catholic parishioner and priest whose Sunday Church service is impacted can travel to Church in an adjacent community. It is only the Orthodox Jewish worshipper who is totally deprived of the ability to participate in services.

18. To be clear, the foregoing is not meant to diminish or justify the impact on our co-religionists. The Order unfairly, unnecessarily and unconstitutionally restricts their Free Exercise of Religion. We merely note the disproportionate effect the Order has on Orthodox Jews.

Conclusion

19. Those of us challenging the Governor's Order do so reluctantly, and only as a last resort, to protect the ability of ourselves and our congregants to comply with Jewish law. We are a coalition of the compliant: our synagogues have followed all closure, capacity limitation, social distancing and masking requirements. The Governor has publicly conceded that there has been no enforcement of those requirements against those who have not voluntarily complied. Imposing the restrictions of the new Order before even attempting enforcement is punishment, not public health. Let there be strict enforcement of the existing rules – that work and allow safety and services to coexist – before imposing punitive and draconian new rules that bring those two into conflict.

Executed this 7th day of October 2020, at Queens, New York.


STEVEN SAPHIRSTEIN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AGUDATH ISRAEL OF AMERICA, AGUDATH ISRAEL OF
KEW GARDEN HILLS, AGUDATH ISRAEL OF MADISON,
AGUDATH ISRAEL OF BAYSWATER, RABBI YISROEL
REISMAN, RABBI MENACHEM FEIFER, and STEVEN
SAPHIRSTEIN,

Plaintiffs,

vs

GOVERNOR ANDREW CUOMO

Defendant.

Civil Action No. 1:20-cv-04834

AFFIDAVIT OF RABBI MENACHEM FEIFER

1. I am a Plaintiff in this action, and I serve as the Rabbi of Agudath Israel of Bayswater, which is also a Plaintiff in this lawsuit.

Our Synagogue

2. Agudath Israel of Bayswater is a synagogue that was founded in 1993. I have been its Rabbi since 1998. Our synagogue serves more than 150 men, women, and children each week. Our primary activities are worship services, which are conducted every day. The services on Saturdays and on Jewish holidays are particularly important. Our main sanctuary has a legal capacity of 250.

3. Our synagogue has been compliant with mandates issued by New York State and New York City since the onset of the pandemic. We suspended services in mid-March, and remained closed until permission was granted to resume services around the end of May. We were careful to enforce social distancing when we reopened and continue to do so. We provide hand sanitizer and masks to all of our congregants. During the summer we divided our services into

two separate services so as to further reduce contact between congregants. Our older congregants, approximately one-third of our congregation, pray separately from the rest, outdoors, as yet another safety precaution.

The Governor's New Executive Order

4. The recently enacted executive order makes it impossible for me and my congregants to comply with both their religious obligations and the limitations of the new Order.

5. For synagogues in the "orange zone," as mine is, worship services are limited to 25 people. This severely limits the number of people who can pray at the proper time. For the Jewish holidays that we will observe this Friday, Saturday and Sunday, it is simply not possible to conduct services for all of our congregants.

6. This Friday, October 9, is the holiday of Hoshana Rabbah. It marks the conclusion of the Days of Judgment that began with Rosh Hashona. There are special, additional services and ritual that are required on that day. In particular, there are seven additional prayers followed by the traditional beating of a willow branch in the synagogue. This tradition dates back two thousand years, to the times of the Temple. Services also require reading from a Torah scroll.

7. Hoshana Rabbah services take at least two to two and a half hours. It is not possible to have services for my congregants on Hoshanna Rabba in groups limited to 25 and enable all of my congregants to pray.

8. By contrast, under the existing rules, we could utilize all the various spaces of our synagogue to have two services, using indoor and outdoor spaces, with social distancing.

9. This Saturday, October 10, is the holiday of Shmini Atzeres. Among the special features of the holiday is the Yizkor service, which is the Prayer for Departed Relatives. This prayer is only recited four times a year. The next recitation is not until Passover, in April. These

additional prayers by men and woman alike are particularly emotional, are led by the Rabbi, take an additional fifteen minutes and are offered only in group (rather than individual) prayer. It would be particularly devastating for congregants to be deprived of this prayer on Saturday. Yet under the Governor's order, it is impossible for them to recite it as they traditionally do.

10. Shmini Atzeres is also the only day of the year when we read Ecclesiasties, which Orthodox Jews accept as the Book of Wisdom. In my and many other synagogues, it is read from a parchment and requires a trained cantor. Again, it is impossible to comply with both the Jewish law requirements to read Ecclesiasties in a congregante setting and the Governor's new Order. We should not be forced to choose which mandate to follow. That is especially so when the existing capacity and other safety restrictions have been implemented and work.

11. The next day, Sunday October 11, is Simchas Torah. Its literal translation is the Joy of the Torah. In celebration of the completion of the annual cycle of Torah readings, each congregant is called to the Torah for a short reading. The Rabbi is then traditionally called to read the final portion of the Torah, after which the first portion of the Torah is read. These Torah reading, in addition to the regular services, take time.

12. Again, it is impossible to conduct services for all of our congregants on Simchas Torah if we are limited to 25 worshippers per service. There simply is not enough time to do even the Torah readings required of the day, let alone the prayer services.

13. By contrast, we would be able to comply with both our religious and civil dictates if the existing capacity restrictions remain in place through this holiday period.

The Disproportionate Impact of the Executive Order on Orthodox Worship Services

14. In addition to being targeted at Orthodox Jews (or perhaps because of that) the Order essentially only truly limits Orthodox worship services. Here is why:

15. This Order covers limited geographic areas. There are no restrictions in adjacent areas. Thus, an Orthodox Jew in an orange zone can continue to shop at the supermarket ten minutes away that he regularly drives to and can continue to go to the office in downtown Brooklyn or Manhattan that he regularly commutes to. But since Orthodox Jews are prohibited from vehicular travel on Saturdays and Holidays, they worship in synagogues close to their homes that they can walk to. For that reason, Orthodox synagogues are clustered in the residential neighborhoods of their congregants. The effect of this is that the only activity of my congregants that the Order makes impossible is their worship on the upcoming holidays.

16. For the same reasons, it is only Orthodox Jews who will experience the full effects of this Order. There is no doubt that other religious worshippers and ministers fall into these zones as well. But the worshipper and officiant who attends Friday services at their mosque at least retains the option to travel to a nearby mosque for services. Similarly, the Catholic parishioner and priest whose Sunday Church service is impacted can travel to Church in an adjacent community. It is only the Orthodox Jewish worshipper who is totally deprived of the ability to participate in services.

17. To be clear, the foregoing is not meant to diminish or justify the impact on our co-religionists. The Order unfairly, unnecessarily and unconstitutionally restricts their Free Exercise of Religion. We merely note the disproportionate effect the Order has on Orthodox Jews.

Conclusion

18. Those of us challenging the Governor's Order do so reluctantly, and only as a last resort, to protect the ability of ourselves and our congregants to comply with Jewish law. Imposing the restrictions of the new Order before even attempting enforcement is punishment, not public health. Let there be strict enforcement of the existing rules – that work and allow safety and

services to coexist – before imposing punitive and draconian new rules that bring those two into conflict.

Executed this 9 day of October 2020, at Far Rockaway, New York.


MENACHEM FEIFER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AGUDATH ISRAEL OF AMERICA, AGUDATH ISRAEL OF
KEW GARDEN HILLS, AGUDATH ISRAEL OF MADISON,
AGUDATH ISRAEL OF BAYSWATER, RABBI YISROEL
REISMAN, RABBI MENACHEM FEIFER, and STEVEN
SAPHIRSTEIN,

Plaintiffs,

vs

GOVERNOR ANDREW CUOMO

Defendant.

Civil Action No. 1:20-cv-04834

AFFIDAVIT OF RABBI YISROEL REISMAN

1. I am a Plaintiff in this action, and I serve as the Rabbi of Agudath Israel of Madison, which is also a Plaintiff in this lawsuit.

Our Synagogue

2. Agudath Israel of Madison is a synagogue that was founded in 1989. I have been its Rabbi since its inception. Our synagogue serves more than 300 men and women each week. Our primary activities are worship services, which are conducted every day. The services on Saturdays and on Jewish holidays are particularly important. Our main sanctuary has a legal capacity of 186, and our lower and upper levels each have capacities of more than 145.

3. Our synagogue has been fully compliant with all mandates issued by New York State and New York City since the onset of the pandemic. We suspended services in mid-March,

and remained closed until permission was granted to resume services around Memorial Day. Since then, we have at all times operated in conformity with all health requirements. We are pleased that we have not had a congregant with COVID for many, many months.

4. We have added services to comply with the restrictions on capacity. To provide the most recent example, we are currently in the middle of the holiday of Succos. In normal times, we would have a single holiday service at 8:30am. In light of the pandemic, however, we had services at 7:15, 8:30 and 9:15, and the 8:30 service also used the courtyard that abuts our main sanctuary. Every congregant wears a mask, at every service.

The Governor's New Executive Order

5. The recently enacted executive order makes it impossible for my synagogue and congregants to fulfill both their religious obligations and their limitations of the new Order.

6. For synagogues in the "red zone," as mine is, worship services are limited to 10 people. For the Jewish holidays that we will observe this Friday, Saturday and Sunday, it is practically impossible to conduct services for all of our congregants.

7. This Friday, October 9, is the holiday of Hoshana Rabbah. It marks the conclusion of the Days of Judgment that began with Rosh Hashona. There are special, additional services and ritual that are required that day. In particular, there are seven additional prayers followed by the traditional beating of a willow branch in the synagogue. This tradition dates back two thousand years, to the times of the Temple. Services also require reading from a Torah scroll.

8. Hoshana Rabbah services take at least ninety to one hundred and twenty minutes. It is a practical impossibility to have services for my congregants on Hoshanna Rabba in groups limited to ten. Even if only two hundred people came to services, that would require twenty different services, each lasting at least ninety to one hundred twenty minutes, on Friday morning.

9. By contrast, under the existing rules, we could utilize all the various spaces of our synagogue to have four or five services, using indoor and outdoor space.

10. This Saturday, October 10, is the holiday of Shmini Atzeres. Among the special features of the holiday is the Yizkor service, which is the Prayer for Departed Relatives. This prayer is only recited four times a year. The next recitation is not until Passover, in April. These additional prayers by men and woman alike are particularly emotional, are led by the Rabbi, take an additional fifteen minutes and are only offered in group (rather than individual) prayer. It would be particularly devastating for congregants to be deprived of this prayer on Saturday. Yet under the Governor's order, it is impossible for them to do so.

11. Shmini Atzeres is also the only day of the year when we read Ecclesiastes, which Orthodox Jews accept as the Book of Wisdom. In my and many other synagogues, it is read from a parchment and requires a trained cantor. Again, it is impossible to comply with both the Jewish law requirements to read Ecclesiastes in a congregate setting and the Governor's new Order. We should not be forced to choose which mandate to follow. That is especially so when the existing capacity restrictions work and have been implemented.

12. The next day, Sunday October 11, is Simchas Torah. Its literal translation is the Joy of the Torah. In celebration of the completion of the annual cycle of Torah readings, each congregant is called to the Torah for a short reading. The Rabbi is then traditionally called to read the final portion of the Torah, after which the first portion of the Torah is read. These Torah readings, in addition to the regular services, take time.

13. Again, it is impossible to conduct services for all of our congregants on Simchas Torah if we are limited to ten worshippers. There simply is not enough time to do even the Torah readings required of the day, let along the services.

14. By contrast, we would be able to comply with both our religious and civil dictates if the existing capacity restrictions remain in place through this holiday period.

The Disproportionate Impact of the Executive Order on Orthodox Worship Services

15. In addition to being targeted at Orthodox Jews the Order essentially only truly limits Orthodox worship services. Here is why:

16. This Order covers limited geographic areas. There are no restrictions in adjacent areas. Thus, the Orthodox Jew in a red zone can continue to shop at the supermarket ten minutes away that he regularly drives to and can continue to go to the office in downtown Brooklyn or Manhattan that she regularly commutes to. But since Orthodox Jews are prohibited from vehicular travel on Saturdays and Holidays, they worship in synagogues close to their homes that they can walk to. For that reason, Orthodox synagogues are clustered in the residential neighborhoods of their congregants. The effect of this is that the only activity of my congregants that the Order makes impossible is their worship on the upcoming holidays.

17. For the same reasons, it is only Orthodox Jews who will experience the full effects of this Order. There is no doubt that other religious worshippers and ministers fall into these zones as well. But the worshipper and officiant who attends Friday services at their mosque at least retains the option to travel to a nearby mosque for services. Similarly, the Catholic parishioner and priest whose Sunday Church service is impacted can travel to Church in an adjacent community. It is only the Orthodox Jewish worshipper who is totally deprived of the ability to participate in services.

18. To be clear, the foregoing is not meant to diminish or justify the impact on our co-religionists. The Order unfairly, unnecessarily and unconstitutionally restricts their Free Exercise of Religion. We merely note the disproportionate effect the Order has on Orthodox Jews.

19. One real world consequence of these new restrictions will be felt by two young orphans who worship in my synagogue. The Yizkor prayers are particularly important to them. Yet these new restrictions make it impossible for them to participate, since they would be unable to gather with the 10 adult men required for this prayer.

Conclusion

20. Those of us challenging the Governor's Order do so reluctantly, and only as a last resort to protect the ability of ourselves and our congregants to comply with Jewish law. We are a coalition of the complaint: our synagogues have followed all closure, capacity limitation, social distancing and masking requirements. The Governor has publicly conceded that there has been no enforcement of those requirements against those who have not voluntarily complied. But that is punishment, not public health. Let there be strict enforcement of the existing rules – that work and allow safety and services to coexist – before imposing punitive and draconian new rules that bring those into conflict.

Executed this 8th day of October 2020, at Brooklyn, New York.


YISROEL REISMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AGUDATH ISRAEL OF AMERICA, AGUDATH ISRAEL OF
KEW GARDEN HILLS, AGUDATH ISRAEL OF MADISON,
AGUDATH ISRAEL OF BAYSWATER, RABBI YISROEL
REISMAN, RABBI MENACHEM FEIFER, and STEVEN
SAPHIRSTEIN,

Plaintiffs,

vs

GOVERNOR ANDREW CUOMO

Defendant.

Civil Action No. 1:20-cv-04834

AFFIDAVIT OF AHARON WEISENFELD

1. I am the Director of Census Outreach for Agudath Israel of Madison, a Plaintiff in this lawsuit.

2. Agudath Israel of America has close to 70 Agudath Israel of America-affiliated synagogues in New York State. The vast majority of them are in New York City and Rockland County, in the areas affected by Governor Cuomo's recent announcement of restrictions on worship services.¹

3. Agudath Israel of America also maintains a data base of Orthodox synagogues in New York State and nearby metropolitan Jewish areas. Of that list, there are 640 synagogues in New York City, the vast majority of them within the areas affected by the Governor's

¹ See red, orange, and yellow areas of <https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative#initiativemaps>.

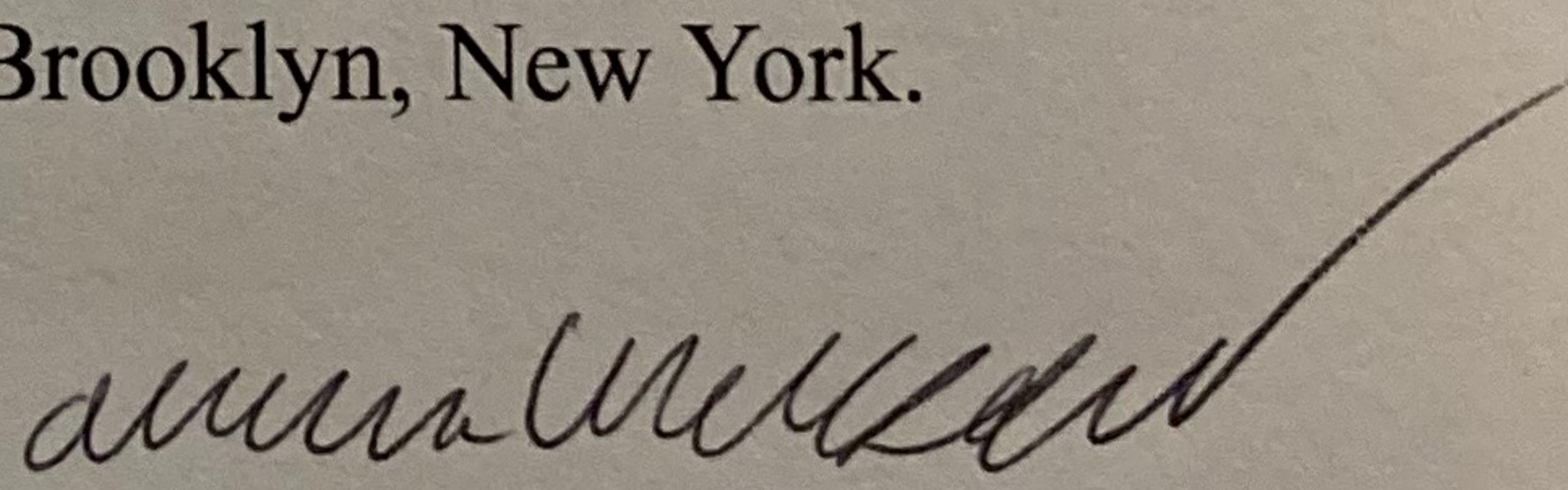
restrictions. There are at least 150 synagogues in the affected areas in Rockland County and Orange County (zip codes 10952 and 10977).

4. In terms of numbers, a 2011 study reported that there were close to 250,000 Orthodox Jews in Brooklyn, New York.² The vast majority of Brooklyn's Orthodox Jews live within the areas affected by the Governor's restrictions. Another study also conducted in 2011 reported there were some 230,000 Orthodox Jews in Brooklyn. That same study shows that there are some 19,700 Orthodox Jews in Queens.³ The Orthodox Jewish population has surely grown since these studies were done.

5. Orthodox Jews need to worship close to their homes, particularly on the Sabbath and on most Jewish holidays, because they are not allowed as a matter of Jewish law to travel by any vehicle. Therefore, restrictions on attending worship services in the areas in which they live effectively prevent Orthodox Jews from attending congregational worship services since they cannot travel elsewhere.

6. The Governor's restrictions thus significantly impact a very substantial number of Orthodox synagogues and Orthodox Jews.

Executed this 7 day of October 2020, at Brooklyn, New York.



AHARON WEISENFELD

² See <https://eportfolios.macaulay.cuny.edu/napoli13/brooklyn-jews/#Pop>.

³ See <https://www.ujafedny.org/api/assets/785690/>.

EXHIBIT G



State of New York

Executive Chamber

No. 202

EXECUTIVE ORDER

Declaring a Disaster Emergency in the State of New York

WHEREAS, on January 30, 2020, the World Health Organization designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern;

WHEREAS, on January 31, 2020, United States Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the entire United States to aid the nation's healthcare community in responding to COVID-19;

WHEREAS, both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and more are expected to continue; and

WHEREAS, New York State is addressing the threat that COVID-19 poses to the health and welfare of its residents and visitors.

NOW, THEREFORE, I, Andrew M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and the Laws of the State of New York, hereby find, pursuant to Section 28 of Article 2-B of the Executive Law, that a disaster is impending in New York State, for which the affected local governments are unable to respond adequately, and I do hereby declare a State disaster emergency for the entire State of New York. This Executive Order shall be in effect until September 7, 2020; and

IN ADDITION, this declaration satisfies the requirements of 49 C.F.R. 390.23(a)(1)(A), which provides relief from Parts 390 through 399 of the Federal Motor Carrier Safety Regulations (FMCSR). Such relief from the FMCSR is necessary to ensure that crews are available as needed.

FURTHER, pursuant to Section 29 of Article 2-B of the Executive Law, I direct the implementation of the State Comprehensive Emergency Management Plan and authorize all necessary State agencies to take appropriate action to assist local governments and individuals in containing, preparing for, responding to and recovering from this state disaster emergency, to protect state and local property, and to provide such other assistance as is necessary to protect public health, welfare, and safety.

IN ADDITION, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation, or parts thereof, of any agency during a State disaster emergency, if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster, I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 6, 2020 the following:

Section 112 of the State Finance Law, to the extent consistent with Article V, Section 1 of the State Constitution, and to the extent necessary to add additional work, sites, and time to State contracts or to award emergency contracts, including but not limited to emergency contracts or leases for relocation and support of State operations under Section 3 of the Public Buildings Law; or emergency contracts under Section 9 of the Public Buildings Law; or emergency contracts for professional services under Section 136-a of the State Finance Law; or emergency contracts for commodities, services, and technology under Section 163 of the State Finance Law; or design-build or best value contracts under and Part F of Chapter 60 of the Laws of 2015 and Part RRR of Chapter 59 of the Laws of 2017; or emergency contracts for purchases of commodities, services, and technology through any federal GSA schedules, federal 1122 programs, or other state, regional, local, multi-jurisdictional, or cooperative contract vehicles;

Section 163 of the State Finance Law and Article 4-C of the Economic Development Law, to the extent necessary to allow the purchase of necessary commodities, services, technology, and materials without following the standard notice and procurement processes;

Section 97-G of the State Finance Law, to the extent necessary to purchase food, supplies, services, and equipment or furnish or provide various centralized services, including but not limited to, building design and construction services to assist affected local governments, individuals, and other non-State entities in responding to and recovering from the disaster emergency;

Section 359-a, Section 2879, and 2879-a of the Public Authorities Law to the extent necessary to purchase necessary goods and services without following the standard procurement processes;

Sections 375, 385 and 401 of the Vehicle and Traffic Law to the extent that exemption for vehicles validly registered in other jurisdictions from vehicle registration, equipment and dimension requirements is necessary to assist in preparedness and response to the COVID-19 outbreak;

Sections 6521 and 6902 of the Education Law, to the extent necessary to permit unlicensed individuals, upon completion of training deemed adequate by the Commissioner of Health, to collect throat or nasopharyngeal swab specimens from individuals suspected of being infected by COVID-19, for purposes of testing; and to the extent necessary to permit non-nursing staff, upon completion of training deemed adequate by the Commissioner of Health, to perform tasks, under the supervision of a nurse, otherwise limited to the scope of practice of a licensed or registered nurse;

Subdivision 6 of section 2510 and section 2511 of the Public Health Law, to the extent necessary to waive or revise eligibility criteria, documentation requirements, or premium contributions; modify covered health care services or the scope and level of such services set forth in contracts; increase subsidy payments to approved organizations, including the maximum dollar amount set forth in contracts; or provide extensions for required reports due by approved organizations in accordance with contracts;

Section 224-b and subdivision 4 of section 225 of the Public Health Law, to the extent necessary to permit the Commissioner of Health to promulgate emergency regulations and to amend the State Sanitary Code;

Subdivision 2 of section 2803 of the Public Health Law, to the extent necessary to permit the Commissioner to promulgate emergency regulations concerning the facilities licensed pursuant to Article 28 of the Public Health Law, including but not limited to the operation of general hospitals;

Subdivision 3 of section 273 of the Public Health Law and subdivisions 25 and 25-a of section 364-j of the Social Services Law, to the extent necessary to allow patients to receive prescribed drugs without delay;

Section 400.9 and paragraph 7 of subdivision f of section 405.9 of Title 10 of the NYCRR, to the extent necessary to permit general hospitals and nursing homes licensed pursuant to Article 28 of the Public Health Law ("Article 28 facilities") that are treating patients during the disaster emergency to rapidly discharge, transfer, or receive such patients, as authorized by the Commissioner of Health, provided such facilities take all reasonable measures to protect the health and safety of such patients and residents, including safe transfer and discharge practices, and to comply with the Emergency Medical Treatment and Active Labor Act (42 U.S.C. section 1395dd) and any associated regulations;

Section 400.11 of Title 10 of the NYCRR, to the extent necessary to permit Article 28 facilities receiving patients as a result of the disaster emergency to complete patient review instruments as soon as practicable;

Section 405 of Title 10 of the NYCRR, to the extent necessary to maintain the public health with respect to treatment or containment of individuals with or suspected to have COVID-19;

Subdivision d and u of section 800.3 of Title 10 of the NYCRR, to the extent necessary to permit emergency medical service personnel to provide community paramedicine, transportation to destinations other than hospitals or health care facilities, telemedicine to facilitate treatment of patients in place, and such other services as may be approved by the Commissioner of Health;

Paragraph 3 of subdivision f of section 505.14 of Title 18 of the NYCRR, to the extent necessary to permit nursing supervision visits for personal care services provided to individuals affected by the disaster emergency be made as soon as practicable;

Sections 8602 and 8603 of the Education Law, and section 58-1.5 of Title 10 of the NYCRR, to the extent necessary to permit individuals who meet the federal requirements for high complexity testing to perform testing for the detection of SARS-CoV-2 in specimens collected from individuals suspected of suffering from a COVID-19 infection;

Subdivision 4 of section 6909 of the Public Health Law, subdivision 6 of section 6527 of the Education Law, and section 64.7 of Title 8 of the NYCRR, to the extent necessary to permit physicians and certified nurse practitioners to issue a non-patient specific regimen to nurses or any such other persons authorized by law or by this executive order to collect throat or nasopharyngeal swab specimens from individuals suspected of suffering from a COVID-19 infection, for purposes of testing, or to perform such other tasks as may be necessary to provide care for individuals diagnosed or suspected of suffering from a COVID-19 infection;

Section 596 of Title 14 of the NYCRR to the extent necessary to allow for rapid approval of the use of the telemental health services, including the requirements for in-person initial assessment prior to the delivery of telemental health services, limitations on who can deliver telemental health services, requirements for who must be present while telemental health services are delivered, and a recipient's right to refuse telemental health services;

Section 409-i of the Education Law, section 163-b of the State Finance Law with associated OGS guidance, and Executive Order No. 2 are suspended to the extent necessary to allow elementary and secondary schools to procure and use cleaning and maintenance products in schools; and sections 103 and 104-b of the General Municipal Law are suspended to the extent necessary to allow schools to do so without the usual advertising for bids and offers and compliance with existing procurement policies and procedures;

Article 7 of the Public Officers Law, section 41 of the General Construction Law, and section 3002 of the Public Health Law, to the extent necessary to permit the Public Health and Health Planning Council and the State Emergency Medical Services Council to meet and take such actions as authorized by law, as may be necessary to respond to the COVID-19 outbreak, without meeting quorum requirements or permitting the public in-person access to meetings, provided that any such meetings must be webcast and means for effective public comment must be made available; and

FURTHER, I hereby temporarily modify, for the period from the date of this Executive Order through April 6, 2020, the following laws:

Section 24 of the Executive Law; Sections 104 and 346 of the Highway Law; Sections 1602, 1630, 1640, 1650, and 1660 of the Vehicle and Traffic Law; Section 14(16) of the Transportation Law; Sections 6-602 and 17-1706 of the Village Law; Section 20(32) of the General City Law; Section 91 of Second Class Cities Law; Section 19-107(ii) of the New York City Administrative Code; and Section 107.1 of Title 21 of the New York Codes, Rules and Regulations, to the extent necessary to provide the Governor with the authority to regulate traffic and the movement of vehicles on roads, highways, and streets.



BY THE GOVERNOR

M. C.
Secretary to the Governor

G I V E N under my hand and the Privy Seal of the
State in the City of Albany this
seventh day of March in the year two
thousand twenty.

[Signature]

EXHIBIT J

October 7, 2020 | 2:16 pm

Information on Novel Coronavirus

Coronavirus is still active in New York. We have to be smart. Wear a mask, maintain six feet distance in public and download the official New York State exposure notification app, COVID Alert NY.

GET THE FACTS >

(<https://coronavirus.health.ny.gov/home>)

**Empire State
Development**
(<https://esd.ny.gov>)

[HOME \(/\)](#) / NEW YORK'S CLUSTER ACTION INITIATIVE GUIDANCE

GUIDANCE FOR DETERMINING WHETHER A BUSINESS ENTERPRISE IS SUBJECT TO A WORKFORCE REDUCTION UNDER EXECUTIVE ORDER 202.68, RELATED TO NEW YORK'S CLUSTER ACTION INITIATIVE TO ADDRESS COVID-19 HOTSPOTS.

FOR GUIDANCE RELATED TO DETERMINING WHETHER A BUSINESS ENTERPRISE IS SUBJECT TO A WORKFORCE REDUCTION UNDER EXECUTIVE ORDER 202.6, RELATED TO NEW YORK'S PAUSE, PLEASE CLICK [HERE](https://esd.ny.gov/guidance-executive-order-2026) (<https://esd.ny.gov/guidance-executive-order-2026>).

UPDATED: OCTOBER 7, 2020 AT 4:10 PM

This guidance is issued in accordance with New York Governor Andrew M. Cuomo's [Executive Order 202.68](#)

(<https://www.governor.ny.gov/news/no-20268-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>),

[Why New York State?](#) Department of Health to determine areas in the State that require enhanced public health restrictions based upon cluster-based cases of COVID-19 at a level that compromises the State's containment of the virus. **Certain activities shall be restricted and any permitted activities, in the three zones (Red, Orange, Yellow) described below, shall be conducted in strict adherence to Department of Health guidance.**

[Regions \(/regions\)](#) This guidance is issued by the New York State Department of Economic Development d/b/a Empire State Development (ESD), in consultation with the Department of Health, and applies to each business or entity location individually and is intended to assist businesses in determining whether they are an essential business, if they are located in areas with designated cluster activity (see below [About Us](#)).
[ESD Media Center](#) respect to business or entities that operate or provide both essential and non-essential services, supplies or support, only those lines and/or business operations that are necessary to support the essential services, supplies, or support are exempt from the workforce reduction restrictions.

Where permitted to operate within the cluster action initiative, businesses and other entities must continue to follow the relevant industry-specific guidelines provided by Department of Health as available on the *New York Forward website* (<https://forward.ny.gov/>) for their applicable operations and activities. Further, State and local governments, including municipalities and authorities, are exempt from these essential business reductions, but may be subject to other provisions that restrict non-essential, in-person workforce and other operations under [Executive Order 202](#) (<https://www.governor.ny.gov/executiveorders>).

On October 6, 2020, Governor Cuomo announced (<https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative>) a new cluster action initiative to address COVID-19 hotspots that cropped up in various areas of New York. Working with the top public health experts, the State developed a science-based approach to contain these clusters and stop any further spread of the virus, including new rules and restrictions directly targeted to areas with the highest concentration of COVID cases and the surrounding communities. The new rules are in effect for a minimum of 14 days.

The initiative is composed of three steps:

- (1) Reduce in-person activities and interactions within the cluster, similar to *New York on PAUSE*;
- (2) Take action in the area surrounding the cluster to stop the spread; and
- (3) Take precautionary action in the outlying communities.

The initiative currently applies to clusters in the following areas:

- Broome County (One Area, Yellow) - Click [Here](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Broome_Map.pdf) (https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Broome_Map.pdf) for Map
- Brooklyn (One Area, Red, Orange and Yellow) - Click [Here](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Brooklyn_large_map.pdf) (https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Brooklyn_large_map.pdf) for Map
- Orange County (One Area, Red and Yellow) - Click [Here](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Orange_Map.pdf) (https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Orange_Map.pdf) for Map
- Queens (Two Areas, Red, Orange and Yellow) - Click [Here](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Queens_upper_map_updated_colors.pdf) (https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Queens_upper_map_updated_colors.pdf) and [Here](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Queens_FarRockaway_map_updated_colors.pdf) (https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Queens_FarRockaway_map_updated_colors.pdf) for Maps
- Rockland County (One Area, Red and Yellow) - Click [Here](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Rockland_Map_updated.pdf) (https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Rockland_Map_updated.pdf) for Map

[Why New York State?](#) ▼

[Red Zone - Cluster Itself](#) ▼

[Doing Business in NY](#)

[Industry Restrictions](#) include:

[Regions \(/regions\)](#)

- No non-essential gatherings of any size
 - Houses of worship are subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer ▼
 - Restaurants and taverns must cease serving patrons food or beverage on-premises and may be open for takeout or delivery only ▼
- [ESD Media Center](#) ▼
- Schools must close for in-person instruction, except as otherwise provided in Executive Order.

All non-essential businesses in the red zone, which do not meet the criteria below, shall reduce in-person workforce by 100%.

Orange Zone – Warning Zone

Activity restrictions include:

- Non-essential gatherings shall be limited to 10 people
- Houses of worship are subject to a capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer
- Restaurants and taverns must cease serving patrons food or beverage inside on-premises but may provide outdoor service, and may be open for takeout or delivery, provided that any one seated group or party must not exceed 4 people

- Schools must close for in-person instruction, except as otherwise provided in Executive Order.
- Certain non-essential businesses, for which there is a higher risk of transmission of the COVID-19 virus, shall reduce in-person workforce by 100%; such businesses include:
 - Gyms, fitness centers or classes
 - Hair salons and barbershops
 - All other personal care services including but not limited to spas, tattoo or piercing parlors, nail technicians and nail salons, cosmetologists, estheticians, the provision of laser hair removal and electrolysis

Yellow Zone – Precautionary Zone

Activity restrictions include:

- Non-essential gathers are limited to no more than 25 people
- Houses of worship are subject to a capacity limit of 50% of its maximum occupancy and shall adhere to Department of Health guidance
- Restaurants and taverns must limit any one seated group or party size to 4 people
- Schools shall adhere to applicable guidance issued by the Department of Health regarding mandatory testing of students and school personnel

For purposes of Executive Order 202.68, essential businesses allowed to remain open in any red zone(s) include:

1. Essential health care operations including

- research and laboratory services
- hospitals
- walk-in-care health clinics and facilities
- veterinary and livestock medical services

Why New York State?

- senior/elder care



Doing Business with NY

- home health care workers or aides for the elderly

Industries (/industries)

- doctors and doctors' offices for both emergency and non-emergency appointments



Regions (/regions)

- nursing homes, residential health care facilities, or congregate care facilities

About Us

- medical supplies and equipment manufacturers and providers



ESD Media Center

- licensed mental health providers

- licensed substance abuse treatment providers
- medical billing support personnel
- speech pathologists and speech therapy
- chiropractic services
- acupuncture
- physical therapy
- occupational therapy
- medically necessary massage therapy



2. Essential infrastructure including

- public and private utilities including but not limited to power generation, fuel supply, and transmission
- public water and wastewater
- telecommunications and data centers
- airlines/airports
- commercial shipping vessels/ports and seaports
- public and private transportation infrastructure such as bus, rail, for-hire vehicles, garages
- hotels, and other places of accommodation, including campgrounds.
 - Campgrounds must take precautions to ensure campers maintain appropriate social distancing and adhere to proper cleaning and disinfecting protocols, including but not limited to maintaining six feet of distance between campers, unless wearing an acceptable face covering, excluding persons from the same household who are camping together.

3. Essential manufacturing including

- food processing, manufacturing agents including all foods and beverages
- chemicals
- medical equipment/instruments
- pharmaceuticals
- sanitary products including personal care products regulated by the Food and Drug Administration (FDA)
- telecommunications
- microelectronics/semi-conductor
- food-producing agriculture/farms
- household paper products
- defense industry and the transportation infrastructure
- automobiles
- any parts or components necessary for essential products that are referenced within this guidance

Why New York State?

4. Essential retail including

Doing Business in NY

- grocery stores including all food and beverage stores

Industries (Industries).

- pharmacies
- convenience stores

Regions (Regions).

- farmer's markets

About Us

- gas stations

ESD Media Center

- restaurants/bars (but only for take-out/delivery)
- hardware, appliance, and building material stores
- pet food
- telecommunications to service existing customers and accounts
- all other retail may operate for curbside pick-up or delivery only with no customers allowed within the establishment and only one employee physically present to fulfill orders.

5. Essential services including

- 2020 Census operations and activities
- trash and recycling collection, processing, and disposal
- mail and shipping services

- laundromats and other clothing/fabric cleaning services
- building cleaning and maintenance
- child care services
- bicycle repair
- auto repair and maintenance
- automotive sales conducted remotely or electronically, with in-person vehicle showing, return, and delivery by appointment only
- warehouse/distribution and fulfillment
- funeral homes, crematoriums and cemeteries
- storage for essential businesses
- maintenance for the infrastructure of the facility or to maintain or safeguard materials or products therein
- animal shelters and animal care including dog walking, animal boarding and pet grooming but only to the extent necessary to ensure animal health
- food and non-food agriculture
- landscaping, gardening and horticulture
- designing, printing, publishing and signage companies to the extent that they support essential businesses or services
- remote instruction or streaming of classes from public or private schools or health/fitness centers; provided, however, that no in-person congregate classes are permitted

6. News media

7. Certain office-based work, including financial services and research

- banks or lending institution
- insurance
- payroll
- accounting

Why New York State?

- services related to financial markets, except debt collection

Doing Business in NY

- higher education research
- other office-based work not specified here may operate remotely

Industries (/industries).

8. Providers of basic necessities to economically disadvantaged populations including Regions (/regions).

About Us

- homeless shelters and congregate care facilities
- food banks

ESD Media Center

- human services providers whose function includes the direct care of patients in state-licensed or funded voluntary programs; the care, protection, custody and oversight of individuals both in the community and in state-licensed residential facilities; those operating community shelters and other critical human services agencies providing direct care or support

9. Construction

- Construction projects may continue, but any work that can be done remotely such as office-based work must proceed remotely, to the extent practicable. Employees/personnel who are not directly involved in in-person work at the business location/construction site are prohibited.

10. Defense

11. Essential services necessary to maintain the safety, sanitation and essential operations of residences or other businesses including

- defense and national security-related operations supporting the U.S. Government or a contractor of the US government
- law enforcement, including corrections and community supervision
- fire prevention and response
- building code enforcement
- security, including security personnel for residential and commercial buildings
- emergency management and response, EMS and 911 dispatch
- building cleaners or janitors
- general and specialized maintenance whether employed by the entity directly or a vendor, including but not limited to heating, ventilation, and air conditioning (HVAC) and pool maintenance
- automotive repair
- cleaning, disinfection, and sanitation services
- occupational safety and health professionals
- residential and commercial moving services

12. Vendors that provide essential services or products, including logistics and technology support, child care and services including but not limited to:

- logistics
- technology support for online services
- child care programs and services
- government owned or leased buildings
- essential government services
- any personnel necessary for online or distance learning or classes delivered via remote means

Why New York State?

13. Recreation

Doing Business in NY

- Local government are permitted to determine whether parks and other public spaces, as well as low-risk recreational activities may be open.

Regions (Regions)

- If open, appropriate social distancing of at least six feet among individuals must be abided, acceptable face coverings must be worn by individuals who are over the age of two and able to medically tolerate such coverings, and frequent cleaning/disinfection

About Us

- measures must be in place for hard surfaces and objects frequently touched by multiple people (e.g., handrails, benches).

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14. Other professional services with extensive restrictions

- Lawyers may continue to perform all work necessary for any service so long as it is performed remotely.
 - Any in-person work presence shall be limited to work only in support of essential businesses or services; however, even work in support of an essential business or service should be conducted as remotely as possible.
- Real estate services shall be conducted remotely for all transactions, including but not limited to title searches, appraisals, permitting, inspections, and the recordation, legal, financial and other services necessary to complete a transfer of real property; provided, however, that any services and parts therein may be conducted in-person only to the extent legally necessary and in accordance with appropriate social distancing and cleaning/disinfecting protocols; and nothing within this provision should be construed to allow brokerage and branch offices to remain open to the general public (i.e. not clients).

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[Industries \(/industries\)](#)

[Regions \(/regions\)](#)

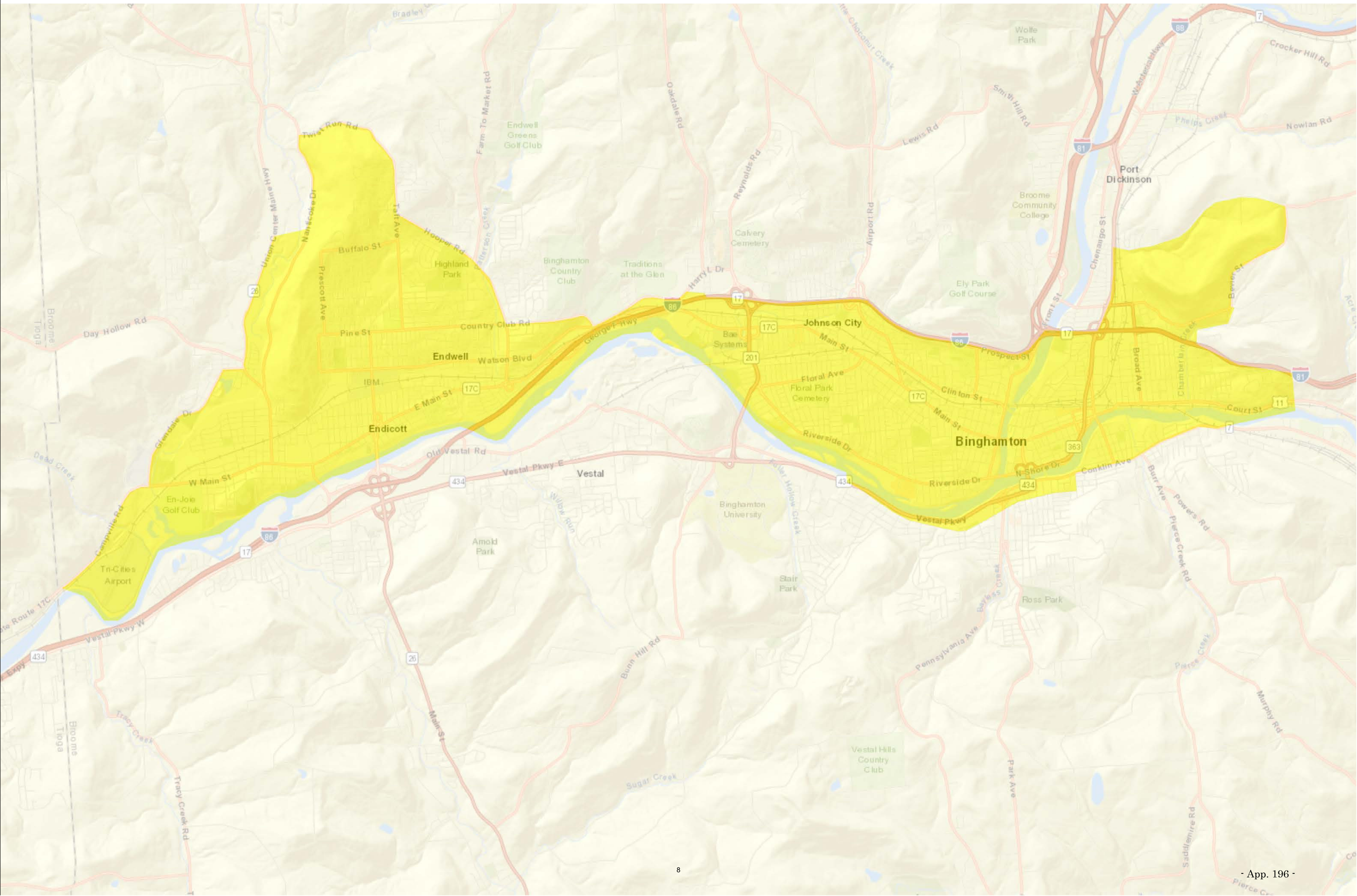
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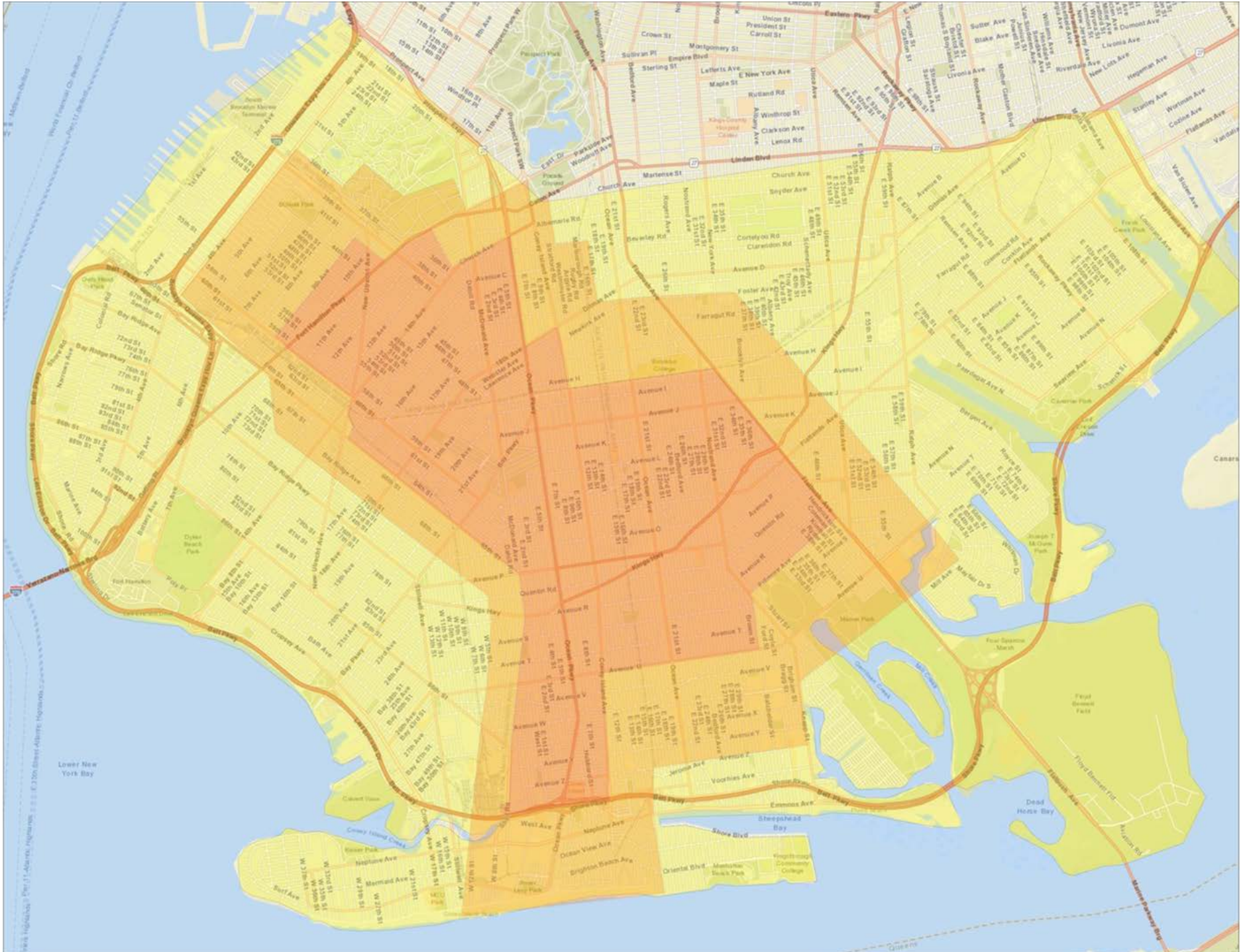
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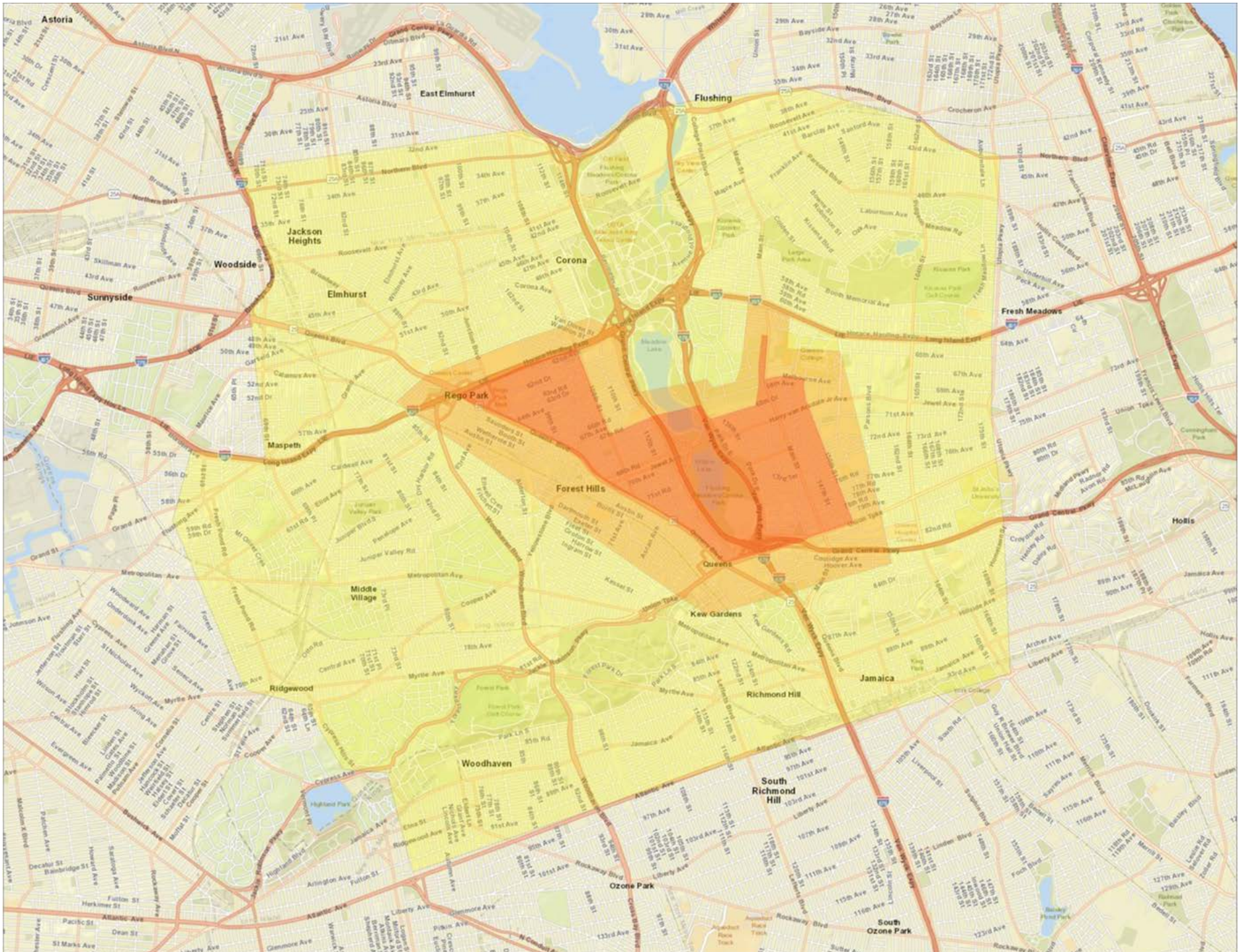
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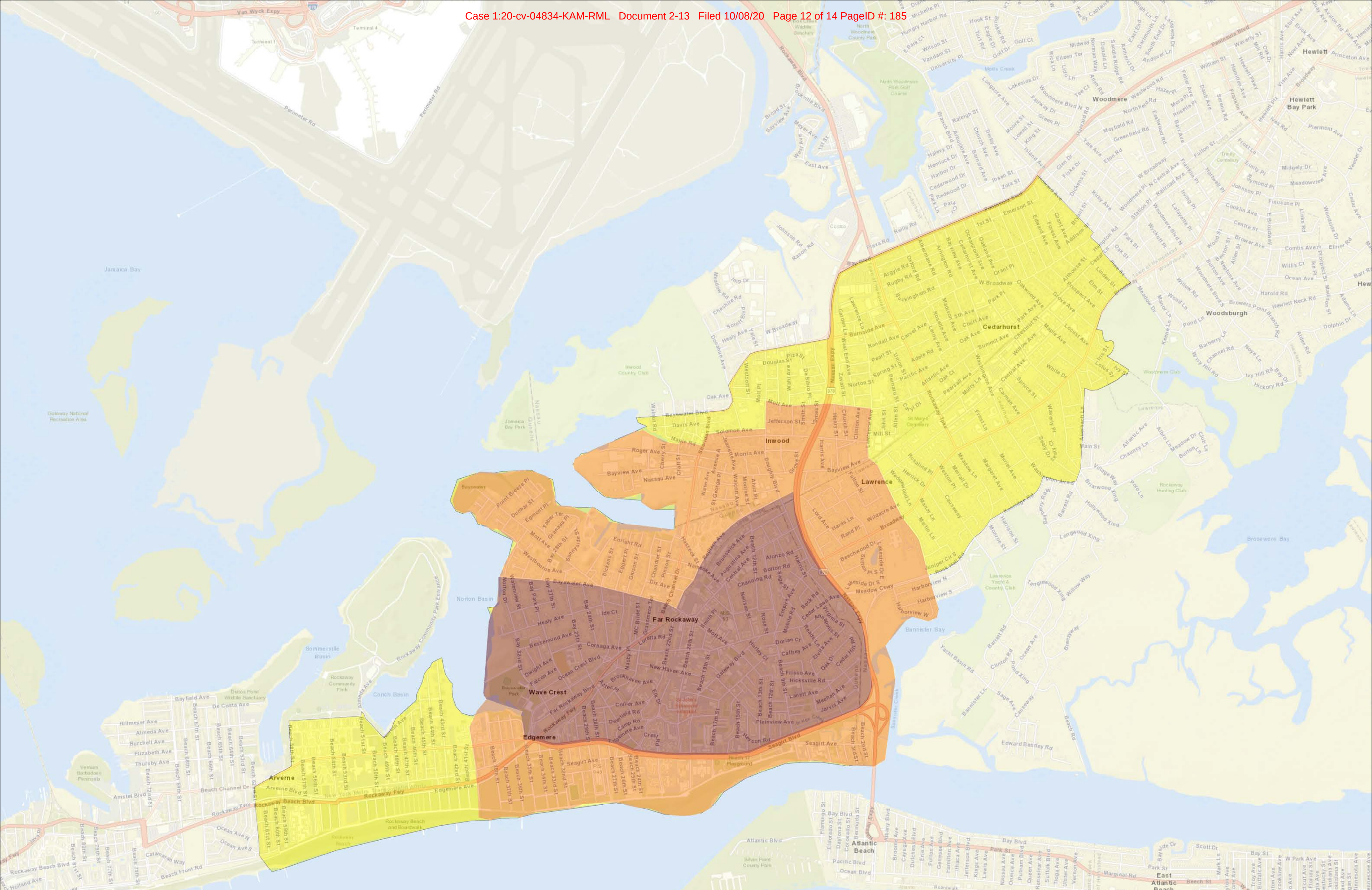
Broome Cluster Zones

 Yellow Zone










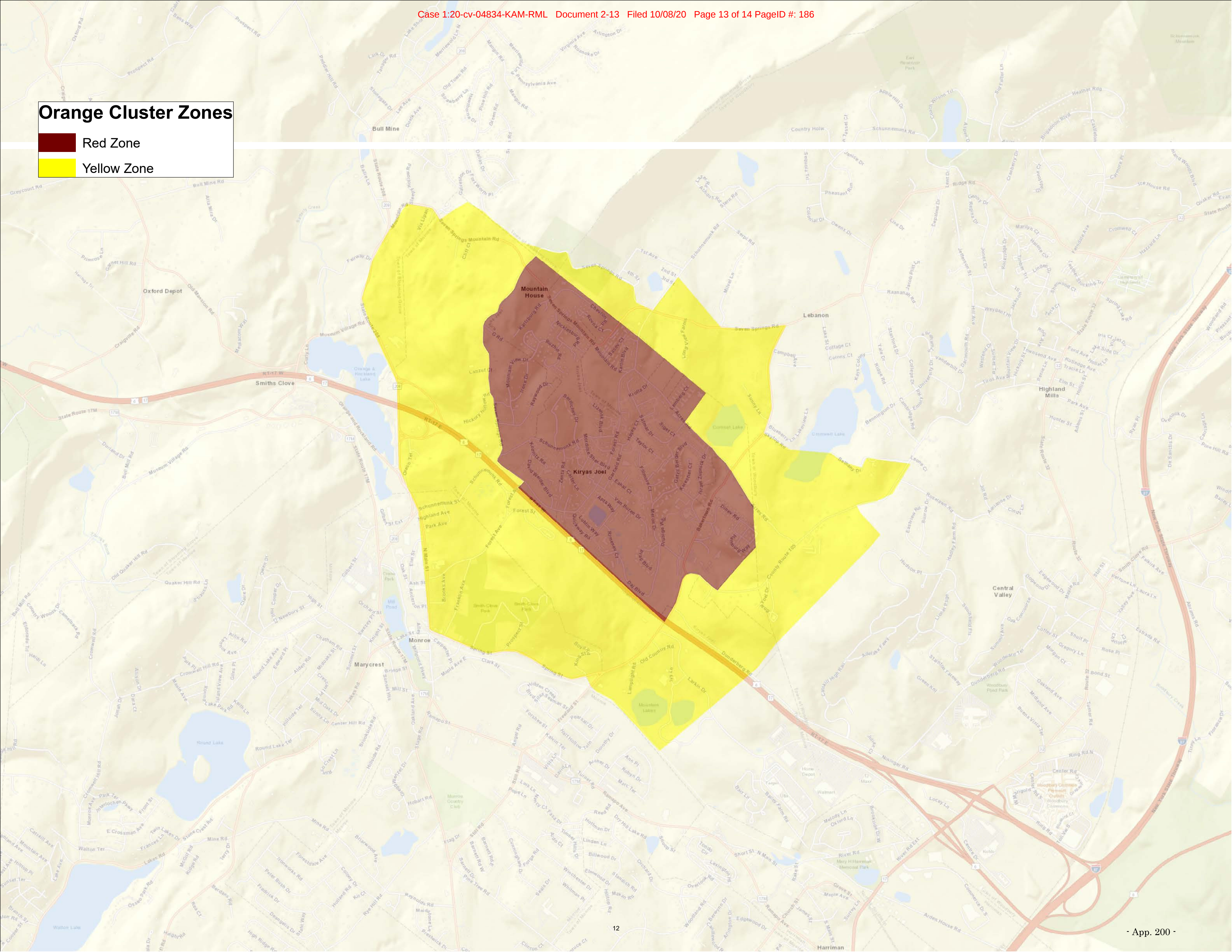


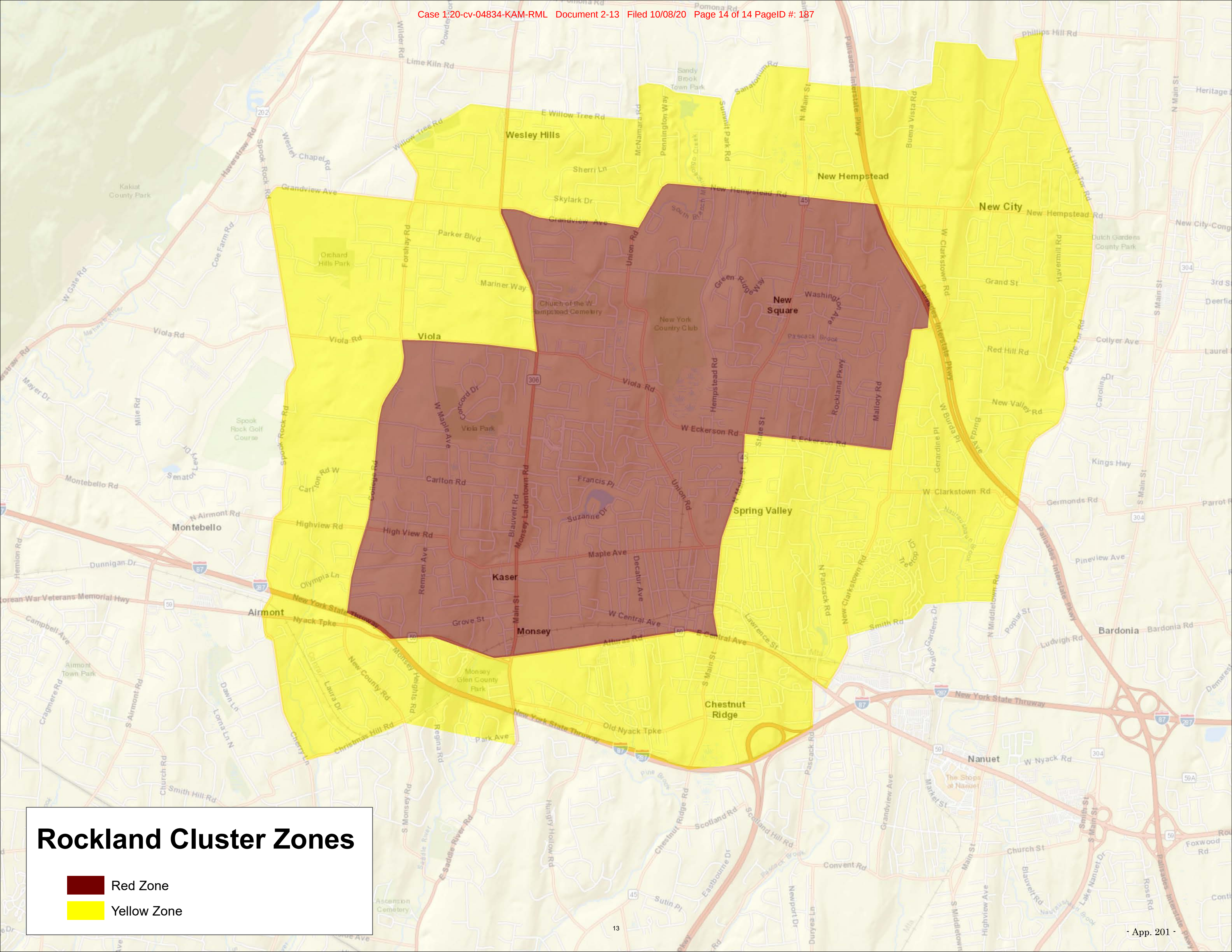
Queens Far Rockaway Cluster Zones

-  Red Zone
-  Orange Zone
-  Yellow Zone

Orange Cluster Zones

-  Red Zone
-  Yellow Zone





Rockland Cluster Zones

- Red Zone
- Yellow Zone

EXHIBIT H



New York Forward (/)

< [NY Forward \(/ny-forward\)](#)

Phase One Industries

SECTIONS

Overview

(#overview)

Construction

(#construction)

Agriculture,

Forestry,

Fishing &

Hunting

(#agriculture-

-forestry--

fishing---

hunting)

Retail

Trade

(#retail-

trade)

Overview

Businesses in each region will re-open in phases. Re-opening refers to non-essential businesses and business activities. Essential businesses and business activities that are open will remain open.

The guidelines below apply to both non-essential businesses in regions that are permitted to re-open and essential businesses throughout the state that were previously permitted to remain open.

Eligibility for reopening will be determined by [health metrics \(https://forward.ny.gov/regional-monitoring-dashboard\)](https://forward.ny.gov/regional-monitoring-dashboard) for each region.

Here is a breakdown of industries in each phase:

Phase One: All regions of the state have entered Phase 1 of reopening

- Construction
- Agriculture, Forestry, Fishing and Hunting
- Retail - (Limited to curbside or in-store pickup or drop off)
- Manufacturing
- Wholesale Trade

For help determining whether or not your business is eligible to reopen, use the reopen lookup tool. You can also scroll down to find the guidance for each phase.

Manufacturing
(#manufacturing)

[NY FORWARD BUSINESS REOPEN LOOKUP](https://www.businessexpress.ny.gov/app/ny-forward)
([HTTPS://WWW.BUSINESSEXPRESS.NY.GOV/APP/NY](https://www.businessexpress.ny.gov/app/ny-forward))

Wholesale

Trade
(#wholesale-trade)

[STATEWIDE GUIDELINES](#) [\(/statewide-guidelines\)](#)

Higher Education Research
(#higher-education-research)

NEXT SECTION

Continue ↓

Construction

File a Complaint
(#file-a-complaint)

Construction

- Building Equipment Contractors
- Building Finishing Contractors
- Foundation, Structure, and Building Exterior Contractors
- Highway, Street and Bridge Construction
- Land Subdivision
- Nonresidential Building Construction
- Residential Building Construction
- Utility System Construction

Frequently Asked Questions
(#frequently-asked-questions)

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(#translations)

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NEXT SECTION

Continue ↓

Agriculture, Forestry, Fishing & Hunting

Agriculture, Forestry, Fishing & Hunting

- Other Animal Production
- Other Crop Production
- Support Activities for Animal Production
- Support Activities for Crop Production
- Support Activities for Forestry

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NEXT SECTION

Continue ↓

Retail Trade

Retail Trade

Phase One includes delivery, curbside, and in-store pickup service only for the following businesses:

- Clothing Stores
- Direct Selling Establishments
- Electronics and Appliance Stores
- Electronic Shopping and Mail-Order Houses
- Furniture and Home Furnishing Stores
- Florists
- General Merchandise Stores
- Health and Personal Care Stores
- Jewelry, Luggage, and Leather Goods Stores

- Lawn and Garden Equipment and Supplies Stores
- Office Supplies, Stationery, and Gift Stores
- Used Merchandise Stores
- Shoe Stores
- Sporting Goods, Hobby, Musical Instrument and Book Stores
- Other Miscellaneous Store Retailers

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NEXT SECTION

Continue ↓

Manufacturing

Manufacturing

- Apparel Manufacturing
- Computer and Electronic Product Manufacturing
- Electric Lighting Equipment Manufacturing
- Fabricated Metal Product Manufacturing
- Furniture and Related Product Manufacturing
- Leather and Allied Product Manufacturing

- Machinery Manufacturing
- Nonmetallic Mineral Product Manufacturing
- Paper Manufacturing
- Petroleum and Coal Products Manufacturing
- Plastics and Rubber Products Manufacturing
- Printing and Related Support Activities
- Textile Mills
- Textile Product Mills
- Wood Product Manufacturing
- Other Miscellaneous Manufacturing

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NEXT SECTION

Continue ↓

Wholesale Trade

Wholesale Trade

- Apparel, Piece Goods, and Notions Merchant Wholesalers
- Chemical and Allied Products Merchant Wholesalers
- Furniture and Home Furnishing Merchant Wholesalers

- Household Appliances and Electrical and Electronic Goods Merchant Wholesalers
- Machinery, Equipment, and Supplies Merchant Wholesalers
- Metal and Mineral (except Petroleum) Merchant Wholesalers
- Paper and Paper Product Merchant Wholesalers
- Professional and Commercial Equipment and Supplies Merchant Wholesalers
- Wholesale Electronic Markets and Agents and Brokers
- Miscellaneous Durable Goods Merchant Wholesalers
- Miscellaneous Nondurable Goods Merchant Wholesalers

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NEXT SECTION

Continue ↓

Higher Education Research

Higher Education Research

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NEXT SECTION

Continue ↓

File a Complaint

File a Complaint

Governor Andrew M. Cuomo established the New York State PAUSE Enforcement Assistance Task Force to assist local authorities with enforcement of Executive Orders and restrictions on business operations and activities, as well as gatherings, during the COVID-19 public health emergency.

Individuals can file complaints regarding the operation of businesses or gatherings 24 hours a day, 7 days a week through an online form (<https://mylicense.custhelp.com/app/ask>) or by calling 1-833-789-0470.

(Note: Specific complaints from employees against their employers should be directed to the Department of Labor through their online form

(<https://labor.ny.gov/workerprotection/laborstandards/cc/complaints.shtm>).

These complaints are reviewed for completeness, accuracy, and applicability under the orders, and then referred to local authorities (as designated by county leaders) by a team of investigators from multiple state agencies. In addition to assessing the credibility of complaints, these skilled investigators can assist local authorities in their front-line role of responding to alleged violations of the orders by providing guidance on available civil and criminal enforcement tools.

NEXT SECTION

Continue ↓

Frequently Asked Questions

Frequently Asked Questions

Visit Empire State Development's website for frequently asked questions on how the New York Forward re-opening plan impacts your business.

[FREQUENTLY ASKED QUESTIONS](https://esd.ny.gov/nyforward-faq)
([HTTPS://ESD.NY.GOV/NYFORWARD-FAQ](https://esd.ny.gov/nyforward-faq))

NEXT SECTION

Continue ↓

Translations

Translations

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| বাংলা অনুবাদ

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Construction

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(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

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| বাংলা অনুবাদ

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Non-Food Agriculture

Summary Guidelines

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Forestry

Summary Guidelines

Español

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(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

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Español

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| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

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Fishing

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| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

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[Español](#)

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| [中文翻譯](#)

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Retail Trade

Summary Guidelines

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Detailed Guidelines

[Español](#)

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| [Kreyòl Ayisyen](#)

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[StorePickupRetailMasterGuidelinesHaitianCreole.pdf](#)

| [русский язык](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

[StorePickupRetailMasterGuidelinesRussian.pdf](#) | [한](#)

국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/StorePickupRetailMasterGuidelinesKorean.pdf>) | 中

文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/StorePickupRetailMasterGuidelinesChinese.pdf>)

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/StorePickupRetailMasterGuidelinesBengali.pdf>)

Curbside Retail

Detailed Guidelines

Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Manufacturing

Summary Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

- | [русский язык](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [한국어 번역](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [中文翻譯](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [বাংলা অনুবাদ](https://www.governor.ny.gov/sites/governor.ny.gov/files)

Wholesale Trade

Summary Guidelines

- | [Español](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [Kreyòl Ayisyen](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [русский язык](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [한국어 번역](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [中文翻譯](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [বাংলা অনুবাদ](https://www.governor.ny.gov/sites/governor.ny.gov/files)

Detailed Guidelines

- | [Español](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [Kreyòl Ayisyen](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [русский язык](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [한국어 번역](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [中文翻譯](https://www.governor.ny.gov/sites/governor.ny.gov/files)
- | [বাংলা অনুবাদ](https://www.governor.ny.gov/sites/governor.ny.gov/files)

Higher Education Research

Summary Guidelines

- | [Español](https://www.governor.ny.gov/sites/governor.ny.gov/files)

- | [Kreyòl Ayisyen](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [русский язык](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [한국어 번역](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [中文翻譯](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [বাংলা অনুবাদ](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Detailed Guidelines

- [Español](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [Kreyòl Ayisyen](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [русский язык](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [한국어 번역](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [中文翻譯](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [বাংলা অনুবাদ](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

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- Freedom of Information Law (FOIL) Requests**
- Novel Coronavirus**
- Privacy Policy**



New York Forward (/)

< [NY Forward \(/ny-forward\)](#)

Phase Two Industries

SECTIONS

Overview
(#overview)

Offices
(#offices)

Real Estate
(#real-estate)

Essential and Phase II In-Store Retail
(#essential-and-phase-ii-in-store-retail)

Overview

The guidelines below apply to non-essential businesses in regions that are permitted to reopen, essential businesses throughout the state that were previously permitted to remain open, and commercial and recreational activities that have been permitted to operate statewide with restrictions. If guidance has not yet been published for your specific industry, but you are permitted to reopen, please refer to the [NY Forward Safety Plan template](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Phase Two: All regions of the state have entered Phase 2 of reopening

Pursuant to the Governor’s Executive Orders, the following businesses remain closed:

- **Malls**; specifically, any indoor common portions of retail shopping malls with 100,000 or more square feet of retail space available for lease must remain closed to the public; however, any stores without their own external entrance(s) may operate via curbside pickup in Phase 1 and 2 providing purchased items to customers at or near the

**Vehicle
Sales,
Leases,
and
Rentals
(#vehicle-
sales--
leases--and-
rentals)**

general mall entrance and any stores with their own external entrance(s) separate from the general mall entrance (e.g. strip malls, anchor tenants), may open for curbside and in-store pickup in Phase 1 and all in-store retail activities in Phase 2;

- **Indoor on-premise restaurant and bar service**, excluding take-out or delivery for off-premise consumption in Phase 1 and outdoor on-premise restaurant and bar service in Phase 2;
- **Large gathering/event venues**, including but not limited to establishments that host concerts, conferences, or other in-person performances or presentations in front of an in-person audience;
- **Gyms, fitness centers, and exercise classes**, except for remote or streaming services;
- **Video lottery and casino gaming facilities;**
- **Movie theaters**, except drive-ins; and
- **Places of public amusement**, whether indoors or outdoors, including but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, arcades, fairs, children’s play centers, funplexes, theme parks, bowling alleys, family and children’s attractions.

**Retail
Rental,
Repair, and
Cleaning
(#retail-
rental--
repair--and-
cleaning)**

For help determining whether or not your business is eligible to reopen, use the reopen lookup tool. You can also scroll down to find the guidance for Phase Two.

**Commercial
Building
Management
(#commercial-
building-
management)**

NY FORWARD BUSINESS REOPEN
LOOKUP TOOL

(<https://www.busessexpress.ny.gov/app/nyforward>)

**Hair Salons
and
Barbershops
(#hair-
salons-and-
barbershops)**

STATEWIDE GUIDELINES [\(statewide-
guidelines\)](#)

NEXT SECTION

Continue ↓

**Outdoor
and Take-
Out/Delivery
Food
Services
(#outdoor-
and-take-
out-delivery-
food-
services)**

Offices

Offices

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND AFFIRM DETAILED
GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/interim-guidance.pdf>)

PRINT BUSINESS SAFETY PLAN
TEMPLATE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>
)

**Frequently
Asked
Questions
(#frequently-
asked-
questions)**

**Translations
(#translations)**

NEXT SECTION

Continue ↓

Real Estate

Real Estate

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND AFFIRM DETAILED
GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/masterguidance.pdf>)

PRINT BUSINESS SAFETY PLAN
TEMPLATE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>
)

NEXT SECTION

Continue ↓

Essential and Phase II In-
Store Retail

Essential and Phase II In-Store Retail

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

READ AND AFFIRM DETAILED
GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

PRINT BUSINESS SAFETY PLAN
TEMPLATE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

NEXT SECTION

Continue ↓

Vehicle Sales, Leases, and Rentals

Vehicle Sales, Leases, and Rentals

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND AFFIRM DETAILED GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/vehicles-master-guidance.pdf>)

PRINT BUSINESS SAFETY PLAN TEMPLATE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

NEXT SECTION

Continue ↓

Retail Rental, Repair, and Cleaning

Retail Rental, Repair, and Cleaning

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND AFFIRM DETAILED
GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/repair-cleaning-master-guidance.pdf>)

PRINT BUSINESS SAFETY PLAN
TEMPLATE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>
)

NEXT SECTION

Continue ↓

Commercial Building Management

Commercial Building Management

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND AFFIRM DETAILED
GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/building-management-master-guidance.pdf>)

PRINT BUSINESS SAFETY PLAN
TEMPLATE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>
)

NEXT SECTION

Continue ↓

Hair Salons and
Barbershops

Hair Salons and Barbershops

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

READ AND AFFIRM DETAILED
GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

PRINT BUSINESS SAFETY PLAN
TEMPLATE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>
)

NEXT SECTION

Continue ↓

Outdoor and Take-Out/Delivery Food Services

Outdoor and Take-Out/Delivery Food Services

VIEW SUMMARY GUIDELINES

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND AFFIRM DETAILED GUIDELINES

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

PRINT BUSINESS SAFETY PLAN TEMPLATE

<https://www.governor.ny.gov/sites/governor.ny.gov/files>
)

NEXT SECTION

Continue ↓

Frequently Asked Questions

Frequently Asked Questions

Visit Empire State Development's website for frequently asked questions on how the New York Forward re-opening plan impacts your business.

[FREQUENTLY ASKED QUESTIONS](https://esd.ny.gov/nyeforward-faq)
([HTTPS://ESD.NY.GOV/NYEFORWARD-FAQ](https://esd.ny.gov/nyeforward-faq))

NEXT SECTION

Continue ↓

Translations

Translations

Business Safety Plan Template

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনূবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Real Estate

Summary Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Essential and Phase II In-Store Retail

Summary Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Vehicle Sales, Leases, and Rentals

Summary Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Retail Rental, Repair, and Cleaning

Summary Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Hair Salons and Barbershops

Summary Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

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(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Detailed Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Outdoor and Take-Out/Delivery Food Services

Summary Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/>)

Detailed Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

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(FOIL) Requests**

Novel Coronavirus

Privacy Policy



New York Forward (/)

< [NY Forward \(/ny-forward\)](#)

Phase Three Industries

SECTIONS

Overview
(#overview)

Food Services
(#food-services)

Personal Care
(#personal-care)

Frequently Asked Questions
(#frequently-asked-questions)

Overview

The guidelines below apply to non-essential businesses in regions that are permitted to reopen, essential businesses throughout the state that were previously permitted to remain open, and commercial and recreational activities that have been permitted to operate statewide with restrictions. If guidance has not yet been published for your specific industry, but you are permitted to reopen, please refer to the [NY Forward Safety Plan template](#)

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Phase Three: All regions of the state have entered Phase 3 of reopening

- Restaurants / Food Services
- Personal Care

For help determining whether or not your business is eligible to reopen, use the reopen lookup tool. You can also scroll down to find the guidance for each phase.

NY FORWARD BUSINESS REOPEN LOOKUP TOOL

Translations
(#translations)

(<https://www.buinessexpress.ny.gov/app/nyforward>)

STATEWIDE GUIDELINES ([/statewide-guidelines](#))

NEXT SECTION

Continue ↓

Food Services

Food Services

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

(<HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN>)

PRIVACY

(<HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN>)

NEXT SECTION

Continue ↓

Personal Care

Personal Care



[HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERNOR](https://www.governor.ny.gov/sites/governor)

[READ A](#)

[HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERNOR](https://www.governor.ny.gov/sites/governor)

[PRI](#)

[HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERNOR](https://www.governor.ny.gov/sites/governor)

NEXT SECTION

Continue ↓

Frequently Asked Questions

Frequently Asked Questions

Visit Empire State Development's website for frequently asked questions on how the New York Forward re-opening plan impacts your business.

[FREQUENTLY ASKED QUESTIONS](#)

[HTTPS://ESD.NY.GOV/NYFORWARD-FAQ](https://esd.ny.gov/nyforward-faq)

NEXT SECTION

Continue ↓

Translations

Translations

Food Services

Summary Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

([governor.ny.gov/sites/governor.ny.gov/files/atoms/files/](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/)

| русский язык

([governor.ny.gov/sites/governor.ny.gov/files/atoms/files/](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/)

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Personal Care

Summary Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [русский язык](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [한국어 번역](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [中文翻譯](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [Kreyòl Ayisyen](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [русский язык](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [한국어 번역](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [中文翻譯](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

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\(FOIL\) Requests](#)

[Novel Coronavirus](#)

[Privacy Policy](#)



New York Forward (/)

< [NY Forward \(/ny-forward\)](#)

Phase Four Industries

SECTIONS

Overview
(#overview)

Higher Education
(#higher-education)

Pre-K to Grade 12 Schools
(#pre-k-to-grade-12-schools)

Low-Risk Outdoor Arts & Entertainment

Overview

The guidelines below apply to non-essential businesses in regions that are permitted to reopen, essential businesses throughout the state that were previously permitted to remain open, and commercial and recreational activities that have been permitted to operate statewide with restrictions. If guidance has not yet been published for your specific industry, but you are permitted to reopen, please refer to the [NY Forward Safety Plan template](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Phase Four: All regions of the state have entered Phase 4 of reopening.

- Higher Education
- Pre-K to Grade 12 Schools
- Low-Risk Outdoor Arts & Entertainment
- Low-Risk Indoor Arts & Entertainment
- Media Production
- Professional Sports Competitions With No Fans
- Malls

(#low-risk-outdoor-arts---entertainment)

- Gyms and Fitness Centers

For help determining whether or not your business is eligible to reopen, use the reopen lookup tool. You can also scroll down to find the guidance for each phase.

NY FORWARD BUSINESS REOPEN LOOKUP TOOL

Low-Risk

Indoor Arts

&

Entertainment

(#low-risk-

indoor-arts--

-

entertainment)

(<https://www.businessexpress.ny.gov/app/nyforward>)

STATEWIDE GUIDELINES [\(/statewide-](#)

[guidelines\)](#)

- Certain businesses and places of arts and entertainment, such as multi-disciplinary event venues and theater spaces, may reopen to the public only for the limited purpose of conducting activities and operations that have been permitted as a part of the State’s phased reopening (e.g., low-risk indoor arts and entertainment, media production). Please consult the specific [New York Forward](#) (<https://forward.ny.gov/>) guidance as it applies to the currently permitted activities and operations.

Media

Production

(#media-

production)

Professional

Sports

Competitions

With No

Fans

(#professional-

sports-

competitions-

with-no-

fans)

NEXT SECTION

Continue ↓

Higher Education

Malls

(#malls)

Higher Education

**Gyms and
Fitness**

([HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERNOR.NY.GOV/FILES](https://www.governor.ny.gov/sites/governor.ny.gov/files))

Centers

READ

**(#gyms-and-
fitness-
centers)**

([HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERNOR.NY.GOV/FILES](https://www.governor.ny.gov/sites/governor.ny.gov/files))

SUPPLEMENTAL GUIDANCE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

**Gaming
Facilities**
**(#gaming-
facilities)**

([HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERNOR.NY.GOV/FILES](https://www.governor.ny.gov/sites/governor.ny.gov/files))

**Frequently
Asked
Questions**
**(#frequently-
asked-
questions)**

NEXT SECTION

Continue ↓

Pre-K to Grade 12 Schools

Pre-K to Grade 12 Schools

Translations
(#translations)

VIEW SUMMARY GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

READ AND AFFIRM DETAILS

([HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERNOR.NY.GOV/FILES](https://www.governor.ny.gov/sites/governor.ny.gov/files))
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REOPENING PLAN CHECKLIST

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Low-Risk Indoor Arts & Entertainment

Low-Risk Indoor Arts & Entertainment

VIEW SUMMARY GUIDELINES

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AN

[HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN](https://www.governor.ny.gov/sites/governor.ny.gov/files)

PRINT BUSINESS SAFETY PLAN
TEMPLATE

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

NEXT SECTION

Continue ↓

Media Production

Media Production

VIEW SUMMARY GUIDELINES

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND AFFIRM DETAILED
GUIDELINES

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

PRINT BUSINESS SAFETY PLAN
TEMPLATE

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>
)

NEXT SECTION

Continue ↓

Professional Sports
Competitions With No Fans

Professional Sports Competitions With No Fans

([HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN](https://www.governor.ny.gov/sites/governor.ny.gov/files)

([HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN](https://www.governor.ny.gov/sites/governor.ny.gov/files)

PRIN

([HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN](https://www.governor.ny.gov/sites/governor.ny.gov/files)

NEXT SECTION

Continue ↓

Malls

Malls

VIEW SUMMARY GUIDELINES

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND A

[HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN](https://www.governor.ny.gov/sites/governor.ny.gov/files)

PRIN

[HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN](https://www.governor.ny.gov/sites/governor.ny.gov/files)

NEXT SECTION

Continue ↓

Gyms and Fitness Centers

Gyms and Fitness Centers

[HTTPS://WWW.GOVERNOR.NY.GOV/SITES/GOVERN](https://www.governor.ny.gov/sites/governor.ny.gov/files)

PR

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

PR

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

NEXT SECTION

Continue ↓

Gaming Facilities

Gaming Facilities

VIEW SUMMARY GUIDELINES

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

READ AND AFFIRM DETAILED
GUIDELINES

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

PR

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

NEXT SECTION

Continue ↓

Frequently Asked Questions

Frequently Asked Questions

Visit Empire State Development's website for frequently asked questions on how the New York Forward re-opening plan impacts your business.

[FREQUENTLY ASKED QUESTIONS
\(HTTPS://ESD.NY.GOV/NYEFORWARD-FAQ\)](https://esd.ny.gov/nyeforward-faq)

NEXT SECTION

Continue ↓

Translations

Translations

Higher Education

Summary Guidelines

Español

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনূবাদ

<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Checklist

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Low Risk Outdoor Arts & Entertainment

Summary Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Low Risk Indoor Arts & Entertainment

Summary Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| বাংলা অনুবাদ

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

Detailed Guidelines

Español

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| Kreyòl Ayisyen

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| русский язык

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 한국어 번역

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| 中文翻譯

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Media Production

Detailed Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Gyms and Fitness Centers

Summary Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Detailed Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Malls

Summary Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Detailed Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [한국어 번역](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [中文翻譯](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [বাংলা অনুবাদ](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Gaming Facilities

Summary Guidelines

[Español](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [Kreyòl Ayisyen](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

| [русский язык](#)

(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

- | [한국어 번역](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [中文翻譯](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [বাংলা অনুবাদ](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

Detailed Guidelines

- [Español](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [Kreyòl Ayisyen](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [русский язык](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [한국어 번역](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [中文翻譯](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)
- | [বাংলা অনুবাদ](#)
(<https://www.governor.ny.gov/sites/governor.ny.gov/files>)

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- [Novel Coronavirus](#)
- [Privacy Policy](#)