

IN THE  
**Supreme Court of the United States**

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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.*

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

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**APPENDIX TO EMERGENCY APPLICATION  
FOR WRIT OF INJUNCTION  
VOLUME II (Pages App. 253 to App. 520)**

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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 &amp; 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 &amp; 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

# **EXHIBIT L**



## INTERIM GUIDANCE FOR OFFICE-BASED WORK DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

### When you have read this document, you can affirm at the bottom.

As of July 17, 2020

### Purpose

This Interim Guidance for Office-Based Work during the COVID-19 Public Health Emergency (“Interim COVID-19 Guidance for Office-Based Work”) was created to provide businesses and entities that operate in office spaces and their employees and contractors with precautions to help protect against the spread of COVID-19 as their businesses reopen or continue to operate.

This guidance addresses business activities where the core function takes place within an office setting. This guidance may apply – but is not limited – to businesses and entities in the following sectors: Professional services, nonprofit, technology, administrative support, and higher education administration (excluding full campus reopening). Please note that these guidelines may also apply to business operating parts of their business functions under different guidelines (e.g. front office for a construction company). This guidance does not address medical offices, such as doctors’ offices or dentists’ offices. This guidance also does not address building owners/managers and their employees or contractors. For more information on building management, see, “Interim COVID-19 Guidance for Commercial Building Management.”

These guidelines are minimum requirements only and any employer is free to provide additional precautions or increased restrictions. These guidelines are based on the best-known public health practices at the time of publication, and the documentation upon which these guidelines are based can and does change frequently. The Responsible Parties – as defined below – are accountable for adhering to all local, state and federal requirements relative to office-based work activities. The Responsible Parties are also accountable for staying current with any updates to these requirements, as well as incorporating same into any office-based work activities and/or Site Safety Plan.

### Background

On March 7, 2020, Governor Andrew M. Cuomo issued [Executive Order 202](#), declaring a state of emergency in response to COVID-19. Community transmission of COVID-19 has occurred throughout New York. To minimize further spread, social distancing of at least six feet must be maintained between individuals, where possible.

On March 20, 2020, Governor Cuomo issued [Executive Order 202.6](#), directing all non-essential businesses to close in-office personnel functions. Essential businesses, as defined by Empire State Development Corporation (ESD) [guidance](#), were not subject to the in-person restriction, but were, however, directed to comply with the guidance and directives for maintaining a clean and safe work environment issued by the New York State Department of Health (DOH), and were strongly urged to maintain social distancing measures to the extent possible.

On April 12, 2020, Governor Cuomo issued Executive Order 202.16, directing essential businesses to provide employees, who are present in the workplace, with a face covering, at no-cost, that must be used when in direct contact with customers or members of the public during the course of their work. On April 15, 2020, Governor Cuomo issued Executive Order 202.17, directing that any individual who is over age two and able to medically tolerate a face-covering must cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance. On April 16, 2020, Governor Cuomo issued Executive Order 202.18, directing that everyone using public or private transportation carriers or other for-hire vehicles, who is over age two and able to medically tolerate a face covering, must wear a mask or face covering over the nose and mouth during any such trip. It also directed any operators or drivers of public or private transport to wear a face covering or mask which covers the nose and mouth while there are any passengers in such a vehicle. On May 29, 2020, Governor Cuomo issued Executive Order 202.34, authorizing business operators/owners with the discretion to deny admittance to individuals who fail to comply with the face covering or mask requirements.

On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses in New York in phases based upon a data-driven, regional analysis. On May 4, 2020, the Governor provided that the regional analysis would consider several public health factors, including new COVID-19 infections, as well as health care system, diagnostic testing, and contact tracing capacity. On May 11, 2020, Governor Cuomo announced that the first phase of reopening would begin on May 15, 2020 in several regions of New York, based upon available regional metrics and indicators. On May 29, 2020, Governor Cuomo announced that the second phase of reopening would begin in several regions of the state, and announced the use of a new early warning dashboard that aggregates the state's expansive data collection efforts for New Yorkers, government officials, and experts to monitor and review how the virus is being contained to ensure a safe reopening.

In addition to the following standards, both essential and non-essential businesses must continue to comply with the guidance and directives for maintaining clean and safe work environments issued by DOH.

Please note that where guidance in this document differs from other guidance documents issued by New York State, the more recent guidance shall apply.

### **Standards for Responsible Office-Based Work Activities in New York State**

No office-based work activities can operate without meeting the following minimum State standards, as well as applicable federal requirements, including but not limited to such minimum standards of the Americans with Disabilities Act (ADA), Centers for Disease Control and Prevention (CDC), Environmental Protection Agency (EPA), and United States Department of Labor's Occupational Safety and Health Administration (OSHA). The State standards apply to all office-based work activities (essential and non-essential) in operation during the COVID-19 public health emergency until rescinded or amended by the State.

The State standards contained within this guidance apply to all office-based work activity – both essential and non-essential – in operation during the COVID-19 public health emergency until rescinded or amended by the State. The owner/operator of the business with office-based functions, or another party as may be designated by the owner/operator (in either case, "the Responsible Parties"), shall be responsible for meeting these standards. The designated party can be an individual or group of individuals responsible for the operations of individual office locations/spaces. The building owner, or their designee, shall be primarily responsible for meeting standards with respect to any unleased or common areas, and the tenant, if not the owner, shall be primarily responsible for meeting these standards with respect to their leased space(s), unless the tenant and building owner reach an alternate

agreement in regard to such responsibilities (e.g. joint screening protocol). Note that the following guidance specifically addresses tenants occupying office space and their employees, contractors, and visitors. Responsible Parties for the entities occupying office spaces should coordinate with building owners/managers, where applicable, on the implementation of practices in accordance with this guidance.

Note that, except where noted otherwise, references made to “employees” are to the office-based businesses/tenants and their employees and/or contractors. Responsible Parties should coordinate with building managers, where applicable, on the implementation of practices in accordance with this guidance. For more information on building managers and their employees, see “Interim COVID-19 Guidance for Commercial Building Management.”

The following guidance is organized around three distinct categories: people, places, and processes.

## I. PEOPLE

### A. Physical Distancing

- Where office-based work is located in a region that is in Phases II, III, or IV, the total number of occupants is limited to no more than 50% of the maximum occupancy at any given time for a particular area as set by the certificate of occupancy. Where applicable, Responsible Parties should work with building owners/managers to maintain capacity limits; and
- Responsible Parties must ensure that a distance of at least six feet is maintained among individuals at all times, unless safety of the core activity requires a shorter distance. Any time individuals must come within six feet of another person, acceptable face coverings must be worn. Individuals must be prepared to don a face covering if another person unexpectedly comes within six feet.
  - Acceptable face coverings for COVID-19 include but are not limited to cloth-based face coverings and disposable masks that cover both the mouth and nose.
  - However, cloth, disposable, or other homemade face coverings are not acceptable face coverings for workplace activities that typically require a higher degree of protection for personal protective equipment (PPE) due to the nature of the work. For those activities, N95 respirators or other PPE used under existing industry standards should continue to be used, as is defined in accordance with OSHA guidelines.
  - Responsible Parties should consider closing any common indoor or outdoor seating areas (e.g. reception areas) within their office space. To the extent that such spaces remain open, Responsible Parties must modify seating areas arrangements (e.g. chairs, tables) to ensure that individuals are at least six feet apart in all directions (e.g. side-to-side and when facing one another).
- Responsible Parties may modify or reconfigure the use and/or restrict the number of workstations, employee seating areas, and desks, so that employees are at least six feet apart in all directions (e.g. side-to-side and when facing one another) and are not sharing workstations without cleaning and disinfection between use. When distancing is not feasible between workstations, Responsible Parties must provide and require the use of face coverings or physical barriers (e.g. plastic shielding walls, in lieu of face coverings in areas where they would not affect air flow, heating, cooling or ventilation).
  - Physical barriers should be put in place in accordance with OSHA guidelines.
  - Physical barrier options may include: strip curtains, cubicle walls, plexiglass or similar materials, or other impermeable dividers or partitions.

- Responsible Parties should consider implementing strict clean-desk policies, so that non-essential items are stored in enclosed cabinets or drawers, rather than on desks.
- Responsible Parties should limit the use of shared workstations (e.g. “hot-desks”), to the extent practicable. To the extent that such workstations remain in use, they must be cleaned and disinfected between users.
- Responsible Parties should prohibit the use of small spaces (e.g. elevators, supply rooms, personal offices, vehicles) by more than one individual at a time, unless all individuals in such space at the same time are wearing acceptable face coverings. However, even when face coverings in use, occupancy must never exceed 50% of the maximum capacity of the space or vehicle, unless it is designed for use by a single occupant. Responsible Parties should increase ventilation with outdoor air to the greatest extent possible (e.g., opening windows and doors in individual office rooms), while maintaining safety protocols. Responsible Parties should take additional measures to prevent congregation in elevator waiting areas and limit density in elevators, by enabling the use of stairs.
  - Responsible Parties may leverage technology, such as room sensors and real-time dashboards, to quantify and display utilization of spaces throughout the office.
  - Responsible Parties must restrict access to areas that have reached maximum capacity under distancing guidelines.
- Responsible Parties should put in place measures to reduce bi-directional foot traffic using tape or signs with arrows in narrow aisles, hallways, or spaces, and post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g. copy rooms, kitchens, reception desks, health screening stations).
  - Responsible Parties should mark six feet distance circles around workstations and other common stationary work areas.
- Responsible Parties must post signs throughout the office, consistent with DOH COVID-19 signage. Responsible Parties can develop their own customized signage specific to their workplace or setting, provided that such signage is consistent with the Department’s signage. Signage should be used to remind individuals to:
  - Cover their nose and mouth with a face covering when six feet of social distance cannot be maintained.
  - Properly store and, when necessary, discard PPE.
  - Adhere to physical distancing instructions.
  - Report symptoms of or exposure to COVID-19, and how they should do so.
  - Follow hand hygiene and cleaning and disinfection guidelines.
  - Follow appropriate respiratory hygiene and cough etiquette.

## **B. Gatherings in Enclosed Spaces**

- Responsible Parties should encourage the use of video or teleconferencing for their employee meetings whenever possible to reduce the density of in-person gatherings, per CDC guidance “Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)”. Responsible Parties should hold in-person meetings in open, well-ventilated spaces and ensure that individuals maintain six feet of social distance between one another (e.g. if there are chairs, leave space between chairs, have employees sit in alternating chairs) or wear appropriate face



coverings. Responsible Parties may consider implementing the following practices to remind participants of appropriate social distancing measures when meetings are held:

- Mark tables in meeting rooms with appropriate distance markers.
- Responsible Parties should encourage social distancing by limiting occupancy or closing non-essential amenities and communal areas that do not allow for social distancing protocols. If open, Responsible Parties must make hand sanitizer or disinfecting wipes available next to equipment near such amenities (e.g. vending machines, communal coffee stations).
- Responsible Parties must put in place practices for adequate social distancing in small areas, such as restrooms and breakrooms, and should develop signage and systems (e.g. flagging when occupied) to restrict occupancy when social distancing cannot be maintained in such areas.
- Responsible Parties should stagger schedules for employees to observe social distancing for any gathering (e.g. coffee breaks, meals, and shift starts/stops).
- If required, employees that don't need to be in the office may be allowed to collect documents from their place of work on a case-by-case basis, but such collection should occur minimally, not with frequency.
- Non-essential common areas (e.g. gyms, pools, game rooms) must remain closed.

### **C. Workplace Activity**

- Responsible Parties must take measures to reduce interpersonal contact and congregation, through methods such as:
  - adjusting workplace hours;
  - reducing in-office workforce to accommodate social distancing guidelines;
  - shifting design (e.g. A/B teams, staggered arrival/departure times to reduce congestion in lobbies and elevators); and/or
  - avoiding multiple teams working in one area by staggering scheduled tasks and using signs to indicate occupied areas.
- Responsible Parties should create policies which encourage employees to work from home when feasible. Responsible Parties may choose to develop return-to-office tiers or waves for employees based on factors such as function, safe transportation, and ability to work remotely, as noted in Section II "People," Subsection C "Phased Reopening."
- Responsible Parties may choose to implement best practices for employees to successfully work from home, such as:
  - Conducting regular surveys of employees to determine what practices are working and what can be improved;
  - Providing tips and tricks for employees to enhance remote work sustainability;
  - Allowing for employees to set morning and evening boundaries and taking regular breaks throughout the day;
  - Informing employees of the resources they have readily available.

### **D. Movement and Commerce**

- Responsible Parties should consider limiting all non-essential travel.

- Responsible Parties must establish designated areas for pickups and deliveries, limiting contact to the extent possible.
- Responsible Parties should limit on-site interactions (e.g. designate an egress for employees leaving their shifts and a separate ingress for employees starting their shifts) and movements (e.g. employees should remain near their workstations as often as possible).

## II. PLACES

### A. Protective Equipment

- In addition to the necessary PPE as required for certain workplace activities, Responsible Parties must procure, fashion, or otherwise obtain acceptable face coverings and provide such coverings to their employees while at work at no cost to the employee. Responsible Parties should have an adequate supply of face coverings, masks and other required PPE on hand should an employee need a replacement, or should a visitor be in need. Acceptable face coverings include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, and face shields.
- Face coverings must be cleaned or replaced after use and may not be shared. Please consult CDC [guidance](#) for additional information on cloth face coverings and other types of PPE, as well as instructions on use and cleaning.
  - Note that cloth face coverings or disposable masks shall not be considered acceptable face coverings for workplace activities that require a higher degree of protection for face covering requirements. For example, if N95 respirators are traditionally required for specific activities, a cloth or homemade mask would not suffice. Responsible Parties must adhere to OSHA standards for such safety equipment.
- Responsible Parties must allow employees to use their own acceptable face coverings but cannot require employees to supply their own face coverings. Further, this guidance shall not prevent employees from wearing their personally owned additional protective coverings (e.g. surgical masks, N95 respirators, or face shields), or if the Responsible Parties otherwise requires employees to wear more protective PPE due to the nature of their work. Employers should comply with all applicable OSHA standards.
- Responsible Parties must train employees on how to adequately put on, take off, clean (as applicable), and discard PPE, including but not limited to, appropriate face coverings. Such training should be extended to contractors if the Responsible Parties will be supplying the contractors with PPE.
- Responsible Parties must advise employees and visitors to wear face coverings in common areas including elevators, lobbies, and when traveling around the office.
- Responsible Parties must put in place measures to limit the sharing of objects, such as laptops, notebooks, touchscreens, and writing utensils, as well as the touching of shared surfaces, such as conference tables; or, require employees to perform hand hygiene before and after contact.

### B. Hygiene, Cleaning, and Disinfection

- Responsible Parties must ensure adherence to hygiene and cleaning and disinfection requirements as advised by the CDC and DOH, including "[Guidance for Cleaning and Disinfection of Public and Private](#)

Facilities for COVID-19,” and the “STOP THE SPREAD” poster, as applicable. Responsible Parties must maintain logs that include the date, time, and scope of cleaning and disinfection.

- Responsible Parties must provide and maintain hand hygiene stations on in the office, as follows:
  - For handwashing: soap, running warm water, and disposable paper towels.
  - For hand sanitizing: an alcohol-based hand sanitizer containing at least 60% alcohol for areas where handwashing facilities may not be available or practical.
  - Make hand sanitizer available throughout common areas in the office. It should be placed in convenient locations, such as at entrances, exits, and reception desks. Touch-free hand sanitizer dispensers should be installed where possible.
- Responsible Parties should place signage near hand sanitizer stations indicating that visibly soiled hands should be washed with soap and water; hand sanitizer is not effective on visibly soiled hands.
- Responsible Parties should place receptacles around the building for disposal of soiled items, including PPE.
- Responsible Parties must provide appropriate cleaning and disinfection supplies for shared and frequently touched surfaces and encourage their employees (or cleaning staffs) to use these supplies, following manufacturer’s instructions, before and after use of these surfaces, followed by hand hygiene.
  - To reduce high-touch surfaces, Responsible Parties should install touch-free amenities such as water fountains, trash-cans, and hand-dryers.
- Responsible Parties must conduct regular cleaning and disinfection of the building and more frequent cleaning and disinfection for high risk areas used by many individuals and for frequently touched surfaces. Cleaning and disinfection must be rigorous and ongoing and should occur at least after each shift, daily, or more frequently as needed. Please refer to DOH’s “Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19” for detailed instructions on how to clean and disinfect facilities.
  - Responsible Parties must ensure regular cleaning and disinfection of restrooms. Restrooms should be cleaned and disinfected more often depending on frequency of use.
    - Responsible Parties must ensure distancing rules are adhered to by using signage, occupied markers, or other methods to reduce restroom capacity where feasible.
  - Responsible Parties must ensure that materials and tools are regularly cleaned and disinfected using registered disinfectants, including at least as often as employees or visitors change workstations or move to a new set of materials. Refer to the Department of Environmental Conservation (DEC) list of products registered in New York State and identified by the EPA as effective against COVID-19.
  - If cleaning or disinfection products or the act of cleaning and disinfection causes safety hazards or degrades the material or machinery, Responsible Parties must put in place hand hygiene stations between use and/or supply disposable gloves and/or limitations on the number of employees using such machinery.
  - Responsible Parties must provide for the cleaning and disinfection of exposed areas in the event an individual is confirmed to have COVID-19, with such cleaning and disinfection to include, at a minimum, all heavy transit areas and high-touch surfaces (e.g. touchscreens, printers, keypads, telephones, hand rails, door handles, vending machines, communal coffee stations).

- CDC guidelines on "[Cleaning and Disinfecting Your Facility](#)" if someone is suspected or confirmed to have COVID-19 are as follows:
  - Close off areas used by the person suspected or confirmed to have COVID-19.
    - Responsible Parties do not necessarily need to close operations, if they can close off the affected areas.
    - Shared building spaces used by the person suspected or confirmed to have COVID-19 (e.g. elevators, lobbies, building entrances) must also be shut down and cleaned and disinfected in coordination with the building manager (For more information, see, "Interim COVID-19 Guidance for Commercial Building Management").
  - Open outside doors and windows to increase air circulation in the area.
  - Wait 24 hours before you clean or and disinfect. If 24 hours is not feasible, wait as long as possible.
  - Clean and disinfect all areas used by the person suspected or confirmed to have COVID-19, such as offices, bathrooms, common areas, and shared equipment.
  - Once the area has been appropriately cleaned and disinfected, it can be reopened for use.
    - Employees without close or proximate contact with the person suspected or confirmed to have COVID-19 can return to the work area immediately after cleaning and disinfection.
    - Refer to DOH's "[Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure](#)" for information on "close or proximate" contacts.
  - If more than seven days have passed since the person who is suspected or confirmed to have COVID-19 visited or used the facility, additional cleaning and disinfection is not necessary, but routine cleaning and disinfection should continue.
- Responsible Parties must prohibit shared food and beverages among employees (e.g. self-serve meals and beverages), encourage employees to bring lunch from home, and reserve adequate space for employees to observe social distancing while eating meals.

### C. Phased Reopening

- Responsible Parties are encouraged to phase-in reopening activities so as to allow for operational issues to be resolved before production or work activities return to normal levels. Responsible Parties should consider limiting the number of employees, hours, and number of customers available to be served when first reopening so as to provide operations with the ability to adjust to the changes.

### D. Communications Plan

- Responsible Parties must affirm that they have reviewed and understand the state-issued industry guidelines, and that they will implement them.
- Responsible Parties should develop a communications plan for employees and visitors, and customers that includes applicable instructions, training, signage, and a consistent means to provide employees with information. Responsible Parties should work with building management to help facilitate any building-wide communications. Responsible Parties may consider developing webpages, text and email groups, and social media.

- Responsible Parties should encourage customers to adhere to CDC and DOH guidance regarding the use of PPE, specifically face coverings when a social distance of six feet cannot be maintained, through verbal communication and signage.
- Responsible Parties should post signage inside and outside of the retail location to remind personnel and customers to adhere to proper hygiene, social distancing rules, appropriate use of PPE, and cleaning and disinfection protocols.
- Responsible Parties should provide building managers/owners a list of essential visitors expected to enter the building.

### III. PROCESSES

#### A. Screening and Testing

- Responsible Parties must implement mandatory daily health screening practices of their employees and, where practicable, visitors, but such screening shall not be mandated for delivery personnel.
  - Screening practices may be performed remotely (e.g. by telephone or electronic survey), before the employee or visitor reports to the office, to the extent possible; or may be performed on site.
  - Screening should be coordinated to prevent employees or visitors from intermingling in close or proximate contact with each other prior to completion of the screening.
  - At a minimum, screening must be required for all employees or visitors and completed using a questionnaire that determines whether the employee or visitor has:
    - (a) knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has or had symptoms of COVID-19;
    - (b) tested positive for COVID-19 in the past 14 days; and/or
    - (c) has experienced any symptoms of COVID-19 in the past 14 days.
- Responsible Parties should coordinate with building managers to facilitate screening. Responsible Parties are responsible for screening their own employees and visitors, unless Responsible Parties and building management have agreed to an alternate arrangement to ensure screening is in effect. Screening best practices include:
  - If space and building configuration allows, screen individuals at or near the building entrance to minimize the impact in case of an individual suspected or confirmed to have COVID-19;
  - Allow for adequate social distancing while individuals queue for screening and/or building entry;
  - Coordinate with building managers to identify individuals who have completed a remote screening;
  - Use contactless thermal cameras in building entrances, in coordination with building management, to identify potentially symptomatic visitors and direct them to a secondary screening area to complete a follow-on screening.
- Refer to CDC guidance on "[Symptoms of Coronavirus](#)" for the most up to date information on symptoms associated with COVID-19.

- Responsible Parties must require employees to immediately disclose if and when their responses to any of the aforementioned questions changes, such as if they begin to experience symptoms, including during or outside of work hours.
- In addition to the screening questionnaire, temperature checks may also be conducted per U.S. Equal Employment Opportunity Commission or DOH guidelines. Responsible Parties are prohibited from keeping records of employee health data (e.g. the specific temperature data of an individual), but are permitted to maintain records that confirm individuals were screened and the result of such screening (e.g. pass/fail, cleared/not cleared).
- Responsible Parties must ensure that any personnel performing screening activities, including temperature checks, are appropriately protected from exposure to potentially infectious employees or visitors entering the office. Personnel performing screening activities should be trained by employer-identified individuals who are familiar with CDC, DOH, and OSHA protocols.
- Screeners should be provided and use PPE, including at a minimum, a face mask, and may include gloves, a gown, and/or a face shield.
- An individual who screens positive for COVID-19 symptoms must not be allowed to enter the office and must be sent home with instructions to contact their healthcare provider for assessment and testing.
  - Responsible Parties should remotely provide such individuals with information on healthcare and testing resources.
  - Responsible Parties must immediately notify the state and local health department about the case if test results are positive for COVID-19.
- Responsible Parties should refer to DOH's "Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure" regarding protocols and policies for employees seeking to return to work after a suspected or confirmed case of COVID-19 or after the employee had close or proximate contact with a person with COVID-19.
- Responsible Parties must designate a central point of contact, which may vary by activity, location, shift or day, responsible for receiving and attesting to having reviewed all employees' questionnaires, with such contact also identified as the party for employees and visitors to inform if they later are experiencing COVID-19-related symptoms, as noted on the questionnaire.
  - If Responsible Parties and building management have agreed to an alternate screening arrangement whereby building management administers screening on behalf of tenants, then building management shall be responsible for maintaining a record of the screening process. Maintaining records of employee health data (e.g. the specific temperature data of an individual) is prohibited; the only records to be maintained on a daily basis regarding the screening process are those individuals who were screened and confirmation that no employee or visitor who failed the screening process was granted access.
- Responsible Parties must designate a site safety monitor whose responsibilities include continuous compliance with all aspects of the site safety plan.
- To the extent possible, Responsible Parties should maintain a log of every person, including employees and visitors, who may have close or proximate contact with other individuals at the worksite or area; excluding deliveries that are performed with appropriate PPE or through contactless means. The log should contain contact information, such that all contacts may be identified, traced

and notified in the event an employee is diagnosed with COVID-19. Responsible Parties must cooperate with state and local health department contact tracing efforts.

## B. Tracing and Tracking

- Responsible Parties must notify the state and local health department immediately upon being informed of any positive COVID-19 test result by an employee in their office.
- In the case of an employee or visitor testing positive, the Responsible Parties must cooperate with the state and local health department as required to trace all contacts in the workplace, and the state and local health department where the building is located must be notified of all individuals who entered the site dating back 48 hours before the employee or visitor first experienced COVID-19 symptoms or tested positive, whichever is earlier. Confidentiality must be maintained as required by federal and state law and regulations.
  - As a best practice, Responsible Parties may offer optional tracing and tracking technology (e.g. Bluetooth enabled mobile applications) to streamline contact tracing and communication process among their workforce and others.
- Responsible Parties must ensure that in the case of an employee showing symptoms while in the workplace, the building managers are immediately notified with information on where the individual has been throughout the building and notify building management if the symptomatic employee tests positive.
- State and local health departments will implement monitoring and movement restrictions of infected or exposed persons including home isolation or quarantine.
- Individuals who are alerted that they have come into close or proximate contact with a person with COVID-19, and have been alerted via tracing, tracking or other mechanism, are required to self-report to their employer at the time of alert and shall follow the protocol referenced above.

## IV. EMPLOYER PLANS

Responsible Parties must conspicuously post completed safety plans on site. The State has made available a business reopening safety plan template to guide business owners and operators in developing plans to protect against the spread of COVID-19.

### **Additional safety information, guidelines, and resources are available at:**

New York State Department of Health Novel Coronavirus (COVID-19) Website  
<https://coronavirus.health.ny.gov/>

Centers for Disease Control and Prevention Coronavirus (COVID-19) Website  
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Occupational Safety and Health Administration COVID-19 Website  
<https://www.osha.gov/SLTC/covid-19/>

**At the link below, affirm that you have read and understand your obligation to operate in accordance with this guidance:**

<https://forms.ny.gov/s3/ny-forward-affirmation>



**EXHIBIT M**



## INTERIM GUIDANCE FOR ESSENTIAL & PHASE II RETAIL BUSINESS ACTIVITIES DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

### When you have read this document, you can affirm at the bottom.

As of July 1, 2020

#### **Purpose**

This Interim Guidance for Essential and Phase II Retail Business Activities during the COVID-19 Public Health Emergency (“Interim COVID-19 Guidance for Essential and Phase II Retail Business Activities”) was created to provide owners/operators of essential and Phase II retail businesses selling goods and their employees and contractors with precautions to help protect against the spread of COVID-19 as they continue to operate or reopen.

This guidance applies to all in-store essential retail business activities throughout the state. This guidance also applies to all in-store non-essential retail business activities in regions of the state that are in Phase II or later of reopening. This guidance does not apply to restaurants or other food services, retailers of rental goods, or personal care services, such as hair salons, nail salons, spas, tattoo parlors, laser hair removal, or electrolysis.

Essential businesses, as defined by Empire State Development (ESD) pursuant to [Executive Order 202.6](#), are entities that regardless of the nature of the service that they provide, the function that they perform, or their corporate or entity structure, are not subject to in-person workforce reductions during the COVID-19 public health emergency. Essential retail businesses include but are not limited to grocery stores, including all food and beverage stores; pharmacies; convenience stores; farmer’s markets; gas stations; and hardware, appliance, and building material stores. Please consult the ESD [essential business guidance](#) for further information.

In regions of the state that are in Phase I of reopening, non-essential retail businesses are only allowed to operate via curbside and in-store pickup. For information on how to safely conduct these services, refer to the New York State Department of Health (DOH) [“Interim COVID-19 Guidance for Curbside and In-Store Pickup Retail Business Activities.”](#) This previously issued guidance pertains to curbside and in-store pickup as defined as a customer placing an order for specific item(s) by phone or internet, then collecting such order at or near the retail location. Customers are only allowed on the premise to retrieve their order; not to browse or place an in-person order.

In regions of the state that are not yet in Phase I of reopening, non-essential retail businesses are only allowed to operate via delivery of orders paced remotely via phone or online with only one employee physical present at the business location.

These guidelines are minimum requirements only and any employer is free to provide additional precautions or increased restrictions. These guidelines are based on the best-known public health practices at the time of issuance, and the documentation upon which these guidelines are based can and does change frequently. The Responsible Parties – as defined below – are accountable for adhering to all local, state and federal requirements relative to retail business activities. The Responsible Parties are also accountable for staying current with any updates to these requirements, as well as incorporating same into any retail business activities and/or Site Safety Plan.

## Background

On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order 202, declaring a state of emergency in response to COVID-19. Community transmission of COVID-19 has occurred throughout New York. To minimize further spread, social distancing of at least six feet must be maintained between individuals, where possible.

On March 20, 2020, Governor Cuomo issued Executive Order 202.6, directing all non-essential businesses to close in-office personnel functions. Essential businesses, as defined by Empire State Development Corporation (ESD) guidance, were not subject to the in-person restriction, but were, however, directed to comply with the guidance and directives for maintaining a clean and safe work environment issued by DOH, and were strongly urged to maintain social distancing measures to the extent possible.

On April 12, 2020, Governor Cuomo issued Executive Order 202.16, directing essential businesses to provide employees, who are present in the workplace, with a face covering, at no-cost, that must be used when in direct contact with customers or members of the public during the course of their work. On April 15, 2020, Governor Cuomo issued Executive Order 202.17, directing that any individual who is over age two and able to medically tolerate a face-covering must cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance. On April 16, 2020, Governor Cuomo issued Executive Order 202.18, directing that everyone using public or private transportation carriers or other for-hire vehicles, who is over age two and able to medically tolerate a face covering, must wear a mask or cloth face covering over the nose and mouth during any such trip. It also directed any operators or drivers of public or private transport to wear a mask or cloth face covering which covers the nose and mouth while there are any passengers in such a vehicle. On May 29, 2020, Governor Cuomo issued Executive Order 202.34, authorizing business operators/owners with the discretion to deny admittance to individuals who fail to comply with the face covering or mask requirements.

On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses in New York in phases based upon a data-driven, regional analysis. On May 4, 2020, the Governor provided that the regional analysis would consider several public health factors, including new COVID-19 infections, as well as health care system, diagnostic testing, and contact tracing capacity. On May 11, 2020, Governor Cuomo announced that the first phase of reopening would begin on May 15, 2020 in several regions of New York, based upon available regional metrics and indicators. On May 29, 2020, Governor Cuomo announced that the second phase of reopening would begin in several regions of the state, and announced the use of a new early warning dashboard that aggregates the state's expansive data collection efforts for New Yorkers, government officials, and experts to monitor and review how the virus is being contained to ensure a safe reopening.

In addition to the following standards, both essential and non-essential businesses must continue to comply with the guidance and directives for maintaining clean and safe work environments issued by DOH.

Please note that where guidance in this document differs from other guidance documents issued by New York State, the more recent guidance shall apply.

## Standards for Responsible Essential and Phase II Retail Activities in New York State

No essential and Phase II retail activity can occur without meeting the following minimum State standards, as well as applicable federal requirements, including but not limited to such minimum standards of the Americans with Disabilities Act (ADA), Centers for Disease Control and Prevention (CDC),

Environmental Protection Agency (EPA), and United States Department of Labor's Occupational Safety and Health Administration (OSHA).

The State standards contained within this guidance apply to all essential and Phase II retail activities in operation during the COVID-19 public health emergency until rescinded or amended by the State. The proprietor/operator of the retail business, or another party as may be designated by the proprietor/operator (in either case, "the Responsible Parties"), shall be responsible for meeting these standards.

The following guidance is organized around three distinct categories: people, places, and processes.

## I. PEOPLE

### A. Physical Distancing

- Responsible Parties must ensure that for any essential and Phase II retail activity, the workforce and customer presence is limited to no more than 50% of the maximum occupancy for a particular area as set by the certificate of occupancy, inclusive of customers, who must maintain six feet of separation from others and, in all cases, must only be permitted entry into the essential and Phase II retail store if they wear an acceptable face covering; provided, however, that the customer is over the age of two and able to medically tolerate such covering; and
- Responsible Parties must ensure a distance of at least six feet is maintained among employees and customers at all times, unless the safety of the core activity requires a shorter distance (e.g. operating cash registers, moving and lifting merchandise). Employees must wear acceptable face coverings any time they interact with customers (e.g. ringing up a purchase, wrapping an item to hand off) and any time employees are within six feet of another person. Employees must be prepared to don a face covering if another person unexpectedly comes within six feet.
  - Acceptable face coverings for COVID-19 include but are not limited to cloth-based face coverings and disposable masks that cover both the mouth and nose.
  - However, cloth, disposable, or other homemade face coverings are not acceptable face coverings for workplace activities that typically require a higher degree of protection for personal protective equipment (PPE) due to the nature of the work. For those activities, N95 respirators or other PPE used under existing industry standards should continue to be used, as is defined in accordance with OSHA guidelines.
- Responsible Parties may modify the use and/or restrict the number of work spaces and employee seating areas, so that employees are at least six feet apart in all directions (e.g. side-to-side and when facing one another) and are not sharing work stations or spaces without cleaning and disinfection between use. When distancing is not feasible between work stations or spaces, Responsible Parties must provide and require the use of face coverings or physical barriers such as plastic shielding walls, in lieu of face coverings in areas where they would not affect air flow, heating, cooling, or ventilation.
  - If used, physical barriers should be put in place in accordance with OSHA guidelines.
  - Physical barrier options may include: strip curtains, plexiglass or similar materials, or other impermeable dividers or partitions.
- Responsible Parties are encouraged to modify retail layouts so that employees and customers are at least six feet apart in all directions when employees are working and customers are browsing, unless physical barriers are in place (e.g. Plexiglass or partitions at cash registers).

- Responsible Parties must require that employees use masks or cloth face coverings when interacting with customers. Responsible Parties shall not permit customers into the store without a face covering, if medically able to tolerate one, and are over age two.
- If entry is denied, Responsible Parties should seek to provide alternate methods of pickup and/or delivery for customers, particularly to ensure access to essential goods, including but not limited to food, medication, and medical equipment or supplies.
- Responsible Parties must reserve adequate space for employees and customers to work and shop, considering appropriate social distancing; Responsible Parties should consider creating one-way aisles, otherwise rearranging traffic flow, or using alternating cash registers.
- Responsible Parties must prohibit the use of small spaces (e.g. behind cash registers, elevators, stock rooms) by more than one individual at a time, unless all individuals in such spaces at the same time are wearing acceptable face coverings. However, occupancy must never exceed 50% of the maximum capacity of the space, unless it is designed for use by a single occupant. Responsible Parties should increase ventilation with outdoor air to the greatest extent possible (e.g. opening windows, leaving doors open), while maintaining safety protocols.
- Responsible Parties should encourage the use of touchless payment options or pay ahead, when available. Minimize handling cash, credit cards, reward cards, and mobile devices, where possible.
- Responsible Parties should put in place measures to reduce bi-directional foot traffic of customers browsing using tape or signs with arrows in narrow aisles, hallways, or spaces, and post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g., clock in/out stations, health screening stations, break rooms, cash register areas).
  - Where possible, place markers or barriers to encourage one directional traffic.
- Responsible Parties must post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g. clock in/out stations, health screening stations, break rooms, cash register areas, near merchandise, in aisles etc.).
- Responsible Parties should strive to minimize the touch points on retail products, by:
  - suspending the use of bulk-bins and dump bins; and
  - encouraging customers to touch only products they will be buying (i.e., avoid putting items back on shelves).
- Responsible Parties must post signs inside and outside of the retail location, consistent with DOH COVID-19 signage. Responsible Parties can develop their own customized signage specific to their workplace or setting, provided that such signage is consistent with the Department's signage. Signage should be used to remind employees and customers to:
  - Cover their nose and mouth with a face covering when six feet of social distance cannot be maintained.
  - Properly store and, when necessary, discard PPE.
  - Adhere to physical distancing instructions.
  - Report symptoms of or exposure to COVID-19, and how they should do so.
  - Follow hand hygiene and cleaning and disinfection guidelines.
  - Follow appropriate respiratory hygiene and cough etiquette.

## B. Gatherings in Enclosed Spaces

- Responsible Parties must limit in-person employee gatherings (e.g. employee meetings, break rooms, stock rooms) to the greatest extent possible and use other methods such as video or teleconferencing whenever possible, per CDC guidance "[Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#)". When videoconferencing or teleconferencing is not possible, Responsible Parties should hold meetings in open, well-ventilated spaces and ensure that individuals maintain six feet of social distance between one another (e.g. if there are chairs, leave space between chairs, have employees sit in alternating chairs).
- Responsible Parties must put in place practices for adequate social distancing in small areas, such as restrooms and breakrooms, and should develop signage and systems (e.g. flagging when occupied) to restrict occupancy when social distancing cannot be maintained in such areas; and
- Responsible Parties should stagger schedules for employees to observe social distancing (i.e., six feet of space) for any gathering (e.g. while taking breaks).

## C. Workplace Activity

- Responsible Parties must take measures to reduce interpersonal contact and congregation, through methods such as:
  - limiting in-person presence to only those staff who are necessary to be at the workplace;
  - adjusting workplace hours;
  - reducing on-site workforce to accommodate social distancing guidelines;
  - shifting design (e.g. A/B teams, staggered arrival/departure times);
  - batching activities, where possible, so employees can adhere to social distancing and reduce the number of hands touching products at the same time (e.g. one employee does all packing and a separate employee fulfills the delivery); and/or
  - encouraging, but not requiring, customers to bag their own purchases.
- Responsible Parties should adjust retail hours as necessary to enable enhanced cleaning and disinfection procedures.

## D. Movement and Commerce

- Responsible Parties must monitor and control the flow of traffic into the establishment to ensure adherence to maximum capacity requirements.
- Responsible Parties must establish designated areas for deliveries, limiting contact to the extent possible.
- Responsible Parties should provide clearly designated, separate entrances and exits, where possible.
  - Responsible Parties must be prepared to queue customers outside while still maintaining physical distance including through the use of visual cues or markers.
- For merchandise deliveries, Responsible Parties should implement a touchless delivery system whereby drivers stay in the cab of the vehicle while delivery takes place or, where not practicable, Responsible Parties must provide acceptable PPE appropriate to the anticipated activities that

includes, at a minimum, a face covering to personnel involved in the delivery at no cost for the duration of the delivery process.

- Responsible Parties must sanitize hands before and after transferring a load (e.g. from a delivery driver) of merchandise (e.g. sanitize hands before starting to load items; and once all items have been loaded, finish by sanitizing their hands again).
- In addition to utilizing curbside and in-store pick up to the extent possible, Responsible Parties should provide remote shopping alternatives for customers, including click-and-collect, delivery, pick-up, and shop-by-phone to limit customers in the establishment.
- Responsible Parties must ensure that fitting rooms are equipped with appropriate cleaning and hygiene supplies for employee and customer use, including hand sanitizer; and strongly encouraged to clean and disinfect fitting rooms after each customer's use.
- Responsible Parties must close amenities, where applicable, including:
  - self-serve bars and samplers;
  - water fountains; and
  - magazine areas.
- For any activities related to food services, Responsible Parties must operate in accordance with "Interim Guidance for Food Services during the COVID-19 Public Health Emergency."

## II. PLACES

### A. Protective Equipment

- Responsible Parties must ensure employees wear face coverings when they are within six feet of customers or coworkers. Employees also must wear face coverings any time they interact with customers (e.g. ringing up a purchase, wrapping an item to hand off).
- Responsible Parties must ensure that customers are only permitted entry into the retail store if they wear an acceptable face covering; provided, however, that the customer is over the age of two and able to medically tolerate such covering.
- In addition to necessary PPE as required for certain workplace activities, Responsible Parties must procure, fashion, or otherwise obtain acceptable face coverings and provide such coverings to their employees while at work at no cost to the employee. Responsible Parties should have an adequate supply of cloth face coverings, masks and other required PPE on hand should an employee need a replacement. Acceptable face coverings include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, N95 respirators, and face shields.
- Face coverings must be cleaned or replaced after use and may not be shared. Please consult CDC [guidance](#) for additional information on cloth face coverings and other types of PPE as well as instructions on use and cleaning.
  - Note that cloth face coverings or disposable masks shall not be considered acceptable face coverings for workplace activities that impose a higher degree of protection for face covering requirements. For example, if N95 respirators are traditionally required for specific retail activities, a cloth or homemade mask would not suffice. Responsible Parties must adhere to OSHA standards for such safety equipment.

- Responsible Parties must allow employees to use their own acceptable face coverings but cannot require employees to supply their own face coverings. Further, this guidance shall not prevent employees from wearing their personally owned additional protective coverings (e.g. surgical masks, N95 respirators, or face shields), or if the Responsible Parties otherwise requires employees to wear more protective PPE due to the nature of their work. Employers should comply with all applicable OSHA standards.
- Responsible Parties must put in place measures to limit the sharing of objects, such as tools, registers, and vehicles, as well as the touching of shared surfaces; or, require employees to wear gloves (trade-appropriate or medical) when in contact with shared objects or frequently touched surfaces; or, require employees to sanitize or wash their hands before and after contact.
- Responsible Parties must ensure gloves are worn while handling any food products.
- Responsible Parties must train employees on how to adequately put on, take off, clean (as applicable), and discard PPE, including but not limited to, appropriate face coverings.

## **B. Hygiene, Cleaning, and Disinfection**

- Responsible Parties must ensure adherence to hygiene and sanitation requirements as advised by the CDC and DOH, including "[Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#)," and the "[STOP THE SPREAD](#)" poster, as applicable. Responsible Parties must maintain logs that include the date, time, and scope of cleaning and disinfection.
- Responsible Parties must provide and maintain hand hygiene stations on site, as follows:
  - For handwashing: soap, running warm water, and disposable paper towels.
  - For sanitizer: an alcohol-based hand sanitizer containing at least 60% alcohol for areas where handwashing facilities may not be available or practical.
  - Responsible Parties must make hand sanitizer available throughout the store for use by employees and customers; it should be placed in convenient locations such as points of entrance for customers and at cash registers or payment terminals.
- Responsible Parties should place signage near hand sanitizer stations indicating that visibly soiled hands should be washed with soap and water; hand sanitizer is not effective on visibly soiled hands.
- Responsible Parties should place receptacles around the location for disposal of soiled items, including PPE.
- Responsible Parties must provide appropriate cleaning and disinfection supplies for shared and frequently touched surfaces and encourage employees to use these supplies, following manufacturers' instructions, before and after use of these surfaces, followed by hand hygiene.
- Responsible Parties must conduct regular cleaning and disinfection of the retail location and more frequent cleaning and disinfection for high risk areas used by many individuals and for frequently touched surfaces. Cleaning and disinfection must be rigorous and ongoing and should occur at least after each shift, daily, or more frequently as needed. Please refer to DOH's "[Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#)" for detailed instructions on how to clean and disinfect facilities.
  - Responsible Parties must ensure regular cleaning and disinfection of restrooms. Restrooms should be cleaned and disinfected more often depending on frequency of use.



- Responsible Parties must ensure distancing rules are adhered to by reducing restroom capacity where feasible.
  - Responsible Parties must ensure that equipment is regularly disinfected using registered disinfectants, including at least as often as employees change workstations. Refer to the Department of Environmental Conservation (DEC) [list of products](#) registered in New York State identified by the EPA as effective against COVID-19.
  - If cleaning or disinfection products or the act of cleaning and disinfection causes safety hazards or degrades the material or equipment, Responsible Parties must put in place hand hygiene stations between use and/or supply disposable gloves and/or limitations on the number of employees using such equipment.
- Responsible Parties must provide for the cleaning and disinfection of exposed areas in the event of a positive case of COVID-19 of an employee or customer, with such cleaning and disinfection to include, at a minimum, all heavy transit areas and high-touch surfaces (e.g. vending machines, handrails, bathrooms, door knobs).
- CDC guidelines on "[Cleaning and Disinfecting Your Facility](#)" if someone is suspected or confirmed to have COVID-19 are as follows:
  - Close off areas used by the person suspected or confirmed to have COVID-19.
    - Responsible Parties do not necessarily need to close operations, if they can close off the affected areas.
  - Open outside doors and windows to increase air circulation in the area.
  - Wait 24 hours before you clean or disinfect. If 24 hours is not feasible, wait as long as possible.
  - Clean and disinfect all areas used by the person who is suspected or confirmed to have COVID-19, such as offices, bathrooms, common areas, and shared equipment.
  - Once the area has been appropriately disinfected, it can be opened for use.
    - Employees without close or proximate contact with the person who is suspected or confirmed to have COVID-19 can return to the work area immediately after disinfection.
    - Refer to DOH's "[Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure](#)" for information on "close or proximate" contacts.
  - If more than seven days have passed since the person who is suspected or confirmed to have COVID-19 visited or used the retail location, additional cleaning and disinfection is not necessary, but routine cleaning and disinfection should continue.
- For retail activities involving the handling of shared objects (e.g. carts, baskets, payment devices), areas (e.g. pickup area), and/or surfaces (e.g. doors), Responsible Parties must ensure that such areas and objects are cleaned and disinfected daily, at a minimum.
- Responsible Parties should prepare a plan for receipt and resale of returned merchandise, or modify policies to ensure safety of employees and customers, which may include restricting certain items from return during the period of the emergency. Responsible Parties should clean and disinfect returned merchandise, to the extent practicable.
- Responsible Parties must prohibit shared food and beverages among employees (e.g. self-serve meals and beverages), encourage employees to bring lunch from home, and reserve adequate space for employees to observe social distancing while eating meals.

### C. Phased Reopening

- To the extent that they are not operating at full capacity during the public health emergency, Responsible Parties are encouraged to phase-in reopening activities so as to allow for operational issues to be resolved before production or work activities return to normal levels. Responsible Parties should consider limiting the number of employees, hours, and number of customers available to be served when first reopening so as to provide operations with the ability to adjust to the changes.

### D. Communications Plan

- Responsible Parties must affirm that they have reviewed and understand the state-issued industry guidelines, and that they will implement them.
- Responsible Parties should develop a communications plan for employees, visitors, and customers that includes applicable instructions, training, signage, and a consistent means to provide employees with information. Responsible Parties may consider developing webpages, text and email groups, and social media.
- Responsible Parties should encourage customers to adhere to CDC and DOH guidance regarding the use of PPE, specifically face coverings when a social distance of 6 feet cannot be maintained, through verbal communication and signage.
- Responsible Parties should post signage inside and outside of the retail location to remind personnel and customers to adhere to proper hygiene, social distancing rules, appropriate use of PPE, and cleaning and disinfection protocols.

## III. PROCESSES

### A. Screening and Testing

- Responsible Parties must implement mandatory daily health screening practices for employees and, where practicable, visitors, but such screening shall not be mandated for customers and delivery personnel.
  - Screening practices may be performed remotely (e.g. by telephone or electronic survey), before the employee reports to the workplace, to the extent possible; or may be performed on site.
  - Screening should be coordinated to prevent employees from intermingling in close or proximate contact with each other prior to completion of the screening.
  - At a minimum, screening must be required of all employees and visitors (but not customers) and completed using a questionnaire that determines whether the employee or visitor has:
    - (a) knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has or had symptoms of COVID-19;
    - (b) tested positive for COVID-19 in the past 14 days; and/or
    - (c) has experienced any symptoms of COVID-19 in the past 14 days.
- Refer to CDC guidance on "[Symptoms of Coronavirus](#)" for the most up to date information on symptoms associated with COVID-19.

- Responsible Parties must require employees to immediately disclose if and when their responses to any of the aforementioned questions changes, such as if they begin to experience symptoms, including during or outside of work hours.
- In addition to the screening questionnaire, temperature checks may also be conducted per Equal Employment Opportunity Commission or DOH guidelines. Responsible Parties are prohibited from keeping records of employee health data (e.g. the specific temperature data of an individual), but are permitted to maintain records that confirm individuals were screened and the result of such screening (e.g., pass/fail, cleared/not cleared).
- Responsible Parties must ensure that any personnel performing screening activities, including temperature checks, are appropriately protected from exposure to potentially infectious employees entering the retail location. Personnel performing screening activities should be trained by employer-identified individuals who are familiar with CDC, DOH, and OSHA protocols.
- Screeners should be provided and use PPE, including at a minimum, a mask or cloth face covering, and may include gloves, a gown, and/or a face shield.
- An individual who screens positive for COVID-19 symptoms must not be allowed to enter the workplace and must be sent home with instructions to contact their healthcare provider for assessment and testing.
  - Responsible Parties should provide such individuals with information on healthcare and testing resources.
  - Responsible Parties must immediately notify the state and local health department about the case if test results are positive for COVID-19.
- Responsible Parties should refer to DOH's "Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure" regarding protocols and policies for employees seeking to return to work after a suspected or confirmed case of COVID-19 or after the employee had close or proximate contact with a person with COVID-19.
- Responsible Parties must designate a central point of contact, which may vary by activity, location, shift or day, responsible for receiving and attesting to having reviewed all questionnaires, with such contact also identified as the party for individuals to inform if they later are experiencing COVID-19-related symptoms, as noted on the questionnaire.
- Responsible Parties must designate a site safety monitor whose responsibilities include continuous compliance with all aspects of the site safety plan.
- To the extent possible, Responsible Parties should maintain a log of employees and visitors who may have close or proximate contact with other individuals at the workplace or area; excluding customers and deliveries that are performed with appropriate PPE or through contactless means. Log should contain contact information, such that all contacts may be identified, traced and notified in the event an employee is diagnosed with COVID-19. Responsible Parties must cooperate with state and local health department contact tracing efforts.
- Responsible Parties cannot mandate that customers complete a health screen or provide contact information but may encourage customers to do so. Responsible Parties may provide an option for customers to provide contact information so they can be logged and contacted for contact tracing, if necessary.

## B. Tracing and Tracking

- Responsible Parties must notify the state and local health department immediately upon being informed of any positive COVID-19 test result by an employee at their workplace.
- In the case of an employee, visitor, or customer who interacted at the business testing positive, the Responsible Parties must cooperate with the state and local health department to trace all contacts in the workplace and notify the state and local health department of all employees logged and visitors/customers (as applicable) who entered the retail location dating back to 48 hours before the employee began experiencing COVID-19 symptoms or tested positive, whichever is earlier, but maintain confidentiality as required by federal and state law and regulations.
- State and local health departments will implement monitoring and movement restrictions of infected or exposed persons including home isolation or quarantine.
- Individuals who are alerted that they have come into close or proximate contact with a person with COVID-19, and have been alerted via tracing, tracking or other mechanism, are required to self-report to their employer at the time of alert and shall follow the protocol referenced above.

## IV. EMPLOYER PLANS

Responsible Parties must conspicuously post completed safety plans on the premises of the workplace. The State has made available a business reopening safety plan template to guide business owners and operators in developing plans to protect against the spread of COVID-19.

### **Additional safety information, guidelines, and resources are available at:**

New York State Department of Health Novel Coronavirus (COVID-19) Website  
<https://coronavirus.health.ny.gov/>

Centers for Disease Control and Prevention Coronavirus (COVID-19) Website  
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Occupational Safety and Health Administration COVID-19 Website  
<https://www.osha.gov/SLTC/covid-19/>

### **At the link below, affirm that you have read and understand your obligation to operate in accordance with this guidance:**

<https://forms.ny.gov/s3/ny-forward-affirmation>



## INTERIM GUIDANCE FOR MALLS DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

### When you have read this document, you can affirm at the bottom.

As of August 19, 2020

**Pursuant to the Governor's Executive Orders, malls remain closed until Friday, July 10, 2020 when malls may reopen in regions that have reached Phase 4 and adhere to the following guidance.** 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 until Friday, July 10, 2020 when malls in Phase 4 regions may reopen; 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 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.

### Purpose

This Interim Guidance for Malls during the COVID-19 Public Health Emergency ("Interim COVID-19 Guidance for Malls") was created to provide proprietors/owners/operators of malls and their employees, contractors, vendors, and customers with precautions to help protect against the spread of COVID-19.

This guidance applies to all indoor, strip, and outlet malls permitted to operate. This guidance does not apply to restaurants or other food services, movie theaters, retailers of rental goods, or personal care services, such as hair salons, nail salons, spas, tattoo parlors, laser hair removal, or electrolysis, that may be located in such malls.

Retail stores within malls must follow the guidelines outlined in the Department of Health's (DOH) "Interim Guidance for Essential and Phase II Retail Business Activities during the COVID-19 Public Health Emergency." Restaurants and other food services within malls must follow the guidelines outlined in DOH's "Interim Guidance for Food Services during the COVID-19 Public Health Emergency." Movie theaters within malls must follow any guidance issued for such purpose (at the time of publication, movie theaters are not permitted to open). Personal care services within malls must follow the guidelines outlined in DOH's "Interim Guidance for Personal Care Services during the COVID-19 Public Health Emergency." All other business within malls should refer to their respective industry guidelines, if and where applicable.

These guidelines are minimum requirements only and any mall proprietor/owner/operator is free to provide additional precautions or increased restrictions. These guidelines are based on the best-known public health practices at the time of publication, and the documentation upon which these guidelines are based can and does change frequently. The Responsible Parties – as defined below – are accountable for adhering to all local, state and federal requirements relative to mall operations. The Responsible Parties are also accountable for staying current with any updates to these requirements, as well as incorporating same into any mall operations and/or Site Safety Plan.

### Background

On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order 202, declaring a state of emergency in response to COVID-19. Community transmission of COVID-19 has occurred throughout New York. To minimize further spread, social distancing of at least six feet must be maintained between individuals, where possible.

On March 20, 2020, Governor Cuomo issued Executive Order 202.6, directing all non-essential businesses to close in-office personnel functions. Essential businesses, as defined by Empire State Development Corporation (ESD) guidance, were not subject to the in-person restriction, but were, however, directed to comply with the guidance and directives for maintaining a clean and safe work environment issued by DOH, and were strongly urged to maintain social distancing measures to the extent possible.

On April 12, 2020, Governor Cuomo issued Executive Order 202.16, directing essential businesses to provide employees, who are present in the workplace, with a face covering, at no-cost, that must be used when in direct contact with customers or members of the public during the course of their work. On April 15, 2020, Governor Cuomo issued Executive Order 202.17, directing that any individual who is over age two and able to medically tolerate a face-covering must cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance. On April 16, 2020, Governor Cuomo issued Executive Order 202.18, directing that everyone using public or private transportation carriers or other for-hire vehicles, who is over age two and able to medically tolerate a face covering, must wear a mask or cloth face covering over the nose and mouth during any such trip. It also directed any operators or drivers of public or private transport to wear a mask or cloth face covering which covers the nose and mouth while there are any passengers in such a vehicle. On May 29, 2020, Governor Cuomo issued Executive Order 202.34, authorizing business operators/owners with the discretion to deny admittance to individuals who fail to comply with the face covering or mask requirements.

On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses in New York in phases based upon a data-driven, regional analysis. On May 4, 2020, the Governor provided that the regional analysis would consider several public health factors, including new COVID-19 infections, as well as health care system, diagnostic testing, and contact tracing capacity. On May 11, 2020, Governor Cuomo announced that the first phase of reopening would begin on May 15, 2020 in several regions of New York, based upon available regional metrics and indicators. On May 29, 2020, Governor Cuomo announced that the second phase of reopening would begin in several regions of the state, and announced the use of a new early warning dashboard that aggregates the state's expansive data collection efforts for New Yorkers, government officials, and experts to monitor and review how the virus is being contained to ensure a safe reopening. On June 11, Governor Cuomo announced that the third phase of reopening would begin on June 12 in several regions of New York. On June 24, 2020, Governor Cuomo announced that several regions of the state were on track to enter the fourth phase of reopening starting on June 26.

In addition to the following standards, businesses must continue to comply with the guidance and directives for maintaining clean and safe work environments issued by DOH.

Please note that where guidance in this document differs from other guidance documents issued by New York State, the more recent guidance shall apply.

### **Standards for Responsible Mall Operations in New York State**

No mall operation can occur without meeting the following minimum State standards, as well as applicable federal requirements, including but not limited to such minimum standards of the Americans with Disabilities Act (ADA), Centers for Disease Control and Prevention (CDC), Environmental Protection

Agency (EPA), and United States Department of Labor's Occupational Safety and Health Administration (OSHA).

The State standards contained within this guidance apply to all malls in operation during the COVID-19 public health emergency until rescinded or amended by the State. The proprietor/operator of the mall, or another party as may be designated by the proprietor/operator (in either case, "the Responsible Parties"), shall be responsible for meeting these standards.

The proprietor/operator of the mall, or their designee, shall be primarily responsible for meeting standards with respect to any common areas. Tenants, if not the proprietor/operator, shall be primarily responsible for meeting these standards with respect to their leased space(s), unless the tenant and proprietor/operator reach an alternate agreement in regard to such responsibilities (e.g. joint screening protocol).

Except where noted otherwise, references made to "employees" (1) include employees, contractors, and vendors, and (2) references to "employees and/or visitors" are to the proprietor/operator of the mall and their employees and/or visitors. Responsible Parties should coordinate with tenant entities occupying space within the mall, where applicable, on the implementation of practices in accordance with this guidance. For more information on such entities and their employees, contractors, and visitors, see the guidance referenced above.

The following guidance is organized around three distinct categories: people, places, and processes.

## I. PEOPLE

### A. Physical Distancing

- Responsible Parties, in coordination with any tenants, must ensure that the workforce and customer presence is limited to no more than 50% of the maximum occupancy for a particular area as set by the certificate of occupancy, inclusive of customers, who must maintain six feet of separation from individuals who are not in their immediate party/household/family and, in all cases, must only be permitted entry into the mall and businesses within the mall if they wear an acceptable face covering; provided however, that the customer is over the age of two and able to medically tolerate such covering; and
- Responsible Parties must ensure a distance of at least six feet is maintained among employees and customers at all times, unless the safety or the core activity requires a shorter distance (e.g. operating cash registers, moving and lifting merchandise). Employees must wear acceptable face coverings any time they interact with customers (e.g. providing information to customers, ringing up a purchase, wrapping an item to hand off) and any time employees are within six feet of another person. Employees must be prepared to don a face covering if another person unexpectedly comes within six feet. Customers entering the mall must also wear a face covering.
  - Acceptable face coverings for COVID-19 include but are not limited to cloth-based face coverings and disposable masks that cover both the mouth and nose.
  - However, cloth, disposable, or other homemade face coverings are not acceptable face coverings for workplace activities that typically require a higher degree of protection for personal protective equipment (PPE) due to the nature of the work. For those activities, N95 respirators or other PPE used under existing industry standards should continue to be used, as is defined in accordance with OSHA guidelines.

- Responsible Parties may modify the use and/or restrict the number of work spaces and employee seating areas, so that individuals are at least six feet apart in all directions (e.g. side-to-side and when facing one another) and are not sharing spaces without cleaning and disinfection between use. When distancing is not feasible between work stations or spaces, Responsible Parties must provide and require the use of face coverings or physical barriers such as plastic shielding walls, in lieu of face coverings in areas where they would not affect air flow, heating, cooling, or ventilation.
  - If used, physical barriers should be put in place in accordance with OSHA guidelines.
  - Physical barrier options may include: strip curtains, plexiglass or similar materials, or other impermeable dividers or partitions.
- Responsible Parties are encouraged to modify mall layouts so that employees and customers are at least six feet apart in all directions when employees are working and customers are browsing, unless physical barriers are in place (e.g. Plexiglass or partitions at cash registers).
  - Responsible Parties must require that employees use face coverings when interacting with customers. Responsible Parties shall not permit customers into the mall without a face covering, if medically able to tolerate one, and are over age two.
  - If entry is denied, Responsible Parties should seek to provide alternate methods of pickup and/or delivery for customers, particularly to ensure access to essential goods, including but not limited to food, medication, and medical equipment or supplies.
  - Responsible Parties must reserve adequate space for employees and customers to work and shop, considering appropriate social distancing.
  - Responsible Parties should consider creating one-way corridors or aisles, or otherwise rearranging traffic flow.
- Responsible Parties must prohibit the use of small spaces (e.g. elevators, bathrooms, stock rooms) by more than one individual at a time, unless all individuals in such spaces at the same time are wearing acceptable face coverings. However, occupancy must never exceed 50% of the maximum capacity of the space, unless it is designed for use by a single occupant. Responsible Parties should increase ventilation with outdoor air to the greatest extent possible (e.g. opening windows, leaving doors open), while maintaining safety protocols.
- Responsible Parties should encourage the use of touchless payment options or pay ahead, when available. Minimize handling cash, credit cards, reward cards, and mobile devices, where possible.
- Responsible Parties should put in place measures to reduce bi-directional foot traffic of customers using tape or signs with arrows in corridors and hallways, and post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g., clock in/out stations, health screening stations, in-mall kiosks, break rooms).
  - Where possible, Responsible Parties should place markers or barriers to encourage one directional traffic.
- Responsible Parties must post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g. clock in/out stations, health screening stations, break rooms, cash register areas, near merchandise, in aisles).
- Responsible Parties must post signs inside and outside of the mall, consistent with DOH COVID-19 signage. Responsible Parties can develop their own customized signage specific to their workplace or



setting, provided that such signage is consistent with the Department's signage. Signage should be used to remind employees and customers to:

- Stay home if sick.
- Cover their nose and mouth with face covering.
- Properly store and, when necessary, discard PPE.
- Adhere to physical distancing instructions.
- Report symptoms of or exposure to COVID-19, and how they should do so.
- Follow hand hygiene and cleaning and disinfection guidelines.
- Follow appropriate respiratory hygiene and cough etiquette.

## **B. Gatherings in Enclosed Spaces**

- Responsible Parties should limit in-person gatherings of employees (e.g. team meetings, stock rooms) to the extent possible, and use other methods such as video or teleconferencing whenever possible, per CDC guidance "[Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#)". Responsible Parties should hold in-person employee meetings in open, well-ventilated spaces and ensure that individuals maintain six feet of social distance between one another (e.g. if there are chairs, leave space between chairs, have employees sit in alternating chairs) or wear appropriate face coverings.
- Responsible Parties should encourage social distancing by limiting occupancy or closing non-essential amenities and communal areas that do not allow for social distancing protocols. If open, Responsible Parties must make hand sanitizer or disinfecting wipes available next to equipment near such amenities (e.g. vending machines, communal coffee stations).
- Responsible Parties must put in place practices for adequate social distancing in small areas, such as restrooms and breakrooms, and should develop signage and systems (e.g. flagging when occupied) to restrict occupancy when social distancing cannot be maintained in such areas; and
- Responsible Parties should stagger schedules for employees to observe social distancing (i.e., six feet of space) for any gathering (e.g. while taking breaks).

## **C. Workplace Activity**

- Responsible Parties must take measures to reduce interpersonal contact and congregation, through methods such as:
  - adjusting workplace hours;
  - reducing on-site workforce, where appropriate, to accommodate social distancing guidelines;
  - shifting design (e.g. A/B teams, staggered arrival/departure times);
  - batching activities, where possible, so employees can adhere to social distancing and reduce the number of hands touching products at the same time (e.g. one employee does all packing and a separate employee fulfills the delivery); and/or
  - encouraging, but not requiring, customers to bag their own purchases.
- Responsible Parties should adjust retail hours as necessary to enable enhanced cleaning and disinfection procedures.

## D. Movement and Commerce

- Responsible Parties must monitor and control the flow of traffic into the mall to ensure adherence to maximum capacity requirements.
  - Responsible Parties should maintain sufficient employee or security presence to monitor traffic flow and to ensure groups adhere to social gathering limitations.
  - Responsible Parties must prohibit congregating and loitering by customers and should maintain sufficient employee or security presence, including hiring additional staff, to eliminate congregating and loitering.
- Responsible Parties must establish designated areas for deliveries, limiting contact to the extent possible.
- Responsible Parties should provide clearly designated, separate entrances and exits, where possible.
  - Responsible Parties must be prepared to queue customers outside both mall and businesses while still maintaining physical distance including through the use of visual cues or markers.
- For merchandise deliveries, Responsible Parties should implement a touchless delivery system whereby drivers stay in the cab of the vehicle while delivery takes place or, where not practicable, Responsible Parties must provide acceptable PPE appropriate to the anticipated activities that includes, at a minimum, a face covering to personnel involved in the delivery at no cost for the duration of the delivery process.
- Responsible Parties must perform hand hygiene hands before and after transferring a load (e.g. from a delivery driver) of merchandise (e.g. perform hand hygiene before starting to load items; and once all items have been loaded, finish by performing hand hygiene again).
- Responsible parties should designate curbside pick-up area(s) for interior stores.
- Responsible parties must suspend valet services.
- Effective August 20, 2020, Responsible Parties may open limited food court seating areas; provided, however, that such seating areas and the food services establishments located within the food courts operate in accordance with DOH's "Interim Guidance for Food Services during the COVID-19 Public Health Emergency," including any required separation between tables with seating, social distancing between parties of customers, and occupancy limits.
- Responsible Parties must close or modify amenities, where applicable, including:
  - Closing common seating areas within the mall, except food court seating areas as provided above;
  - Closing self-serve bars and samplers; and
  - Closing water fountains.

## II. PLACES

### A. Air Filtration and Building Systems

- For malls that are greater than 800,000 square feet, Responsible Parties must ensure building HVAC system filtration meets the highest rated filtration compatible with the currently installed filter rack and air handling systems, at a minimum MERV-13, or industry equivalent or greater (e.g., HEPA), as applicable, and as certified and documented by a certified HVAC technician, professional, or company, ASHRAE-certified professional, certified retro-commissioning professional, or New York-licensed professional building engineer.
  - Responsible Parties may also consider adopting additional ventilation and air filtration mitigation protocols per CDC recommendations, particularly for buildings older than 15 years, including:
    - Increasing ventilation rates and outdoor air ventilation to the extent possible;
    - Keeping systems running for longer hours (e.g., 24/7 if possible);
    - Disabling demand-controlled ventilation, where reasonable, but still maintaining systems that increase fresh air supply (e.g., conference or meeting rooms);
    - Opening outdoor air dampers to reduce or eliminate recirculation to the extent possible;
    - Considering the installation of appropriately designed and deployed ultraviolet germicidal irradiation (UVGI) to deactivate airborne virus particles;
    - Sealing edges of the filter to limit bypass; and/or
    - Regularly inspecting systems and filters to ensure they are properly operating, and filters are appropriately installed, serviced and within service life.
- If a mall greater than 800,000 square feet is unable to meet a building HVAC system filtration rating of MERV-13 or greater, Responsible Parties must have a certified HVAC technician, professional, or company, ASHRAE-certified professional, certified retro-commissioning professional, or New York-licensed professional building engineer certify and document that the currently installed filter rack and air handling system would be unable to perform to the minimum level of heating and cooling that it was otherwise able to provide prior to the COVID-19 public health emergency if such a high degree of filtration (i.e., MERV-13 or greater) was installed. Further, Responsible Parties must submit such documentation to DOH for review and approval to operate at a lesser filtration rating of MERV-11 or MERV-12 with additional ventilation and air filtration mitigation protocols. In all instances, however, Responsible Parties must maintain a building HVAC system filtration rating of, at least, MERV-11.
  - In addition, Responsible Parties who are unable to meet a filtration rating of MERV-13 or greater must put in place additional ventilation and air filtration mitigation protocols per CDC recommendations, where appropriate, including:
    - Increasing ventilation rates and outdoor air ventilation to the extent possible;
    - Keeping systems running for longer hours (e.g., 24/7 if possible);
    - Disabling demand-controlled ventilation, where reasonable, but still maintaining systems that increase fresh air supply (e.g., conference or meeting rooms);
    - Opening outdoor air dampers to reduce or eliminate recirculation to the extent possible;
    - Considering the installation of appropriately designed and deployed ultraviolet germicidal irradiation (UVGI) to deactivate airborne virus particles;
    - Sealing edges of the filter to limit bypass; and/or
    - Regularly inspecting systems and filters to ensure they are properly operating, and filters are appropriately installed, serviced and within service life.
- For malls that are less than 800,000 square feet, Responsible Parties must ensure building HVAC system filtration meets the highest rated filtration compatible with the currently installed filter rack

and air handling systems, at a minimum MERV-11, or industry equivalent or greater (e.g., HEPA), but ideally MERV-13, as applicable, and as certified and documented by a certified HVAC technician, professional, or company, ASHRAE-certified professional, certified retro-commissioning professional, or New York-licensed professional building engineer.

- Responsible Parties may also consider adopting additional ventilation and air filtration mitigation protocols per [CDC recommendations](#), particularly for buildings operating HVAC systems at less than MERV-13 filtration rating and buildings older than 15 years, including:
  - Increasing ventilation rates and outdoor air ventilation to the extent possible;
  - Keeping systems running for longer hours (e.g., 24/7 if possible);
  - Disabling demand-controlled ventilation, where reasonable, but still maintaining systems that increase fresh air supply (e.g., conference or meeting rooms);
  - Opening outdoor air dampers to reduce or eliminate recirculation to the extent possible;
  - Considering the installation of appropriately designed and deployed ultraviolet germicidal irradiation (UVGI) to deactivate airborne virus particles;
  - Sealing edges of the filter to limit bypass; and/or
  - Regularly inspecting systems and filters to ensure they are properly operating, and filters are appropriately installed, serviced and within service life.
- Before occupants return to a building that has been entirely closed, Responsible Parties must complete pre-return checks, tasks, and assessments to ensure a healthy and safe environment. These systems include, but are not limited to, mechanical systems, water systems, elevators, and HVAC systems.
  - Depending on the length of time equipment has been inactive, Responsible Parties should run systems with careful observation to ensure machinery (e.g. valves and switches) are operating correctly.
  - Specific system actions may be required to restart systems after prolonged shutdown. Responsible Parties may determine necessity for each of these items based on length of shutdown and condition as inspected.
  - As appropriate and applicable, Responsible Parties should flush building with fresh air based on the design of the makeup/outside air system for a minimum of 24 hours.
  - Responsible Parties must ensure air filters are replaced as needed (e.g. after flushing the building).
  - Responsible Parties must ensure maintenance and monitoring of cooling towers have been conducted in accordance with state regulations and that chemical and microbial levels are within defined ranges for any closed water systems and/or water features, and drain any devices that may contain stagnant water.
  - Responsible Parties must flush cold- and hot-water systems in accordance with building water management plan, if applicable.
  - Responsible Parties must ensure any water filters are replaced as needed after flushing the building's water systems.
  - For buildings that were entirely closed, Responsible Parties should ensure that the operation of all mechanical equipment and systems has been restored prior to reopening the building.

## B. Protective Equipment

- Responsible Parties must ensure employees wear face coverings when they are within six feet of customers or coworkers. Employees also must wear face coverings any time they interact with customers (e.g. ringing up a purchase, wrapping an item to hand off, security interactions).
- Responsible Parties must ensure that customers are only permitted entry into the mall and businesses within the mall if they wear an acceptable face covering; provided, however, that the customer is over the age of two and able to medically tolerate such covering.
- In addition to necessary PPE as required for certain workplace activities, Responsible Parties must procure, fashion, or otherwise obtain acceptable face coverings and provide such coverings to their employees while at work at no cost to the employee. Responsible Parties should have an adequate supply of face coverings and other required PPE on hand should an employee or customer need a replacement. Acceptable face coverings include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, N95 respirators, and face shields.
- Face coverings must be cleaned or replaced after use and may not be shared. Please consult CDC [guidance](#) for additional information on cloth face coverings and other types of PPE as well as instructions on use and cleaning.
  - Note that cloth face coverings or disposable masks shall not be considered acceptable face coverings for workplace activities that require a higher degree of protection for face covering requirements. For example, if N95 respirators are traditionally required for specific retail activities, a cloth or homemade mask would not suffice. Responsible Parties must adhere to OSHA standards for such safety equipment.
- Responsible Parties must allow employees to use their own acceptable face coverings but cannot require employees to supply their own face coverings. Further, this guidance shall not prevent employees from wearing their personally owned protective face coverings (e.g. surgical masks, N95 respirators, or face shields). Responsible Parties may require employees to wear more protective PPE due to the nature of their work. Employers should comply with all applicable OSHA standards.
- Responsible Parties must put in place measures to limit the sharing of objects, such as tools, registers, and vehicles, as well as the touching of shared surfaces; or, require employees to wear gloves (trade-appropriate or medical) when in contact with shared objects or frequently touched surfaces; or, require employees to perform hand hygiene before and after contact.
- Responsible Parties must ensure gloves are worn while handling any food products.
- Responsible Parties must train employees on how to adequately put on, take off, clean (as applicable), and discard PPE, including but not limited to, appropriate face coverings.

## C. Hygiene, Cleaning, and Disinfection

- Responsible Parties must ensure adherence to hygiene and cleaning and disinfection requirements as advised by the CDC and DOH, including "[Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#)," and the "[STOP THE SPREAD](#)" poster, as applicable. Responsible Parties must maintain logs that include the date, time, and scope of cleaning and disinfection.
- Responsible Parties must provide and maintain hand hygiene stations on site, as follows:
  - For handwashing: soap, running warm water, and disposable paper towels.

- For hand sanitizing: an alcohol-based hand sanitizer containing at least 60% alcohol for areas where handwashing facilities may not be available or practical.
- Responsible Parties must make hand sanitizer available throughout the mall for use by employees and customers; it should be placed in convenient locations such as points of entrance of the mall, information kiosks, and entrances of each store for customers and at cash registers or payment terminals. Responsible Parties must include signage indicating that visibly soiled hands should be washed with soap and water; hand sanitizer is not effective on visibly soiled hands.
- Responsible Parties must provide appropriate cleaning and disinfection supplies for shared and frequently touched surfaces and encourage employees to use these supplies, following manufacturers' instructions for use, before and after use of these surfaces, followed by hand hygiene.
- Responsible Parties must conduct regular cleaning and disinfection of the mall and more frequent cleaning and disinfection for high risk areas used by many individuals and for frequently touched surfaces. Cleaning and disinfection must be rigorous and ongoing and should occur at least after each twice daily, or more frequently as needed. Please refer to DOH's "[Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#)" for detailed instructions on how to clean and disinfect facilities.
  - Responsible Parties must ensure regular cleaning and disinfection of restrooms. Restrooms should be cleaned and disinfected more often depending on frequency of use.
    - Responsible Parties must ensure distancing rules are adhered to by using signage, occupied markers, or other methods to reduce restroom capacity where feasible.
  - Responsible Parties must ensure that equipment is regularly cleaned and disinfected using registered disinfectants, including at least as often as employees change workstations. Refer to the Department of Environmental Conservation (DEC) [list of products](#) registered in New York State identified by the EPA as effective against COVID-19.
  - If cleaning or disinfection products or the act of cleaning and disinfection causes safety hazards or degrades the material or equipment, Responsible Parties must put in place hand hygiene stations between use and/or supply disposable gloves and/or limitations on the number of employees using such equipment.
- Responsible Parties must provide for the cleaning and disinfection of exposed areas in the event of a positive case of COVID-19 of an employee or customer, with such cleaning and disinfection to include, at a minimum, all heavy transit areas and high-touch surfaces (e.g. vending machines, handrails, bathrooms, door knobs).
- CDC guidelines on "[Cleaning and Disinfecting Your Facility](#)" if someone is suspected or confirmed to have COVID-19 are as follows:
  - Close off areas used by the person suspected or confirmed to have COVID-19.
    - Responsible Parties do not necessarily need to close operations, if they can close off the affected areas.
  - Open outside doors and windows to increase air circulation in the area.
  - Wait 24 hours before you clean and disinfect. If 24 hours is not feasible, wait as long as possible.
  - Clean and disinfect all areas used by the person suspected or confirmed to have COVID-19, such as offices, bathrooms, common areas, and shared equipment.
  - Once the area has been appropriately cleaned and disinfected, it can be re-opened for use.

- Employees without close or proximate contact with the person suspected or confirmed to have COVID-19 can return to the work area immediately after cleaning and disinfection.
- Refer to DOH's "[Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure](#)" for information on "close or proximate" contacts.
- If more than seven days have passed since the person suspected or confirmed to have COVID-19 visited or used the mall location, additional cleaning and disinfection is not necessary, but routine cleaning and disinfection should continue.
- For activities involving the handling of shared objects (e.g. baskets, payment devices), areas (e.g. pickup area), and/or surfaces (e.g. doors, touch-screen directories), Responsible Parties must ensure that such areas and objects are cleaned and disinfected twice daily, at a minimum.
- Responsible Parties must prohibit employees from sharing food and beverages (e.g. buffet style meals), encourage bringing lunch from home, and reserve adequate space for employees to observe social distancing while eating meals.

#### **D. Phased Reopening**

- Responsible Parties are encouraged to phase-in reopening activities so as to allow for operational issues to be resolved before mall activities return to normal levels. Responsible Parties should consider limiting the number of employees, hours, and number of customers available to be served when first reopening to provide operations with the ability to adjust to the changes.

#### **E. Communications Plan**

- Responsible Parties must affirm that they have reviewed and understand the state-issued industry guidelines, and that they will implement them.
- Responsible Parties should develop a communications plan for employees and customers that includes applicable instructions, training, signage, and a consistent means to provide employees with information. Responsible Parties may consider developing webpages, text and email groups, and social media.
- Responsible Parties should encourage customers to adhere to CDC and DOH guidance regarding the use of PPE, specifically face coverings when a social distance of six feet cannot be maintained, through verbal communication and signage.
- Responsible Parties should post signage inside and outside of the mall to remind personnel and customers to adhere to proper hygiene, social distancing rules, appropriate use of PPE, and cleaning and disinfection protocols.

### **III. PROCESSES**

#### **A. Screening and Testing**

- Responsible Parties must implement mandatory daily health screening practices for employees and, where practicable, visitors, but such screening shall not be mandated for customers or delivery personnel.

- Screening practices may be performed remotely (e.g. by telephone or electronic survey), before the employee reports to the workplace, to the extent possible; or may be performed on site.
- Screening should be coordinated to prevent employees from intermingling in close or proximate contact with each other prior to completion of the screening.
- At a minimum, screening must be required of all employees and visitors (but not customers) and completed using a questionnaire that determines whether the employee or visitor has:
  - (a) knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has or had symptoms of COVID-19;
  - (b) tested positive for COVID-19 in the past 14 days; and/or
  - (c) has experienced any symptoms of COVID-19 in the past 14 days.
- Refer to CDC guidance on "Symptoms of Coronavirus" for the most up to date information on symptoms associated with COVID-19.
- Responsible Parties must require individuals to immediately disclose if and when their responses to any of the aforementioned questions changes, such as if they begin to experience symptoms, including during or outside of work hours.
- In addition to the screening questionnaire, temperature checks may also be conducted per Equal Employment Opportunity Commission or DOH guidelines. Responsible Parties are prohibited from keeping records of employee health data (e.g. the specific temperature data of an individual), but are permitted to maintain records that confirm individuals were screened and the result of such screening (e.g. pass/fail, cleared/not cleared).
- Responsible Parties must ensure that any personnel performing screening activities, including temperature checks, are appropriately protected from exposure to potentially infectious employees entering the mall. Personnel performing screening activities should be trained by employer-identified individuals who are familiar with CDC, DOH, and OSHA protocols.
- Screeners should be provided and use PPE, including at a minimum, a mask or cloth face covering, and may include gloves, a gown, and/or a face shield.
- An individual who screens positive for COVID-19 symptoms must not be allowed to enter the workplace and must be sent home with instructions to contact their healthcare provider for assessment and testing.
  - Responsible Parties should remotely provide such individuals with information on healthcare and testing resources.
  - Responsible Parties must immediately notify the state and local health department about the case if test results are positive for COVID-19.
- Responsible Parties should refer to DOH's "Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure" regarding protocols and policies for employees seeking to return to work after a suspected or confirmed case of COVID-19 or after the employee had close or proximate contact with a person with COVID-19.
- Responsible Parties must designate a central point of contact, which may vary by activity, location, shift or day, responsible for receiving and attesting to having reviewed all questionnaires, with such



contact also identified as the party for individuals to inform if they later are experiencing COVID-19-related symptoms, as noted on the questionnaire.

- If Responsible Parties and tenants have agreed to an alternate screening arrangement whereby Responsible Parties screen on behalf of tenants, then Responsible Parties shall be responsible for maintaining a record of the screening process. Maintaining record of employee health data (e.g. the specific temperature data of an individual) is prohibited; the only records to be maintained on a daily basis regarding the screening process are those individuals who were screened, and confirmation that no employee or visitor who failed the screening process was granted access.
- Responsible Parties must designate a site safety monitor whose responsibilities include continuous compliance with all aspects of the site safety plan.
- To the extent possible, Responsible Parties should maintain a log of every person, including employees and visitors, who may have close or proximate contact with other individuals at the workplace or area; excluding customers and deliveries that are performed with appropriate PPE or through contactless means. Log should contain contact information, such that all contacts may be identified, traced and notified in the event an employee is diagnosed with COVID-19. Responsible Parties must cooperate with state and local health department contact tracing efforts.
- Responsible Parties cannot mandate that customers complete a health screen or provide contact information but may encourage customers to do so. Responsible Parties may provide an option for customers to provide contact information so they can be logged and contacted for contact tracing, if necessary.

## B. Tracing and Tracking

- Responsible Parties must notify the state and local health department where the business is located immediately upon being informed of any positive COVID-19 test result by an employee at their workplace.
- In the case of an employee or customer who interacted at the mall testing positive, the Responsible Parties must cooperate with the state and local health department to trace all contacts in the workplace and notify the state and local health department of all employees logged and visitors/customers (as applicable) who entered the mall dating back to 48 hours before the employee began experiencing COVID-19 symptoms or tested positive, whichever is earlier, but maintain confidentiality as required by federal and state law and regulations.
- State and local health departments will implement monitoring and movement restrictions of infected or exposed persons including home isolation or quarantine.
- Individuals who are alerted that they have come into close or proximate contact with a person with COVID-19, and have been alerted via tracing, tracking or other mechanism, are required to self-report to their employer at the time of alert and shall follow the protocol referenced above.

## IV. EMPLOYER PLANS

Responsible Parties must conspicuously post completed safety plans on site for employees. The State has made available a business reopening safety plan template to guide business owners and operators in developing plans to protect against the spread of COVID-19.

**Additional safety information, guidelines, and resources are available at:**

New York State Department of Health Novel Coronavirus (COVID-19) Website  
<https://coronavirus.health.ny.gov/>

Centers for Disease Control and Prevention Coronavirus (COVID-19) Website  
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Occupational Safety and Health Administration COVID-19 Website  
<https://www.osha.gov/SLTC/covid-19/>

**At the link below, affirm that you have read and understand your obligation to operate in accordance with this guidance:**

<https://forms.ny.gov/s3/ny-forward-affirmation>

# **EXHIBIT I**



## INTERIM GUIDANCE FOR RELIGIOUS & FUNERAL SERVICES DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

### When you have read this document, you can affirm at the bottom.

As of June 26, 2020

### Purpose

This Interim Guidance for Religious and Funeral Services and Operations of Faith-Based institutions during the COVID-19 Public Health Emergency (“Interim COVID-19 Guidance for Religious and Funeral Services and Operations of Faith-Based Institutions”) was created to provide faith leaders and officiants of religious and funeral services and their employees, contractors, volunteers, and attendees with precautions to help protect against the spread of COVID-19 as religious and funeral services reopen or increase activity. This guidance applies to all religious and funeral gatherings, including burial and committal services.

These guidelines are minimum requirements only, and additional precautions or increased restrictions may be required by the institution or operator. These guidelines are based on the best-known public health practices at the time of publication, and the documentation upon which these guidelines are based can and does change frequently. The Responsible Parties – as defined below – are accountable for adhering to all local, state and federal requirements relative to religious and funeral services. The Responsible Parties are also accountable for staying current with any updates to these requirements, as well as incorporating same into any religious and funeral services and/or Site Safety Plan.

### Background

On March 7, 2020, Governor Andrew M. Cuomo issued Executive Order 202, declaring a state of emergency in response to COVID-19. Community transmission of COVID-19 has occurred throughout New York. To minimize further spread, social distancing of at least six feet must be maintained between individuals, where possible.

On April 15, 2020, Governor Cuomo issued Executive Order 202.17, directing that any individual who is over age two and able to medically tolerate a face-covering must cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance. On April 16, 2020, Governor Cuomo issued Executive Order 202.18, directing that everyone using public or private transportation carriers or other for-hire vehicles, who is over age two and able to medically tolerate a face covering, must wear a mask or face covering over the nose and mouth during any such trip. It also directed any operators or drivers of public or private transport to wear a face covering or mask which covers the nose and mouth while there are any passengers in such a vehicle. On May 29, 2020, Governor Cuomo issued Executive Order 202.34, authorizing business operators/owners with the discretion to deny admittance to individuals who fail to comply with the face covering or mask requirements.

On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses in New York in phases based upon a data-driven, regional analysis. On May 4, 2020, the Governor provided that the regional analysis would consider several public health factors, including new COVID-19 infections, as well as health care system, diagnostic testing, and contact tracing capacity. On

May 11, 2020, Governor Cuomo announced that the first phase of reopening would begin on May 15, 2020 in several regions of New York, based upon available regional metrics and indicators. On May 29, 2020, Governor Cuomo announced that the second phase of reopening would begin in several regions of the state, and announced the use of a new early warning dashboard that aggregates the state's expansive data collection efforts for New Yorkers, government officials, and experts to monitor and review how the virus is being contained to ensure a safe reopening. On June 11, Governor Cuomo announced that the third phase of reopening would begin on June 12 in several regions of New York.

In addition to the following standards, any Department of Health guidance and directives for maintaining clean and safe work environments must be followed.

Please note that where guidance in this document differs from other guidance documents issued by New York State, the more recent guidance shall apply.

## **Standards for Responsible Religious and Funeral Services in New York State**

No religious and funeral services activity can occur without meeting the following minimum State standards, as well as applicable federal requirements, including but not limited to such minimum standards of the Americans with Disabilities Act (ADA), Centers for Disease Control and Prevention (CDC), Environmental Protection Agency (EPA), and United States Department of Labor's Occupational Safety and Health Administration (OSHA).

The State standards contained within this guidance apply to all religious and funeral services in operation during the COVID-19 public health emergency until rescinded or amended by the State. The operator of the religious or funeral service, or another party as may be designated by the operator (in either case, "the Responsible Parties"), shall be responsible for meeting these standards.

The following guidance is organized around three distinct categories: people, places, and processes.

## **I. PEOPLE**

### **A. Physical Distancing**

- Responsible Parties must ensure that for any religious or funeral service, the congregant/attendee capacity is limited to:
  - In Phase 1 regions, no more than 10 people for any services occurring indoor or outdoor.
  - In Phase 2 and 3 regions, no more than 25% of the maximum occupancy for a particular area as set by the certificate of occupancy for services occurring indoor or no more than 25 people for services occurring outdoor.
  - In Phase 4 regions, 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 outdoor.
    - If separate buildings are available for use, Responsible Parties may have multiple groups of 10 in separate buildings at the same time in Phase 1; a maximum occupancy of 25% in separate buildings at the same time in Phase 2 and 3; or a maximum occupancy of 33% in separate buildings at the same time in Phase 4 so long as the buildings have separate entrances and exits designated and groups do not interact.

- Responsible Parties must ensure that a distance of at least six feet is maintained amongst all individuals at all times, unless safety of the core activity requires a shorter distance (e.g. pallbearing) or the individuals are members of the same household. However, any singing activity must provide for a distance between individuals of at least twelve feet, subject to additional protective measures. Any time employees, volunteers, and/or attendees must come within six feet of another person, (or twelve feet if singing) acceptable face coverings must be worn, unless they are members of the same household. Employees, volunteers, and/or attendees must be prepared to don a face covering if another person unexpectedly comes within six feet (e.g. when walking to seats). (See below).
  - Acceptable face coverings to protect against COVID-19 include but are not limited to cloth-based face coverings and disposable masks that cover both the mouth and nose.
- Responsible Parties may modify the use and/or restrict the number of stations (e.g. podiums) and seating areas, so that staff members, volunteers, and attendees are at least six feet apart in all directions (e.g. side-to-side, in rows, and when facing one another) and are not sharing stations or seats without cleaning and disinfection between use, unless all individuals are members of the same household (e.g. seating allows household members to sit together, so long as six feet of distance from non-household members). When distancing is not feasible between stations (e.g. sound booths), Responsible Parties must provide and require the use of face coverings and/or enact physical barriers, such as plastic shielding walls, in lieu of face coverings in areas where they would not affect air flow, heating, cooling, or ventilation.
  - If used, physical barriers should be put in place in accordance with OSHA guidelines.
  - Physical barrier options may include strip curtains, plexiglass or similar materials, or other impermeable dividers or partitions.
- Responsible Parties must prohibit the use of small spaces (e.g. vehicles, elevators) by more than one individual at a time, unless all individuals in such space at the same time are wearing acceptable face coverings. However, even with face coverings in use, occupancy must never exceed 50% of the maximum capacity of the space or vehicle, unless it is designed for use by a single occupant. Responsible Parties should increase ventilation with outdoor air to the greatest extent possible (e.g. opening windows and doors), while maintaining safety protocols. Responsible Parties should take additional measures to prevent congregation in elevator waiting areas and limit density in elevators, such as enabling the use of stairs.
- Responsible Parties must put in place measures to reduce bi-directional foot traffic using tape or signs with arrows in narrow aisles, hallways, pews, or spaces, and post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g. restrooms, entrances, health screening stations, etc.).
- Responsible Parties must post signs throughout the facility, consistent with DOH COVID-19 signage. Responsible Parties can develop their own customized signage specific to their workplace or setting, provided that such signage is consistent with the Department's signage. Signage should be used to remind individuals to:
  - Stay home if sick.
  - Cover their nose and mouth with a face covering.
  - Properly store and, when necessary, discard PPE.
  - Adhere to physical distancing instructions.
  - Report symptoms of or exposure to COVID-19, and how they should do so.
  - Follow hand hygiene and cleaning and disinfection guidelines.

- Follow appropriate respiratory hygiene and cough etiquette.
- Prohibit holding or shaking hands of members of different households during services or prayers.

## **B. Gatherings in Enclosed Spaces**

- Responsible Parties must limit in-person gatherings (e.g. rehearsals, congregational meetings) within the following parameters, and may use other methods such as video, teleconferencing, or drive-in services whenever possible, per CDC guidance "Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)".
  - In Phase 1 regions, no more than 10 people for any services occurring indoor or outdoor.
  - In Phase 2 and 3 regions, no more than 25% of the maximum occupancy for a particular area as set by the certificate of occupancy for services occurring indoor or no more than 25 people for services occurring outdoor.
  - In Phase 4 regions, 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 outdoor.
- Responsible Parties must put in place practices for adequate social distancing in small areas, such as restrooms and breakrooms, and should develop signage and systems (e.g. flagging when occupied) to restrict occupancy when social distancing cannot be maintained in such areas; and
- Responsible Parties should stagger schedules for staff members and volunteers to observe social distancing (e.g. six feet of space) for any gathering (e.g. coffee breaks, and shift starts/stops).

## **C. Gathering Activity**

- Responsible Parties must take measures to reduce interpersonal contact and congregation, through methods such as:
  - limiting in-person presence of staff to only those employees/volunteers who are necessary;
  - holding services outdoors, when possible (e.g. outdoor service for religious gatherings, or graveside-only service for funerals);
  - reducing on-site attendees to accommodate social distancing guidelines;
  - providing remote service options (e.g. live streaming, AM/FM broadcast);
  - allowing drive-in services:
    - Ensure attendees remain in the vehicle in which they arrived.
    - Attendees should not interact physically with clergy, employees, or attendees in other vehicles.
    - Vehicles should contain only members of a single household;
    - Cars must be at least 6 feet apart, or use alternate parking spaces.
  - offering multiple service times, including separate times for vulnerable populations (e.g. those over 70, who have underlying health condition, or those how are immunocompromised);
  - encouraging advanced sign-ups to manage capacity;
  - prioritizing activities that allow for social distancing over those that do not;

- avoiding multiple people and/or teams working in one area by staggering scheduled activities and using signs to indicate occupied areas;
- changing or removing practices that involve close or proximate contact or sharing things among members of different households, such as:
  - sharing a car or limousine ride between locations;
  - providing food and beverages for attendees before, during, or after the event or service.
- Responsible Parties must limit activities involving singing, e.g., a choir, soloist, cantor, or musical ensemble, unless at least 12 feet of separation can be provided between individuals, or additional distancing or physical barriers can reduce transmission of respiratory droplets.

#### **D. Movement and Operations**

- Responsible Parties must establish designated areas for pickups and deliveries, limiting contact to the extent possible.
- Responsible Parties should limit on-site interactions (e.g. designate an egress for individuals leaving the premises and a separate ingress for individuals entering) and movements (e.g. individuals should remain near their stations or seats as often as possible).

## **II. PLACES**

### **A. Protective Equipment**

- Responsible Parties must procure, fashion, or otherwise obtain acceptable face coverings and provide such coverings to their employees while at work at no cost to the employee. Responsible Parties should have an adequate supply of face coverings, masks and other required personal protective equipment (PPE) on hand should an employee need a replacement, or should a visitor or attendee be in need. Acceptable face coverings include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, and face shields.
- Responsible Parties must ensure all attendees wear face coverings that completely cover the nose and mouth unless doing so would be contrary to the individual's health or safety due to medical a condition, or if the attendee is under two years old.
  - Face coverings are required at all times except while seated, provided all individuals are six feet apart except for immediate household members. Faith leaders, officiants, volunteers, and/or attendees must be prepared to don a face covering if another person unexpectedly comes within six feet (e.g. when walking to seats).
- Face coverings must be cleaned or replaced after use and may not be shared. Please consult the [CDC guidance](#) for additional information on cloth face coverings and other types of PPE, as well as instructions on use and cleaning.
- Responsible Parties must allow those performing the religious service or ceremony to use their own acceptable face coverings but cannot require such participants to supply their own face coverings. Further, this guidance shall not prevent employees, officiants, volunteers or attendees from wearing their personally owned additional protective coverings (e.g. surgical masks, or face shields).



- Responsible Parties should consider putting in place measures to limit the sharing of objects, such as religious texts, collection plates, and other materials, as well as the touching of shared surfaces, such as pews, instruments, doors, and railings; or, require employees and volunteers to wear gloves when in contact with shared objects or frequently touched surfaces; or, require employees, volunteers, and attendees to sanitize or wash their hands before and after contact.
- If providing gowns or other garments, Responsible Parties must ensure they are clean and laundered between uses.
- Responsible Parties may implement the following practices to limit the sharing of materials:
  - Place donation plates/boxes in central location with proper distancing protocols in place;
  - Remove religious texts from pews or benches, and encourage congregation to bring their own;
  - If choir/musical ensemble meets enhanced distancing measures, encourage members to launder their own gowns at home, and bring their own instruments, where possible;
  - Adapt certain religious practices that traditionally require close or proximate contact in order to minimize contact between individuals; and/or
  - Empty fonts or other shared water-related service or ceremonial activities.
- Responsible Parties must train employees on how to adequately don, doff, clean (as applicable), and discard PPE, including but not limited to, appropriate face coverings.

## **B. Hygiene, Cleaning, and Disinfection**

- Responsible Parties must ensure adherence to hygiene, cleaning and disinfection requirements as advised by the CDC and DOH, including "Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19," and the "STOP THE SPREAD" poster, as applicable. Responsible Parties must maintain logs that include the date, time, and scope of cleaning and disinfection.
- Responsible Parties must provide and maintain hand hygiene stations on site, as follows:
  - For handwashing: soap, running warm water, and disposable paper towels.
  - For sanitizer: an alcohol-based hand sanitizer containing at least 60% alcohol for areas where handwashing facilities may not be available or practical.
  - Hand sanitizer must be placed throughout the location for use by all attending or working. It should be placed in convenient locations such as points of entrance/exit.
- Responsible Parties should place signage near hand sanitizer stations indicating that visibly soiled hands should be washed with soap and water; hand sanitizer is not effective on visibly soiled hands.
- Responsible Parties should place receptacles around the facility for disposal of soiled items, including PPE.
- Responsible Parties must provide appropriate cleaning and disinfection supplies for shared and frequently touched surfaces and encourage participants to use these supplies, following manufacturers' instructions, before and after use of these surfaces, followed by hand hygiene.
- Responsible Parties must conduct regular cleaning and disinfection of the location or facility and more frequent cleaning and disinfection for high risk areas used by many individuals and for frequently touched surfaces. Cleaning and disinfection must be rigorous and ongoing and must occur at least after each service. Please refer to DOH's "Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19" for detailed instructions on how to clean and disinfect facilities.

- Responsible Parties must ensure regular cleaning and disinfection of restrooms. Restrooms should be cleaned and disinfected more often depending on frequency of use.
  - Responsible Parties must ensure distancing rules are adhered to by reducing restroom capacity where feasible.
- Responsible Parties must ensure that shared objects are regularly disinfected using registered disinfectants, including at least between services. Refer to the Department of Environmental Conservation (DEC) [list of products](#) registered in New York State and identified by the EPA as effective against COVID-19.
- If cleaning or disinfection products or the act of cleaning and disinfection causes safety hazards or degrades the material (e.g. religious artifact), Responsible Parties must put in place hand hygiene stations between use and/or supply disposable gloves and/or limitations on the number of individuals touching such material.
- Responsible Parties must provide for the cleaning and disinfection of exposed areas in the event of a positive case of COVID-19, with such cleaning and disinfection to include, at a minimum, all heavy transit areas and high-touch surfaces (e.g. pews, religious texts, collection plates, railings, doors and other objects).
- CDC guidelines on "[Cleaning and Disinfecting Your Facility](#)" if someone is suspected or confirmed to have COVID-19 are as follows:
  - Close off areas used by the person suspected or confirmed to have COVID-19.
    - Responsible Parties do not necessarily need to close operations, if they can close off the affected areas.
  - Open outside doors and windows to increase air circulation in the area.
  - Wait 24 hours before you clean or disinfect. If 24 hours is not feasible, wait as long as possible.
  - Clean and disinfect all areas used by the person suspected or confirmed to have COVID-19, such as offices, bathrooms, common areas, and shared equipment.
  - Once the area has been appropriately disinfected, it can be opened for use.
    - Anyone without close or proximate contact with the person suspected or confirmed to have COVID-19 can return to the area immediately after disinfection.
    - Refer to DOH's "[Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure](#)" for information on "close or proximate" contacts.
  - If more than seven days have passed since the person suspected or confirmed to have COVID-19 visited or used the facility, additional cleaning and disinfection is not necessary, but routine cleaning and disinfection should continue.
- For funeral related services, Responsible Parties must prohibit touching, hugging, or kissing the body of a deceased person who had confirmed or suspected COVID-19 per CDC guidance, "[Funeral Guidance for Individuals and Families](#)."
- Responsible Parties must prohibit shared food and beverages (e.g. self-serve meals and beverages).

#### D. Phased Reopening

- Responsible Parties are encouraged to phase-in reopening activities so as to allow for operational issues to be resolved before production or work activities return to normal levels. Responsible Parties should consider limiting the number of staff members and volunteers, hours, and number of

attendees available to be served when first reopening so as to provide operations with the ability to adjust to the changes.

#### **D. Communications Plan**

- Responsible Parties must affirm that they have reviewed and understand the state-issued industry guidelines, and that they will implement them.
- Responsible Parties should develop a communications plan for employees, volunteers, or congregants, that includes applicable instructions, training, signage, and a consistent means to provide staff members with information. Responsible Parties may consider developing webpages, text and email groups, and social media.

### **III. PROCESSES**

#### **A. Screening and Testing**

- Responsible Parties must implement mandatory daily health screening practices for employees, faith leaders and volunteers. Responsible Parties are encouraged to offer optional health screenings for attendees.
  - Screening practices may be performed remotely (e.g. by telephone or electronic survey), before the person arrives to the building, to the extent possible; or may be performed on site.
  - Screening should be coordinated to prevent person from intermingling in close or proximate contact with each other prior to completion of the screening.
  - At a minimum, screening must be completed using a questionnaire that determines whether the person has:
    - (a) knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has or had symptoms of COVID-19;
    - (b) tested positive for COVID-19 in the past 14 days; and/or
    - (c) has experienced any symptoms of COVID-19 in the past 14 days.
- Refer to CDC guidance on "[Symptoms of Coronavirus](#)" for the most up to date information on symptoms associated with COVID-19.
- Responsible Parties must require a person to immediately disclose if and when their responses to any of the aforementioned questions changes, such as if they begin to experience symptoms, including during or outside of work hours.
- In addition to the screening questionnaire, temperature checks of employees may also be conducted per U.S. Equal Employment Opportunity Commission or DOH guidelines. Responsible Parties are prohibited from keeping records of individuals' health data (e.g. the specific temperature data of an individual), but are permitted to maintain records that confirm individuals were screened and the result of such screening (e.g., pass/fail, cleared/not cleared).
- Responsible Parties must ensure that any personnel performing screening activities, including temperature checks, are appropriately protected from exposure to potentially infectious employees or visitors entering the site. Personnel performing screening activities must be trained by individuals who are familiar with CDC, DOH, and OSHA protocols.

- Screeners must be provided and use PPE, including at a minimum, a face mask, and may include gloves, a gown, and/or a face shield.
- An individual who screens positive for COVID-19 symptoms must not be allowed to enter the gathering place and must be sent home with instructions to contact their healthcare provider for assessment and testing.
  - Responsible Parties should provide such individuals with information on healthcare and testing resources.
  - Responsible Parties must immediately notify the state and local health department about the case if test results are positive for COVID-19 and they are so informed by the affected person or persons.
- Responsible Parties should refer to DOH's "[Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure](#)" regarding protocols and policies for employees seeking to return to work after a suspected or confirmed case of COVID-19 or after the employee had close or proximate contact with a person with COVID-19.
- Responsible Parties must designate a central point of contact, which may vary by activity, location, shift or day, responsible for receiving and attesting to having reviewed all questionnaires, with such contact also identified as the party for individuals to inform if they later are experiencing COVID-19-related symptoms, as noted on the questionnaire.
- Responsible Parties must designate a site safety monitor whose responsibilities include continuous compliance with all aspects of the site safety plan.
- To the extent possible, Responsible Parties should maintain a log of every person, including employees and visitors, who may have close or proximate contact with other individuals at the gathering site or area; excluding deliveries that are performed with appropriate PPE or through contactless means. The log should contain contact information, such that all contacts may be identified, traced and notified in the event an employee, volunteer, or attendee is diagnosed with COVID-19. Responsible Parties must cooperate with state and local health department contact tracing efforts. The log is not required to maintain a list of attendees.
- Responsible Parties cannot mandate that attendees complete a health screen or provide contact information but may encourage attendees to do so. Responsible Parties may provide an option for attendees to provide contact information so they can be logged and contacted for contact tracing, if necessary.

## **B. Tracing and Tracking**

- Responsible Parties must notify the state and local health department immediately upon being informed of any positive COVID-19 test result by an employee or faith leader at their site.
- In the case of an employee or faith leader testing positive, the Responsible Parties must cooperate with the state and local health department to trace all contacts in the workplace and notify the state and local health department of all employees and visitors who entered the site dating back to 48 hours before the employee began experiencing COVID-19 symptoms or tested positive, whichever is earlier, but maintain confidentiality as required by federal and state law and regulations.
- State and local health departments will implement monitoring and movement restrictions of infected or exposed persons including home isolation or quarantine.

- Individuals who are alerted that they have come into close or proximate contact with a person with COVID-19, and have been alerted via tracing, tracking or other mechanism, are required to self-report to their employer at the time of alert and shall follow the protocol referenced above.

## IV. OPERATOR PLANS

Responsible Parties must conspicuously post completed safety plans on site. The State has made available a safety plan template to guide in developing plans to protect against the spread of COVID-19, and such plans are adaptable for faith-based institutions to use.

### **Additional safety information, guidelines, and resources are available at:**

New York State Department of Health Novel Coronavirus (COVID-19) Website  
<https://coronavirus.health.ny.gov/>

Centers for Disease Control and Prevention Coronavirus (COVID-19) Website  
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Occupational Safety and Health Administration COVID-19 Website  
<https://www.osha.gov/SLTC/covid-19/>

### **At the link below, affirm that you have read and understand your obligation to operate in accordance with this guidance:**

<https://forms.ny.gov/s3/ny-forward-affirmation>

# 20-3572-CV

## IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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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.

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

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### REPLY BRIEF IN SUPPORT OF EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS FOR INJUNCTION PENDING APPEAL

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October 29, 2020

## TABLE OF CONTENTS

INTRODUCTION .....	1
ARGUMENT .....	3
I. Plaintiffs Are Likely To Prevail On The Merits.....	3
A. The Order Is Unlawful Under <i>Masterpiece Cakeshop, Lukumi, And Central Rabbinical</i> .....	3
B. The Order Discriminates By Disfavoring “Houses of Worship” .....	7
II. Injunctive Relief Is Necessary Under The Equities .....	9
III. Plaintiffs Have Complied With Rule 8(a) .....	11
CONCLUSION .....	12

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Calvary Chapel Dayton Valley v. Sisolak</i> , 140 S. Ct. 2603 (2020).....	7, 8
<i>Cent. Rabbinical Cong. of the U.S. &amp; Can. v. N.Y.C. Dep’t of Health &amp; Mental Hygiene</i> , 763 F.3d 183 (2d Cir. 2014) .....	1, 2, 3, 4
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	1, 3, 4, 5
<i>Denver Bible Church v. Azar</i> , 2020 U.S. Dist. LEXIS 195607 (D. Colo. Oct. 15, 2020).....	8
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	9
<i>Emp’t Div., Dep’t of Human Res. of Ore. v. Smith</i> , 494 U.S. 872 (1990).....	10
<i>Harvest Rock Church, Inc. v. Newsom</i> , __ F.3d __, 2020 U.S. App. LEXIS 31226 (9th Cir. Oct. 1, 2020).....	9
<i>Homans v. City of Albuquerque</i> , 264 F.3d 1240 (10th Cir. 2001) .....	11
<i>In re Flint Water Cases</i> , 960 F.3d 820 (6th Cir. 2020) .....	12
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905).....	2, 4
<i>Jolly v. Coughlin</i> , 76 F.3d 468 (2d Cir. 1996) .....	9
<i>Maryville Baptist Church, Inc. v. Beshear</i> , 957 F.3d 610 (6th Cir. 2020) .....	8



*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*,  
138 S. Ct. 1719 (2018).....1, 2, 3, 4

*N.Y. Progress & Prot. PAC v. Walsh*,  
733 F.3d 483 (2d Cir. 2013) .....10

*Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*,  
734 F.3d 406 (5th Cir. 2013) .....12

*Roberts v. Neace*,  
958 F.3d 409 (6th Cir. 2020) .....7

*Soos v. Cuomo*,  
2020 U.S. Dist. LEXIS 111808 (N.D.N.Y. June 26, 2020) .....8

*South Bay United Pentecostal Church v. Newsom*,  
140 S. Ct. 1613 (2020).....4, 7, 8, 9

*Spell v. Edwards*,  
962 F.3d 175 (5th Cir. 2020) .....8

*The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*,  
No. 20-3590 (2d Cir.) .....6

*The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*,  
No. 20-4844 (E.D.N.Y.) .....6, 10

**Rules**

Executive Order No. 202.68 .....*passim*

Fed. R. App. P. 8.....11

**Other Authorities**

Carl Campanile, *Cuomo Calls COVID-19 Resurgence an ‘Ultra-Orthodox’ Jewish Problem*, NYPost (Oct. 9, 2020).....3

Governor Andrew M. Cuomo, *Governor Cuomo Announces Travel Advisory Requiring 14-Day Quarantine*, New York State (Oct. 27, 2020) .....7

Governor Andrew M. Cuomo, *Governor Cuomo Updates New Yorkers on State’s Progress During COVID-19 Pandemic*, New York State (Oct. 23, 2020).....6, 7

*Calculating Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Laboratory Test Percent Positivity* (Sept. 3, 2020) .....6

Maired Mc Ardle, *Cuomo Says ‘Religious Practices’ of Orthodox Jews Causing Virus to Spread in New York City*, National Review (Oct. 14, 2020) .....3

New York “Micro-Cluster” Strategy (Oct. 21, 2020).....6

## INTRODUCTION

Defendant's targeting of a religious minority for blame during the COVID-19 pandemic, falsely tarring them as perpetrators rather than victims of the virus, is religious discrimination that is incompatible with the Free Exercise Clause. As the amicus brief submitted by the Muslim Public Affairs Council, et al., explains, Defendant's statements and actions are yet another example of the regrettable historical experience that "[t]oo often, religious minorities have served as scapegoats in times of sickness, war, and fear." Dkt.57, Am. Br. 2. Plaintiffs respectfully submit that this Court would not permit a COVID-19 order to stand if an official had made comments similar to those articulated by Defendant while simply replacing the words "Orthodox Jewish community" with a racial or ethnic rather than a religious minority. The same result is required here.

Plaintiffs lead argument in their Motion was that Defendant's religious discrimination is forbidden under *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Central Rabbinical Congress of the United States & Canada v. New York City Department of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014). In particular, Defendant's discriminatory words and targeted actions against Orthodox Jews are fatal to Executive Order No. 202.68 (the "Order"). Defendant largely ignores this argument, instead focusing on Plaintiffs'

alternative argument about the Order's disfavoring of houses of worship. Defendant fails even to cite *Masterpiece Cakeshop* or *Central Rabbinical*, while attempting to recast his repeated comments about Orthodox Jews as refusing to give them "special treatment." Opp'n 26. Plaintiffs trust that the Court can see through this sophistry.

These words led Defendant to design a cluster regime gerrymandered to target Orthodox Jews, and no amount of post-hoc explanation can justify his ad hoc creation of zones meant to restrict the Orthodox Jewish community. Tellingly, twice in the first page of Defendant's opposition he describes imposing restrictions on "communities" rather than "neighborhoods." A community refers to a group of people, such as Orthodox Jews, while a neighborhood refers to a geographic area. This Court should take Defendant at his word that the Order was issued to impose heightened restrictions on Orthodox Jews. Given that Defendant has no plausible defense for his statements, Plaintiffs are exceedingly likely to prevail on the merits.

On the equities, Defendant's Order should be enjoined because every day that it remains in effect it deprives Plaintiffs of their constitutional rights. While a state "has the right to protect itself against an epidemic of disease," *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905), both the Free Exercise Clause and principles of equity prohibit government officials from scapegoating a religious minority and targeting them for heightened restrictions.

## ARGUMENT

### I. Plaintiffs Are Likely to Prevail on the Merits

#### A. The Order Is Unlawful Under *Masterpiece Cakeshop*, *Lukumi*, and *Central Rabbinical*

Plaintiffs’ lead merits argument is that Defendant engaged in unconstitutionally impermissible targeting of a specific religious minority, the Orthodox Jewish community. Mot. 14–17. There are two independently sufficient bases on which Plaintiffs prevail on this targeting argument. First, Defendant’s *repeated* statements singling out the Orthodox Jewish community—the “ultra-Orthodox community” is causing the “problem,” R.2-4:8–9; “the issue is with that ultra-orthodox community,” Carl Campanile, *Cuomo Calls COVID-19 Resurgence an ‘Ultra-Orthodox’ Jewish Problem*, NYPost (Oct. 9, 2020);<sup>1</sup> and “[w]e’re now having issues in the Orthodox Jewish community in New York,” Mairead McArdle, *Cuomo Says ‘Religious Practices’ of Orthodox Jews Causing Virus to Spread in New York City*, National Review (Oct. 14, 2020)<sup>2</sup>—are sufficient to render this Order unconstitutional, under a straightforward application of *Masterpiece Cakeshop*. Mot. 15–16. Second and independently, under *Lukumi* and *Central Rabbinical*,

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<sup>1</sup> Available at <https://nypost.com/2020/10/09/gov-cuomo-ny-covid-19-spike-an-ultra-orthodox-jewish-problem/>.

<sup>2</sup> Available at <https://www.nationalreview.com/news/cuomo-says-religious-practices-of-orthodox-jews-causing-virus-to-spread-in-new-york-city/>.

Defendant's gerrymandering of the zones subject to the Order's restrictions was plainly aimed at the Orthodox Jewish community. Mot. 16–17.

Defendant has almost nothing to say in defense of his repeated, discriminatory statements, other than claiming that all he meant was he would not give Orthodox Jews “special treatment.” Opp’n 26. That is, with all respect, not a plausible account of Defendant's repeated targeting of Orthodox Jews in multiple statements over more than ten days. Once Defendant's obviously post-hoc “special treatment” assertion is properly set aside, his lack of response to Plaintiffs' lead argument is a concession that Plaintiffs are exceedingly likely to prevail on the merits. Defendant's silence about his repeated comments implicitly acknowledges that they are more problematic than the comments that the Supreme Court found impermissible in *Masterpiece Cakeshop*. Mot. 15–16. Defendant also concedes by silence Plaintiffs' point that *Jacobson* and *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), do not apply to cases involving a showing of targeting a religious minority, because a pandemic does not give public officials license to discriminate and scapegoat. Mot. 20. Finally, Defendant admits by silence that his Order cannot survive strict scrutiny, which is what *Masterpiece Cakeshop* demands. Mot. 18–19.

Turning to the gerrymandered nature of his Order under *Lukumi* and *Central Rabbinical*, Defendant's arguments are similarly unpersuasive. Defendant has failed

to set forth any nondiscriminatory basis for his *original* placement of the Orthodox Jewish community in highly restrictive Red Zones. Plaintiffs’ lawsuit challenges that designation, which remains to this day. The Order did not include any criteria for identifying restricted areas, and Defendant did not disclose any such criteria when Plaintiffs’ communities were designated as restricted zones on October 6. Rather, Defendant gerrymandered his zone levels and zone lines to target Orthodox Jewish communities. Mot. 6–7; *accord* Dkt. 49-2 at 5 (Brooklyn zone with Jewish religious institutions identified). Defendant relies on subsequently-issued criteria purportedly used “to establish zone designations,” disclosed only *after* Plaintiffs filed this lawsuit, as evidence of the nondiscriminatory nature of *original* zones being challenged. Opp’n 24–25. But these new metrics purport to explain only how a new “cluster” can achieve a zone designation. They do not even attempt to explain how the original and still-existing Red Zones targeting Orthodox Jewish communities were designated,<sup>3</sup> and do not cure Defendant’s targeted creation of the Order.

Defendant’s post-filing actions only further underscore that he continues to target Orthodox Jewish communities as his “discriminatory object.” *Lukumi*, 508

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<sup>3</sup> Defendant wrongly contends that the Brooklyn Orange Zone challenge is mooted by Defendant’s October 22 re-designation of that zone to a Yellow Zone. Opp’n 2 n.2, 14. Plaintiffs challenge the Order itself as discriminatory, and Defendant remains free to move communities between zones at his whim.

U.S. at 533, 540. On October 9, Defendant claimed that he identified areas with 8% positivity rates<sup>4</sup> as “Red Zones.” R.12 ¶ 82. But, after the *Diocese* court questioned the metric’s accuracy, *The Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, No. 20-3590 (2d Cir.), Dkt. 20-3, Ex. O-1 at 62–63, Defendant unveiled new metrics the next day pegging Red Zones at 3% or higher positivity rate “for a sustained period of time” (plus other factors), Declaration of Howard A. Zucker, *Diocese*, No. 1:20-cv-04844 (E.D.N.Y.), Dkt. 29-1 at ¶¶ 12–13, 20. Defendant now points to still new criteria, announced October 21, which Defendant concedes “afford the Governor and DOH some discretion” in deciding which areas to restrict. Opp’n 25.<sup>5</sup>

Defendant has continued to wield this discretion to target Orthodox Jewish communities for restrictions while relieving others with higher positivity rates. Defendant has maintained heavily-restrictive Red Zone status for Jewish communities in Brooklyn that had a 7-day rolling average positivity rate of 4.57% on October 23. Governor Andrew M. Cuomo, *Governor Cuomo Updates New*

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<sup>4</sup> Positivity rate is “the number of positive tests (numerator) divided by the total number of resulted reported tests (denominator).” *Calculating Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Laboratory Test Percent Positivity* (Sept. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/calculating-percent-positivity.html/>.

<sup>5</sup> See New York “Micro-Cluster” Strategy at 3, 9 (Oct. 21, 2020), [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/MicroCluster\\_Metrics\\_10.21.20\\_FINAL.pdf/](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/MicroCluster_Metrics_10.21.20_FINAL.pdf/) (consideration of “community cooperation” and “other epidemiological factors,” like “demographic information”).



*Yorkers on State's Progress During COVID-19 Pandemic*, New York State (Oct. 23, 2020).<sup>6</sup> Yet Defendant did not impose similar Red Zone restrictions on areas with higher positivity rates but without a meaningful Orthodox Jewish population. Thus there is a “Broome yellow-zone” with 6.30% positivity, a “Steuben yellow-zone” with 4.65%, and a “Chemung orange-zone” with 8.13%. *Id.*

As of October 27, Defendant continued to impose “Red Zone” restrictions on Brooklyn Orthodox Jewish communities with 4.23% positivity, while areas without a Jewish population have higher positivity but fewer restrictions: “Broome yellow-zone” at 8.04%, “Steuben yellow-zone” at 4.44%, and “Chemung orange-zone” at 7.80%. Governor Andrew M. Cuomo, *Governor Cuomo Announces Travel Advisory Requiring 14-Day Quarantine*, New York State (Oct. 27, 2020).<sup>7</sup>

### **B. The Order Discriminates By Disfavoring “Houses of Worship”**

Defendant’s Order is unconstitutional for the *additional* reason that it discriminates—on its face—against “houses of worship,” vis-à-vis permitted secular activity. Mot. 17–18. It is this, second aspect of Plaintiffs’ merits argument that is the type of claim that *South Bay, Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020) (per curiam),

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<sup>6</sup> Available at <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-50/>.

<sup>7</sup> Available at <https://www.governor.ny.gov/news/governor-cuomo-announces-travel-advisory-requiring-14-day-quarantine-0/>.

*Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (per curiam), *Denver Bible Church v. Azar*, 2020 U.S. Dist. LEXIS 195607 (D. Colo. Oct. 15, 2020), and *Soos v. Cuomo*, 2020 U.S. Dist. LEXIS 111808 (N.D.N.Y. June 26, 2020), adjudicated. On this argument, this case is more like *Roberts*, *Maryville Baptist*, *Denver Bible*, and *Soos* because the *permitted* secular activities under the Order are “comparable,” *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief), to “houses of worship,” in terms of COVID-19 risk. Mot. 20–21.

By its very terms the Order disproves Defendant’s claim that “houses of worship are treated more favorably than comparable secular activities.” Opp’n 2. Defendant’s restrictions afford more favorable rules to schools in Yellow Zones, R.2-8:3; R.2-14, offices, malls, and retail in Orange Zones, R.2-8:3; R.2-15; R.2-16, and “essential” businesses, such as “financial services” and manufacturing, in Red Zones, R.2-8:3; R.2-13:5–6, where individuals congregate and remain in close proximity for extended periods of time.<sup>8</sup> The Order also fails to define the exempted

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<sup>8</sup> Defendant’s argument that “services vital to public health and safety” are not comparators because “[i]t is hard to see how” they “could be halted,” Opp’n 23, fails because a law is underinclusive if “a single secular analog is *not* regulated.” *Calvary Chapel*, 140 S. Ct. at 2613 (Kavanaugh, J., dissenting) (citation omitted); *see also Spell v. Edwards*, 962 F.3d 175, 183 (5th Cir. 2020) (Ho, J., concurring).

“essential gatherings,” even in Red Zones where houses of worship are limited to 10 individuals.<sup>9</sup> Defendant is entirely silent on virtually all of these points.

Defendant also wrongly argues that *South Bay* “compel[s]” this Court to conclude that the Order “treat[s] religious gatherings the same as, or more favorably than, secular comparators.” Opp’n 19. *South Bay* “was unaccompanied by any opinion of the Court and thus is precedential only as to the precise issues presented and necessarily decided.” *Harvest Rock Church, Inc. v. Newsom*, \_\_ F.3d \_\_, 2020 U.S. App. LEXIS 31226, at \*7 (9th Cir. Oct. 1, 2020) (O’Scannlain, J., dissenting). Moreover, and fatal to Defendant’s *South Bay* analogy, Chief Justice Roberts’ concurrence distinguished permitted conduct dissimilar to that allowed here, such as schools, malls, offices, and manufacturing, R.2-8:3; R.2-13:5–6; R.2-14; R.2-15; R.2-16, “where large groups of people gather in close proximity for extended periods of time,” 140 S. Ct. at 1613.

## **II. Injunctive Relief Is Necessary Under The Equities**

Plaintiffs have shown that equitable factors favor relief. This Court “presum[es] irreparable injury . . . flows from a violation of constitutional rights.” *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *see also Elrod v. Burns*, 427 U.S.

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<sup>9</sup> Twenty-one days after issuing the Order, the best Defendant can muster is that it “would reasonably be understood” that “essential gatherings” are “[g]atherings necessary to perform” services associated with “essential businesses.” Opp’n 5–6 n.7. That reading renders the essential gatherings exemption superfluous.

347, 373 (1976) (plurality op.). Defendant’s restrictions bar Plaintiffs from worshipping in synagogue and engaging in critical religious practices essential to their religious beliefs, such as communal prayer and ritual, which is particularly true for Orthodox Jews who cannot travel by vehicle on the Sabbath and religious holidays. Mot. 22. Injunctive relief would benefit the public by protecting Plaintiffs’ constitutional rights, *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013), and would not harm Defendant, as Plaintiffs have complied with all mandates and have not caused COVID-19 spread. Mot. 22–23.

Defendant’s equitable arguments fail. Opp’n 28–30. Plaintiffs cannot simply “modif[y]” their religious practices to avoid irreparable harm. *Id.* It is undisputed that Defendant’s restrictions render it “impossible” for Plaintiffs to worship in synagogue and to engage in core religious practices, R.2-19 ¶ 5; R.2-20 ¶¶ 4–5; R.2-21 ¶¶ 5–6; in any event, “courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim,” *Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990). Nor does the timing of Plaintiffs’ appellate filing “weigh[ ] further against a finding of irreparable harm.” Opp’n 28. Both Plaintiffs and the *Diocese* plaintiffs filed complaints on October 8 and had TRO hearings on late-Friday, October 9 that resulted in the denial of relief. The *Diocese* court held a preliminary injunction hearing on October 15, and issued its ruling late-Friday, October 16, *Diocese*, No. 1:20-cv-04844, Dkt. 32. Had the

*Diocese* court enjoined Defendant from enforcing the Order’s capacity limits on houses of worship, Plaintiffs surely would have benefitted from that ruling. Plaintiffs filed this motion on October 21, just three business days after the October 16 ruling. Mot. 1, 4 n.10. Finally, despite his generic claims that relief would harm the public because Plaintiffs’ “congregants could catch COVID-19,” Opp’n 29, Defendant fails to provide any evidence that Plaintiffs have failed to successfully guard against COVID-19 previously or would not continue to do so.<sup>10</sup>

### **III. Plaintiffs Have Complied With Rule 8(a)**

Plaintiff complied with Rule 8(a) by seeking “an order . . . granting an injunction while an appeal is pending” from this Court because asking for this relief from the district court would have been “*impracticable*” under that Rule’s text. Fed. R. App. P. 8(a)(1)(C), 8(a)(2)(A)(i) (emphasis added). Defendant’s action here—taken after careful consultation with this Court’s clerk’s office on October 20—of asking for relief from this Court, without re-asking the district court to issue what essentially would have been the same injunctive relief it had already declined, is consistent with Rule 8(a)’s “impracticable” clause, the principle that “another application to the district court would serve little purpose,” *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001), and the ongoing, emergency

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<sup>10</sup> Defendant also offers no basis for restricting *all* houses of worship to 10 people, whether they seat 40 or 400.

nature of Plaintiffs' harms under Defendant's unlawful Order. *See, e.g., In re Flint Water Cases*, 960 F.3d 820, 825 (6th Cir. 2020); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410–11 (5th Cir. 2013). Defendant cites no decision requiring a movant to seek injunctive relief pending appeal from the district court that has just denied preliminary injunctive relief on the same grounds that would be argued in any stay application, especially in a case involving ongoing deprivation of constitutional rights.

### CONCLUSION

This Court should enjoin the Order pending appeal.

Dated: October 29, 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 2,600 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 29, 2020

/s/ Avi Schick

AVI SCHICK

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th 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 29, 2020

/s/ Avi Schick

AVI SCHICK



# **EXHIBIT E**



# State of New York

## Executive Chamber

No. 202.68

### EXECUTIVE ORDER

#### **Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency**

**WHEREAS**, on March 7, 2020, I issued Executive Order Number 202, declaring a State disaster emergency for the entire State of New York; and

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

**NOW THEREFORE**, I, Andrew M. Cuomo, Governor of the State of New York, 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, or to provide any directive necessary to respond to the disaster, do hereby continue the suspensions and modifications of law, and any directives not superseded by a subsequent directive contained in Executive Orders 202.31, 202.41, 202.42, 202.43, 202.51, 202.52, 202.56, as contained in Executive Order 202.63, and Executive Orders 202.61 and 202.62 for another thirty days through November 5, 2020, and I hereby temporarily suspend or modify the following from the date of this Executive Order through November 5, 2020:

- Sections 12 and 206 of the Public Health Law, to the extent necessary to, notwithstanding any other provision of this Executive Order, provide 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; and
- Sections 12-a and 206(4) of the Public Health Law, to the extent necessary to authorize, at the direction of the Commissioner of Health or the Commissioner's representative, any local government official to assess, and the local government to retain, a civil penalty for violations of Executive Orders issued pursuant to Section 29-A of the Executive Law, or any regulations of the Department of Health, that impose requirements pertaining to maintaining social distance and wearing of face coverings, for the duration of this disaster emergency, and to conduct any hearing related to such penalties. Such penalties, if assessed on an individual basis, shall not exceed \$1,000 per violation, except as otherwise provided herein.

**IN ADDITION**, by virtue of the authority vested in me by Section 29-a of Article 2-B of the Executive Law to issue any directive during a disaster emergency necessary to cope with the disaster, I do hereby issue the following directives through November 5, 2020:

- The Department of Health shall 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 all three zones below, shall be conducted in strict adherence to Department of Health guidance.

- Based upon the severity of the cluster activity, the Department of Health shall adopt in the most severe, or “red zones,” the following mitigation measures:
  - Non-essential gatherings of any size shall be postponed or cancelled; all non-essential businesses, as determined by the Empire State Development Corporation based upon published guidance, shall reduce in-person workforce by 100%; houses of worship shall be subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer; any restaurant or tavern shall cease serving patrons food or beverage on-premises and may be open for takeout or delivery only; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.
- In moderate severity warning areas or “orange zones” the following mitigation measures:
  - Non-essential gatherings shall be limited to 10 people; certain non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus, including gyms, fitness centers or classes, barbers, hair salons, spas, tattoo or piercing parlors, nail technicians and nail salons, cosmetologists, estheticians, the provision of laser hair removal and electrolysis, and all other personal care services shall reduce in-person workforce by 100%; houses of worship shall be subject to a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer; any restaurant or tavern shall cease serving patrons food or beverage inside on-premises but may provide outdoor service, and may be open for takeout or delivery, provided however, any one seated group or party shall not exceed 4 people; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.
- In precautionary or “yellow zones,” the following mitigation measures:
  - Non-essential gatherings shall be limited to no more than 25 people; houses of worship shall be subject to a capacity limit of 50% of its maximum occupancy and shall adhere to Department of Health guidance; any restaurant or tavern must limit any one seated group or party size to 4 people; and the Department of Health shall issue guidance by October 9, 2020 regarding mandatory testing of students and school personnel, and schools shall adhere to such guidance.
- The above directive shall be effective immediately, and at such time as notice is provided to such affected areas, may be enforced and shall be enforced no later than Friday, October 9, 2020, as determined by the county in which the red zones, orange zones, and yellow zones are located.



GIVEN under my hand and the Privy Seal of the  
 State in the City of Albany this sixth  
 day of October in the year two  
 thousand twenty.

A handwritten signature in black ink, appearing to read "Andrew Cuomo", written over a faint horizontal line.

BY THE GOVERNOR

A handwritten signature in black ink, appearing to read "M. C.", written over a faint horizontal line.

Secretary to the Governor

# **EXHIBIT F**



OCTOBER 6, 2020 Albany, NY

## **Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces New Cluster Action Initiative**

Initiative Developed in Consultation with Leading National Public Health Experts—Dr. Noam Ross of EcoHealth Alliance, Dr. Michael Osterholm of the University of Minnesota and Former CDC Director Dr. Tom Frieden

New Initiative Maps Clusters by Density of Cases to Address COVID Hot Spots in Brooklyn, Queens, and Broome, Orange and Rockland Counties

Fines for Sponsors of Mass Gatherings Increased to \$15,000

New Rules and Restrictions in Effect for Minimum of 14 Days

Governor Cuomo: "First, identify the cluster. You can identify the cluster because we do so much testing and we have so much data. We can tell you where there is a cluster by the actual number of cases. We have the addresses of people who are COVID-positive. So we have mapping software where you can see exactly where the cluster is. That's the highest density of cases. That's where you have to take the most dramatic action."

Cuomo: "We're increasing the fines for sponsors of mass gatherings to \$15,000. We are going to be providing the local governments with the maps that we did in their areas. We'll be

consulting with them. These were done specifically from the actual case numbers themselves. If there's some peculiarity, local governments have a comment, we'll do that today. The rules can go into effect as soon as tomorrow, that's up to the local government, but no later than Friday. If local government says we want time to get adjusted, fine. Today is Tuesday, get adjusted no later than Friday."

Earlier today, Governor Andrew M. Cuomo announced a new cluster action initiative to address COVID-19 hot spots that have cropped up in Brooklyn, Queens, and Broome, Orange and Rockland Counties. Working with the top public health experts, New York State developed a science-based approach to attack 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 will be in effect for a minimum of 14 days.

The plan was developed in consultation with national public health experts including Dr. Noam Ross of EcoHealth Alliance, Dr. Michael Osterholm of the University of Minnesota and former CDC Director Dr. Tom Frieden.

**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 the Governor's remarks is available below:*

Good afternoon. To my right, we have the esteemed secretary to the governor Melissa DeRosa. To her left, the esteemed budget director Robert Mujica. Thank you all for being here. Appropriately social distanced.

Today is day 220, believe it or not. The fall is here. What happens in the fall? Leaves come down, Jimmy Vielkind spends a lot of time with the foliage up north. What else happens in the

fall? The virus goes up. The leaves come down, the virus goes up. They've been talking about this for a long time. They predicted this and on this prediction they happen to be right. You see the virus increasing across the country, you see it increasing across the globe, you see countries that had it under control are now struggling again.

In New York, statewide, we are doing very well on the numbers. We have what I call a COVID cluster problem. But a cluster problem is serious because a cluster problem can grow. The virus spreads in mass gatherings. We know this from our own experience, from what we've seen, and from what every expert tells us, right. The outbreaks, which is when the virus is spreading out of control, it starts with a mass gathering and then it expands from there, especially indoors. We've seen it in colleges, state colleges, private colleges, you have that congregate mass gathering indoors or frequenting a bar in the case of colleges, and it take off. We've seen it in factory settings around the country, we've seen it in produce plants, apple plants, in New York. We've seen it in a single restaurant, can be a mass gathering. We've seen it at July 4th parties, we've seen it at Labor Day parties. We've seen it in the Rose Garden. That was a mass gathering, outdoor, by the way, and we've seen it. You see that growing list of all the people who were infected from that mass gathering.

We see it in places of worship. We've seen one church infect people, we've seen synagogues infect people, we've seen mosques infect people. We had the first hot spot cluster in the United States of America. New Rochelle, a super spreader who attended a temple service and then attended a wedding, and that was it. We were off to the races. So, it's to be taken very seriously. A mass gathering causes infections. Infections cause a cluster. A cluster causes community spread. That is the natural evolution of things unless we intervene and we stop the cycle. If you just let the cycle run, that is what's going to happen.

We see clusters now across the state, colleges upstate. We have a cluster in Binghamton, Orange Rockland, Queens, Brooklyn, Nassau. The cluster is just that, it's a cluster of cases, a high density of cases. And it seeps, it grows from that cluster almost in concentric circles. Drop a pebble into the pond, pebble goes in, then there's one ring, two rings, three rings, and the rings continue across the pond. That's how the virus spreads. When you see the cluster, you have to stop it at that point. What's our strategy? Crush the cluster and stop the spread.

And we're announcing a special initiative to do just that, the Cluster Action Initiative. Catchy name.

Step one, you take the most dramatic action within the cluster itself, where you have the highest density of cases. Understanding that the people in that cluster interface with the surrounding communities, take additional action in the communities surrounding the cluster, and then on a precautionary measure, take action in the communities that are out line that area, so three steps.

First, identify the cluster. You can identify the cluster because we do so much testing and we have so much data. We can tell you where there is a cluster by the actual number of cases. We have the addresses of people who are COVID-positive. So we have mapping software where you can see exactly where the cluster is. That's the highest density of cases. That's where you have to take the most dramatic action. The surrounding area is where that cluster is going to seep. Why? Because that's where people interact in the grocery store. That's where they interact at the bus stop. That's where they interact in the local recreational areas. So cluster, the area around the cluster, and then as a precautionary measure, the area around that's. That's how you attack a cluster. Most intense action on the cluster itself and then precautionary action as you pull back.

Clusters, all of these areas, you can look at them exactly by the cases. It's not by zip code, it's not by census tract, it's not by any political metric, it's only by the number of cases. So for example, Brooklyn New York - we have one area. This is an actual map of Brooklyn. The cluster is the red area. That is the area in, this is basically south Brooklyn, that has the highest number of cases by actual data. The surrounding area, orange, that is the second ring. That's the warning area because the people who are in that cluster, they're going to the same store, they're going to the same church, they're going to the same bus stop as people in that surrounding area. These are there are no walls here. The third area is the yellowish area around the perimeter from that line straight line down. That we call a precautionary area because they may very well also be coming in contact with the people in the cluster. Or, the people in the middle of that cluster may have infected somebody in the orange zone who may be in contact with someone in the yellow zone. It goes red is the cluster, orange is surrounding the cluster, yellow is the periphery. So that's the actual south Brooklyn map.



Queens, there are two areas that will be mapped just the way Brooklyn is mapped but same concept. There's a central cluster, there's a surrounding area and there's a precautionary area surrounding that. Two smaller areas in Queens. The Brooklyn area is larger than either of the two Queens areas. Binghamton we have a cluster.

Binghamton we're declaring a yellow zone which is the precautionary zone which is a less intense action plan than in a red zone. Why? Because there's just fewer number of cases in Binghamton. The density is less, the cluster is less, but it still requires precaution.

Orange County, we have an intense cluster and then what we call a precautionary zone around that cluster.

Rockland County, same thing. We have an intense cluster and then we're establishing a precautionary zone around that cluster.

These are relatively small areas geographically. Maybe a cluster is one mile in diameter. Maybe with the orange warning area it's a mile and a half. Maybe with the precaution area it's about 2 miles. These are geographically circumscribed, relatively small but that's why they're clusters. The trick is to keep it small. Keep the infection from spreading. Small, but intense targeted efforts in that area. We have new rules for red, orange or yellow communities.

The red, which is the most impacted area, houses of worship will be 25 percent capacity up to 10 people maximum. If it's a church or a mosque or a temple, there will be a maximum of 25 percent capacity or 10 people. No mass gatherings, only essential businesses open, only take out dining and schools are closed.

In the orange areas - that's the second ring - houses of worship 33 percent capacity, 25 people maximum. Mass gatherings, ten people maximum, indoor or outdoor. Businesses, we closed high-risk, non-essential businesses. High risk are defined businesses like gyms, personal care, et cetera. Dining, no indoor dining, outdoor dining only. Four people to a table.

Yellow, which is the precautionary zone, 50 percent capacity in a house of worship. Mass gatherings, 25 people. Businesses are open; dining indoor and outdoor, but 4 people maximum per table. Also, the schools in yellow areas, public or private, must do mandatory weekly testing.

The students are people who are very likely to interact with people within that community. We saw this in New Rochelle. All the kids go to different schools, I know, but they meet at the playground or they're on the little league team or they're on the hockey team or they went to somebody's birthday party and they interacted. The schools are important because you will very often see the schools be a place of transmission. If two students interact at a birthday party on a Friday night and then go to school, they then bring it home to their parents and now we're off to the races again.

We're increasing the fines for sponsors of mass gatherings to \$15,000. We are going to be providing the local governments with the maps that we did in their areas. We'll be consulting with them. These were done specifically from the actual case numbers themselves. If there's some peculiarity, local governments have a comment, we'll do that today. The rules can go into effect as soon as tomorrow, that's up to the local government, but no later than Friday. If local government says we want time to get adjusted, fine. Today is Tuesday, get adjusted no later than Friday.

Testing for schools in the yellow zones starts next week. I am more and more concerned about schools with the more experience we have. The more we get into this the more important I think it is that schools do random testing. Well, students are young and they're resilient. First of all, we don't really know that. What do we know about this virus? And not only do you have young people in schools, you have teachers. We all think we're young, I think I'm young, you have teachers and I want to make sure we're protecting all lives. So the schools in those yellow zones must do weekly testing. The Department of Health will set a sample number. We want to make sure it's statistically representative and they'll set that sample by Friday. If a school needs additional testing equipment, they should contact us - we can to help them. If they want to do pool testing, they should contact us, we can help them. These rules will be in effect for 14 days, and then we'll see where we are and we'll see the numbers and we'll adjust from there.

We've gone through this evolving situation with some of the best people on the globe who have been advising us and I want to thank them very much for their help. Local governments most enforce the law. I know I've said this several times. But we can sit here all day long and come up with laws and rules - they are only as good as their enforcement. And a lack of

enforcement has contributed to this problem. There is no one who say they didn't see this coming. We've had concerts in the Hamptons that should have never happened. We've had bars that have attracted crowds over and over again that should have never happened. We've had college parties that have happened offsite that should have never happened. We have had religious gatherings that have been circulated on social media for weeks and action was not taken. There can be no surprise - the rules are only as good as their enforcement. "Well we have COVID fatigue. We're tired of wearing masks." COVID isn't tired. The virus isn't tired. The virus - still energetic to strong enough to kill you. It's no time to be fatigued. We don't have the luxury of fatigue.

And I understand it's a politically difficult situations - I've tried everything with local governments. I said that I would fine local governments if failed to enforce the law because these are laws that they're enforcing. A law doesn't work if you're too incompetent or too politically frightened to enforce it, period, said A.J. Parkinson. I also said to local governments, "Blame me." I understand these are difficult acts to enforce. These are state laws. Blame me. I have no problem with that.

Moving forward, I'm not going to pass more laws that are not enforced. This is a government that is competent, this is a government that is capable, this is a government that has helped the people of the state through this horrendous situation. We'll continue to do it - we do it because we're effective, that's why. Local governments need to assign people to a State Enforcement Task Force, because I want to make sure that that is happening. New York City must provide 400 personnel to the New York State Task Force. I want to thank our government partners in this Cluster Initiative. I've spoken to many of them myself today. But we have in Binghamton, Broome, Jason Garner has been very helpful, Steven Neuhaus in Orange, Ed Day in Rockland County, we spoke through some issues today - I want to thank him very much for his cooperation. New York City we've been working with, Laura Curran in Nassau we've been working with. Together we're going to get this done - it's not easy. But we know where the cases and we know what we have to do.

So, government has to do its job, but individuals have to do their job also. And organizations have to do their job also. We're all citizens, and it's not government's job to catch you. It's citizen's obligation to do the right thing, right? You don't speed on the road, not just because

you're afraid to get a ticket, because you don't want to kill anyone. Right? You act responsibly with COVID because you want to protect yourself, you want to protect your family, you want to protect other people. And organizations have to do the same thing. I am informing all houses of worship today. Obviously these new rules are most impactful on houses of worship because this virus is not coming from nonessential businesses. That's not what this is about. It may be spread by nonessential business. It's not starting in schools; it may be spread by schools. This is about mass gatherings. And one of the prime places of mass gatherings are houses of worship. I understand it's a sensitive topic but that is the truth. You want to solve the problem? Acknowledged the problem. Deny the problem, look at a red herring, and then the problem gets worse. The problem is mass gatherings and houses of worship, colleges and some miscellaneous foolish behavior in bars, outdoor venues, etc.

I spoke to members of the Orthodox Jewish community today. I spoke to the leaders myself this morning. We had a very good conversation. These rules will apply to all houses of worship. Many of these communities have a large Orthodox population. I have been very close to the Orthodox community for many years. I understand the imposition this is going to place on them, and I said to them I need their cooperation. I need their partnership. They're very cohesive communities. And I asked for them to work with me to follow these guidelines and that was positively received. I said to them that I'm doing this for a very simple reason because I have such respect and love for the Orthodox community. I have been friends with them all my life and my father before me by the way. We go way back and it's out of respect and it's out of love and it's because I want to protect them. In Jewish teaching, one of the most precious principles is saving a life. To save a life. The Torah speaks about how certain religious obligations can be excused, if you are going to save a life. This is about saving a life. That's what this is. No large gatherings in synagogues to save a life. You look at where the infection rate is, you look at those clusters, people will die in those clusters and this is about protecting people and saving lives. And I felt very good about my conversation with the Orthodox community and I thank them for their help in their cooperation. Seasons change, circumstances change, and we change with it. That's what we do. This is not a New York State phenomenon. If you look at what's happening in our region of the country, New York is about 1.2 percent; Pennsylvania's up at about 8 percent; New Jersey is about 2.4 percent; Connecticut - which God bless Governor Ned Lamont has always had a lower incident rate than we have, but there are still facts in life: one plus one equals two; night follows day, the

world is round. These are facts, OK? There's another fact: if the rules are not complied with, and enforcement is not done, then the infection rate will increase. If the infection rate increases, we will be forced to close down. We know that. We've been here. This is déjà vu. So, let's do what we have to do in these clusters, let's save lives, and let's continue the economic advancement that we're making.

Today's specific numbers — top 20 zip codes — we're doing two types of testing now. We're testing in the hotspots and then we're doing the normal testing statewide. In the testing just in the hotspots, the infection rate is about 5.5. Statewide the testing is about 1.2. If you roll the hotspots into the state numbers, which now oversamples the hotspots, you're at 1.4 percent. Nine New Yorkers passed away. They're in our thoughts and prayers. 705 hospitalized, ICU 158, intubation 72.

We're going to do this the way we've done it all along because we are New York tough, smart united, disciplined, loving.

Last point is I'd like to make a comment about the President, what he's been saying. We wished him well when we heard about his diagnosis with COVID and we wished the First Lady well. We sent them a great New York special care package, and I hope he's back to 100 percent as quickly as possible. I think the President has an opportunity that he is missing and I think he has an opportunity to do a public service and I think he's right now doing the public a disservice. To say to the people of this country, "Look at me! Don't worry about COVID. Look how well I'm doing!" First of all, this is a funny disease. We hope you're doing well, but the disease still has not run its course and it's a little premature to say "I'm doing great," right? You're not really doing great until you test negative and then, by the way — there are people who test negative and have consequences that continue for weeks and months and months. This is a frightening virus. But the President is not analogous to the average person in this country, right? The average person gets COVID, they don't get flown by helicopter to Walter Reed Hospital, and have a team of 20 doctors, millions of dollars of medical talent attend to their needs, receive experimental drugs that haven't been available to the public and are administered just to the President under Compassionate Care, right? So, there's no analogy there. From the public service point of view, 210,000 people died. More people die in this country than countries around the world that were doing much worse than we were. From a

public service point of view, "Don't be afraid of COVID?" No. Be afraid of COVID. It can kill you. Don't be cavalier. You This is just more denial. This is where it started and you know, the President — God bless him — he tells you where he's going. We know that when COVID started, he knew how bad it was going to be and he just lied about it. We know that he had the White House memo done by Peter Navarro that said millions of people could get infected and he just lied about it. Woodward's book, he actually has him on tape saying, "I know how bad it's going to be, but I don't want to tell the American people." Yeah, that cost this nation, and that confusion cost this nation, many unnecessary lives and expense and pain and hardship. I was saying at that time, "Take it seriously." The President was saying when it started, "It's a hoax. It will be gone by Easter. It's going to disappear like a miracle." Yeah, none of that was true. None of it was true. He knew it wasn't true and it's not true now to say, "Don't be afraid of COVID."

Denial doesn't works. It never does in life. It never does. "I don't have a drinking problem. I don't have a substance abuse problem. I don't have a gambling problem." Denial never works. Acknowledge the problem: it's a frightening virus. Be smart, be careful. Don't hide under your bed. We're reopening, go about your business, but do it smartly and that's what the President should be saying.



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**EXHIBIT K**



## INTERIM GUIDANCE FOR IN-PERSON INSTRUCTION AT PRE-K TO GRADE 12 SCHOOLS DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

### When you have read this document, you can affirm at the bottom.

As of August 26, 2020

#### Purpose

This Interim Guidance for In-Person Instruction at Pre-K to Grade 12 Schools during the COVID-19 Public Health Emergency (“Interim COVID-19 Guidance for Schools”) was created to provide all elementary (including pre-kindergarten), middle, and high schools, as well as their employees, contractors, students, and parents/legal guardians of students with precautions to help protect against the spread of COVID-19 for schools that are authorized to provide in-person instruction in the 2020-2021 school year.

This guidance is intended to address all types of public and private (both secular and non-secular) elementary (including pre-kindergarten), middle, and high schools. In addition to affirming to understand and meet the requirements described herein, school districts, boards of cooperative educational services (BOCES), charter schools, and private schools must develop individual plans for reopening and operating during the COVID-19 public health emergency. Each plan must meet the minimum standards set forth in this guidance and reflect engagement with school stakeholders and community members, including but not limited to administrators, faculty, staff, students, parents/legal guardians of students, local health departments, local health care providers, and, where appropriate, affiliated organizations (e.g., union, alumni, and/or community-based groups). Specifically, each school district, BOCES, charter school, and private school must develop and submit to the New York State Department of Health (DOH) and the New York State Education Department (NYSED), or the State University of New York (SUNY) for charter schools authorized by SUNY, a plan that, at minimum, covers:

- (1) Reopening of school facilities for in-person instruction,
- (2) Monitoring of health conditions,
- (3) Containment of potential transmission of the 2019 novel coronavirus (COVID-19), and
- (4) Closure of school facilities and in-person instruction, if necessitated by widespread virus transmission.

#### Core Health and Safety Principles and Definitions

- **Responsible Parties:** Responsible Parties shall be responsible for developing the plan, affirming to having read and adhere to this guidance, and meeting the standards set forth herein. For school districts and BOCES, the district superintendent, or another party as may be designated by the district superintendent, and for private and charter schools, the head of school, or another party as may be designated by the head of school, is the Responsible Parties. The designated party can be an individual or group of individuals responsible for the operations of the school or schools.
- **Face Coverings:** Responsible Parties must maintain protocols and procedures for students, faculty, staff, and other individuals to ensure appropriate personal protective equipment (PPE) is used to protect against the transmission of the COVID-19 virus when on school grounds and in school facilities. Specifically, appropriate PPE means, at least, an acceptable face covering, which is strongly



recommended to be worn by all individuals at all times but is required to be worn any time or place that individuals cannot maintain appropriate social distancing. However, if face coverings are to be worn by all individuals at all times, Responsible Parties should allow students to remove their face covering during meals, instruction, and for short breaks so long as they maintain appropriate social distance. Acceptable face coverings include but are not limited to cloth-based face coverings (e.g., homemade sewn, quick cut, bandana), and surgical masks that cover both the mouth and nose.

- **Social Distancing:** Responsible Parties must maintain protocols and procedures for students, faculty, and staff to ensure appropriate social distancing to protect against the transmission of the COVID-19 virus when on school grounds and in school facilities. Specifically, appropriate social distancing means six feet of space in all directions between individuals or use of appropriate physical barriers between individuals that do not adversely affect air flow, heating, cooling, or ventilation, or otherwise present a health or safety risk. If used, physical barriers must be put in place in accordance with United States Department of Labor's Occupational Safety and Health Administration (OSHA) guidelines, and may include strip curtains, cubicle walls, code compliant materials, or other impermeable divider or partition.
- **Spaces:** To reduce social density, Responsible Parties should consider and assess additional and/or alternate indoor space(s) that may be repurposed for instruction or other required purposes in support of in-person instruction within the school facility, school grounds, municipal facilities, municipal grounds, or community (e.g., community centers), as well as outdoor space(s) where health and safety conditions (e.g., allergies, asthma) allow for such potential usage.
- **In-Person Instruction:** To ensure equity in education, Responsible Parties should prioritize efforts to return all students to in-person instruction at this time. However, based on the dynamic nature of local community transmission of the COVID-19 virus, a phased-in approach or hybrid model combining in-person instruction and remote/distance learning may be necessary at various times through the 2020-2021 school year. In planning for these approaches and models, school plans should indicate if certain students will be prioritized to return to in-person instruction first or more frequently based on educational or other needs (e.g., early grades, students with disabilities, English language learners), given requirements for equity, capacity, social distancing, PPE, feasibility, and learning considerations.
- **Cohorts:** Responsible Parties should "cohort" students, to the extent practicable, to limit potential exposure to the COVID-19 virus. Cohorts, particularly for younger students, are self-contained, pre-assigned groups of students with reasonable group size limits set forth by the Responsible Parties in their plans. Responsible Parties should enact measures to prevent intermingling between cohorts, to the extent possible (e.g., separation by appropriate social distancing, particularly if there are multiple cohorts in one area). Responsible Parties should make reasonable efforts to ensure that cohorts are fixed – meaning contain the same students – for the duration of the COVID-19 public health emergency. Faculty may instruct more than one cohort so long as appropriate social distancing is maintained.
- **Screening:** Responsible Parties must implement mandatory health screenings, including temperature checks, of students, faculty, staff, and, where applicable, contractors, vendors, and visitors to identify any individuals who may have COVID-19 or who may have been exposed to the COVID-19 virus. Specifically, all individuals must have their temperature checked each day. If an individual presents a temperature of greater than 100.0°F, the individual must be denied entry into the facility or sent directly to a dedicated area prior to being picked up or otherwise sent home. Responsible Parties must also use a daily screening questionnaire for faculty and staff reporting to school; and periodically use a questionnaire for students, particularly younger students, who may require the assistance of their parent/legal guardian to answer. Remote health screening (e.g., by electronic survey, digital application, or telephone, which may involve the parent/legal guardian) before any individual reports to school, is strongly advised.

- **Transportation:** Consistent with State-issued public transit guidance, Responsible Parties must develop protocols and procedures, which include that individuals must wear acceptable face coverings at all times on school buses (e.g., entering, exiting, and seated), and that individuals should maintain appropriate social distancing, unless they are members of the same household. Responsible Parties should encourage parents/legal guardians to drop off or walk students to school to reduce density on buses.
- **Food Services:** Responsible Parties must continue to provide school breakfast and/or lunch to students who were previously receiving school meals, both on site and remote. For students on site, Responsible Parties must provide meals while maintaining appropriate social distancing between students. Students do not need to wear face coverings when seated and eating so long as they are appropriately socially distanced. Responsible Parties may serve meals in alternate areas (e.g., classrooms) or staggered meal periods to ensure social distancing and proper cleaning and disinfection between students.
- **Ventilation:** Responsible Parties should increase ventilation with outdoor air to the greatest extent possible (e.g., opening windows and doors) while maintaining health and safety protocols, particularly for younger students.
- **Hygiene, Cleaning, and Disinfection:** Responsible Parties must adhere to and promote hygiene, cleaning, and disinfection guidance set forth by DOH and the Centers for Disease Control and Prevention (CDC). Responsible Parties must train all students, faculty, and staff on proper hand and respiratory hygiene. Responsible Parties must maintain logs that include the date, time, and scope of cleaning and disinfection, as well as identify cleaning and disinfection frequency for each facility and area type and assign responsibility to staff.
- **Contact Tracing:** Responsible Parties must notify the state and local health department immediately upon being informed of any positive COVID-19 diagnostic test result by an individual within school facilities or on school grounds, including students, faculty, staff, and visitors. In the case of an individual testing positive, Responsible Parties must develop and maintain plans to support local health departments in tracing all contacts of the individual, in accordance with the protocols, training, and tools provided through the New York State Contact Tracing Program. Confidentiality must be maintained as required by federal and state law and regulations. Responsible Parties must cooperate with all state and local health department contact tracing, isolation, and quarantine efforts.
- **Return to School:** Responsible Parties must establish protocols and procedures, in consultation with the local health department(s), about the requirements for determining when individuals, particularly students, who screened positive for COVID-19 symptoms can return to the in-person learning environment at school. This return to school protocol shall include, at minimum, documentation from a health care provider following evaluation, negative COVID-19 diagnostic test result, and symptom resolution, or if COVID-19 positive, release from isolation. Responsible Parties should refer to DOH's "Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure" regarding protocols and policies for faculty and staff seeking to return to work after a suspected or confirmed case of COVID-19 or after the faculty or staff member had close or proximate contact with a person with COVID-19.

## Plan Requirements

**Reopening of in-person instruction** includes protocols and procedures for restarting school operations including students, faculty, and staff returning to in-person instruction. At a minimum, plans must incorporate the following:

- **Capacity:** Phasing and quantity of students, faculty, and staff allowed to return in-person, considering factors such as ability to maintain appropriate social distance, personal protective equipment (PPE) availability, local medical capacity, and availability of safe transportation;

- **Social Distancing:** Protocols and procedures for students, faculty, and staff to ensure appropriate social distancing when on school grounds and in school facilities;
- **PPE and Face Coverings:** Protocols and procedures for students, faculty, staff, and other individuals to ensure appropriate PPE is used to protect against the transmission of the COVID-19 virus when on school grounds and in school facilities. Plans for all students, faculty, and staff to have the required PPE (i.e., acceptable face coverings) before entering school facilities, grounds, or any other space owned or administered by the school or school district (e.g., school buses);
- **Operational Activity:** Determinations on how classes, shared spaces, and activities may be adapted in various phases of learning and operations (e.g., identify which, if any, students will be offered alternate approaches, such as alternative schedules or hybrids of in-person and remote learning; how additional and alternative – school and non-school – spaces can be used for, or in support of, in-person instruction; how such schedules could be administered to create overlap for students from the same household; how shared spaces, such as cafeterias, libraries, playgrounds, and gymnasiums, will be modified and used, if and how cohorts will be implemented). Policies regarding field trips, special congregate events, and visitors considering risks for COVID-19 transmission, as well as protocols and procedures for social distancing, PPE usage, and cleaning and disinfection, which may include conducting virtual events;
- **Restart Operations:** Plans to safely reopen facilities and grounds, such as cleaning and disinfection, and restarting building ventilation, water systems, and other key facility components, as applicable;
- **Hygiene, Cleaning, and Disinfection:** Protocols and procedures for school-wide cleaning and disinfection of classrooms, restrooms, cafeterias, libraries, playgrounds, school buses, and all other school facilities, as well as training and promotion of hand and respiratory hygiene among all individuals in school facilities and on school grounds;
- **Extracurriculars:** Policies regarding extracurricular programs and which activities will be allowed, considering social distancing, PPE usage, and cleaning and disinfection, as well as risk of COVID-19 transmission (e.g., interscholastic sports, assemblies, and other gatherings). Policies should consider how to maintain cohorts, if applicable, or members of the same household. Responsible Parties must refer to DOH’s “Interim Guidance for Sports and Recreation During the COVID-19 Public Health Emergency” to assist in development of these policies and the conduct of school-sponsored sports. Further, lower- and moderate-risk sports (e.g., tennis, soccer, cross country, field hockey, and swimming) may practice and play, effective September 21, 2020. However, travel for practice or play is prohibited outside of the school’s region or contiguous regions/counties until October 19, 2020. Higher-risk sports (e.g., football, wrestling, rugby, hockey, and volleyball) may practice, effective September 21, 2020, but not play until authorized at a later date, but no later than December 31, 2020; in accordance with the State-issued guidance, such practices are limited to individual or group, no- to low-contact training (e.g., skills development) whereby contact between players may only be incidental and any activities that are specifically designed to promote close physical contact are prohibited. If school is closed for in-person education during the school year due to an increase in confirmed COVID-19 cases, school-sponsored sports must be suspended until in-person education is resumed; provided, however, that this restriction does not apply to schools that are conducting only remote instruction.
- **Before and Aftercare:** Policies regarding before and aftercare programs, considering social distancing, PPE usage, and cleaning and disinfection requirements, as well as risk of COVID-19 transmission. Policies should consider how to maintain cohorts, if applicable, or group members of the same household;
- **Vulnerable Populations:** Policies regarding vulnerable populations, including students, faculty and staff who are at increased risk for severe COVID-19 illness, and individuals who may not feel comfortable returning to an in-person educational environment, to allow them to safely participate in educational activities and, where appropriate, accommodate their specific circumstances. These

accommodations may include but are not limited to remote learning or telework, modified educational or work settings, or providing additional PPE to individuals with underlying health conditions. Responsible Parties must also identify and describe any modifications to social distancing or PPE that may be necessary for certain student or staff populations, including individuals who have hearing impairment or loss, students receiving language services, and young students in early education programs, ensuring that any modifications minimize COVID-19 exposure risk for students, faculty, and staff, to the greatest extent possible;

- **Transportation:** Consistent with State-issued public transit guidance, protocols and procedures, which include that individuals must wear acceptable face coverings at all times on school buses (e.g., entering, exiting, and seated), and that individuals should maintain appropriate social distancing, unless they are members of the same household. Protocols and procedures should include how school buses will be adapted to keep students and staff safe (e.g., how face coverings will be provided to students in need, how members of the same household will be seated together, how social distancing will be conducted on buses, whether bus schedules will be adapted to accommodate reduced capacity, whether any health screening will be conducted at home before students board buses, how parents/legal guardians will be encouraged to drop off or walk students to reduce density on buses);
- **Food Services:** Protocols and procedures for onsite and remote food services for students, considering appropriate social distancing and any modifications to service that may be necessary (e.g., providing meals in a combination of classrooms and cafeterias, staggering meal periods). Measures to protect students with food allergies if providing meals in spaces outside the cafeteria. Protocols and procedures must also include how students will perform hand hygiene before and after eating, how appropriate hand hygiene will be promoted, and how sharing of food and beverages will be discouraged. Additionally, protocols and procedures must account for cleaning and disinfection prior to the next group of students arriving for meals, if served in the same common area (e.g., cafeteria);
- **Mental Health, Behavioral, and Emotional Support Services and Programs:** Available resources and referrals to address mental health, behavioral, and emotional needs of students, faculty, and staff when school reopens for in-person instruction (e.g., how they will identify and support students having difficulty with transitioning back into the school setting, especially given the changed school environment). Any training for faculty and staff on how to talk with, and support, students during and after the ongoing COVID-19 public health emergency, as well as information on developing coping and resilience skills for students, faculty, and staff; and
- **Communication:** Communications plans for students, parents/legal guardians of students, faculty, staff and visitors that includes applicable instructions, training, signage, and a consistent means to provide individuals with information. Plans should describe how schools will communicate with students and families about preparing for the upcoming year, which should include adapting to social distancing requirements, properly wearing face coverings, and proper hand and respiratory hygiene. Consider developing webpages, text and email groups, and social media to disseminate information. Schools should develop communication plans in multiple languages, as necessary.

**Monitoring** includes protocols and procedures to track health conditions at schools. At a minimum, plans must incorporate the following:

- **Screening:** Protocols and procedures for mandatory health screenings, including temperature checks, of students, faculty, staff, and, where applicable, contractors, vendors, and visitors to identify any individuals who may have COVID-19 or who may have been exposed to the COVID-19 virus. Responsible Parties should consider limiting the number of visitors permitted on school grounds or in school facilities, and, if visitors are allowed, screening of such visitors;
- **Testing Protocols:** Process for the provision or referral of diagnostic testing for students, faculty, and staff for COVID-19, in consultation with local health department officials, when needed, which should

include plans for testing of symptomatic individuals, close contacts of COVID-19 suspected or confirmed individuals, and individuals with recent international travel or travel within a state with widespread transmission of COVID-19 as designated through the New York State Travel Advisory, before allowing such individuals to return to in-person to the school;

- **Testing Responsibility:** Identification of who in the community is responsible for referring, sourcing, and administering testing (e.g., local health department testing site, physician offices, hospital system), particularly in the event that large-scale testing at the school is needed; and
- **Early Warning Signs:** Defined metrics that will serve as early warning signs that positive COVID-19 cases may be increasing beyond an acceptable level, as established by state and local health departments; define and deploy method(s) to monitor against such metrics.

**Containment** includes protocols and procedures for how to respond to positive or presumed-positive cases, as well as preventative practices. At a minimum, plans must incorporate the following:

- **School Health Offices:** Protocols for safely caring for a student, faculty, or staff member if they develop symptoms of COVID-19 during the school day;
- **Isolation:** Procedures to isolate individuals who screen positive upon arrival, or symptomatic individuals should they become symptomatic while at school, providing appropriate PPE for school health office staff caring for the symptomatic individual. Protocols for safe transportation, including pick-up arrangements, if applicable, for symptomatic students, faculty, and staff;
- **Collection:** Protocols for how parents or legal guardians should pick up their student with instructions that the student must be seen by a health care provider;
- **Infected Individuals:** Requirements that persons who have tested positive complete isolation and have recovered, and will not transmit COVID-19 when returning to in-person learning. Discharge from isolation and return to school will be conducted in coordination with the local health department.
- **Exposed Individuals:** Requirements that individuals who were exposed to the COVID-19 virus complete quarantine and have not developed symptoms before returning to in-person learning. Discharge from quarantine and return to school will be conducted in coordination with the local health department;
- **Hygiene, Cleaning, and Disinfection:** Adherence to, and promotion of, hygiene, cleaning, and disinfection guidance set forth by DOH and CDC, including strategies for cleaning and disinfection of exposed areas and appropriate notification to occupants of such areas;
- **Contact Tracing:** Plans to support local health departments in contact tracing efforts using the protocols, training, and tools provided through the New York State Contact Tracing Program – an initiative between the Department of Health, Bloomberg Philanthropies, Johns Hopkins Bloomberg School of Public Health, and Vital Strategies; and
- **Communication:** Plans to share protocols and safety measures taken by the school with all relevant parties including parents/legal guardians, faculty, staff, students and the local community.

**Closure** includes contingency plans, protocols, and procedures for decreasing the scale or scope of in-person education, and/or closing the school. At a minimum, plans must incorporate the following:

- **Closure triggers:** Identification of the conditions that may warrant reducing in-person education or closing the school, in consultation with state and local health departments, and plan for an orderly closure;
- **Operational Activity:** Determination of which operations will be decreased, or ceased and which operations will be conducted remotely; include process to conduct orderly closures which may include phasing, milestones, and involvement of key personnel; and

- **Communication:** Plan to communicate internally and externally throughout the closure process.

### State-Issued Guidance and Minimum Standards

Pre-K through Grade 12 schools involve a variety of activities depending on their specific educational and extracurricular programs and services, and, as such, should reference relevant “industry-specific” guidelines provided by DOH – and available on the [New York Forward](#) website – for operations of food services, office workspaces, transportation, and other activities, as applicable. Specifically, operations of cafeterias and other food services must operate in accordance with “[Interim Guidance for Food Services during the COVID-19 Public Health Emergency](#)” with additional precautions for students that are contained herein, such as social distancing between students or cohorts of students. Administrative functions must operate in accordance with, “[Interim Guidance for Office-Based Work during the COVID-19 Public Health Emergency](#).” Transportation services administered by the school must operate in accordance with “[Interim Guidance for Public Transportation Activities during the COVID-19 Public Health Emergency](#)” with additional precautions that are contained herein. Interscholastic athletics must follow DOH’s “[Interim Guidance for Sports and Recreation During the COVID-19 Public Health Emergency](#)” for the conduct of school-sponsored sports. Specifically, lower- and moderate-risk sports (e.g., tennis, soccer, cross country, field hockey, and swimming) may practice and play, effective September 21, 2020. However, travel for practice or play is prohibited outside of the school’s region or contiguous regions/counties until October 19, 2020. Higher-risk sports (e.g., football, wrestling, rugby, hockey, and volleyball) may practice, effective September 21, 2020, but not play until authorized at a later date, but no later than December 31, 2020; in accordance with the State-issued guidance, such practices are limited to individual or group, no- to low-contact training (e.g., skills development) whereby contact between players may only be incidental and any activities that are specifically designed to promote close physical contact are prohibited. If school is closed for in-person education during the school year due to an increase in confirmed COVID-19 cases, school-sponsored sports must be suspended until in-person education is resumed; provided, however, that this restriction does not apply to schools that are conducting only remote instruction. Further, Responsible Parties hosting competitive play must follow the Department’s guidance, including but not limited to reducing the capacity of indoor sports facilities to no more than 50% of the maximum occupancy, restricting spectators to no more than two spectators per player, and, where required, implementing and enforcing rules for appropriate social distancing, face coverings, and cleaning and disinfection.

These guidelines are minimum requirements only and each school is free to provide additional precautions or increased restrictions. These guidelines are based on the best-known public health practices at the time of publication, and the documentation upon which these guidelines are based can and does change frequently. The Responsible Parties – as defined above – are accountable for adhering to all local, state and federal requirements relative to schools and auxiliary activities. The Responsible Parties are also accountable for staying current with any updates to these requirements, and related guidance as stated above, as well as incorporating same into any school activities and/or school reopening plan(s).

### Background

On March 7, 2020, Governor Andrew M. Cuomo issued [Executive Order 202](#), declaring a state of emergency in response to COVID-19. Community transmission of COVID-19 has occurred throughout New York. To minimize further spread, social distancing of at least six feet must be maintained between individuals, where possible.

On March 16, 2020, Governor Cuomo issued Executive Order [202.4](#), ordering all schools to close no later than March 18, 2020. Subsequent Executive Orders [202.11](#), [202.14](#), [202.18](#), and [202.28](#) extended such closure through the remainder of the 2019-2020 school year. On June 5, 2020, Governor Cuomo issued

Executive Order 202.37, allowing in-person special education services and instruction during the summer term, provided that any district offering such services follow state and federal guidance.

On March 20, 2020, Governor Cuomo issued Executive Order 202.6, directing all non-essential businesses to close in-office personnel functions. Essential businesses, as defined by Empire State Development Corporation (ESD) guidance, were not subject to the in-person restriction, but were, however, directed to comply with the guidance and directives for maintaining a clean and safe work environment issued by the New York State Department of Health (DOH), and were strongly urged to maintain social distancing measures to the extent possible.

On April 12, 2020, Governor Cuomo issued Executive Order 202.16, directing essential businesses to provide employees, who are present in the workplace, with a face covering, at no-cost, that must be used when in direct contact with customers or members of the public during the course of their work. On April 15, 2020, Governor Cuomo issued Executive Order 202.17, directing that any individual who is over age two and able to medically tolerate a face-covering must cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance. On April 16, 2020, Governor Cuomo issued Executive Order 202.18, directing that everyone using public or private transportation carriers or other for-hire vehicles, who is over age two and able to medically tolerate a face covering, must wear a mask or face covering over the nose and mouth during any such trip. It also directed any operators or drivers of public or private transport to wear a face covering or mask which covers the nose and mouth while there are any passengers in such a vehicle. On May 29, 2020, Governor Cuomo issued Executive Order 202.34, authorizing business operators/owners with the discretion to deny admittance to individuals who fail to comply with the face covering or mask requirements.

On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses in New York in phases based upon a data-driven, regional analysis. On May 4, 2020, the Governor provided that the regional analysis would consider several public health factors, including new COVID-19 infections, as well as health care system, diagnostic testing, and contact tracing capacity. On May 11, 2020, Governor Cuomo announced that the first phase of reopening would begin on May 15, 2020 in several regions of New York, based upon available regional metrics and indicators. On May 29, 2020, Governor Cuomo announced that the second phase of reopening would begin in several regions of the state, and announced the use of a new early warning dashboard that aggregates the state's expansive data collection efforts for New Yorkers, government officials, and experts to monitor and review where and how the virus is being contained to ensure a safe reopening. On June 11, 2020, Governor Cuomo announced that the third phase of reopening would begin on June 12, 2020 in several regions of New York. On June 24, 2020, Governor Cuomo announced that several regions of the state were on track to enter the fourth phase of reopening, starting on June 26, 2020.

On May 8, 2020, Governor Cuomo launched New York's Reimagine Education Advisory Council – made up of educators, students, parents, and education leaders – to help school districts, colleges, and universities reimagine teaching and learning as they prepare to reopen while protecting the health and safety of students and educators. The collective expertise and experience of this advisory council helped address key questions about how to strengthen New York's entire education system and helped inform this guidance. Specifically, this distinguished Council recommended the following key principles, which are reflected throughout these guidelines:

- **Develop Flexible Plans:** Schools must allow students, faculty, and staff to return to an in-person classroom setting with safety rules in place, while creating plans that are flexible and adaptable to ever-changing circumstances, especially given the possibility of a resurgence of COVID-19.
- **Enact Safeguards to Protect the Health of Students and Employees:** Essential safeguards for in-person education must be embedded in schools' plans, including but not limited to developing procedures for hand hygiene, cleaning and disinfection; providing proper PPE; maintaining social distancing; developing screening procedures; considering implications of busing and transportation;

developing mitigation measures in cases of student and staff infections; considering needs of higher risk and vulnerable populations.

- Develop proper procedures for hand washing, cleaning and disinfection, ventilation, and appropriate use of PPE.
- Schools should provide proper PPE for those staff that must come into close contact with students, e.g. those who work with students that have certain disabilities.
- Schools should develop a plan for group purchasing of PPE.
- To maintain the safety of students and staff school districts plans must include physical/social distancing of six feet. In instances when six feet cannot be maintained proper face coverings must be worn in common areas such as hallways or on school buses. Provide exemptions or alternatives for those medically unable to wear masks.
- Place students in cohorts throughout the school day where feasible, and determine appropriate meal service options to ensure social distancing.
- Develop a plan for screening of students and staff.
- Consider the implications of busing (and limited busing) on students' ability to attend school in person.
- Work with state and local health departments to develop mitigation measures—such as additional disinfecting, postponing in-classroom instruction, or school closures—in cases of student and staff infections.
- Consider the needs of vulnerable populations and offer options for students and staff at higher risk of severe illness to limit their risk of exposure (e.g., virtual learning and teaching opportunities, respectively).
- Schools must work with state and local health departments as conditions may change. The flexible plan must adhere to federal and state guidelines for cleaning, sanitization and social distancing protocols.
- **Prioritize In-Classroom Instruction for Students that Need it the Most:** Schools should include steps to facilitate face-to-face instruction as much as possible, with a particular emphasis on in-person instruction for younger students, low-income students, special education students, English Language Learners, and those with limited access to technology.
- **Arts, CTE, Labs, and Other Areas Must be Prioritized:** Recognize the unique challenges and opportunities of remote instruction to the arts, career and technical education, physical education, laboratory coursework, and other activity-oriented subjects, understanding it is imperative that schools include in-person instruction in those areas to the extent possible.
- **Utilize Innovative Models Such as Community Schools:** Schools should be encouraged to expand community schools and wraparound services to support students and their families with essential needs like health and support services. Schools should create partnerships with arts, culture, athletic, and other community-based organizations. As part of this effort, schools should identify and ensure the availability of community resources to support the social, emotional, and health needs of students, families, and staff.
- **Establish Best Practices for Hybrid and Remote Learning:** Given the potential for intermittent school closures, or limited in-school activity, schools should establish effective hybrid and remote learning strategies in conjunction with stakeholders. In addition, schools should consider providing education/classroom activities in alternative non-traditional school spaces, such as community centers, simulcast lessons and professional development.
- **Share Best Practices throughout the Region/State:** Given the unprecedented challenges facing schools because of the ongoing public health emergency, schools should collaborate in developing reopening plans and districts should work with their communities and surrounding school districts to share knowledge and resources which promote efficiencies and increased opportunities for students, educators, and communities.



- Collaborate with Stakeholders: Schools should collaborate with stakeholders within districts and create specific processes to ensure that multiple perspectives are considered when developing plans.
- Communicate and Share Plans Widely: School plans should be readily available and accessible in all dominant languages spoken by students and their parents/legal guardians.

In addition to the following standards, schools must continue to comply with the guidance and directives for maintaining clean and safe work environments issued by DOH.

Please note that where guidance in this document differs from other guidance documents issued by New York State, or the respective regulatory or oversight body, such as NYSED or DOH, the more recent guidance shall apply.

### **Standards for Responsible School Activities in New York State**

No school activities can operate without meeting the following minimum State guidance, as well as applicable federal requirements, including but not limited to such minimum standards of the Americans with Disabilities Act (ADA), Centers for Disease Control and Prevention (CDC), Environmental Protection Agency (EPA), and OSHA. The State standards apply to all school activities in operation during the COVID-19 public health emergency until rescinded or amended by the State.

The following guidance is provided to help schools develop their reopening plans and is organized around three distinct categories: people, places, and processes.

## **I. PEOPLE**

### **A. Social Distancing and Face Covering**

#### ***Social Distancing***

- Responsible Parties must ensure that appropriate social distancing is maintained between individuals while in school facilities and on school grounds, inclusive of students, faculty, and staff, unless safety or the core activity (e.g., instruction, moving equipment, using an elevator, traveling in common areas) requires a shorter distance or individuals are of the same household.

#### ***Face Coverings***

- Any time or place that individuals cannot maintain appropriate social distancing, individuals must wear acceptable face coverings.
- Face coverings are strongly recommended at all times, except for meals and instruction with appropriate social distancing. However, Responsible Parties can require face coverings at all times, even during instruction; and it is strongly recommended in areas with higher rates of COVID-19 community infection.
  - Responsible Parties requiring the wearing of face coverings by students at all times will need to consider and address developmental appropriateness, feasibility, and ability to implement such policy in a safe, consistent manner.
- Responsible Parties should develop plans for face covering breaks for students when they can maintain social distance.
- All individuals in school facilities and on school grounds must be prepared to put on a face covering if another person unexpectedly cannot socially distance; and for this reason, individuals – including

students – must wear face coverings in common areas, such as entrances/exits, lobbies, and when traveling around the school.

- Students who are unable to medically tolerate a face covering, including students where such covering would impair their physical health or mental health are not subject to the required use of a face covering.
- Responsible Parties should consider assistance to students who may have difficulty in adapting to wearing a face covering.
- Responsible Parties must train all students, faculty, and staff on how to adequately put on, take off, clean (as applicable), and discard PPE, including but not limited to, appropriate face coverings. This training should be extended to contractors and vendors, if the Responsible Parties will be supplying the contractors and vendors with PPE.

### ***Social Distancing for Certain Activities***

- Responsible Parties should ensure that a distance of twelve feet in all directions is maintained between individuals while participating in activities requires projecting the voice (e.g., singing), playing a wind instrument, or aerobic activity resulting in heavy breathing (e.g., participating in gym classes).

### ***Space Configurations***

- Responsible Parties are strongly encouraged to (1) modify or reconfigure spaces and areas, and/or (2) restrict the use of classrooms and other places where students, faculty, and staff gather (e.g., lockers, cubbies, entryways, hallways), so that individuals can be socially distanced (e.g., side-to-side and when facing one another), and are not sharing workstations, desks, tables, or other shared surfaces without cleaning and disinfection between use.
  - If Responsible Parties are using a cohort model, cleaning and disinfection may be performed in between each group's use instead of individual's use.
- Where feasible, Responsible Parties should put in place measures to reduce bi-directional foot traffic using tape or signs with arrows in hallways, or spaces throughout the school, and post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g., outdoor spaces, libraries, classrooms, cafeterias, health screening stations).
- Responsible Parties should determine which facilities, grounds, or portions thereof (e.g., libraries, recreational facilities) will be closed to the public (i.e., not students, faculty, or staff) or offer limited, specific hours to members of the general public. Any use of a school facility or grounds by the general public must be subject to the same guidelines required during all other school operations.
- Responsible parties should work to find additional or alternate space with community-based organizations and other operators of alternative spaces (e.g., local governments) to maximize capacity for in-person learning.

### ***Schedules***

- Responsible Parties should consider staggered arrival and pick-up times to facilitate proper social distancing, and assign lockers or other student storage areas by cohort or eliminate their use. However, students should not carry an unreasonable number of books or materials throughout the day.

### ***Signage***

- Responsible Parties must post signs throughout the school and should regularly share similar messages with the school community, consistent with [DOH COVID-19 signage](#) regarding public health protections against COVID-19. Responsible Parties can develop their own customized and age-

appropriate signage specific to their school or educational setting, provided that such signage is consistent with the Department's signage. Signage should be used to remind individuals to:

- Stay home if they feel sick.
- Cover their nose and mouth with an acceptable face covering when unable to maintain social distance from others or in accordance with any stricter policy implemented by the school.
- Properly store and, when necessary, discard PPE.
- Adhere to social distancing instructions.
- Report symptoms of, or exposure to, COVID-19, and how they should do so.
- Follow hand hygiene, and cleaning and disinfection guidelines.
- Follow respiratory hygiene and cough etiquette.

## **B. Gatherings**

### ***Meals***

- Responsible Parties must ensure social distancing between individuals while eating in school cafeteria. If not feasible, meals may be served in alternate areas (e.g., classrooms) or in staggered meal periods to ensure social distancing and proper cleaning and disinfection between students.
  - Responsible Parties must prohibit sharing of food and beverages (e.g., buffet style meals, snacks), unless individuals are members of the same household. Adequate space should be reserved for students, faculty, and staff to observe social distancing while eating meals.

### ***Small Spaces***

- Responsible Parties should limit gathering in small spaces (e.g., elevators, supply rooms, faculty offices) by more than one individual at a time, unless all individuals in such space at the same time are wearing acceptable face coverings or are members of the same household. However, even with face coverings in use, occupancy should not exceed 50% of the maximum capacity of the space, unless it is designed for use by a single occupant.

### ***Faculty and Staff Meetings***

- Pursuant to their school reopening plan, Responsible Parties may consider choosing to use video or teleconferencing for faculty and staff meetings and conferences to reduce the density of congregations, per CDC guidance "[Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#)". When videoconferencing or teleconferencing is not preferable or possible, Responsible Parties may choose to hold meetings in open, well-ventilated spaces and ensure that individuals maintain appropriate social distance (e.g., leave space between chairs, have individuals sit in alternating chairs).

### ***Ventilation***

- Responsible Parties should increase ventilation with outdoor air to the greatest extent possible (e.g., opening windows and doors) while maintaining health and safety protocols.

### ***Common Areas***

- Responsible Parties should take additional measures to prevent congregation in elevator waiting areas and limit density in elevators, by, for instance, enabling the use of stairs.
- Responsible Parties may choose to encourage social distancing by reducing access to, or closing, non-essential amenities and communal areas that do not allow for adequate social distancing

protocols to be followed. If open, Responsible Parties should make hand sanitizer or disinfecting wipes available near such amenities or areas (e.g., vending machines, communal coffee stations).

- However, Responsible Parties should not provide cleaning and disinfecting supplies to students, particularly younger students, nor should students be present when disinfectants are in use.
- Responsible Parties should put in place practices for adequate social distancing in small areas, such as restrooms and breakrooms, and should develop signage and systems (e.g., flagging when occupied) to restrict occupancy when social distancing cannot be maintained in such areas.
- To the extent practical, Responsible Parties may consider staggering schedules for faculty and staff to reduce density and promote social distancing in enclosed areas (e.g., coffee breaks, meals, and shift starts/stops).

## C. Operational Activity

### *Cohorts*

- Responsible Parties are recommended to cohort students to the extent practicable to limit potential exposure. "Cohorts," particularly for younger students, are self-contained, pre-assigned groups of students with reasonable group size limits set forth by the school in their plan. Responsible Parties should enact measures to prevent intermingling across cohorts, to the greatest extent possible (e.g., separation by appropriate social distancing, particular if there are multiple cohorts in one area). Responsible Parties should make reasonable efforts to ensure that cohorts are fixed – meaning contain the same students – for the duration of the COVID-19 public health emergency. Faculty may instruct more than one cohort so long as appropriate social distancing is maintained.

### *In-Person Instruction*

- While the goal is to return all students to in-person instruction, due to the dynamic nature and risk of community transmission of COVID-19, Responsible Parties should prepare for a combination of in-person instruction and remote learning to facilitate a phased-in approach or hybrid model, which may be necessary at various times throughout the 2020-2021 school year. In such approaches and models, Responsible Parties may use video or teleconferencing in lieu of in-person gatherings (e.g., classes, office hours), per CDC guidance "[Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#)".
  - In cases where in-person instruction is not feasible, phased-in and hybrid models of education will need to consider if certain students will be prioritized for in-person instruction first or more frequently based on educational or other needs (e.g., early grades, students with disabilities, English language learners), and must balance this with equity, capacity, social distancing, PPE, feasibility, and learning considerations.
  - If COVID-19 cases develop, Responsible Parties may consider restricting access within school facilities and across school grounds, particularly in affected areas to avoid full school closures. In such instances, Responsible Parties may choose to temporarily move classes where an individual has tested positive for COVID-19 to remote/virtual format until all contacts can be identified, notified, tested, and cleared.
- To maximize in-person instruction, Responsible Parties should consider measures that can be implemented to decrease density and congregation in school facilities and on school grounds, when possible, such as:
  - Finding alternative spaces in the community to allow for more in-person instruction;
  - adjusting class or work hours, where appropriate and possible;

- limiting in-person presence to only those staff who are necessary to be at the school during normal school hours;
- maintaining or increasing remote workforce (e.g., administrative staff) to accommodate social distancing guidelines;
- staggering schedules and allowing more time between classes to reduce congestion in hallways, walkways, and buildings; and/or
- shifting design of class schedules to accommodate social distancing guidelines, including cohorts (e.g., alternative classroom schedules, full-time in-person learning for younger students, and part-time distance learning for older students).

#### **D. Movement and Commerce**

##### ***Student Drop-Off and Pick-Up***

- Responsible Parties should establish designated areas for student drop-off and pick-up, limiting contact and entry of parents/legal guardians into the building, to the greatest extent possible.

##### ***Deliveries***

- Responsible Parties should establish designated areas for pickups and deliveries, limiting contact to the extent possible.

##### ***Faculty/Staff Entrances and Exits***

- To the extent feasible, Responsible Parties should limit on-site interactions (e.g., designating separate ingress or egress for faculty and staff, eliminating bidirectional flow of individuals to the extent practicable).

##### ***Shared Objects***

- Responsible Parties should put in place plans or measures to limit the sharing of objects, such as lockers, cubbies, laptops, notebooks, touchscreens, writing utensils, chalk and dry erase boards, musical instruments, tools, and toys, as well as the touching of shared surfaces, such as conference tables and desks; or require students, faculty, and staff to perform hand hygiene before and after contact.

## **II. PLACES**

### **A. Personal Protective Equipment**

- Acceptable face coverings for COVID-19 include but are not limited to cloth-based face coverings (e.g., homemade sewn, quick cut, bandana), and surgical masks that cover both the mouth and nose. Face shields worn without other face coverings are not considered adequate protection or source control against COVID-19 and should not be used.
  - Responsible Parties and faculty may use alternate PPE (i.e., face coverings that are transparent at or around the mouth) for instruction or interventions that require visualization of the movement of the lips and/or mouths (e.g., speech therapy). These alternate coverings may also be used for certain students (e.g., hearing impaired) who benefit from being able to see more of the face of the faculty or staff member.
- However, cloth-based face coverings or disposable masks shall not be considered acceptable face coverings for workplace activities that require a higher degree of protection for PPE due to the nature of the work. For those types of activities, N-95 respirators or other PPE used under existing industry standards should continue to be used, in accordance with OSHA guidelines.

- In addition to the necessary PPE as required for certain workplace activities, Responsible Parties must procure, fashion, or otherwise obtain acceptable face coverings and provide such coverings to their faculty and staff who directly interact with students or members of the public while at work at no cost to the faculty or staff member, pursuant to Executive Order 202.16, as amended and extended.
- Responsible Parties should have an adequate supply of face coverings, masks, and other required PPE on hand should faculty or staff need a replacement, or a student be in need.
- Responsible Parties must advise students, faculty, staff, and visitors that they are required to wear face coverings in common areas or situations where social distancing may be difficult to maintain, such as riding in elevators, entering/exiting classrooms or student centers, walking in hallways, and traveling around school buildings.
- Responsible Parties must allow students, faculty, and staff to use their own acceptable face coverings, but cannot require faculty and staff to supply their own face coverings. Further, this guidance shall not prevent employees from wearing their personally owned protective coverings (e.g., surgical masks, N-95 respirators, face shields), as long as they adhere to the minimum standards of protection for the specific activity. Responsible Parties may otherwise require employees to wear more protective PPE due to the nature of their work. If applicable, employers should comply with all applicable OSHA standards.
- Responsible Parties may request that students bring their own face covering, but may not require it and must procure, fashion, or otherwise obtain acceptable face coverings and provide such coverings to any student who does not have their own, at no cost to the student.
- Face coverings should be cleaned or replaced after use and must not be shared. Students and parents/legal guardians should take responsibility for maintaining their face coverings. Please consult CDC [guidance](#) for additional information on cloth face coverings and other types of PPE, as well as instructions on use and cleaning.

## B. Hygiene, Cleaning and Disinfection

### *Hygiene*

- Responsible Parties must ensure adherence to hygiene and cleaning and disinfection requirements as advised by the CDC and DOH, including "[Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#)," and the "[STOP THE SPREAD](#)" poster, as applicable. Responsible Parties must maintain logs that include the date, time, and scope of cleaning and disinfection. Responsible Parties must identify cleaning and disinfection frequency for each facility type and assign responsibility.
- Responsible Parties must train all students, faculty, and staff on proper hand and respiratory hygiene, and should provide information to parents and/or legal guardians on ways to reinforce this at home.
- Responsible Parties must provide and maintain hand hygiene stations around the school, as follows:
  - For handwashing: soap, running warm water, and disposable paper towels.
  - For hand sanitizing: an alcohol-based hand sanitizer containing at least 60% alcohol for areas where handwashing facilities may not be available or practical.
    - School medical or health directors should approve and permit the use of alcohol-based hand sanitizers in school facilities without individual's physician orders as alcohol-based hand sanitizers are considered over-the-counter drugs. Student use of alcohol-based hand sanitizers should always be supervised by adults to minimize accidental ingestion and promote safe usage; supervision is required for elementary school students. Parents/guardians can inform the school that they do not want their child to use alcohol-based hand sanitizers by sending a written notice to the school. Schools must provide

accommodations for students who cannot use hand sanitizer, to allow for their use of handwashing stations.

- Make hand sanitizer available throughout common areas. It should be placed in convenient locations, such as at building, classroom, and cafeteria entrances and exits. Touch-free hand sanitizer dispensers should be installed where possible.
  - Responsible Parties should place signage near hand sanitizer stations indicating that visibly soiled hands should be washed with soap and water; hand sanitizer is not effective on visibly soiled hands.
  - Responsible Parties should remind individuals that alcohol-based hand sanitizers can be flammable and may not be suitable for certain areas in school facilities and on school grounds.
- Responsible Parties should place receptacles around the school for disposal of soiled items, including paper towels and PPE.

### ***Cleaning and Disinfection***

- Responsible Parties should ensure that cleaning and disinfection are the primary responsibility of the school's custodial staff. However, Responsible Parties may also choose to provide appropriate cleaning and disinfection supplies to faculty and staff for shared and frequently touched surfaces:
  - Consider providing disposable wipes to faculty and staff so that commonly used surfaces (e.g., keyboards, desks, remote controls) can be wiped down before and/or after use, followed by hand hygiene.
  - To reduce high-touch surfaces, Responsible Parties should install touch-free amenities, such as water-bottle refilling stations, trash receptacles and paper towel dispensers, where feasible.
  - If installing touch-free amenities is not feasible, Responsible Parties should, at a minimum, make hand sanitizer available near high-touch surfaces (e.g., trash receptacles, paper towel dispensers).
  - Responsible Parties should consider closing water drinking fountains (unless they are configured as a bottle refilling station) and encourage students, faculty, and staff to bring their own water bottles or use disposable cups.
- Responsible Parties must conduct regular cleaning and disinfection of the facilities and more frequent cleaning and disinfection for high-risk areas used by many individuals and for frequently touched surfaces, including desks and cafeteria tables which should be cleaned and disinfected between each individual's use, if shared. If cohorts are used, cleaning and disinfection may take place between each cohort's use rather than each individual. Cleaning and disinfection must be rigorous and ongoing and should occur at least daily, or more frequently as needed. Please refer to DOH's "[Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#)" and "[Interim Guidance for Cleaning and Disinfection of Primary and Secondary Schools for COVID-19](#)" for detailed instructions on how to clean and disinfect facilities.
  - Responsible Parties must ensure regular cleaning and disinfection of restrooms. Restrooms should be cleaned and disinfected more often depending on frequency of use.
  - Responsible Parties should ensure that materials and tools used by employees are regularly cleaned and disinfected using registered disinfectants. Refer to the Department of Environmental Conservation (DEC) [list of products](#) registered in New York State and identified by the EPA as effective against COVID-19.
    - If cleaning or disinfection products or the act of cleaning and disinfection causes safety hazards or degrades the material or machinery, Responsible Parties must put in place hand

hygiene stations between use and/or supply disposable gloves and/or limitations on the number of employees using such machinery.

- Best practices to implement in residential, shared (i.e., communal) bathrooms include, but are not limited to:
  - Installation of physical barriers between toilets and sinks if six feet of separation is not feasible; and
  - Use of touch-free paper towel dispensers in lieu of air dryers.
- Responsible Parties must ensure distancing rules are adhered to by using signage, occupied markers, or other methods to reduce restroom occupancy at any given time, where feasible.

### ***Cleaning and Disinfection Following Suspected or Confirmed COVID-19 Case***

- Responsible Parties must provide for the cleaning and disinfection of exposed areas in the event an individual is confirmed to have COVID-19, with such cleaning and disinfection to include, at a minimum, all heavy transit areas and high-touch surfaces.
- Responsible Parties are expected to follow CDC guidelines on "[Cleaning and Disinfecting Your Facility](#)," if someone is suspected or confirmed to have COVID-19:
  - Close off areas used by the person who is suspected or confirmed to have COVID-19.
    - Responsible Parties do not necessarily need to close operations, if they can close off the affected areas (e.g., classroom, restroom, hallway), but they should consult with local health departments in development of their protocols.
  - Open outside doors and windows to increase air circulation in the area.
  - Wait 24 hours before you clean and disinfect, unless waiting 24 hours is not feasible, in which case, wait as long as possible.
  - Clean and disinfect all areas used by the person suspected or confirmed to have COVID-19, such as offices, classrooms, bathrooms, lockers, and common areas.
  - Once the area has been appropriately cleaned and disinfected, it can be reopened for use.
    - Individuals without close or proximate contact with the person suspected or confirmed to have COVID-19 can return to the area and resume school activities immediately after cleaning and disinfection.
    - Refer to DOH's "[Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure](#)" for information on "close and proximate" contacts.
  - If more than seven days have passed since the person who is suspected or confirmed to have COVID-19 visited or used the facility, additional cleaning and disinfection is not necessary, but routine cleaning and disinfection should continue.

### **C. Coordination and Phased Reopening**

- Responsible Parties must designate a COVID-19 safety coordinator whose responsibilities include continuous compliance with all aspects of the school's reopening plan, as well as any phased-in reopening activities necessary to allow for operational issues to be resolved before activities return to normal or "new normal" levels.

### **D. Communications Plan**



- Responsible Parties must affirm that they have reviewed and understand the State-issued industry guidelines and must submit reopening plans, as outlined above and instructed below, prior to reopening.
  - Please note that the State will decide on reopening dates for Pre-K through Grade 12 schools in early August 2020.
- Responsible Parties must engage with school stakeholders and community members (e.g., administrators, faculty, staff, students, parents/legal guardians of students, local health departments, local health care providers, and affiliated organizations, such as unions, alumni, and/or community-based groups) when developing reopening plans. Plans for reopening should identify the groups of people involved and engaged throughout the planning process.
- Responsible Parties must develop a communications plan for students, parents or legal guardians of students, staff, and visitors that includes applicable instructions, training, signage, and a consistent means to provide individuals with information. Responsible Parties may consider developing webpages, text and email groups, and/or social media groups or posts.
- Responsible Parties must ensure all students are taught or trained how to follow new COVID-19 protocols safely and correctly, including but not limited to hand hygiene, proper face covering wearing, social distancing, and respiratory hygiene.
- Responsible Parties must encourage all students, faculty, staff, and visitors through verbal and written communication (e.g., signage) to adhere to CDC and DOH guidance regarding the use of PPE, specifically acceptable face coverings, when a social distance cannot be maintained.
- Responsible Parties should designate a coordinator or other point(s)-of-contact to be the main contact upon the identification of positive COVID-19 cases and to be responsible for subsequent communication. Coordinators should be responsible for answering questions from students, faculty, staff, and parents or legal guardians of students regarding the COVID-19 public health emergency and plans implemented by the school.
  - Coordinators should also work closely with local health departments and other schools to monitor public health conditions and jointly develop monitoring strategies.

## E. Residential Living Considerations

- For schools with students who reside on campus, Responsible Parties must consider the following as they develop their plans:
  - Residence halls: Plans should include protocols for capacity limits, enhanced cleaning and disinfection, appropriate social distancing, use of acceptable face coverings in common areas, restrictions on non-essential gatherings and activities, limited access by students to other residential facilities (e.g., dormitories), restrictions of visitors, special housing considerations for students who are immunocompromised or who have an underlying health condition, separate living spaces for persons undergoing isolation or quarantine, and a modified set of rules for students to follow;
  - Residential testing: Plan for screening all students and faculty upon return, and to ensure diagnostic testing for any students or faculty members who screen positive for potential COVID-19 infection upon return, especially including any individuals with recent international or long-distance travel, or travel from designated states with widespread community transmission of COVID-19, as identified through the [New York State Travel Advisory](#);
  - Residential isolation and quarantine: Isolation (for individuals with suspected or confirmed case of COVID-19) or quarantine (for individuals exposed to a suspected or confirmed case of COVID-19, or who have recently traveled internationally or in states with widespread COVID-19

transmission) of individuals residing on school grounds may become necessary and schools should develop plans, in consultation with the local health department, that specify where individuals will be residing (e.g., dedicated residence hall, hotel, home) and the support system that will be implemented to meet daily needs (e.g., food, medication, psychosocial, academic and/or other support) throughout the duration of their isolation or quarantine. Plans should include measures to monitor and provide medical care and other health services to students who test positive and are in isolation, need more advanced medical care, or who are awaiting test results; and

- Residence move-out: Plans need to be put in place for how students should safely depart residence halls in the event of a closure. Schools should consider policies for students who may not be able to depart campus quickly (e.g. international students).

### III. PROCESSES

#### A. Screening and Testing

##### *Health Screening and Temperature Checks*

- Responsible Parties must implement mandatory health screenings, including temperature checks, of students, faculty, staff, and, where applicable, contractors, vendors, and visitors to identify any individuals who may have COVID-19 or who may have been exposed to the COVID-19 virus.
  - Temperature checks should be conducted per U.S. Equal Employment Opportunity Commission or DOH guidelines. Specifically, all individuals must have their temperature checked each day – ideally, at home, prior to departing to school – before entering any school facility. If an individual presents a temperature of greater than 100.0°F, the individual must be denied entry into the facility, or sent directly to a dedicated area prior to being picked up or otherwise sent home.
  - Responsible Parties must also use a daily screening questionnaire for faculty and staff reporting to school; and periodically use a questionnaire for students, particularly younger students, who may require the assistance of their parent/legal guardian to answer.
    - Responsible Parties are prohibited from keeping records of student, faculty, staff, and visitor health data (e.g., the specific temperature data of an individual), but are permitted to maintain records that confirm individuals were screened and the result of such screening (e.g., pass/fail, cleared/not cleared).
  - Screening is strongly recommended to be conducted remotely (e.g. by electronic survey, digital application, or telephone, which may involve the parent/legal guardian), before the individual reports to school, to the extent possible; or may be performed on site at the school.
    - Remote screening should be coordinated to identify individuals who should not go to school and should be referred to their health care provider for further evaluation and COVID-19 testing.
    - On-site screening should be coordinated in a manner that prevents individuals from intermingling in close or proximate contact with each other prior to completion of the screening.
  - Screening for all students, faculty, staff, and, where practicable, visitors, contractors, and vendors, must be completed using a questionnaire that determines whether the individual has:
    - (a) knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive through a diagnostic test for COVID-19 or who has or had symptoms of COVID-19;
    - (b) tested positive through a diagnostic test for COVID-19 in the past 14 days;

- (c) has experienced any symptoms of COVID-19, including a temperature of greater than 100.0°F, in the past 14 days; and/or
- (d) has traveled internationally or from a state with widespread community transmission of COVID-19 per the New York State Travel Advisory in the past 14 days.
- As able, Responsible Parties should consider implementing health screening practices for unscheduled visitors (e.g., members of the public allowed to use school grounds).
- Refer to CDC guidance on "Symptoms of Coronavirus" for the most up to date information on symptoms associated with COVID-19.
  - Please note that the manifestation of COVID-19 in children, although similar, is not always the same as that for adults. Children may be less likely to present with fever as an initial symptom, and may only have gastrointestinal tract symptoms, which should be taken into consideration during the screening process. Schools should also consider reminding parents/guardians that students may not attend school if they have had a temperature of greater than 100.0°F at any time in the past 14 days, even if a fever-reducing medication was administered and the student no longer has a fever.
- Responsible Parties should remain aware that quarantine of students, faculty, or staff may be required after international travel or travel within certain states with widespread community transmission of COVID-19, pursuant to current CDC and DOH guidance, as well as Executive Order 205.

### ***Positive Screen Protocols***

- Any individual who screens positive for COVID-19 exposure or symptoms, if screened at the school, must be immediately sent home with instructions to contact their health care provider for assessment and testing.
  - Students who are being sent home because of a positive screen (e.g., onset of COVID-19 symptoms) must be immediately separated from other students and supervised until their parent/legal guardian or emergency contact can retrieve them from school.
  - Responsible Parties should provide such individuals with information on health care and testing resources, if applicable.
  - Responsible Parties must immediately notify the state and local health department about the case if diagnostic test results are positive for COVID-19.
- Responsible Parties must require individuals to immediately disclose if and when their responses to any of the aforementioned questions changes, such as if they begin to experience symptoms, including during or outside of school hours.
- Responsible Parties must establish policies, in consultation with the local health department(s), about the requirements for determining when individuals, particularly students, who screened positive for COVID-19 symptoms can return to the in-person learning environment. This returning to learning protocol must include at minimum documentation from a health care provider evaluation, negative COVID-19 testing, and symptom resolution, or if COVID-19 positive, release from isolation.
- Responsible Parties must designate a central point of contact(s), which may vary by activity, location, shift or day, responsible for receiving and attesting to having reviewed all screening activities, with such contact(s) also identified as the party for individuals to inform if they later experience COVID-19-related symptoms or COVID-19 exposure, as noted on the questionnaire.

### ***In-Person Screening***

- Responsible Parties must ensure that any personnel performing in-person screening activities, including temperature checks, are appropriately protected from exposure to potentially infectious

individuals entering the facilities. Personnel performing screening activities should be trained by employer-identified individuals who are familiar with CDC, DOH, and OSHA protocols.

- Screeners should be provided and use PPE, which includes at a minimum, an acceptable face covering or mask, and may also include gloves, a gown, and/or a face shield.

## **B. School Health Offices**

- Responsible Parties may consider developing testing systems in school facilities or self-testing systems in collaboration with local health departments or local health care providers, as able.
- Responsible Parties must develop protocols for caring for a student, faculty, or staff member who develops COVID-19 symptoms during the school day. These protocols must include:
  - Identification of a dedicated area to separate students, faculty, or staff with symptoms of COVID-19 from others until they can go home or to a health care facility, depending on severity of illness;
  - Plans to ensure that symptomatic students who are waiting to be picked up remain under the visual supervision of a staff member who is socially distanced;
  - PPE requirements for school health office staff caring for sick individuals, which must include both standard and transmission-based precautions. In areas with moderate to substantial community transmission, eye protection (i.e., goggles or face shield) should be added. When caring for a suspect or confirmed individual with COVID-19, gloves, a gown, and a fit-tested N-95 respirator should be used, if available (or surgical face mask and face shield, if not available), as well as eye protection. Please consult CDC guidance for additional information; and
  - Required guidelines for cleaning and disinfection.
- Responsible Parties must develop protocols for asthma-related acute respiratory treatment care using up to date standard of care:
  - Nebulizer treatments and suctioning are identified by the CDC as aerosol-generating procedures requiring a N-95 mask fitted to the healthcare worker;
  - Consult with students' healthcare providers for alternate asthma medication delivery systems; and
  - Consult with school maintenance and facilities department for environmental controls.

## **C. Tracing and Tracking**

### ***Metrics***

- Responsible Parties should identify clearly defined measures that will serve as warning signs that the level of COVID-19 transmission may be increasing in the school setting beyond an acceptable level, as defined by state and local health departments.
  - Responsible Parties must include a process in their plan if/when COVID-19 cases are discovered at school, including closing areas or classes where individuals were infected or more broadly the entire school in consultation with the local health department.
  - Responsible Parties may choose to modify operations prior to instituting school-wide closures to help mitigate a rise in cases.

### ***Notification***

- Responsible Parties must notify the state and local health department immediately upon being informed of any positive COVID-19 diagnostic test result by an individual in school facilities or on school grounds, including students, faculty, staff, and visitors.

### ***Tracing Support***

- In the case of an individual testing positive, Responsible Parties must develop plans to support local health departments in tracing all contacts of the individual, in accordance with the protocols, training, and tools provided through the New York State Contact Tracing Program. Confidentiality must be maintained as required by federal and state law and regulations. Responsible Parties must cooperate with state and local health department contact tracing, isolation, and quarantine efforts.
  - If feasible, Responsible Parties may offer optional tracing and tracking technology (e.g., mobile applications) to streamline contact tracing and communication process among their students, faculty, staff, parents/legal guardians of students, and community.
  - Responsible Parties should partner with local health departments to train faculty and staff to undertake contact tracing efforts for populations in school facilities and on school grounds, where feasible.

### ***Quarantine, Isolation, and Return to School***

- State and local health departments will implement monitoring and movement restrictions of COVID-19 infected or exposed persons, including isolation or quarantine.
- Responsible Parties must ensure that reporting plans are in place for individuals who are alerted that they have come into close or proximate contact with a person with COVID-19, and have been alerted to such exposure via tracing, tracking or other mechanism.
- Responsible Parties should refer to DOH's "Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure" regarding protocols and policies for faculty and staff seeking to return to work after a suspected or confirmed case of COVID-19 or after the faculty or staff member had close or proximate contact with a person with COVID-19.

## **IV. SUBMISSION OF SCHOOL PLANS**

Responsible Parties must submit an affirmation at the below link that they have read and understand this guidance. Further, pursuant to this guidance, Responsible Parties must prepare and submit plan(s) for reopening and operating during the ongoing emergency by July 31, 2020. If an extension is required, Responsible Parties should contact DOH and either NYSED if they are a school district, BOCES, private school, or NYSED-authorized charter school, or SUNY if they are a SUNY-authorized charter school, for an extension. Plans should be presumed to be approved upon submission, unless otherwise notified by the State that modifications are necessary to ensure compliance with this guidance.

Plans should reflect engagement with school stakeholders and community members (e.g., administrators, faculty, staff, students, parents/legal guardians of students, local health care providers, and affiliated organizations, such as unions, alumni, and/or community-based groups), particularly local health department(s), and, in accordance with the minimum requirements referenced herein, cover: (1) reopening of school facilities for in-person instruction, (2) monitoring of health conditions, (3) containment of potential transmission of the 2019 novel coronavirus, and (4) closure of school facilities and in-person instruction, if necessitated by widespread virus transmission.

Responsible Parties must conspicuously post completed reopening plans at the school and on their website for faculty, staff, students, and parents and legal guardians of students to access.

**School districts and BOCES** should use the following submission form link to file their plans with NYSED and DOH. DOH and/or NYSED may require such school districts and BOCES to modify their plans, to the extent necessary to ensure compliance with this guidance. Plans will be made publicly available.

<https://forms.ny.gov/s3/PK-12-Education-Reopening-Plan>, then select "School Districts and BOCES"

**Charter schools** should use the following submission form link to file their plans with DOH and their authorizer (i.e., NYSED or SUNY). DOH and/or NYSED/SUNY may require charter schools to modify their plans to the extent necessary to ensure compliance with this guidance. Plans will be made publicly available.

<https://forms.ny.gov/s3/PK-12-Education-Reopening-Plan>, then select "Charter Schools"

**Private schools** should use the following submission form link to file their plans with NYSED and DOH. DOH and/or NYSED may require private schools to modify their plans to the extent necessary to ensure compliance with this guidance. Plans will be made publicly available.

<https://forms.ny.gov/s3/PK-12-Education-Reopening-Plan>, then select "Private Schools"

**Additional safety information, guidelines, and resources are available at:**

New York State Department of Health Novel Coronavirus (COVID-19) Website  
<https://coronavirus.health.ny.gov/>

New York State Education Department Coronavirus (COVID-19) Website  
<http://www.nysed.gov/coronavirus>

Centers for Disease Control and Prevention Coronavirus (COVID-19) Website  
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Occupational Safety and Health Administration COVID-19 Website  
<https://www.osha.gov/SLTC/covid-19/>

**At the link below, affirm that you have read and understand your obligation to operate in accordance with this guidance:**

<https://forms.ny.gov/s3/ny-forward-affirmation>



## INTERIM GUIDANCE FOR HIGHER EDUCATION DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

### When you have read this document, you can affirm at the bottom.

As of June 28, 2020

#### Purpose

This Interim Guidance for Higher Education during the COVID-19 Public Health Emergency (“Interim COVID-19 Guidance for Higher Education”) was created to provide colleges, universities and other higher education institutions, and their employees, students, visitors, contractors, and vendors with precautions to help protect against the spread of COVID-19.

This guidance is intended to address all types of in-person higher education institutions, including but not limited to community and junior colleges, universities, graduate and professional schools, medical schools, and technical schools. In addition to affirming to understand and meet the requirements described herein, higher education institutions must develop a plan for reopening and operating for the duration of the COVID-19 public health emergency. Plans should reflect engagement with campus stakeholders, including but not limited to administrators, faculty, staff, students and, where appropriate, affiliated organizations (e.g., union, alumni, and/or community-based groups). Specifically, each institution must develop and submit a plan that, at a minimum, covers:

- (1) Reopening of the campus,
- (2) Monitoring of health conditions,
- (3) Containment of potential transmission of the virus, and
- (4) Shut down of in-person operations on the campus, if necessitated by widespread COVID-19 transmission.

**Reopening** includes plans for restarting campus operations including student, faculty, and staff return. The following considerations must be included, at a minimum:

- **Capacity:** Phasing and quantity of students, faculty and staff to return to campus, considering factors such as ability to maintain social distance in public spaces and residence halls, testing capabilities, Personal Protective Equipment (PPE) availability, quarantine and isolation capacity, local medical capacity, and availability of safe transportation;
- **PPE:** Develop plans for obtaining and providing acceptable face coverings to all employees of the institution. Determine if the institution will be providing face coverings or other PPE to students. Develop requirements about what PPE is required where and when for employees, students, and other individuals on campus, in accordance with state and local public health laws, regulations, and policies;
- **Testing:** Plan for screening and diagnostic testing students and faculty for SARS-CoV-2 upon return, especially any individuals with recent international or long-distance travel, particularly from areas with widespread community transmission of the virus. Plans should indicate if individuals will be tested, who will be tested, the frequency of testing, the method of testing, notification of test results, and the process for those arriving to campus untested. Plans may determine whether to quarantine students upon arrival until they receive testing and a negative test result;

- **Residential living:** Residential living plans should include protocols for capacity limits, enhanced cleaning and disinfection, appropriate social distancing, use of acceptable face coverings in common areas, restrictions on non-essential gatherings and activities, limited access by students to other residential facilities (e.g. dormitories), restrictions of visitors, special housing considerations for students who are immunocompromised or who have an underlying health condition, separate living spaces for persons undergoing isolation or quarantine, and a modified set of rules for students to follow;
- **Operational activity:** Determine how classes, shared spaces, and activities may be adapted in various phases of return and operations (e.g., identify which classes will offer alternate approaches such as A/B schedules or remote instruction; appointment-only use of shared spaces, limiting number of individuals participating in in-person activities at any given time);
- **Restart operations:** Implement plans to safely reopen buildings such as cleaning and disinfection, and restarting ventilation, water systems, and other key facility components, as applicable;
- **Extracurriculars:** Institute policies regarding extracurricular programs and which activities will be allowed, considering social distancing and risk of COVID-19 transmission;
- **Vulnerable Populations:** Consider vulnerable populations on campus and individuals who may not feel comfortable returning, to allow them to safely participate in educational activities and accommodate their specific circumstances; and
- **Hygiene, cleaning and disinfection:** Establish campus-wide cleaning and disinfection protocols for classrooms, residence halls, restrooms, dining halls and other facilities. Promote hand and respiratory hygiene among all individuals on campus.

**Monitoring** includes policies to track health conditions on campus. The following considerations must be included, at a minimum:

- **Testing responsibility:** Identify who is responsible for purchasing and administering testing, as well as notification of test results; plans should offer contingencies for continual screening of symptoms and temperature checks without testing, if needed.
- **Testing frequency and protocols:** Determine testing frequency and process which may include plans to test for cause (e.g. symptomatic individuals, close or proximate contacts, international travel), plans to test for surveillance to proactively monitor for symptoms of influenza-like illness, as well as protocols around group testing.
- **Early warning signs:** Define metrics that will serve as early warning signs that positive cases may be increasing beyond an acceptable level; define method(s) to monitor against such metrics;
- **Tracing:** Consider plans for contact tracing in close coordination with state and local health departments using the protocols, training, and tools provided through the [New York State Contact Tracing Program](#) – an initiative between the Department of Health, Bloomberg Philanthropies, Johns Hopkins Bloomberg School of Public Health, and Vital Strategies; and
- **Screening:** Develop plans for regular health screening of employees, students, and visitors.

**Containment** includes plans for how to respond to positive or suspected cases as well as preventative policies and practices. The following considerations must be included, at a minimum:

- **Isolation:** Identify how to isolate symptomatic individuals, both residential and non-residential (as applicable). Plans must specifically identify where individuals will be residing (e.g. residence halls, hotels, home) throughout the duration of their isolation, as well as the support system that will be provided including food, medicine, psychosocial, academic and/or other support, as needed;



- **Quarantine:** Identify how exposed individuals (residential and non-residential) will be quarantined away from others, including the support system that will be provided including food, medicine, psychosocial, academic and/or other support, as needed;
- **Students confirmed or suspected to have COVID-19:** Residential institutions need to include plans to monitor and provide medical care and other health services to students who test positive and are in isolation, need more advanced medical care, or who are awaiting test results;
- **Hygiene, cleaning and disinfection:** Implement strategies for cleaning and disinfection of exposed areas and appropriate notification to occupants of such areas; and
- **Communication:** Develop plans to share protocols and safety measures taken by the institution.

**Shutdown** includes contingency plans for decreasing on-campus activities and operations and/or closing the campus. The following considerations must be included, at a minimum:

- **Operational Activity:** Include which operations will be decreased, scaled back, ramped down, or shutdown and which operations will be conducted remotely; include process to conduct orderly shutdown which may include phasing, milestones, and involvement of key personnel.
- **Move-out:** For residential universities, plans need to be put in place for how students would safely depart campus. Institutions should consider policies for students who may not be able to depart campus quickly (e.g. international students); and
- **Communication:** Develop comprehensive plans to communicate internally and externally throughout the process.

Higher education institutions involve a variety of activities and should reference relevant “industry-specific” guidelines provided by the Department of Health – and available on the [New York Forward](#) website – for operations of dining halls, research, office workspaces, transportation, retail stores, and others, as applicable. Specifically, operations of dining halls and other on-campus food services must operate in accordance with, “[Interim Guidance for Food Services during the COVID-19 Public Health Emergency.](#)” Research activities must operate in accordance with, “[Interim Guidance for Higher Education Research during the COVID-19 Public Health Emergency.](#)” Administrative functions must operate in accordance with, “[Interim Guidance for Office-Based Work during the COVID-19 Public Health Emergency.](#)” Transportation services run by the institution must operate in accordance with “[Interim Guidance for Public Transportation Activities during the COVID-19 Public Health Emergency.](#)” Campus bookstores and other retail locations must operate in accordance with, “[Interim Guidance for Retail Business Activities during the COVID-19 Public Health Emergency.](#)” On-campus gyms and fitness centers must operate in accordance with forthcoming guidance. Collegiate athletics operated by the institution must operate in accordance with forthcoming guidance.

These guidelines are minimum requirements only and each institution is free to provide additional precautions or increased restrictions. These guidelines are based on the best-known public health practices at the time of publication, and the documentation upon which these guidelines are based can and does change frequently. The Responsible Parties – as defined below – are accountable for adhering to all local, state and federal requirements relative to higher education, and auxiliary activities. The Responsible Parties are also accountable for staying current with any updates to these requirements, and related guidance as stated above, as well as incorporating same into any higher education activities and/or Site Safety Plan.

## Background

On March 7, 2020, Governor Andrew M. Cuomo issued [Executive Order 202](#), declaring a state of emergency in response to COVID-19. Community transmission of COVID-19 has occurred throughout

New York. To minimize further spread, social distancing of at least six feet must be maintained between individuals, where possible.

On March 20, 2020, Governor Cuomo issued Executive Order 202.6, directing all non-essential businesses to close in-office personnel functions. Essential businesses, as defined by Empire State Development Corporation (ESD) guidance, were not subject to the in-person restriction, but were, however, directed to comply with the guidance and directives for maintaining a clean and safe work environment issued by the New York State Department of Health (DOH), and were strongly urged to maintain social distancing measures to the extent possible.

On April 12, 2020, Governor Cuomo issued Executive Order 202.16, directing essential businesses to provide employees, who are present in the workplace, with a face covering, at no-cost, that must be used when in direct contact with customers or members of the public during the course of their work. On April 15, 2020, Governor Cuomo issued Executive Order 202.17, directing that any individual who is over age two and able to medically tolerate a face-covering must cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance. On April 16, 2020, Governor Cuomo issued Executive Order 202.18, directing that everyone using public or private transportation carriers or other for-hire vehicles, who is over age two and able to medically tolerate a face covering, must wear a mask or face covering over the nose and mouth during any such trip. It also directed any operators or drivers of public or private transport to wear a face covering or mask which covers the nose and mouth while there are any passengers in such a vehicle. On May 29, 2020, Governor Cuomo issued Executive Order 202.34, authorizing business operators/owners with the discretion to deny admittance to individuals who fail to comply with the face covering or mask requirements.

On April 26, 2020, Governor Cuomo announced a phased approach to reopen industries and businesses in New York in phases based upon a data-driven, regional analysis. On May 4, 2020, the Governor provided that the regional analysis would consider several public health factors, including new COVID-19 infections, as well as health care system, diagnostic testing, and contact tracing capacity. On May 11, 2020, Governor Cuomo announced that the first phase of reopening would begin on May 15, 2020 in several regions of New York, based upon available regional metrics and indicators. On May 29, 2020, Governor Cuomo announced that the second phase of reopening would begin in several regions of New York. On June 11, 2020, Governor Cuomo announced that the third phase of reopening would begin on June 12, 2020 in several regions of New York.

On May 8, 2020, Governor Cuomo launched New York's Reimagine Education Advisory Council – made up of educators, students, parents, and education leaders – to help colleges, universities, and school districts reimagine teaching and learning as they prepare to reopen while protecting health and safety of students and educators. The collective expertise and experience of this advisory council helped address key questions about how to strengthen New York's entire education system and helped inform this guidance.

In addition to the following standards, higher education institutions must continue to comply with the guidance and directives for maintaining clean and safe work environments issued by DOH.

Please note that where guidance in this document differs from other guidance documents issued by New York State, the more recent guidance shall apply.

### **Standards for Responsible Higher Education Activities in New York State**

No higher education activities can operate without meeting the following minimum State guidance, as well as applicable federal requirements, including but not limited to such minimum standards of the Americans with Disabilities Act (ADA), Centers for Disease Control and Prevention (CDC), Environmental Protection Agency (EPA), and United States Department of Labor's Occupational Safety and Health

Administration (OSHA). The State standards apply to all higher education activities in operation during the COVID-19 public health emergency until rescinded or amended by the State.

The primary executive/owner/operator of the higher education institution (e.g., university president), or another party designated by the executive/owner/operator (in either case, "the Responsible Parties"), shall be responsible for meeting these standards. The designated party can be an individual or group of individuals responsible for the operations of the higher education institution.

The following guidance is provided to help higher education institutions develop their reopening plans and is organized around three distinct categories: people, places, and processes.

## I. PEOPLE

### A. Physical Distancing

- Responsible Parties should ensure that a distance of at least six feet is maintained among individuals while on campus, inclusive of employees and students, to the extent possible and when seated in a classroom setting or meeting, unless safety or the core activity (e.g., moving equipment, using an elevator, performing a transaction) requires a shorter distance or individuals are of the same residence. Any time individuals come within six feet of another person who does not reside in the same residence (i.e., roommate), acceptable face coverings must be worn. Individuals should be prepared to don a face covering if another person unexpectedly comes within six feet.
  - Acceptable face coverings are required for individuals who are over the age of two and able to medically tolerate such covering.
  - Acceptable face coverings for COVID-19 include but are not limited to cloth-based face coverings (e.g. homemade sewn, quick cut, bandana), surgical masks, and face shields that cover both the mouth and nose.
  - However, cloth, disposable, or other homemade face coverings are not acceptable face coverings for workplace activities that typically require a higher degree of protection for personal protective equipment (PPE) due to the nature of the work. For those activities, N-95 respirators or other PPE used under existing industry standards should continue to be used, as is defined in accordance with [OSHA guidelines](#).
  - This provision should not be construed to require physical distancing among roommates, or require face coverings to be worn while inside an individual's residence. For the purposes of this guidance, students who share the same residence (i.e., dormitory room) should be considered members of the same household.
- Responsible Parties are encouraged to modify or reconfigure spaces and/or restrict the use of classrooms and other places where students and employees congregate, so that individuals are spaced at least six feet apart in all directions (e.g. side-to-side and when facing one another) and are not sharing workstations without appropriate cleaning and disinfection between use. When distancing is not feasible in public spaces, Responsible Parties must require the use of face coverings or physical barriers (e.g. plastic shielding walls, in lieu of face coverings in areas where they would not affect air flow, heating, cooling or ventilation, or otherwise present a health or safety risk).
  - Physical barriers should be put in place in accordance with [OSHA guidelines](#).
  - Physical barrier options may include strip curtains, cubicle walls, plexiglass or similar materials, or other impermeable dividers or partitions.

- Responsible Parties should limit gathering in small spaces (e.g. elevators, supply rooms, faculty offices) by more than one individual at a time, unless all individuals in such space at the same time are wearing acceptable face coverings or are members of the same residence. However, even with face coverings in use, occupancy should not exceed 50% of the maximum capacity of the space, unless it is designed for use by a single occupant. Responsible Parties should increase ventilation with outdoor air to the greatest extent possible (e.g. opening windows and doors) while maintaining health and safety protocols. Further, Responsible Parties should take additional measures to prevent congregation in elevator waiting areas and limit density in elevators, by, for instance, enabling the use of stairs.
- Where feasible, Responsible Parties should put in place measures to reduce bi-directional foot traffic using tape, signs, or other indicators with arrows in hallways, or spaces throughout campus, and post signage and distance markers denoting spaces of six feet in all commonly used areas and any areas in which lines are commonly formed or people may congregate (e.g., campus centers, libraries, classrooms, dining halls, health screening stations).
  - Responsible Parties may choose to mark six feet distance circles around desks, workstations and other common work areas or areas where gathering is likely to occur (e.g. libraries, study centers, lawns).
- Responsible parties should determine which on-campus facilities (e.g., libraries, study lounges, recreational facilities) will be closed to the general public (i.e., not students or employees) or offer limited, specific hours to members of the general public. Recommended practices for limiting public interactions on campus include, but are not limited to:
  - Limiting visitors to "invited guests" only, who are expected to abide all campus and building specific protocols; and
  - Requiring student/institutional identification (IDs) to enter any on-campus building(s).
- In consultation with the local health department, Responsible Parties must identify where students who are exposed to, or infected with, COVID-19 will be residing and how daily needs (e.g., food, medication) will be met if it becomes necessary to have a period of quarantine or isolation. Recommended facilities include, but are not limited to:
  - Reserved residence halls with private bathrooms, if possible, used solely for the purpose of isolating or quarantining individuals living on-campus who have, who are suspected to have, or who were exposed to COVID-19;
  - Nearby hotels that are arranged to accommodate individuals who have, who are suspected to have, or who were exposed to COVID-19; and/or
  - Individual student homes, pending the student's ability to safely get home (e.g., not using mass transit) and their home is safe for them to isolate away from other individuals.
  - Local health departments may, under their legal authority, implement monitoring and movement restrictions of COVID-19 infected or exposed persons including home isolation or quarantine
- Responsible Parties should post signs throughout the institution or campus, consistent with DOH COVID-19 signage. Responsible Parties can develop their own customized signage specific to their workplace or setting, provided that such signage is consistent with the Department's signage. Signage should be used to remind individuals to:
  - Stay home if they feel sick.
  - Cover their nose and mouth with an acceptable face-covering.
  - Properly store and, when necessary, discard PPE.

- Adhere to social distancing instructions.
- Report symptoms of or exposure to COVID-19, and how they should do so.
- Follow hand hygiene and cleaning and disinfection guidelines.
- Follow respiratory hygiene and cough etiquette.

## **B. Gatherings in Enclosed Spaces**

- Responsible Parties may choose to use and encourage video or teleconferencing in lieu of in-person gatherings (e.g. classes, conferences, office hours) to reduce the density of congregations, per CDC guidance "[Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#)". When videoconferencing or teleconferencing is not preferable or possible, Responsible Parties may choose to hold classes or meetings in open, well-ventilated spaces and ensure that individuals maintain six feet of social distance between one another (e.g. leave space between chairs, have individuals sit in alternating chairs).
- Responsible Parties may consider closing non-essential amenities and communal areas that promote gathering or are high-touch (e.g., break areas, communal coffee machines); or providing cleaning and disinfecting supplies that may be used by individuals before and after they use the amenity or area.
- Responsible Parties should put in place practices for adequate social distancing in small areas, such as restrooms and breakrooms, and should develop signage and systems (e.g. flagging when occupied) to restrict occupancy when social distancing cannot be maintained in such areas.
- Responsible Parties should consider staggering schedules for employees to promote social distancing (e.g. coffee breaks, meals, and shift starts/stops).

## **C. Operational Activity**

- Responsible Parties should consider a mix of traditional in-person and remote classes depending on student needs (e.g., vulnerable populations), technological capabilities, and/or immediately following historically high-travel periods (e.g., limiting in-person classes during holiday travel periods), among other measures to reduce in-person congregation.
- Responsible Parties should take measures to reduce interpersonal contact and decrease density on campus, through methods, such as:
  - adjusting class or work hours, where appropriate and possible;
  - limiting in-person presence to only those employees who are necessary to be at the institution;
  - reducing in-person workforce and increasing remote workforce to accommodate social distancing guidelines;
  - staggering schedules and allowing more time between classes to reduce congestion in walkways and buildings; and/or
  - shifting design of class schedules to create cohorts or sections of students (e.g., A/B schedule or course sections) to reduce risk of exposure and transmission among students.
- When COVID-19 cases develop, Responsible Parties should consider restricting social contact and mobility across campus, particularly in affected areas (e.g., shutting down some functions, but keeping others open to help contain the spread).

- Responsible Parties may choose to temporarily move all classes where an individual has tested positive to remote/virtual format until all contacts can be identified, notified, tested, and cleared.

#### **D. Movement and Commerce**

- Responsible Parties should establish designated areas for pickups and deliveries, limiting contact to the extent possible.
- To the extent feasible, Responsible Parties should limit on-site interactions (e.g., designating separate ingress or egress for employees, eliminating bidirectional flow of individuals to the extent practicable).

## **II. PLACES**

### **A. Protective Equipment**

- In addition to the necessary PPE as required for certain workplace activities, Responsible Parties must procure, fashion, or otherwise obtain acceptable face coverings and provide such coverings to their employees who directly interact with students or members of the public while at work at no cost to the employee, pursuant to Executive Order 202.16, as amended.
- Responsible Parties should have an adequate supply of face coverings, masks and other required PPE on hand should an employee need a replacement. Acceptable face coverings include, but are not limited to, cloth (e.g. homemade sewn, quick cut, bandana), surgical masks, N95 respirators, and face shields.
- Responsible Parties should advise employees, students, and visitors that they are required to wear face coverings in common areas or situations where social distancing may be difficult to maintain, such as riding in elevators, entering/exiting classrooms or student centers, and traveling around the campus.
- Face coverings should be cleaned or replaced after use and must not be shared. Please consult CDC [guidance](#) for additional information on cloth face coverings and other types of PPE, as well as instructions on use and cleaning.
  - Note that cloth face coverings or disposable masks shall not be considered acceptable face coverings for workplace activities that require a higher degree of protection for face covering requirements. For example, if N-95 respirators are traditionally required for specific activities, a cloth or homemade mask would not suffice. Responsible Parties must adhere to [OSHA guidelines](#) for such safety equipment.
- Responsible Parties must allow individuals to use their own acceptable face coverings but cannot require employees to supply their own face coverings. Further, this guidance shall not prevent employees from wearing their personally owned protective coverings (e.g. surgical masks, N95 respirators, or face shields), as long as they abide by the minimum standards of protection for the specific activity. The Responsible Parties may require employees to wear more protective PPE due to the nature of their work. Employers should comply with all applicable OSHA standards.
- Responsible Parties must train employees on how to adequately put on, take off, clean (as applicable), and discard PPE, including but not limited to, appropriate face coverings. Such training should be extended to contractors if the Responsible Parties will be supplying the contractors with PPE.

- Responsible Parties should put in place plans to limit the sharing of objects, such as laptops, notebooks, touchscreens, and writing utensils, as well as the touching of shared surfaces, such as conference tables; or, require employees to perform hand hygiene before and after contact.

## B. Hygiene, Cleaning, and Disinfection

- Responsible Parties must ensure adherence to hygiene and cleaning and disinfection requirements as advised by the CDC and DOH, including "[Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#)," and the "[STOP THE SPREAD](#)" poster, as applicable. Responsible Parties must maintain logs that include the date, time, and scope of cleaning and disinfection. Responsible Parties must identify cleaning and disinfection frequency for each facility type and assign responsibility.
- Responsible Parties should provide and maintain hand hygiene stations around the institution, as follows:
  - For handwashing: soap, running warm water, and disposable paper towels.
  - For hand sanitizing: an alcohol-based hand sanitizer containing at least 60% alcohol for areas where handwashing facilities may not be available or practical.
  - Make hand sanitizer available throughout common areas. It should be placed in convenient locations, such as at building entrances, exits, and points of reception. Touch-free hand sanitizer dispensers should be installed where possible.
    - Responsible Parties should place signage near hand sanitizer stations indicating that visibly soiled hands should be washed with soap and water; hand sanitizer is not effective on visibly soiled hands.
    - Responsible Parties should remind individuals that alcohol-based hand sanitizers can be flammable and may not be suitable for certain areas on campus.
  - Place receptacles around the institution for disposal of soiled items, including paper towels and PPE.
- Responsible Parties may choose to provide appropriate cleaning and disinfection supplies for shared and frequently touched surfaces and encourage their employees (or cleaning staff) to use these supplies following manufacturer's instructions for use before and after use of these surfaces, followed by hand hygiene.
  - Consider providing disposable wipes to employees so that commonly used surfaces (e.g., keyboards, desks, remote controls) can be wiped down before and/or after use.
  - To reduce high-touch surfaces, Responsible Parties should install touch-free amenities such as water fountains, trash receptacles, and paper towel dispensers, where feasible.
  - If installing touch-free amenities is not feasible, Responsible Parties should, at a minimum, make hand sanitizer available near high-touch surfaces (e.g. trash receptacles, paper towel dispensers).
- Responsible Parties must conduct regular cleaning and disinfection of the facilities and more frequent cleaning and disinfection for high risk areas used by many individuals and for frequently touched surfaces. Cleaning and disinfection must be rigorous and ongoing and should occur at least daily, or more frequently as needed. Please refer to DOH's "[Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19](#)" for detailed instructions on how to clean and disinfect facilities.

- Responsible Parties must ensure regular cleaning and disinfection of restrooms. Restrooms should be cleaned and disinfected more often depending on frequency of use.
- Responsible Parties should ensure that materials and tools used by employees are regularly cleaned and disinfected using registered disinfectants. Refer to the Department of Environmental Conservation (DEC) [list of products](#) registered in New York State and identified by the EPA as effective against COVID-19. If cleaning or disinfection products or the act of cleaning and disinfection causes safety hazards or degrades the material or machinery, Responsible Parties must put in place hand hygiene stations between use and/or supply disposable gloves and/or limitations on the number of employees using such machinery.
- Best practices to implement in residential, shared (i.e., communal) bathrooms include, but are not limited to:
  - Installation of physical barriers between showers, toilets, and sinks if six feet of separation is not feasible;
  - Use of paper towel dispensers in lieu of air dryers;
  - Where the physical layout of the building permits, designation of communal bathrooms on a residential hall floor for use by specific rooms or individuals may limit cross contamination and assist with traffic control; and/or
  - Limit storage of personal items within communal bathrooms, particularly if they are shared by individuals who are not members of the same residence (i.e., roommates).
- Responsible Parties must ensure distancing rules are adhered to by using signage, occupied markers, or other methods to reduce restroom occupancy at any given time, where feasible.
- Responsible Parties must provide for the cleaning and disinfection of exposed areas in the event an individual is confirmed to have COVID-19, with such cleaning and disinfection to include, at a minimum, all heavy transit areas and high-touch surfaces.
- Responsible Parties are expected to follow CDC guidelines on ["Cleaning and Disinfecting Your Facility"](#) if someone is suspected or confirmed to have COVID-19:
  - Close off areas used by the person who is suspected or confirmed to have COVID-19.
    - Responsible Parties do not necessarily need to close operations, if they can close off the affected areas.
  - Open outside doors and windows to increase air circulation in the area.
  - Wait 24 hours before you clean and disinfect. If 24 hours is not feasible, wait as long as possible.
  - Clean and disinfect all areas used by the person suspected or confirmed to have COVID-19, such as offices, classrooms, bathrooms, and common areas.
  - Once the area has been appropriately cleaned and disinfected, it can be reopened for use.
    - Individuals without close or proximate contact with the person suspected or confirmed to have COVID-19 can return to work area or resume on-campus activities in the area immediately after cleaning and disinfection.
    - Refer to DOH's ["Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure"](#) for information on "close and proximate" contacts.



- If more than seven days have passed since the person who is suspected or confirmed to have COVID-19 visited or used the facility, additional cleaning and disinfection is not necessary, but routine cleaning and disinfection should continue.
- Responsible Parties should prohibit shared food and beverages among employees (e.g. self-serve meals and beverages), unless individuals are members of the same household, and reserve adequate space for employees and students to observe social distancing while eating meals.
- Responsible Parties may open buffets, provided that they are not self-serve and that they are sufficiently staffed to ensure that there is no customer touching of common objects (e.g. serving spoons, tongs) and that appropriate social distance is maintained.

### C. Phased Reopening

- Responsible Parties must designate a campus safety monitor whose responsibilities include continuous compliance with all aspects of the higher education institution's reopening plan.
- Responsible Parties are encouraged to phase-in reopening activities to allow for operational issues to be resolved before activities return to normal levels. Responsible Parties should consider limiting the number of employees, hours, and number of students when first reopening so as to provide operations with the ability to adjust to the changes.

### D. Communications Plan

- Responsible Parties must affirm that they have reviewed and understand the state-issued industry guidelines and must submit reopening plans, as instructed below, prior to reopening.
- Responsible Parties should engage with campus community members (e.g., employees, students, interested organizations) when developing reopening plans. Plans for reopening should identify the groups of people involved and engaged throughout the planning process.
- Responsible Parties should develop a communications plan for students, parents or legal guardians, employees and visitors that includes reopening-related instructions, training, signage, and a consistent means to provide individuals with information. Responsible Parties may consider developing webpages, text and email groups, and/or social media groups or posts.
- Responsible Parties should encourage all students, employees, and visitors to adhere to CDC and DOH guidance regarding the use of PPE, specifically face coverings when a social distance of six feet cannot be maintained, through verbal communication and signage.
- Responsible Parties should designate points-of-contact or coordinators to be the main contact upon the identification of positive cases and who are responsible for subsequent communication. Coordinators should be responsible for answering questions from students and employees regarding the COVID-19 public health emergency and plans implemented by the institution.
  - If feasible, coordinators should also work closely with local health departments and other higher education institutions to monitor public health conditions and jointly develop monitoring strategies.

## III. PROCESSES

## A. Screening and Testing

- Residential higher education institutions may choose to test students, faculty, and/or student-facing staff for COVID-19 using a molecular diagnostic test prior to or upon arrival.
  - It is recommended, at a minimum, that institutions test students who are arriving from other states and countries upon arrival.
  - The best practice is to re-test individuals arriving from other states and countries between 7 to 14 days after arrival, or upon development of symptoms.
  - Individuals who become symptomatic, but who have a negative COVID-19 test result should continue to stay home or in isolation while they are sick and should consult their health care provider about the need for additional testing and when to resume normal activities.
  - In residential higher education institutions, Responsible Parties should determine whether to separate students upon arrival until they can be tested, and test results return negative.
- Responsible Parties should remain aware that quarantine of students or employees may be required after international travel, pursuant to current CDC and DOH guidance.
- Responsible Parties may consider developing testing systems on campus or self-testing systems, as able.
- Responsible Parties must implement mandatory regular health screening practices of their employees, students, and, where practicable, scheduled visitors (e.g., on-campus tour groups), but such screening shall not be mandated for delivery personnel.
  - Employees reporting to work on-campus must be screened on a daily basis.
  - Students must be screened periodically as determined by the higher education institution but are not required to be screened on a daily basis.
  - Screening practices are recommended to be conducted remotely (e.g., by telephone or electronic survey), before the individual reports in-person to the higher education related activity, to the extent possible; or may be performed on site.
  - Screening should be completed using either a digital or in-person questionnaire that determines whether the individual has:
    - (a) knowingly been in close or proximate contact in the past 14 days with anyone who has tested positive for COVID-19 or who has or had symptoms of COVID-19;
    - (b) tested positive for COVID-19 in the past 14 days; and/or
    - (c) has experienced any symptoms of COVID-19 in the past 14 days.
- As able, Responsible Parties should consider implementing health screening practices for unscheduled visitors (e.g., members of the public allowed to use campus facilities).
- Refer to CDC guidance on "[Symptoms of Coronavirus](#)" for the most up-to-date information on symptoms associated with COVID-19.
- Any individual who screens positive for COVID-19 exposure or symptoms must be immediately sent home, to their residence, or to the designated quarantine or isolation location with instructions or arrangement for health assessment and testing. Responsible Parties must immediately notify the state and local health departments about the case if test results are positive for COVID-19.

Responsible Parties should also provide the individual with information on health care and testing resources, if applicable.

- Responsible Parties must designate a central point of contact(s), which may vary by activity, location, shift or day, responsible for receiving and attesting to having reviewed all screening activities, with such contact(s) also identified as the party for individuals to inform if they later are experiencing COVID-19-related symptoms or COVID-19 exposure, as noted on the questionnaire.
- Responsible Parties must require individuals to immediately disclose if and when their responses to any of the aforementioned questions changes, such as if they begin to experience symptoms, including during or outside of work hours.
  - In addition to the screening questionnaire, temperature checks may also be conducted per U.S. Equal Employment Opportunity Commission or DOH guidelines. Responsible Parties are prohibited from keeping records of employee health data (e.g. the specific temperature data of an individual), but are permitted to maintain records that confirm individuals were screened and the result of such screening (e.g. pass/fail, clear/not cleared).
- Responsible Parties must ensure that any personnel performing in-person screening activities, including temperature checks, are appropriately protected from exposure to potentially infectious employees or visitors entering the facilities. Personnel performing screening activities should be trained by employer-identified individuals who are familiar with CDC, DOH, and OSHA protocols.
- Screeners should be provided and use PPE, including at a minimum, an acceptable face covering or mask, and may include gloves, a gown, and/or a face shield.

## B. Tracing and Tracking

- Responsible Parties must notify the state and local health department immediately upon being informed of any positive COVID-19 test result by an individual on campus, including employees, students, and visitors.
- In the case of an individual testing positive, Responsible Parties must develop plans with local health departments to trace all contacts of the individual, in accordance with the protocols, training, and tools provided through the New York State Contact Tracing Program. Confidentiality must be maintained as required by federal and state law and regulations. Responsible Parties must cooperate with state and local health department contact tracing, isolation, and quarantine efforts.
  - If feasible, Responsible Parties may offer optional tracing and tracking technology (e.g., mobile applications) to streamline contact tracing and communication process among the workforce and student body.
  - Responsible Parties should partner with local health departments to train staff and students to undertake contact tracing efforts for on-campus populations, where feasible.
- State and local health departments will implement monitoring and movement restrictions of COVID-19 infected or exposed persons, including isolation or quarantine.
- Responsible Parties must ensure that reporting plans are in place for individuals who are alerted that they have come into close or proximate contact with a person with COVID-19, and have been alerted to such exposure via tracing, tracking or other mechanism.

- Responsible Parties should refer to DOH’s “[Interim Guidance for Public and Private Employees Returning to Work Following COVID-19 Infection or Exposure](#)” regarding protocols and policies for individuals seeking to return to work or class after a suspected or confirmed case of COVID-19 or after individuals have had close or proximate contact with a person with COVID-19.

## IV. INSTITUTION PLANS

Responsible Parties must submit an affirmation at the below link that they have read and understand this guidance. Further, pursuant to this guidance, Responsible Parties must prepare and submit plan(s) for reopening and operating during the ongoing emergency.

Plans should reflect engagement with campus stakeholders and, in accordance with the minimum requirements referenced herein, cover: (1) reopening of the campus, (2) monitoring of health conditions, (3) containment of potential transmission of the virus, and (4) shut down of in-person operations on the campus, if necessitated by widespread COVID-19 transmission. Responsible Parties must conspicuously post completed reopening plans for employees and students to access.

**Private and other non-public higher education institutions** should use the following submission form link to file their plans with DOH. DOH may require such higher education institutions to modify their plans, to the extent necessary to ensure compliance with this guidance.

<https://forms.ny.gov/s3/higher-education-reopening>

**State University of New York (SUNY) and City University of New York (CUNY) institutions** should submit their plans to their respective chancellor’s office and should not use the above submission form. SUNY and CUNY officials will directly contact each institution regarding their submitted plans.

### **Additional safety information, guidelines, and resources are available at:**

New York State Department of Health Novel Coronavirus (COVID-19) Website  
<https://coronavirus.health.ny.gov/>

Centers for Disease Control and Prevention Coronavirus (COVID-19) Website  
<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Occupational Safety and Health Administration COVID-19 Website  
<https://www.osha.gov/SLTC/covid-19/>

American College Health Association Website  
<https://www.acha.org>

**[At the link below, affirm that you have read and understand your obligation to operate in accordance with this guidance:](#)**

<https://forms.ny.gov/s3/ny-forward-affirmation>

# 20-3572-CV

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## IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

*Plaintiffs-Appellants,*

v.

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

*Defendant-Appellee.*

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

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### **BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY IN SUPPORT OF PLAINTIFFS- APPELLANTS AND AN INJUNCTION PENDING APPEAL**

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## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Each of The Becket Fund for Religious Liberty and The Jewish Coalition for Religious Liberty states that it has no parent corporation and that no publicly held corporation owns any part of it.

## TABLE OF CONTENTS

RULE 26.1 CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES.....	iv
INTEREST OF THE <i>AMICI</i> .....	1
ARGUMENT .....	2
I. The Governor’s Order violates the Free Exercise Clause. ....	4
A. The Governor’s Order is not neutral. ....	4
B. Governor Cuomo’s Order fails strict scrutiny. ....	7
II. <i>Jacobson</i> is also no defense.....	10
CONCLUSION.....	12
CERTIFICATE OF COMPLIANCE.....	13
CERTIFICATE OF SERVICE.....	14

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bayley’s Campground, Inc. v. Mills</i> , No. 20-cv-00176, 2020 WL 2791797 (D. Me. May 29, 2020).....	11
<i>Brown v. Ent. Merchs. Ass’n</i> , 564 U.S. 786 (2011).....	8
<i>Burwell v. Hobby Lobby Stores</i> , 573 U.S. 682 (2014).....	1
<i>Calvary Chapel Dayton Valley v. Sisolak</i> , 140 S. Ct. 2603 (2020).....	11
<i>Capitol Hill Baptist Church v. Bowser</i> , No. 20-cv-02710, 2020 WL 5995126 (D.D.C. Oct. 9, 2020) .....	11, 12
<i>Central Rabbinical Congress v. N.Y.C. Dep’t of Health &amp; Mental Hygiene</i> , 763 F.3d 183 (2d. Cir. 2014) .....	1, 4, 7
<i>Church of the Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993).....	4, 6, 8
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	9
<i>Denver Bible Church v. Azar</i> , No. 1:20-cv-02362 (D. Colo. Oct. 15, 2020).....	11
<i>Employment Div. v. Smith</i> , 494 U.S. 872 (1990).....	4
<i>Fratello v. Archdiocese of N.Y.</i> , 863 F.3d 190 (2d Cir. 2017) .....	1



*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006)..... 7-8

*Hassan v. City of N.Y.*,  
804 F.3d 277 (3d Cir. 2015) ..... 7

*Holt v. Hobbs*,  
574 U.S. 352 (2015)..... 1, 9

*Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,  
565 U.S. 171 (2012)..... 1

*Jacobson v. Massachusetts*,  
197 U.S. 11 (1905)..... 10, 11, 12

*Korematsu v. United States*,  
323 U.S. 214 (1944)..... 3, 11, 12

*Lebovits v. Cuomo*,  
No. 1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020)..... 2

*Little Sisters of the Poor v. Pennsylvania*,  
140 S. Ct. 2367 (2020)..... 1

*McCullen v. Coakley*,  
573 U.S. 4646 (2014)..... 9

*New Hope Family Services v. Poole*,  
966 F.3d 145 (2d Cir. 2020) ..... 4

*Our Lady of Guadalupe School v. Morrissey-Berru*,  
140 S. Ct. 2049 (2020)..... 1

*Phillips v. City of New York*,  
775 F.3d 538 (2d Cir. 2015) ..... 10, 11

*Prince v. Massachusetts*,  
321 U.S. 158 (1944)..... 11

*Roberts v. Neace*,  
958 F.3d 409 (6th Cir. 2020)..... 7

*Roman Catholic Diocese of Brooklyn v. Cuomo*,  
 No. 20-CV-4844, 2020 WL 5994954  
 (E.D.N.Y. Oct. 9, 2020) ..... 4

*Shrum v. City of Coweta*,  
 449 F.3d 1132 (10th Cir. 2006)..... 7

*Trump v. Hawaii*, 138 S. Ct. 2392 (2018) ..... 3

*Turner Broad. Sys., Inc. v. FCC*,  
 512 U.S. 622 (1994)..... 9

*W. Virginia State Bd. of Educ. v. Barnette*,  
 319 U.S. 624 (1943)..... 3

*Wisconsin v. Yoder*,  
 406 U.S. 205 (1972)..... 8

*Zucht v. King*,  
 260 U.S. 174 (1922)..... 10

**Other Authorities**

Executive Order 202.68..... 5

FRAP 29..... 1

*Governor Cuomo Is a Guest on CNN Newsroom with Poppy  
 Harlow and Jim Sciutto*, New York State  
 (Oct. 9, 2020),..... 6

*Governor Cuomo Updates New Yorkers on State’s Progress  
 During COVID-19 Pandemic*, New York State  
 (Oct. 12, 2020)..... 8

*Governor Cuomo Updates New Yorkers on State’s Progress  
 During COVID-19 Pandemic*, New York State  
 (Oct. 5, 2020)..... 6, 7

Hana Levi Julian, *Cuomo Warns Yeshivas, ‘Stay Closed or  
 Lose Funding,’* Jewish Press (Oct. 14, 2020)..... 6

Reuvain Borchardt, *Jewish Leaders Say They Were ‘Stabbed  
in the Back’ by Cuomo*, Hamodia (Oct. 12, 2020) ..... 9, 10

*U.S. coronavirus map: What do the trends mean for you?*,  
Mayo Clinic ..... 8

## INTEREST OF THE *AMICI*

*Amicus* Becket Fund for Religious Liberty is a non-profit law firm dedicated to protecting the free exercise of all religious traditions.<sup>1</sup> To that end, it has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country, including multiple merits cases at the United States Supreme Court. *See, e.g., Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

Becket has also appeared frequently before this Court. *See, e.g., Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (merits counsel); *Central Rabbinical Congress v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d. Cir. 2014) (amicus).

*Amicus* Jewish Coalition for Religious Liberty is an incorporated group of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty. JCRL has an

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<sup>1</sup> Appellants have consented to the filing of this brief. Appellees take no position on the filing of 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. FRAP 29(a)(4)(E).

interest in restoring an understanding of the Free Exercise Clause that offers broad protection to religious liberty.

*Amici* currently represent Yitzchok and Chana Lebovits and their two daughters, along with Bais Yaakov Ateres Miriam (“BYAM”), an Orthodox Jewish girls’ school in Far Rockaway, Queens. The Lebovits family and BYAM have challenged Governor Cuomo’s actions—including the Executive Order at issue in this appeal—in federal district court. *Lebovits v. Cuomo*, No. 1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020).

*Amici* submit this brief to make a simple but important point: because all parties to the case agree that Governor Cuomo’s Executive Order No.202.68 is directed at Orthodox Jews and their worship services, strict scrutiny applies, *regardless of the government’s motive*. Whether the Governor targeted Orthodox Jews for bad reasons or good ones, the First Amendment requires strict scrutiny. And the Governor’s own admissions foreclose any hope of meeting that standard.

## ARGUMENT

Some free exercise cases are hard, but this one is not. Under any theory of the Free Exercise Clause, a government that uses targeted restrictions to close houses of worship must face constitutional scrutiny. That is particularly true where, as here, the religious restrictions are specifically focused on a minority group. Express attacks on religious minority groups in response to real or perceived threats have a terrible historical pedigree, and do not belong in American public discourse. The

First Amendment helps weed out such attacks by subjecting targeted restrictions to strict scrutiny to ensure it happens only where government has exceptionally good reasons.

Almost eighty years ago, the Supreme Court rejected an attack on another religious minority that had been scapegoated as a threat and singled out for ill treatment. *See W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Few things could be more corrosive to the body politic than allowing collective guilt to be applied to a disfavored religious group because of the perceived actions of some of their co-religionists. As it was 77 years ago, it is sadly again “necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.” *Id.* at 641; *accord Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944)). By applying strict scrutiny, the Court should nip this attack on our core constitutional values in the bud.

And it is on this question of strict scrutiny—even more than on targeting—where Governor Cuomo’s many public comments about his Order are dispositive. Where the Governor himself characterizes his Order as based on fear rather than science, as cut by a “hatchet” rather than a scalpel, and designed to manage public “anxiety” and people “moving out” of the City, no Court should uphold his Order and allow worship to be largely prohibited for a religious minority. Rather, the only constitutional course is an injunction.

## **I. The Governor’s Order violates the Free Exercise Clause.**

### **A. The Governor’s Order is not neutral.**

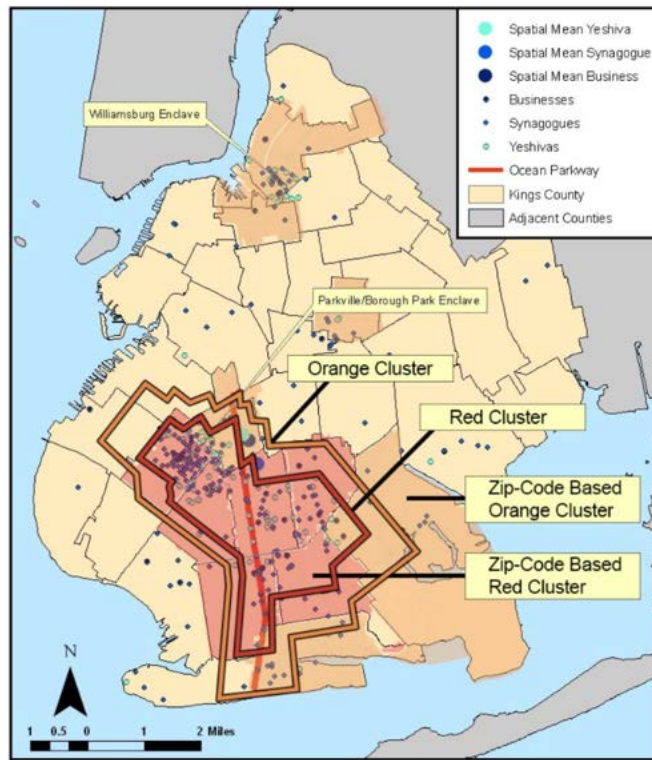
Governor Cuomo’s Order is not neutral because it is “specifically directed at [a] religious practice.” *Central Rabbinical Congress v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990)). That is exactly what happened here. Governor Cuomo has clearly and repeatedly emphasized that his Order is designed to specifically restrict Orthodox Jewish religious practice. As Judge Komitee held, “the Governor of New York made remarkably clear that this Order was intended to target [Orthodox Jewish] institutions.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-CV-4844, 2020 WL 5994954 at \*1 (E.D.N.Y. Oct. 9, 2020).

To determine whether a government action is an “improper attempt to target [a religion],” courts look to its “text” as well as its “effect” “in its real operation.” *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534-35 (1993). A court also “must consider ‘the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.’” *New Hope Family Services v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (quoting *Lukumi*, 508 U.S. at 534, 540).

Here, the text, effect, and history of the Governor’s Order show it was designed to limit Orthodox Jewish practices and institutions.

As to text, the Order specifically regulates “houses of worship[.]” See Executive Order 202.68, available at <https://perma.cc/QV5W-YF2M>. Under *Lukumi*, the “choice of these words” supports “a finding of improper targeting of” religion. 508 U.S. at 534.

The effect of the Governor’s Order is likewise unmistakable. The Governor specifically targeted as “clusters” several predominantly Jewish areas in New York, as overlaying the Brooklyn clusters on a map of Orthodox Jewish synagogues, yeshivas, and businesses illustrates:





*Lebovits*, Dkt.6-1, Ex.X at 3. By drawing the boundaries of the “clusters” to include Orthodox Jewish areas while excluding other areas that are experiencing similar COVID-19 rates, the Governor “accomplishe[d] . . . a “religious gerrymander.” *Lukumi*, 508 U.S. at 535.

The history of the Governor’s order is even more damning. The Governor explained on October 9 that “we have a couple of unique clusters, frankly, which are more religious organizations, *and that’s what we’re targeting.*” *Governor Cuomo Is a Guest on CNN Newsroom with Poppy Harlow and Jim Sciutto*, New York State (Oct. 9, 2020), <https://perma.cc/LDV2-8EVR> (emphasis added) (“[T]he issue is with that ultra-orthodox community.”). The Governor further explained that he believed the spread was “because of their religious practices.” Hana Levi Julian, *Cuomo Warns Yeshivas, ‘Stay Closed or Lose Funding,’* Jewish Press (Oct. 14, 2020), <https://perma.cc/HLB7-CXAJ>.

The Governor’s other statements confirm the targeting. *Governor Cuomo Updates New Yorkers on State’s Progress During COVID-19 Pandemic*, New York State (Oct. 5, 2020), <https://perma.cc/67T4-TDPH> (“10/5 Briefing”). At the October 5 press conference announcing the “cluster” policy, the Governor repeatedly referred to “the Orthodox community,” the “Jewish community” and “rabbi[s].” *Id.* He stated that he was “going to meet with members of the ultra-Orthodox community” and tell them “[i]f you do not agree to enforce the rules, then we’ll close

the institutions down.” *Id.* And he illustrated his claim that “[r]eligious gatherings . . . have been a problem” with photographs of gatherings of members of one (and only one) religion—Orthodox Jews. *Id.*

That targeting is enough to trigger strict scrutiny: It does not matter whether the government acted out of subjective animus or hostility towards Orthodox Jews. As this Court has previously ruled, “close scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus, pure and simple.” *Central Rabbinical*, 763 F.3d at 197-98; accord *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) (“the Free Exercise Clause is not confined to actions based on animus”); *Hassan v. City of N.Y.*, 804 F.3d 277, 309 (3d Cir. 2015) (hostility not required).

With or without animus, Governor Cuomo’s admitted “targeting” requires strict constitutional scrutiny.

### **B. Governor Cuomo’s Order fails strict scrutiny.**

***Compelling governmental interest.*** The government has a “compelling interest in preventing the spread of” COVID-19. *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020). But compelling interests aren’t assessed in the abstract. Courts must “look[] beyond broadly formulated interests” and “searchingly examine” whether Governor Cuomo has a compelling interest in taking the *particular action at issue here*—placing onerous restrictions on Plaintiffs’ synagogues. *Gonzales v. O Centro*

*Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)). There is no such interest.

The Governor has said renewed lockdowns are justified by positivity rates in the “micro-clusters” exceeding 2%, while the statewide goal is 1%. *Governor Cuomo Updates New Yorkers on State’s Progress During COVID-19 Pandemic*, New York State (Oct. 12, 2020), <https://perma.cc/KR96-G4BP> (“10/12 Briefing”). Yet as the Governor admitted, the micro-clusters’ positivity rates would be “nothing” “[t]o other states”; indeed, the micro-clusters would be a “safe zone” or “cool spot” nationwide. *Id.* And the 1% goal is “unrealistic” when considered “intellectually”—“absurdly low.” *Id.*; compare *U.S. coronavirus map: What do the trends mean for you?*, Mayo Clinic, <https://perma.cc/Q7TV-V5BR> (showing 6.49% national positivity rate as of Oct. 25). *Amicus* doesn’t blame the Governor for wishing the virus would evaporate. But a government official’s self-described “emotional[]” fixation on an “absurd[]” and “unrealistic” goal, see 10/12 Briefing, is not an “interest[] of the highest order” that overrides First Amendment rights, *Lukumi*, 508 U.S. at 546. As in other First Amendment contexts, “the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 803 n.9 (2011).

At bottom, the only interest consistent with his actions is the one Governor Cuomo “candid[ly]” articulated on October 6—a climate of

“fear” in the City, which the Governor thought he needed to appease with a “blunt policy.” Reuvain Borchardt, *Jewish Leaders Say They Were ‘Stabbed in the Back’ by Cuomo*, Hamodia (Oct. 12, 2020), <https://perma.cc/93XT-TS3Q>. Indeed, the Governor acknowledged that “the fear [was] too high” in the City to take “a smarter, more tailored approach” because “we have a real problem with fear and anxiety” and people “moving out.” *Id.*

But “unsubstantiated” “fear[s] . . . are not permissible bases for” overriding fundamental rights. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

**Furthering.** Nor does the Order “actually further[]” the claimed compelling interest. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (government “must demonstrate” that restriction “will in fact alleviate these harms in a direct and material way.”). Effectively shutting down Plaintiffs’ synagogues won’t help prevent the spread of COVID-19, because Plaintiffs have been assiduously following health guidance and have experienced no COVID-19 outbreak. Agudath Mot. 23. Indeed, the Governor himself has indicated that merely following his *prior* rules sufficed. *See* 10/5 Briefing (“[H]ow’s it increasing? Because people are not following the rules.”). *Cf. McCullen v. Coakley*, 573 U.S. 4646, 492 (2014) (government should have enforced “existing” restrictions). Shuttering

synagogues that are following the rules out of fear that others aren't does not further the asserted interest.

***Least restrictive means.*** The Governor has also freely admitted that he is not using the means least restrictive of religious exercise. He expressly conceded that applying the Order to effectively shut down Orthodox Jewish worship was “not a policy being written by a scalpel,” but rather one “cut by a hatchet.” Borchardt, <https://perma.cc/93XT-TS3Q>. Indeed, he expressly contrasted it with “a smarter, more tailored approach[.]” *Id.* A dumber, less-tailored approach is hardly the least restrictive means.

## **II. *Jacobson* is also no defense.**

The courts below mistakenly supplanted ordinary free exercise principles with *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—a 115-year-old case addressing substantive due process objections to an across-the-board mandatory vaccination law. But this Court has already decided that “*Jacobson* does not specifically control [a Plaintiff’s] free-exercise claim,” “because, at the time it was decided, the Free Exercise Clause of the First Amendment had not yet been held to bind the states.” *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). *Jacobson* only “settled that it is within the police power of a state to provide for compulsory vaccination.” *Zucht v. King*, 260 U.S. 174, 176 (1922). Accordingly, *Phillips* applied *Jacobson* to resolve a substantive due

process claim, but applied standard free exercise principles to the free exercise claim. 775 F.3d at 542-43.<sup>2</sup>

Echoing *Phillips*, several other justices and judges reject treating *Jacobson* as “a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review.” *Bayley’s Campground, Inc. v. Mills*, No. 20-cv-00176, 2020 WL 2791797, \*8 (D. Me. May 29, 2020); accord *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting); *Denver Bible Church v. Azar*, No. 1:20-cv-02362, Dkt. 65 at \*16 (D. Colo. Oct. 15, 2020), temporarily stayed, No. 20-1377 (10th Cir. Oct. 22, 2020); *Capitol Hill Baptist Church v. Bowser*, No. 20-cv-02710, 2020 WL 5995126, at \*7 (D.D.C. Oct. 9, 2020).

Nor does the Chief Justice’s *South Bay* concurrence change *Phillips*. No other justice joined his opinion. And *South Bay* involved only a denial of emergency relief under the heightened standard required under the All Writs Act. Indeed, “other Justices, and even a majority of the Court, may very well have agreed with Justice Alito’s suspicion of *Jacobson* and its application to the issues facing the Court.” *Capitol Hill Baptist*, 2020

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<sup>2</sup> *Phillips* cited what it called the “persuasive dictum” in *Prince* that “[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.” *Phillips*, 775 F.3d at 543 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)). But *Phillips* held that this dictum is “consonant” with standard free exercise analysis, not a new, more deferential analysis. 775 F.3d at 543.

WL 5995126, at \*7 n.9. Finally, even if *Jacobson* authorizes vaccine regulations “applicable equally to all in like condition,” 197 U.S. at 30, it surely cannot displace judicial review where, as here, the government admits to fear-based targeting and extinguishing constitutional rights over COVID levels that would be “safe zones” elsewhere nationwide.

### CONCLUSION

In *Korematsu*, Justice Jackson warned against allowing a “passing incident [to] become[] the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does . . . this case.” *Korematsu*, 323 U.S. at 246, (Jackson, J., dissenting). Singling out a minority group for collective blame should be stopped at the outset.

This Court should enjoin Governor Cuomo’s Order pending appeal.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Rule 29.1(c), which sets the length of amicus briefs as one-half the length of the supported party's briefing. Here, the supported party's motion is limited to 5,200 words, *see* Fed. R. App. P. 27(d)(2), and the foregoing brief contains 2,573 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with 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 26, 2020

/s/ Eric C. Rassbach  
Eric C. Rassbach



## 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 26, 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 26, 2020

/s/ Eric C. Rassbach  
Eric C. Rassbach

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,

Civil Action No. 1:20-cv-4834

vs

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

Defendant.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

Plaintiffs, by and through their undersigned counsel Troutman Pepper Hamilton Sanders  
LLP, respectfully allege as follows:

**PRELIMINARY STATEMENT**

1. Orthodox Jews celebrate three holidays on October 9, 10, and 11, respectively. These holidays each have special prayers and rituals that are incorporated into worship services.

2. Orthodox Jews will gather at their synagogues for collective prayer, Torah readings, remembrances of deceased loved ones, and other rituals in observance of Hoshanah Rabbah, Shmini Atzeres, and Simchas Torah.

3. Forty-eight hours before the onset of these holidays, Defendant Governor Cuomo issued an Executive Order that singles out and discriminates against all houses of worship—and synagogues in particular—by imposing occupancy and gathering restrictions that make it impossible for Orthodox Jews to comply with both their religious obligations and the Order.

4. In doing so, Defendant explicitly targeted the Orthodox Jewish community, declaring that if the “orthodox community” does not agree with his rules “the state will take action.” See Professor Josh Blackman, *New York Governor Cuomo: “I’m Going to Say to the Orthodox Community Tomorrow If You Don’t Agree Then We Will Have to Close Down Your Religious Institutions,”* The Volokh Conspiracy (Oct. 6, 2020) <https://reason.com/2020/10/06/new-york-governor-cuomo-im-going-to-say-to-the-orthodox-community-tomorrow-if-you-dont-agree-then-we-will-have-to-close-down-your-religious-institutions/>.

5. Defendant’s Executive Order and the restrictions it contains will disrupt the religious observance of tens of thousands of Orthodox Jews in New York State, depriving them of their religious worship and holiday observance. The Executive Order requires enforcement of its restrictions to begin on Friday, October 9, which is Hoshanah Rabbah, the first of these three holidays.

6. Defendant has imposed these onerous and discriminatory new restrictions despite the fact that even he concedes he has not enforced the existing restrictions on houses of worship that already impose capacity limits and health requirements. Plaintiffs have *completely* complied with these rules, and Defendant does not contend otherwise.

7. Defendant’s Executive Order violates Plaintiffs’ constitutional rights under the Free Exercise Clause of the First Amendment in two separate ways, both independently sufficient to justify the temporary restraining order and all other equitable relief that they are requesting.

8. First, Defendant’s restrictions are facially discriminatory toward religious practices when compared to similar secular activities.

9. Second, Defendant's explicit targeting of religious institutions and communities for these restrictions is a punitive attempt to infringe upon Plaintiffs' religious services *because of* their religious nature.

10. Plaintiffs will suffer imminent, irreparable harm because of Defendant's actions. By depriving Plaintiffs and their congregants of the critical religious worship and practices associated with these upcoming holidays, Defendant has trampled on their constitutional right to the Free Exercise of Religion, an injury that cannot be remedied with a later money judgment.

11. This action therefore seeks immediate judicial relief from Defendant's discriminatory restrictions by way of a temporary restraining order, followed by a preliminary and permanent injunction and a declaratory judgment that the Executive Order is unconstitutional and void because it deprives Plaintiffs of their constitutional rights.

#### **PARTIES, JURISDICTION, AND VENUE**

12. Plaintiff Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel regularly intervenes at all levels of government to advocate and protect the interests of the Orthodox Jewish community in the United States in particular and religious liberty in general. Agudath Israel has a large number of Agudath-Israel affiliated synagogues throughout the country, with close to 70 in New York State, and advocates for synagogues whenever their rights are threatened. Agudath Israel of America's principal place of business is located at 42 Broadway, 14th Floor, New York, NY 10004.

13. Plaintiff Agudath Israel of Kew Garden Hills is an Orthodox Jewish Synagogue located at 14737 70th Rd., Flushing, NY 11367.

14. Plaintiff Agudath Israel of Madison is an Orthodox Jewish Synagogue located at 2122 Ave. S, Brooklyn, NY 11229.

15. Plaintiff Agudath Israel of Bayswater is an Orthodox Jewish Synagogue located at 2422 Bayswater Ave., Far Rockaway, NY 11691.

16. Plaintiff Rabbi Yisroel Reisman is the Rabbi at Agudath Israel of Madison, located at 2122 Ave. S, Brooklyn, NY 11229. Rabbi Reisman resides in Brooklyn, New York.

17. Plaintiff Rabbi Menachem Feifer is the Rabbi at Agudath Israel of Bayswater, located at 2422 Bayswater Ave., Far Rockaway, NY 11691. Rabbi Feifer is a Resident of Far Rockaway, New York.

18. Plaintiff Steven Saphirstein is the Secretary of Agudath Israel of Kew Garden Hills, located at 14737 70th Rd., Flushing, NY 11367. Mr. Saphirstein is a resident of Queens, New York.

19. Defendant Governor Andrew M. Cuomo is the Governor of the State of New York and is acting in his official capacity at all times relevant to the allegations herein. Defendant's principal place of business is located at the State Capitol Building, Albany, New York.

20. This action raises federal questions under the First Amendment to the United States Constitution and under federal law, 28 U.S.C. §§ 2201 and 2202, as well as 42 U.S.C. §§ 1983 and 1988.

21. This Court has jurisdiction over these federal claims under 28 U.S.C. §§ 1331 and 1343.

22. This Court has the authority to grant the requested injunctive relief under 28 U.S.C. § 1343(3), the requested declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, and Plaintiffs' prayer for costs, including reasonable attorneys' fees, under 42 U.S.C. § 1988 and 28 U.S.C. § 1920.

23. Venue is proper in the Eastern District pursuant to 28 U.S.C. § 1391, as a substantial part of the events giving rise to the claims herein arise in this District.

## **BACKGROUND**

### **New York State Restrictions**

24. To combat the "transmission of COVID-19" and the "threat that COVID-19 poses to the health and welfare" of the State of New York, Defendant issued Executive Order No. 202 on March 7, 2020, declaring a disaster emergency in New York.<sup>1</sup>

25. In the following months, Defendant issued dozens of orders imposing business closures, in-person gathering restrictions, and other requirements throughout the State.<sup>2</sup>

26. In May of this year, the State announced that it would allow a phased, regional approach for non-essential businesses to reopen and other conduct to resume, based on regions satisfying certain health-related metrics specified by the New York Department of Health.<sup>3</sup>

27. Pursuant to that regional plan, Defendant has issued orders exempting non-essential businesses and other conduct from his gathering and closure restrictions in certain regions of the State, provided that such entities operate subject to Department of Health guidance.

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<sup>1</sup> Available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf).

<sup>2</sup> See generally <https://www.governor.ny.gov/keywords/executive-order>.

<sup>3</sup> See, e.g., <https://forward.ny.gov/>.

28. Among other things, the Department of Health guidance requires such businesses and other conduct to adhere to certain health and safety protocols, which often include capacity limitations on maximum occupancy.

29. All regions of the State currently are in the final phase (Phase 4) of that plan.<sup>4</sup>

30. For religious services in Phase 4,<sup>5</sup> the State’s guidelines impose a restriction of “no more than 33% of the maximum occupancy for a particular area for services occurring indoor; or no more than 50 people for services occurring outdoors.”

31. In *Soos v. Cuomo*, \_\_\_ F. Supp. 3d \_\_\_, 2020 U.S. Dist. LEXIS 111808 (N.D.N.Y. June 26, 2020), the district court enjoined Defendant’s previous attempt to impose a 25% indoor-capacity limitation on houses of worship, concluding that this limitation imposed more restrictive capacity limits than on comparable secular activity that allowed 50% capacity, such as “offices, retail stores that are not inside of shopping malls, [ ] salons,” and restaurants, and restrained Defendant from enforcing such limitations on houses of worship greater than those imposed for such comparable secular activity. *Id.* at \*29–30, 25.

32. Despite the extensive existing restrictions on houses of worship and worship services, Defendant has publicly conceded that there has been no enforcement of those requirements against persons who have not voluntarily complied with them.

#### **Defendant’s “Redlining” Initiative and Executive Order 202.68**

33. Rather than enforce these existing rules—which can both be effective at stopping the transmission of COVID-19 and allow for religious services and safety to coexist—earlier this

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<sup>4</sup> See <https://forward.ny.gov/phase-four-industries> (“All regions of the state have entered Phase 4 of reopening.”).

<sup>5</sup> Available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReligiousandFuneralServicesSummaryGuidance.pdf>.

week Defendant imposed punitive new restrictions that create conflict between religious services and government mandates.

34. On October 5, Defendant held a press conference to announce the new restrictions he intended to impose.<sup>6</sup> At this press conference, Defendant explained that his new restrictions are designed to target religious institutions.

35. Defendant stated that “[r]eligious institutions” and “mass gatherings,” can spread COVID-19. Further, Defendant singled out “[r]eligious institutions” as “the greatest potential” threat, declaring that “[w]e know religious institutions have been a problem.”

36. During this press conference, Defendant displayed pictures of Orthodox Jews, including a fourteen-year-old photo that was described as “recent.”<sup>7</sup>



37. Defendant also stated that he planned to “meet with members of the ultra-Orthodox community tomorrow,” and threatened that “we’ll close the [religious] institutions down” if “you do not agree to enforce the rules.”

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<sup>6</sup> Available at <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1>.

<sup>7</sup> Available at <https://www.flickr.com/photos/governorandrewcuomo/albums/72157716268567076>.



38. The following day, on October 6, 2020, Defendant announced at a press conference a “new cluster action initiative,” intended to curb the transmission of COVID-19.<sup>8</sup>

39. This new initiative imposes selective and discriminatory gathering restrictions on houses of worship, which are given their own category of restriction.

40. Defendant admitted that he intended his restrictions to be “most impactful on houses of worship” because “[t]he problem is mass gatherings and houses of worship.”

41. To that end, the initiative declares COVID-19 “high density” zones by neighborhood, and assigns such zones with a color—red, orange, or yellow—each of which has their own set of COVID-19 restrictions.

42. Defendant also released a chart<sup>9</sup> explaining the particular restrictions applicable to each zone, and noting that the “cluster action initiative . . . divide[s] clusters and the areas around them into three categories with successively higher restrictions within each one”:

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<sup>8</sup> Available at <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-announces-new-cluster-action-initiative>.

<sup>9</sup> See <https://www.flickr.com/photos/governorandrewcuomo/albums/72157716284149688>.

Type of Activity	RED	ORANGE	YELLOW
Worship	25% capacity 10 people maximum	33% capacity 25 people maximum	50% capacity
Mass Gathering	Prohibited	10 people maximum, indoor and outdoor	25 people maximum, indoors and outdoors
Businesses	Only essential businesses open	Closing high-risk non-essential business (gyms, personal care, etc.)	Open
Dining	Takeout only	Outdoor dining only, 4 person maximum per table	Indoor and outdoor dining, 4 person maximum per table
Schools	CLOSED Remote-only		Open Mandatory weekly testing of students and teachers/staff for in-person settings. DOH will set percent by Friday.

43. In areas that the Defendant decides are in the “Red Zone – Cluster Itself,” Defendant restricts houses of worship to a 10-person maximum limit.

44. “Essential businesses” in the red zone, however, are exempted from the restrictions. The Executive Order, released later that night, also permits “essential” gatherings. No definition of essential gatherings has ever been provided.

45. In areas that Defendant determines are in the “Orange Zone – Warning Zone,” Defendant restricts houses of worship to a 25-person maximum limit.

46. In this zone, Defendant exempts most businesses from the restrictions, allowing them to operate without any specified capacity limitation, and “[c]losing” only “high-risk non-essential businesses, such as gyms and personal care.”

47. Finally, in areas Defendant determines are in the “Yellow Zone – Precautionary Zone,” Defendant restricts houses of worship to 50% capacity.

48. Defendant exempts all businesses, including restaurants for indoor and outdoor dining service, and schools, from these “Yellow Zone” restrictions, allowing them to remain

“[o]pen” without any specified capacity limitation, except for limiting each restaurant table to a maximum of four persons.

49. To enforce these new restrictions, Defendant announced that sponsors of worship services in violation of his rules will be subject to fines of \$15,000.

50. Consistent with these announcements, Defendant issued Executive Order 202.68 (“EO 202.68”) on October 6.<sup>10</sup> This Order directs the Department of Health to adopt the “most severe” mitigation measures in “red zones,” precluding all “[n]on-essential gatherings,” prohibiting all non-essential employees from in-person work, and specifically “subject[ing]” all houses of worship “to a capacity limit of 10 people.” *Id.* at 2.

51. EO 202.68 mandates that “moderate severity warning areas, or ‘orange zones,’” are allowed non-essential gatherings of 10 people or less, permits non-essential businesses—except for gyms, fitness centers or classes, barbers, hair salons, spas, tattoo or piercing parlors, nail technicians and nail salons, cosmetologists, estheticians, the provision of laser hair removal and electrolysis, and all other personal care services—to return to in-person work, and restricts houses of worship “to a maximum capacity limit of . . . 25 people.” *Id.*

52. Finally, in “precautionary” or “yellow zones,” non-essential gatherings are limited to 25 or fewer people, “houses of worship shall be subject to a capacity limit of 50% of its maximum occupancy and shall adhere to Department of Health guidance,” whereas restaurants and taverns are permitted indoor and outdoor seating for all parties of four or less, and children can return to in-person school. *Id.*

53. EO 202.68 also announced that it “shall be enforced no later than Friday, October 9, 2020.” *Id.*

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<sup>10</sup> Available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.68.pdf>.

54. At his October 6 press conference, Defendant also declared that “[t]he state is going to take over the enforcement oversight in all the hotspot clusters.”

**Jewish Houses of Worship Are A Vital Component of Jewish Religious Practice**

55. Synagogues are a necessary and critical component of Jewish life.

56. Plaintiff synagogues and dozens or hundreds more just like them each serve several hundred men and woman every week and have legal occupancy capacities that permit them to have several hundred worshippers in the building at any one time.

57. Plaintiff Agudath Israel of Kew Garden Hills holds daily worship services, serving over 150 men and women each week. It is located in a geographic area affected by Defendant’s gathering restrictions on houses of worship. Without such restrictions it has a legal capacity of 400 persons in its main sanctuary.

58. Plaintiff Agudath Israel of Madison holds worship services, conducted every day, serving over 300 men and women every week. It is located in a geographic area affected by Defendant’s gathering restrictions on houses of worship. Without such restrictions it has a legal capacity of 186 persons in its main sanctuary, with an additional capacity of more than 145 persons each in its lower and upper levels.

59. Plaintiff Agudath Israel of Bayswater holds daily worship services and serves over 150 men and women every week. It is located in a geographic area affected by Defendant’s gathering restrictions on houses of worship. Without such restrictions it has a legal capacity of 250 persons in its main sanctuary.

60. The congregants’ spiritual connection to the synagogue and its community is intense. The spiritual role of the synagogue and its community is especially critical during these unprecedented and challenging times.

61. A high point of this communal life takes place during the current holiday period, which began nearly three weeks ago with Rosh Hashona, the Jewish New Year.

62. The holiday period culminates with three special days on the Jewish calendar. These days are known as Hoshanah Rabbah, Shmini Atzeres, and Simchas Torah, and this year they are observed on October 9, October 10, and October 11, respectively.

63. Hoshanah Rabbah, observed on October 9, marks the conclusion of the Days of Judgment that began with Rosh Hashona. There are special, additional services and rituals that are required on Hoshanah Rabbah, including reading from a Torah scroll, seven additional prayers, and the traditional beating of a willow branch in the synagogue. This tradition dates back 2,000 years, to the times of the Temple. Religious services on Hoshanah Rabbah take at least ninety to one hundred and twenty minutes.

64. 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 and, after this Saturday, will not be recited again until Passover in April. These additional prayers by men and women alike are especially emotional, led by a Rabbi, require approximately 15 additional minutes of service, and are *only* offered in group prayer.

65. Shmini Atzeres is also the only day of the year that Orthodox Jews read Ecclesiastes, which they accept as the Book of Wisdom, in shul. In many synagogues, including that of Plaintiff Agudath Israel of Madison, Ecclesiastes is read from a parchment and requires a trained cantor.

66. Simchas Torah, falling on October 11, is literally translated as “the Joy of the Torah,” and is a celebration of the completion of the annual cycle of Torah readings. As part of this celebration, each congregant is called to the Torah for a short reading. Traditionally, the Rabbi

is then called to read the final portion of the Torah, after which the first portion of the Torah is read to begin the new cycle.

67. Practitioners of Judaism observe these holidays primarily in the synagogue. Plaintiffs and their congregants understand that joining together to pray is more than a religious ceremony; it is an emotional connection to God and community.

**Executive Order 202.68 Makes It Impossible for Orthodox Jews to Conduct Services**

68. Defendant's EO 202.68 renders it impossible for Plaintiffs' synagogues and their congregants to fulfill their religious obligations.

69. For all synagogues in the "red zone," including Plaintiff Agudath Israel of Madison, EO 202.68 limits attendance at worship services to 10 individuals.

70. Under these new restrictions, then, it is impossible for Plaintiffs to both comply with the State-issued restrictions on houses of worship and fulfill their religious obligations.

71. For example, Hoshanah Rabbah services, Friday, October 9, take approximately ninety to one hundred and twenty minutes. For a synagogue the size of Plaintiff Agudath Israel of Madison, the capacity limits would require over twenty such services on Friday morning to serve the entire congregation. That is simply impossible.

72. Under the existing COVID-19 capacity limitations, however, Plaintiffs use all of their various spaces and outdoor settings to divide their congregants into multiple services.

73. Plaintiffs also cannot conduct Shmini Atzeres services, on Saturday, October 10, under the new restrictions. The additional services on Shmini Atzeres, including Yizkor (the Prayer for Departed Relatives), add roughly fifteen minutes to the services, and are only offered in group-prayer settings. Under the new restrictions, Plaintiffs and their congregants will suffer

the particularly devastating harm of being deprived these special prayers, which are only recited four times a year.

74. Under the existing COVID-19 capacity limits, Plaintiffs are able to conduct such services.

75. The new restrictions embodied in the Executive Order also make it impossible for Plaintiffs to complete all required prayers and readings for Simchas Torah, on Sunday October 11. This “Joy of the Torah” service requires individual, short Torah readings by all congregants, in addition to the regular services. It is impossible for Plaintiffs to hold such services for all of their congregants while complying with the ten-person capacity limits.

76. Under the existing COVID-19 capacity limits, Plaintiffs are be able to comply with their religious and civil dictates for the entirety of the holiday period.

77. Although Defendant’s EO 202.68 discriminates against *all* religions by singling out houses of worship for more restrictive treatment than similarly situated secular institutions, the order disproportionately impacts Orthodox Jewish services.

78. Because Orthodox Jews are prohibited by their faith from engaging in vehicular travel on the Saturday Sabbath and religious holidays, they must walk to their synagogues, which are generally located within the communities where their congregants reside.

79. Although Orthodox Jews can continue to drive outside of restricted areas to go to work or engage in other permitted activities outside of prohibited zones, the restrictions bar Orthodox Jews principally from attending religious services, as they are unable to travel to synagogues outside of their restricted zones.

80. Without minimizing the unconstitutional impact that the Executive Order has on practitioners of other faiths, they at least retain the ability to drive to houses of worship in nearby, unrestricted zones, whereas Orthodox Jews are simply unable to do so.

81. There are *hundreds* of synagogues in the presently delineated “restricted zones,” with many tens of thousands of Orthodox Jews residing in those communities. Therefore, the brunt of the religious burden imposed by Defendant’s EO 202.68 falls upon the Orthodox Jewish community, who, alone, are totally deprived of the ability to participate in religious services.

**Jewish Houses of Worship Protect Against the Transmission of COVID-19**

82. Plaintiffs and other Jewish houses of worship have adopted rigorous health protocols and have altered religious congregation to safeguard against the spread of COVID-19.

83. Prior to the Executive Order, Plaintiffs have followed *all* closure, capacity limitation, social distancing, and masking requirements imposed by the State.

84. These include the capacity limits currently imposed upon all religious activities.

85. Plaintiffs suspended services in mid-March, and remained closed until they were granted permission to resume services around Memorial Day.

86. Since resuming services, Plaintiffs have at all times operated in conformity with all health requirements.

87. In addition to capacity limits and masking, Plaintiff and other synagogues have erected plexiglass barriers between those leading services and reading the Torah and others.

88. They have also split the traditional congregational service into separate gatherings. This accommodates every congregant while ensuring that they maintain proper social distancing.

89. Plaintiffs and other synagogues require congregants to wear masks during the entire service, and congregants have fully complied with this requirement.



90. For the upcoming holidays, Plaintiffs have previously announced additional limitations to ensure the safety of all during these important religious services and rituals.

91. By way of example, a principal part of the service typically has the congregation circle the synagogue together, but Plaintiffs instead have had only one individual perform that ritual, as the rest of the congregation stands in place in prayer.

92. By implementing rigorous health and safety protocols, Plaintiffs have been able to allow their members to continue to practice their religious beliefs while still safeguarding from the spread of COVID-19.

### **COUNT I**

#### **Violation of the First Amendment to the United States Constitution 42 U.S.C. § 1983**

93. Plaintiffs incorporate and reallege Paragraphs 1 through 92 as if fully set forth herein.

94. The Free Exercise Clause of the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, forbids the States from enacting laws inhibiting the free exercise of religion. *See Wisconsin v. Yoder*, 406 U.S. 205, 213–14, 232 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Accordingly, Plaintiffs have a constitutional right to freely exercise their religious beliefs and practices by providing a religious upbringing for their children and families. *See Wisconsin v. Yoder*, 406 U.S. 205, 213–14, 232 (1972).

95. The government violates the Free Exercise Clause when it burdens a person's religious exercise through a law that is not neutral or generally applicable, unless the government can satisfy strict scrutiny. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

96. A law may fail the First Amendment’s neutrality requirement in two ways: (1) if it the law regulates motivated conduct, but not similar secular conduct, *Cent. Rabbinical Congress of the U.S. & Can. v. NYC Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 195 (2d Cir. 2014), or is specifically directed at religious practice; or (2) if the government targeted the law at religiously motivated conduct for special restrictions, even if the text of the law is facially neutral, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018); *Lukumi*, 508 U.S. at 540.

97. EO 202.68 burdens Plaintiffs’ religious beliefs by restricting the number of individuals who may gather in houses of worship, at risk of substantial financial penalties. Plaintiffs are sincere practitioners of Judaism who believe that attending religious services at the synagogue, especially on Jewish holidays, is a critical and necessary component of their religious practices and beliefs. EO 202.68’s restrictions make it impossible for Plaintiffs and their congregants and others to conduct services on Jewish holidays observed on October 9, 10, and 11, 2020, thereby infringing upon Plaintiffs’ ability to comply with religious dictates.

98. EO 202.68 is not neutral, and violates the Free Exercise Clause for two independently sufficient reasons.

99. First, EO 202.68 is not neutral because it is *facially discriminatory*, as the restrictions in each zone expressly impose gathering restrictions on “houses of worship” and not other secular conduct.

100. In areas designated to be in the “Yellow Zone,” EO 202.68 restricts houses of worship to 50% capacity while permitting all businesses, including restaurants for indoor and outdoor dining service, and schools, to remain open (subject to Department of Health guidance). Further, the secular conduct that EO 202.68 permits to open at greater capacity than 50% similarly

constitutes gatherings of individuals for a prolonged period of time—the very characteristics of public congregation used to justify restrictions to combat the transmission of COVID-19.

101. In areas designated to be in the “Orange Zone,” EO 202.68 restricts worship services to a maximum of 25 people while closing only non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus. The “non-essential” businesses that EO 202.68 permits to open at greater capacity than 50%, which include offices and retail, among other things, 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 claims justify restrictions on houses of worship.

102. In areas designated to be in the “Red Zone – Cluster Itself,” EO 202.68 restricts houses of worship to a 10-person maximum. These restrictions similarly facially target religious practice. Moreover, EO 202.68 exempts all essential gatherings and businesses from such restrictions, yet it fails to define “essential” gatherings not subject to the gathering restrictions.

103. Second, EO 202.68 is not neutral because it infringes on the religious practices of the Orthodox Jewish community because of their religious motivation. Defendant’s actions and contemporaneous statements establish this lack of neutrality.

104. The day before issuing his restrictions, Defendant singled out houses of worship for discriminatory treatment, stating: “Religious institutions are mass gatherings and raise the greatest potential” for the spread of COVID-19, and that “[w]e know religious institutions have been a problem.” Defendant further threatened “religious institutions” and “*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.”

105. Defendant’s order requires enforcement of its restrictions beginning October 9—the first of the three upcoming Jewish holidays, ensuring it will be impossible for Plaintiffs to conduct services for all of their congregants.

106. Furthermore, the brunt of Defendant’s restrictions falls disparately on Orthodox Jews, who do not use vehicular travel on Sabbath or on religious holidays and thus are unable to travel to houses of worship for religious practice in other, permitted areas.

107. Given its lack of neutrality, EO 202.68 can only survive a Free Exercise Clause challenge if it satisfies the exceptionally demanding strict-scrutiny review, which requires it to further a compelling government interest in a narrowly tailored way.

108. Here, EO 202.68 is not narrowly tailored because it is massively underinclusive in relation to its goals: it exempts secular activity—all businesses and restaurants in counties in the Yellow Zone, and most businesses in counties in the Orange Zone, in which individuals congregate and remain in close proximity for long periods—that endangers the health and welfare of the public through the transmission of COVID-19 in a similar or greater degree than do houses of worship.

109. EO 202.68 will cause irreparable harm to Plaintiffs absent preliminary injunctive relief. EO 202.68 deprives Plaintiffs of their free-exercise rights during three Jewish holidays, and “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 473 (1976) (plurality op.); *see also LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 426 (2d Cir. 1995).

110. Defendant would suffer no harm if EO 202.68 were preliminarily enjoined, because Plaintiffs have guarded against the spread of COVID-19 with their own comprehensive health and safety protocols, and Plaintiffs have been fully compliant with all State and local mandates since the onset of the pandemic.

111. Injunctive relief would further the public interest by protecting Plaintiffs' constitutional rights and treating religious and secular conduct in comparable ways.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

(a) a temporary restraining order, followed by a preliminary and final injunction restraining Defendant, and all those acting in concert with him, from enforcing EO 202.68;

(b) a declaratory judgment that the enforcement of EO 202.68 is unconstitutional, both facially and as applied to plaintiffs;

(c) an award of costs of this litigation, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920; and

(d) such other and further relief as the Court may deem just and proper.

This 8th day of October, 2020.

/s/Avi Schick

Avi Schick

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*Attorneys for Plaintiffs*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Agudath Israel of America, Agudath Israel of Kew Garden Hills, Agudath Israel of Madison, Agudath Israel

(b) County of Residence of First Listed Plaintiff New York (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Avi Schick, 875 Third Avenue, New York NY 10022 (212) 704-6000

DEFENDANTS

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

County of Residence of First Listed Defendant Albany (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Personal Injury, Contract, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. Section 1983. Brief description of cause: Suit to declare unlawful and enjoin enforcement of executive orders

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

October 8, 2020 /s/Avi Schick

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**CERTIFICATION OF ARBITRATION ELIGIBILITY**

Local Arbitration Rule 83.7 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

Case is Eligible for Arbitration

I, Avi Schick, counsel for Plaintiffs, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- the complaint seeks injunctive relief,
- the matter is otherwise ineligible for the following reason

**DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1**

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

No such parent corporation or publicly held corporation exists.

**RELATED CASE STATEMENT (Section VIII on the Front of this Form)**

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

**NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)**

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County?  Yes  No
- 2.) If you answered "no" above:
  - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County?  Yes  No
  - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District?  Yes  No
  - c) If this is a Fair Debt Collection Practice Act case, specify the County in which the offending communication was received: \_\_\_\_\_

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County?  Yes  No

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

**BAR ADMISSION**

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

Yes  No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

Yes (If yes, please explain)  No

I certify the accuracy of all information provided above.

Signature: /s/ Avi Schick



AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

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

Plaintiff(s)

v.

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

Defendant(s)

Civil Action No. 1:20-cv-4834

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) The Honorable Andrew M. Cuomo Governor of New York State State Capital Building Albany, New York 12224

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Avi Schick Troutman Pepper Hamilton Sanders LLP 875 Third Avenue New York, NY 10022 (212) 704-6000

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DOUGLAS C. PALMER CLERK OF COURT

Date: \_\_\_\_\_

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. 1:20-cv-4834

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_ .

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_ , who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*:

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

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.

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

Defendant.

Civil Action No. 1:20-cv-04834

**PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER  
AND A PRELIMINARY INJUNCTION**

Plaintiffs, by and through their undersigned counsel Troutman Pepper Hamilton Sanders LLP, respectfully request that this Court enter a temporary restraining order and preliminary injunction pursuant to Fed. R. Civ. P 65 against Defendant Governor Andrew M. Cuomo, and all those acting in concert with him, from restricting gathering at houses of worship pursuant to the restrictions set forth in New York Executive Order No. 202.68. The grounds for emergency relief are summarized as follows:

1. Plaintiff Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Among its other functions and activities, Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel has a large number of Agudath-Israel affiliated synagogues throughout the country, with close to 70 in New York State.

2. Plaintiff Agudath Israel of Kew Garden Hills is an Orthodox Jewish Synagogue located in New York. Agudath Israel of Kew Garden Hills holds worship services, which are conducted every day, and serves more than 150 men and women each week. Agudath Israel of Kew Garden Hills is located in a geographic area affected by Defendant's gathering restrictions on houses of worship.

3. Plaintiff Agudath Israel of Madison is an Orthodox Jewish Synagogue located in New York. Agudath Israel of Madison holds worship services, which are conducted every day, and serves more than 300 men and women each week. Agudath Israel of Madison is located in a geographic area affected by Defendant's gathering restrictions on houses of worship.

4. Plaintiff Agudath Israel of Bayswater is an Orthodox Jewish Synagogue located in New York. Agudath Israel of Bayswater holds worship services, which are conducted every day, and serves more than 150 men and women each week. Agudath Israel of Bayswater is located in a geographic area affected by Defendant's gathering restrictions on houses of worship.

5. Plaintiff Rabbi Yisroel Reisman serves as the Rabbi of Agudath Israel of Madison.

6. Plaintiff Rabbi Menachem Feifer serves as the Rabbi of Agudath Israel of Bayswater.

7. Plaintiff Steven Saphirstein serves as the Secretary of Agudath Israel of Kew Garden Hills.

8. On October 6, 2020, Defendant introduced issued an Executive Order that imposed selective and discriminatory restrictions on gathering at houses of worship. Executive Order No. 202.68 requires enforcement of the restrictions "no later than Friday, October 9, 2020[.]"

9. As set forth in the accompanying Memorandum of Law, Declarations, and Exhibits, Defendant's restrictions set forth in Executive Order No. 202.68 imposing gathering limitations at

houses of worship violate Plaintiffs' free exercise of religion by preventing Plaintiffs from conducting services for all of their congregants at the existing COVID-19 occupancy capacities.

10. Plaintiffs simply request that Defendant not target houses of worship, with their essential religious elements protected by the First Amendment to the United States Constitution, for discriminatory treatment as compared to secular activities, which Defendant has permitted to operate under more favorable limitations provided that they adhere to health and safety protocols similar to those that Plaintiffs' houses of worship have and will continue to implement.

11. Plaintiffs will suffer irreparable harm in the absence of a temporary restraining order and preliminary injunction, as the closure of houses of worship would require Plaintiffs to sacrifice the provision of constitutionally-protected religious practice. This is particularly true given the timing of Defendant's restrictions, which require enforcement of the restrictions on the beginning of the Jewish holidays observed on October 9–11, 2020, known as Hoshana Rabbah, Shmini Atzeres, and Simchas Torah, respectively. The balance of the hardships tips strongly in Plaintiffs' favor, as Plaintiffs have guarded against the spread of COVID-19 by implementing strict health and safety protocols and have been fully compliant with all State and local mandates since the onset of the pandemic. Finally, injunctive relief would serve the public interest in securing the right to the free exercise of religion.

12. In support of this Motion, Plaintiffs rely on the accompanying Memorandum of Law, the Declarations of Rabbi Yisroel Reisman, Rabbi Menachem Feifer, Avrohom Weinstock, Aharon Weisenfeld, Steven Saphirstein, and Avi Schick, and the Exhibits attached thereto.

WHEREFORE, Plaintiffs request:

(a) that a temporary restraining order be issued by this Court enjoining Defendant, and all those acting in concert with him, from enforcing New York Executive Order No. 202.68 to restrict gathering at houses of worship, and that such relief be granted **on or before October 9, 2020** so that synagogues and worshippers can engage in religious wordship and practices. This is particularly urgent given that the new restrictions are set to commence during the Jewish holidays observed from October 9–11, 2020, during which congregants observe the holidays primarily in the synagogue, engaging in special religious practices and rituals;

(b) in the alternative, a preliminary injunction hearing on an expedited basis;

(c) such other relief as this Court deems proper.

Plaintiffs request that the Court waive bond or require only a nominal bond.

This 8th day of October, 2020.

  
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*/s/ Avi Schick*

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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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.

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

Defendant.

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**DECLARATION**

Civil No. 20-cv-04834

Howard A. Zucker, M.D., J.D., on the date noted below and pursuant to § 1746 of title 28 of the United States Code, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

**Background and Qualifications**

1) I am the Commissioner of the New York State Department of Health (“Department”). I make this declaration in my capacity as the Commissioner after consultation with Department program staff directing the initiatives detailed below. I respectfully submit this declaration in order to place before the Court certain testimony and documents relevant to the relief requested. I am familiar with the matters set forth herein, either from professional knowledge, conversations with Department staff, or on the basis of documents that have been provided to and reviewed by me. I have been asked to assist New York State in its response to the COVID-19



public health emergency. I have attended meetings of the Governor’s COVID-19 Response and Recovery Task Force (the “COVID-19 Task Force”).

2) I have extensive knowledge of pediatric medicine and care and am aware of many family health issues. I am board-certified in six specialties/subspecialties and trained in pediatrics at Johns Hopkins Hospital, anesthesiology at the Hospital of the University of Pennsylvania, pediatric critical care medicine/pediatric anesthesiology at The Children’s Hospital of Philadelphia, and pediatric cardiology at Children’s Hospital Boston/Harvard Medical School. I was a professor of clinical anesthesiology at Albert Einstein College of Medicine of Yeshiva University and pediatric cardiac anesthesiologist at Montefiore Medical Center in the Bronx. I also served as associate professor of clinical pediatrics and anesthesiology at Columbia University College of Physicians & Surgeons and pediatric director of the ICU at New York Presbyterian Hospital. I am a former Columbia University Pediatrics Teacher of the Year.

3) As Commissioner of the Department, I must “take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law.” Public Health Law (“PHL”) §206(1)(a).

4) I preside over the State’s Office of Public Health, which includes epidemiology, the Medicaid program, the New York State Public Health and Health Planning Council, and the Wadsworth Center, New York’s premier public health lab, as well as the entire health care workforce, and health care facilities.

5) In the last five months, I have been personally involved in the development and implementation of what is known as the “New York State on PAUSE” initiative—restrictions

implemented through a series of executive orders and associated guidance designed to stop the transmission of the novel coronavirus (COVID-19)—and I am also familiar with the detailed plan that the State adopted to allow the safe reopening of each New York industry, including all gatherings. I am familiar with the facts set forth herein based upon personal knowledge, discussions with Department staff, and Department records. This declaration has also been informed by other declarations I and my colleagues have drafted to oppose challenges to State regulations and guidance issued to respond to the COVID-19 pandemic. See Exhs. EE and FF.

6) I make this declaration in support of Defendant’s Opposition to Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction.

**COVID-19**

7) On January 7, 2020, following an outbreak of pneumonia of unknown etiology in China’s Wuhan Province, Chinese authorities identified a novel coronavirus—COVID-19. Its spread around the world has been well documented. Exh. A.

8) COVID-19 is a highly infectious and potentially deadly respiratory disease caused by a novel coronavirus that spreads easily from person-to-person. Exh. B.

9) Because there is no pre-existing immunity against this new virus, it has spread worldwide in an exceptionally short period of time, posing a “serious public health risk.” Id.

10) On January 31, 2020, the World Health Organization (“WHO”) declared a “public health emergency of international concern.” Exh. C.

11) Less than two months later, on March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. Exh. D

12) On March 13, 2020, the President of the United States declared a national emergency. Exh. E.

13) “Transmission of SARS-CoV-2 can occur through direct, indirect, or close contact with infected people through infected secretions such as saliva and respiratory secretions or their respiratory droplets, which are expelled when an infected person coughs, sneezes, talks or sings.” Exh. F. “WHO, together with the scientific community, has been actively discussing and evaluating whether SARS-CoV-2 may also spread through aerosols in the absence of aerosol generating procedures, particularly in indoor settings with poor ventilation.” Id. “Current evidence suggests that SARS-CoV-2 may remain viable for hours to days on surfaces made from a variety of materials.” Exh. G.

14) COVID-19 has an incubation period of up to fourteen days. Exh. F. Social distancing is one of the most effective means of limiting transmission of COVID-19. Id.

15) The CDC has thus issued guidance recommending that people comply with social distancing measures in order to prevent the spread of COVID-19. According to the CDC, “[l]imiting face-to-face contact with others is the best way to reduce the spread” of COVID-19. Exh. H.

16) In order to limit exposure to COVID-19 and slow its spread, the CDC recommends keeping “at least six feet away from other people” and limiting “close contact with others outside your household in indoor and outdoor spaces” including avoiding groups and crowded places. Id. Social distancing “is one of the best tools we have to avoid being exposed to this virus and slowing its spread locally and across the country and world” because it “helps limit contact with infected people and contaminated surfaces.” Id.

17) The rapid spread of COVID-19 in New York, in the United States, and worldwide, presented and continues to present a grave threat to New Yorkers and to New York's health care system. However, by taking strong action to ensure social distancing as well as other important measures, New York has mitigated that threat. To avoid a devastating resurgence of COVID-19, responsible parties, business owners, and the public must continue to adhere to the Executive Orders and guidance.

18) At the end of September, we crossed the grim milestone of more than 1,000,000 deaths worldwide. As of October 8, 2020, 1,060,370 people have died worldwide<sup>1</sup>; 211,132 people have died of COVID-19 in the United States of COVID-19<sup>2</sup>; and 25,555 have died in the State of New York of COVID-19<sup>3</sup>.

### **COVID-19 Surges in New York**

19) New York recorded its first cases of COVID-19 on March 1, 2020, in New York City and on March 2, 2020, in Westchester County.

20) On March 7, 2020, Governor Cuomo declared a State of Emergency. See Executive Order 202, Exh. I<sup>4</sup>, available at <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>. As of March 7, 2020, 60 people had tested positive for COVID-19 in the State of New York. See Fn. 3. Cases in the United States totaled 275. See Fn. 2. Cases

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<sup>1</sup> Johns Hopkins Coronavirus Resource Center COVID-19 Dashboard: <https://coronavirus.jhu.edu/map.html>; see also WHO Coronavirus Disease (COVID-19) Dashboard found at <https://covid19.who.int/> (last viewed October 8, 2020).

<sup>2</sup> CDC Covid Tracker found at <https://www.cdc.gov/covid-data-tracker/index.html#cases> (last viewed October 8, 2020).

<sup>3</sup> NYSDOH COVID-19 Tracker found at <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-DailyTracker?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n#/views> (last viewed October 8, 2020).

<sup>4</sup> All of Governor Cuomo's Executive Orders can be found at <https://www.governor.ny.gov/executiveorders>.

worldwide totaled 179,111, with 7,426 deaths reported. See Fn. 1.

21) By March 20, 2020, the number of individuals testing positive for COVID-19 in New York approached 10,000, and deaths exceeded 150. See Fn. 3.

22) By April 20, 2020, over 267,000 individuals had tested positive for COVID-19, and over 13,000 people had died from COVID-19 in New York State. See Fn. 3. See also, <https://www.syracuse.com/coronavirus/2020/06/where-is-coronavirus-in-ny-see-map-charts-of-covid-19-cases-deaths-hospitalizations-sunday-june-14.html> (includes similar charts with trends over time).

23) These events placed significant strain on New York State's healthcare system. For example, as the virus spread, New York faced a shortage of hospital beds, ventilators, and personal protective equipment such as masks and gloves.

24) As a result, alternate care sites were set up, including at the Javits Center in New York City. The United States Navy sent the U.S.N.S. Comfort, a Mercy-class hospital ship, to New York to assist with medical care.

25) Funeral homes were also overwhelmed, resulting in the use of mass graves to bury the dead.

26) At the worst stage of the pandemic, New York State had more coronavirus cases than any single country in the world.

27) Among other measures aimed at flattening the curve, slowing the spread of COVID-19, and preventing the health care system from becoming overburdened, Governor Cuomo issued multiple Executive Orders restricting gatherings.

28) On March 16, 2020, gatherings in excess of 50 people were prohibited. On-

premises service of food and beverages in all bars and restaurants were indefinitely suspended and gambling establishments, gyms, and movie theaters were indefinitely closed. Exh. J, Executive Order 202.3. All non-essential state and local workers to stay home, “except for those personnel essential to the . . . response to the COVID-19 emergency.” Exh. K, Executive Order 202.4. All schools were closed. Id.

29) On March 18, 2020, all malls and places of public amusement closed. Exh. L, Executive Order 202.5.

### **New York State on PAUSE**

30) On March 20, 2020, the governor announced the New York State on PAUSE initiative.

31) The 10-point New York State on PAUSE plan is as follows:

- All non-essential businesses statewide closed, effective March 22, 2020, at 8pm;
- Non-essential gatherings of individuals of any size for any reason (e.g., parties, celebrations or other social events) are canceled or postponed at this time;
- Any concentration of individuals outside their home must be limited to workers providing essential services and social distancing should be practiced;
- When in public, individuals must practice social distancing of at least six feet from others;
- Businesses and entities that provide other essential services must implement rules that help facilitate social distancing of at least six feet;
- Individuals should limit outdoor recreational activities to non-contact and avoid activities where they come in close contact with other people;
- Individuals should limit use of public transportation to when absolutely necessary and should limit potential exposure by spacing out at least six feet from other

riders;

- Sick individuals should not leave their home unless to receive medical care and only after a telehealth visit to determine if leaving the home is in the best interest of their health;
- Young people should also practice social distancing and avoid contact with vulnerable populations; and
- Use precautionary sanitizer practices such as using isopropyl alcohol wipes.

32) Among the more important measures the Governor adopted as part of the New York on PAUSE initiative were restrictions on non-essential gatherings.

33) On March 23, 2020, the Governor issued Executive Order 202.10, which banned “[n]on-essential gatherings of any size for any reason.” Exh. M.

34) That restriction remained in place until May 21, 2020, when the Governor issued Executive Order 202.32 to permit non-essential outdoor gatherings of up to ten individuals for religious services or Memorial Day service or commemoration, provided the participants follow the social distancing and cleaning and disinfection protocols established by the Department. Exh. N.

35) The following day, May 22, 2020, the Governor issued Executive Order 202.33, which further modified the ban to permit non-essential outdoor gatherings of up to ten individuals for any lawful purpose or reason, provided the participants follow the social distancing and cleaning and disinfection protocols established by the Department. Exh. O.

36) On June 15, 2020, the Governor issued Executive Order 202.42, which extended Executive Order 202.33 until July 15, 2020, and further modified the restriction to permit non-essential outdoor gatherings of up to twenty-five individuals for any purpose or reason, provided

the gathering was in a region that had reached Phase Three of the re-opening plan and the participants follow the social distancing and cleaning and disinfection protocols established by the Department. Exh. P.

37) On June 15, 2020, the Governor issued Executive Order 202.45, which permits non-essential gatherings of up to 50 individuals for any purpose or reason, provided the gathering was in a region that had reached fourth phase of the re-opening plan, and the participants follow the social distancing and cleaning and disinfection protocols established by the Department. Exh. Q.

**APRIL, MAY, and JUNE 2020—New York Appears to Flatten the Curve**

38) Before the New York State on PAUSE initiative, the daily increase in the number of positive COVID-19 tests had been rising quickly. On March 19, the number of positive tests increased nearly 70%, from, 1,769 to 2,950. For the remainder of March and early April, the number of positive tests increased at an average rate of approximately 20% per day. On April 9, 2020, alone, over 10,000 people tested positive for COVID-19. Since April 9, 2020, the number of positive tests per day has declined steadily. On May 28, 2020, over 1,551 people tested positive for COVID-19. On June 29, 2020, 46,428 people were tested and only 319 tested positive—a positivity rate below .7%.<sup>5</sup>

**New York Forward**

39) When New York transitioned from New York State on PAUSE to New York Forward, four phases were created to guide non-essential businesses and offices, as well as the

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<sup>5</sup> Found at <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-DailyTracker?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n> (last viewed October 8, 2020).



essential businesses that remained open, on how to reopen. See <https://forward.ny.gov/ny-forward>.

40) Due to the success of the people of the State of New York at flattening the curve, all regions are in Phase Four. See <https://forward.ny.gov/>.

41) Providing transmission and infection rates remain stable, restrictions can be relaxed allowing for larger gatherings.

42) By following the guidelines and requirements, such as social distancing and wearing masks, New York has successfully reduced the spread of the virus. As testing throughout the state has increased, the number of positive cases has decreased. See <https://forward.ny.gov/percentage-positive-results-region-dashboard>. On August 2, 2020, the downward trend of positive cases continued as 51,839 individuals were tested and 545 of those tested positive. Id.

43) The transmission rate, also known as the reproduction rate—which measures the number of individuals infected on average by an infected individual—was at 3.59 on February 24, 2020. The rate was as low as .67 on April 17, 2020. The rate remained consistent between .67 and .73 until May when the NY Forward transition began. Since reopening the rate has remained low but has begun inching up as the state progresses through the phases of reopening. On October 8, 2020, the transmission rate was 1.13%, slightly above the critical 1.0, which warrants close monitoring. See <https://rt.live/>.

**The Pandemic Continues to Present a Grave Threat to the Health and Safety  
of the People of the State of New York**

44) Despite the gains that New York has made, the pandemic is not over as numbers have continued to increase. On July 29, 2020, WHO reported 16,558,289 individuals confirmed positive for COVID-19, and 656,093 confirmed COVID 19 deaths worldwide.<sup>6</sup> On July 29, 2020, the CDC reported that 4,339,997 individuals in the United States had tested positive for COVID-19, and 148,866 had died of COVID-19.<sup>7</sup>

45) Indeed, during the week of July 18 through July 24, the United States reported the highest seven-day average of new COVID-19 cases with the highest number of new cases reported in a single day on July 24, 2020 – 74,818. Id.

46) COVID-19 cases and deaths continue to grow globally. On October 8, 2020, Johns Hopkins reported a total 36,423,659 individuals confirmed positive for COVID-19, and 1,060,370 confirmed COVID-19 deaths worldwide. See Fn. 1.

47) A second wave of the COVID-19 pandemic is currently sweeping United States. On September 29, 2020, the CDC reported that 7,095,422 individuals in the United States had tested positive for COVID-19, and 204,328 had died of COVID-19. See Fn. 8.

48) In an effort to sustain the gains attributable to the PAUSE initiative, the Governor, on June 24, issued Executive Order 205, “Quarantine Restrictions on Travelers Arriving in New York.” Exh. R. The Order requires all travelers entering New York from a state with a positive test rate higher than 10 per 100,000 residents, or higher than a 10% test positivity rate, over a

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<sup>6</sup> Found at <https://covid19.who.int/> (last viewed September 25, 2020).

<sup>7</sup> Found at <https://www.cdc.gov/covid-data-tracker/index.html#trends> (last viewed October 8, 2020).

seven-day rolling average, to quarantine for a period of 14 days consistent with Department of Health regulations for quarantine. See also <https://coronavirus.health.ny.gov/covid-19-travel-advisory>.

49) As of October 6, 2020, 33 states and two territories had a positivity rate of over 10%, or positive test rate higher than 10 per 100,000 residents, over a seven-day rolling average, including Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Guam, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. See id., COVID-19 Travel Advisory, available at <https://coronavirus.health.ny.gov/covid-19-travel-advisory>.

50) Executive Order 205 gives discretion to the Commissioner of the Department of Health to issue additional protocols for essential workers, or for other extraordinary circumstances, when a quarantine is not possible, provided such measures continue to safeguard the public health. See Exh. R.

51) On June 24, 2020, the Office of the Commissioner for the New York State Department issued the “Interim Guidance for Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel.” See NYS Interim Guidance for Quarantine Restrictions on Travelers Arriving in New York State Following Out of State Travel, available at <https://coronavirus.health.ny.gov/covid-19-travel-advisory>.

52) All individuals traveling to New York from any of the restricted states must complete the form upon entering New York. Travelers coming to New York from designated states through means of transport, including trains and cars, must fill out the form online. Id.

**Risks for Non-essential Business and Indoor Gatherings**

53) Restrictions on the operation of non-essential businesses and indoor gatherings are necessary to ensure sufficient space for proper distancing, thereby reducing potential transmission rates.

54) The four phases were intended to have gradually increasing gathering sizes and decreasing occupancy restrictions, with Phase One having the most restrictions and Phase Four having the least.

55) The phases allowed monitoring for, and to quickly identify, any increase in virus transmission in a particular community that may have occurred as a result of moving to a new, less restrictive phase. This is necessary to ensure that virus transmission in a community is stable before continuing on to the next phase.

56) Providing transmission rates remained stable during each transition, restrictions on less risky activities were relaxed allowing for larger gatherings in each subsequent phase. This can be seen with respect to guidance for restaurants. For a region in Phase One, restaurants are permitted to be open for takeout and delivery service only, with no indoor or outdoor dining allowed. For a region in Phase Two, restaurants are permitted to expand their services to include outdoor dining only, limited to a maximum of ten individuals per table. For a region in Phase Three, restaurants added indoor dining with capacity limited to no more than 50% of the maximum occupancy.

57) The directive in Executive Order 202.48, which modified the directive contained in Executive Order 202.41, that prohibited indoor food services and dining as part of Phase Three in New York City, has been modified by EO 202.61 to allow indoor food services and

dining in New York City beginning September 30, 2020, so long as the Department's, and any other applicable State-issued guidance, is strictly adhered to. Exh. S.

58) The restrictions in the Executive Orders and guidance are developed in consultation and cooperation with medical staff in the Department with the goal of reducing the opportunity for the virus to spread.

59) The limits and restrictions lessen and evolve as the curve continues to flatten through the continuing practice of these social distancing and hygiene and disinfecting guidelines. The numbers of new infections, hospitalizations, and deaths continue to decline in areas where these guidelines are followed, which shows why adherence to these practices is so crucial to safeguarding public health.

60) Conversely, the limits and restrictions will increase, similar to the earlier phases, if a review of the data indicates a trend of increasing COVID-19 cases or spikes of cases in cluster areas.

61) The Governor and the Department of Health are constantly monitoring transmission and infection rates. See COVID-19 Early Warning Monitoring System Dashboard<sup>8</sup>.

62) Again, large gatherings present the greatest risk for rapid and widespread transmission of the virus in a community given the nature of having many people in a single enclosed space. For this reason, non-essential outdoor gatherings, excluding religious activity, were limited to a maximum of 50 people for regions in Phase Four.

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<sup>8</sup> Found at <https://forward.ny.gov/early-warning-monitoring-dashboard> (last viewed September 29, 2020).

**Large and Super-Spreader Gatherings**

63) Gatherings, both indoor and outdoor, pose a significant risk of becoming super-spreader events. For example, “[a]s scientists have learned more about COVID-19, it has become clear that so-called superspreader incidents—in which one person infects a disproportionate number of other individuals—have played an oversized role in the transmission of the virus that causes the disease.” Exh T.

64) “The more individuals you pile into one place, the greater the opportunity for the coronavirus to infect many people at once.... If you max out at five people, it will be very hard to have a superspreading event.... But as a group’s size increases, so does the risk of transmitting the virus to a wider cluster. A large group size also increases the chance that someone present will be infectious.” Id.

65) It is critically important to control the size of gatherings, both indoor and outdoor, since “as a group’s size increases, so does the risk of transmitting the virus to a wider cluster. A large group size also increases the chance that someone present will be infectious.” Id.

66) A research team “found that superspreading events tended to happen in indoor spaces, with people in close proximity. Social occasions led to more clusters than exposure in the workplace or home – mass transmissions occurred at weddings, temples, bars and karaoke parties, for instance. The risk seems to be higher if people are raising their voices in some way, such as singing or shouting.” Exh. U.

67) The Department tracks clusters throughout the State and data indicates that social gatherings followed by restaurants/bars present the highest levels of clusters – 46 and 30 from New York State, excluding New York City, respectively from June 16, 2020 to September 28,

2020. Within each separate cluster are many individual cases of COVID-19.

68) As CDC stated in guidance released on Friday June 12, 2020: The *more people* an individual interacts with at a gathering and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19 and COVID-19 spreading. Exh. V.

69) Gatherings provide an ideal platform for the efficient transmission of COVID-19 to multiple people at once. Those individuals who contract COVID-19 at a gathering may themselves become super-spreaders if they attend further gatherings while they are asymptomatic. Exh W.

70) A super-spreader, usually identified in retrospect, has a greater than average propensity to infect a larger number of people and it is thought that “10% of the [COVID-19] cases may be responsible for 80% of the transmission”. Id.

71) “[A]ny large gathering or movement of groups or individuals can constitute super-spreading.” Id.

72) The idea of “super-spreaders” or super-spreading events is not new to COVID-19. “[S]uper-spreading was thought to be a driver of MERS, SARS and, to a lesser extent, Ebola.” Id.

73) Large social gatherings were only permitted if 10 or fewer people were in attendance during Phase One, 25 or fewer people attending during Phases Two and Three, and now if 50 or fewer people attend a social gathering during Phase Four. See <https://coronavirus.health.ny.gov/travel-large-gatherings-and-quarantines>. During a large social gathering, “[i]ndividuals must wear face coverings when they are in a public and are: within six feet of distance from other individuals; or in a situation or setting where they are unable to

maintain six feet of distance from other individuals....” Id.

74) While attending a service, “[a] distance of at least 6 ft. must be maintained amongst all individuals at all times, unless safety or the core activity requires a shorter distance (e.g. pallbearing) or the individuals are members of the same household. However, any singing activity must provide for a distance between individuals of 12 ft., subject to additional protective measures.” Exh X.

75) Attendees are prohibited from “holding or shaking hands of members in different households during services or prayers.” Id.

76) Attendees must also “[l]imit activities involving singing (e.g. choir, soloist, cantor, musical ensemble), unless 12 ft. of separation can be provided between individuals or additional distancing or physical barriers can reduce transmission of respiratory droplets.” Id.

77) The CDC provides recommendations “to help communities of faith discern how best to practice their beliefs while keeping their staff and congregations safe.” Exh. Y.

78) It is important for these communities to promote social distancing and “[t]ake steps to limit the size of gatherings **in accordance with the guidance and directives of state and local authorities** and subject to the protections of the First Amendment and any other applicable federal law.” Id. [Emphasis added.]

79) It is important to consider the intention behind the guidance and the activities that take place during normal business operations. Here, restaurants are not appropriate comparators to religious services and therefore they should be treated differently. For example, when going to a restaurant for a meal, the expectation during normal business operations is that small parties (a maximum of 10 individuals per table) are there to eat their meal and leave, not to mix and



mingle with other patrons at the restaurant for hours. Patrons generally arrive with their group and do not coordinate arrivals for the same time.

80) In a religious service or ceremony, the idea is a group of people coming together as a community to interact and pray together, as stated in ¶ 67 of the Complaint. Generally, the congregants are arriving and leaving at the same time and are together over an extended period of time. This type of close interaction, while having deep meaning for the congregants, poses a higher risk of transmission of the virus. See Compl. ¶¶ 60-67.

81) Since the beginning of September, the Department has seen the number of clusters spike in a few areas around the state:

- Broome County (One Area, Yellow)
- Brooklyn (One Area, Red, Orange and Yellow)
- Orange County (One Area, Red and Yellow)
- Queens (Two Areas, Red, Orange and Yellow)
- Rockland County (One Area, Red and Yellow)

Exh. Z. See also Fn. 9 and Fn. 3.

82) The data and report from the New York City Department of Health indicated that immediate action was required to contain the virus and prevent a super-spreader event. A status report submitted in the Soos case clearly summarizes the urgency in each of the cluster areas as positivity rates spiked. Exh. AA. For example, while most of New York City has a rate of positive tests around 1%, the red zone area had a positivity rate of approximately 8% which is alarming. Id.

83) According to the CDC, “A high percent positivity means that SARS-CoV-2, the virus that causes COVID-19, transmission is elevated in the jurisdiction and community mitigation measures are warranted to reduce transmission. A high percent positivity means there is a high rate of SARS-CoV-2 infections due to extensive transmission of the virus in the

geographic area.” Exh. BB.

84) The CDC also provides guidance for community mitigation when there is a high positivity rate in an area. Exh. CC. “The goal of community mitigation in areas with local COVID-19 transmission is to slow its spread and to protect all individuals, especially those at increased risk for severe illness, while minimizing the negative impacts of these strategies.”

Id.

85) The CDC describes layers of mitigation and levels of mitigation needed based on the levels of transmission, which is what is being done through the creation of the three zones described below. See id., Table 1.

86) On October 6, 2020, the Governor announced a new Cluster Action Initiative to deal with the hotspots found in Brooklyn and Queens, as well as Broome, Orange, and Rockland Counties.<sup>9</sup> The purpose is to “develop[ ] a science-based approach to attack 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 will be in effect for a minimum of 14 days.” See Exh Z.

87) EO 202.68 was issued to address these hotspots and created three zones with the level of restriction the highest in red, and lower in yellow. Exh. DD.

88) In the most severely impacted area, the “red zone”,

Non-essential gatherings of any size shall be postponed or cancelled; all non-essential businesses, as determined by the Empire State Development Corporation based upon published guidance, shall reduce in-person workforce by 100%; houses of worship shall

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<sup>9</sup> Cluster Action Initiative found at <https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative> (last visited October 8, 2020).

be subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer; any restaurant or tavern shall cease serving patrons food or beverage on-premises and may be open for takeout or delivery only; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.

Id.

- 89) The “orange zone” is a moderately severe location and

Non-essential gatherings shall be limited to 10 people; certain non-essential businesses, for which there is a higher risk associated with the transmission of the COVID-19 virus, including gyms, fitness centers or classes, barbers, hair salons, spas, tattoo or piercing parlors, nail technicians and nail salons, cosmetologists, estheticians, the provision of laser hair removal and electrolysis, and all other personal care services shall reduce in-person workforce by 100%; houses of worship shall be subject to a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer; any restaurant or tavern shall cease serving patrons food or beverage inside on-premises but may provide outdoor service, and may be open for takeout or delivery, provided however, any one seated group or party shall not exceed 4 people; and the local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in Executive Order.

Id.

- 90) The precautionary or “yellow zone” requires that

Non-essential gatherings shall be limited to no more than 25 people; houses of worship shall be subject to a capacity limit of 50% of its maximum occupancy and shall adhere to Department of Health guidance; any restaurant or tavern must limit any one seated group or party size to 4 people; and the Department of Health shall issue guidance by October 9, 2020 regarding mandatory testing of students and school personnel, and schools shall adhere to such guidance.

Id.

- 91) Again, one of the most effective ways to mitigate the risk of infection and reduce transmission is to reduce density.

92) The purpose behind the initiative is to “take dramatic action within the cluster” while also taking action in the surrounding area in order to contain and prevent spread of the virus. Exh. BB Precautionary actions are taken in the outlying communities. Id.

93) Each zone allows for a different maximum number of people allowed to gather. In the red zone, only essential businesses are permitted to be open, dining is take-out only, schools are closed and remote learning only, and all mass gatherings are prohibited, with the exception houses of worship are allowed a maximum of 10 people – similar to regressing to Phase One. Id.

94) In the warning or orange zone, high risk non-essential businesses are closed, such as gyms and personal care, only outdoor dining with four people maximum per table is permitted, schools are still remote only, and mass gatherings allow a maximum of 10 people indoor and outdoor, while an exception is made for houses of worship where it is 33% capacity with a 25 person maximum. Id.

95) The precautionary yellow zone businesses are open, indoor and outdoor dining are permitted with a maximum of four people per table, schools are open with mandatory testing each week of students, teachers, and staff, and a maximum of 25 people are allowed at a mass gathering either indoor or outdoor, with the exception of houses of worship, which are allowed 50% capacity. Id.

96) The zones are representative of the prior reopening phases, but now on a smaller scale to target hotspots and clusters.

**Responsible Parties**

97) For industries where people may gather, guidelines are directed at a responsible party – the individual who will ensure that the guidelines and EOs are being adhered to at the gatherings. See <https://forward.ny.gov/statewide-guidelines>. It is the responsible party for any gathering who must ensure that masks are worn, soap and water and/or hand sanitizer are available, proper distances are maintained, and any necessary markings are made on the floor or ground to show proper distancing.

98) It is important for responsible parties to follow State and local guidance to prevent transmission of COVID-19.

99) True and accurate copies of the following documents are attached hereto:

**Exhibit A:** WHO Situation Report 1.

**Exhibit B:** WHO Situation Report 3.

**Exhibit C:** A true and accurate copy of the Statement on the Second Meeting of the International Health Regulations (2005) Emergency Committee Regarding the Outbreak of Novel Coronavirus (2019-nCoV) (Jan 30, 2020).

**Exhibit D:** WHO Declares Global Pandemic.

**Exhibit E:** A true and accurate copy of the National Emergency Declaration signed by President Trump on March 13, 2020.

**Exhibit F:** WHO Article: Transmission of SARS-CoV-2: implications for infection prevention precautions

**Exhibit G:** CDC: Cleaning and Disinfection for Households.

**Exhibit H:** CDC: Social Distancing.

**Exhibit I:** Governor Cuomo's Executive Order 202.

**Exhibit J:** Governor Cuomo's Executive Order 202.3.

**Exhibit K:** Governor Cuomo's Executive Order 202.4.

**Exhibit L:** Cuomo's Executive Order 202.5.

**Exhibit M:** Governor Cuomo's Executive Order 202.10.

**Exhibit N:** Governor Cuomo's Executive Order 202.32.

**Exhibit O:** Governor Cuomo's Executive Order 202.33.

**Exhibit P:** Governor Cuomo's Executive Order 202.42.

**Exhibit Q:** Governor Cuomo's Executive Order 202.45.

**Exhibit R:** Governor Cuomo's Executive Order 205.

**Exhibit S:** Governor Cuomo's Executive Order 202.61.

**Exhibit T:** Scientific American Article.

**Exhibit U:** New Scientist Article.

**Exhibit V:** CDC Large Event Considerations.

**Exhibit W:** NIH, COVID-19 Super-spreaders: Definitional Quandaries and Implications

**Exhibit X:** Governor Cuomo's Executive Order 202.6.

**Exhibit Y:** CDC Considerations for Communities of Faith.

**Exhibit Z:** Governor Cuomo's Announcement of Cluster Initiative.

**Exhibit AA:** New York City Status Report in Soos, et al. v. Cuomo, et al., 1:20-CV-651 (GLS)(DJS).

**Exhibit BB:** CDC Frequently Asked Questions: Calculating Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) RT-PCR Laboratory Test Percent Positivity.

**Exhibit CC:** CDC Implementation of Mitigation Strategies for Communities.

**Exhibit DD:** Governor Cuomo's Executive Order 202.68

**Exhibit EE:** Affidavit of Elizabeth M. Dufort, M.D., FAAP, sworn to September 14, 2020 in Sportsmen's Tavern LLC v. N.Y. State Liquor Auth., Index No. 809297 (Sup. Ct., Erie Cnty.) (without exhibits)

**Exhibit FF:** Declaration of Howard Zucker, M.D., J.D, dated August 11, 2020. in DiMartile et al v. Cuomo, et al., 20-cv-859 (N.D.N.Y.) (without exhibits).

Dated: October 9, 2020

Albany, New York

*Howard Zucker M.D.*

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Howard A. Zucker, M.D., J.D.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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THE ROMAN CATHOLIC DIOCESE OF BROOKLYN,  
NEW YORK,

Plaintiff,

vs.

GOVERNOR ANDREW M. CUOMO, in his official  
capacity,

Defendant.

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**DECLARATION**

Civil No. 20-cv-4844

Howard A. Zucker, M.D., J.D., on the date noted below and pursuant to § 1746 of title 28 of the United States Code, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

**Background and Qualifications**

1) I am the Commissioner of the New York State Department of Health (“Department”). I make this declaration in my capacity as the Commissioner after consultation with Department program staff directing the initiatives detailed below. I respectfully submit this declaration in order to place before the Court certain testimony and documents relevant to the relief requested. I am familiar with the matters set forth herein, either from professional knowledge, conversations with Department staff, or on the basis of documents that have been provided to and reviewed by me. I have been asked to assist New York State in its response to the COVID-19 public health emergency. I am a member of the Governor’s COVID-19 Response and Recovery Task Force (the “COVID-19 Task Force”).



2) I have extensive knowledge of pediatric medicine and care and am aware of many family health issues. I am board-certified in six specialties/subspecialties and trained in pediatrics at Johns Hopkins Hospital, anesthesiology at the Hospital of the University of Pennsylvania, pediatric critical care medicine/pediatric anesthesiology at The Children's Hospital of Philadelphia, and pediatric cardiology at Children's Hospital Boston/Harvard Medical School. I was a professor of clinical anesthesiology at Albert Einstein College of Medicine of Yeshiva University and pediatric cardiac anesthesiologist at Montefiore Medical Center in the Bronx. I also served as associate professor of clinical pediatrics and anesthesiology at Columbia University College of Physicians & Surgeons and pediatric director of the ICU at New York Presbyterian Hospital. I am a former Columbia University Pediatrics Teacher of the Year.

3) As Commissioner of the Department, I must "take cognizance of the interests of health and life of the people of the state, and of all matters pertaining thereto and exercise the functions, powers and duties of the department prescribed by law." Public Health Law ("PHL") §206(1)(a).

4) I preside over the State's Office of Public Health, which includes epidemiology, the Medicaid program, the New York State Public Health and Health Planning Council, and the Wadsworth Center, New York's premier public health lab, as well as the entire health care workforce, and health care facilities.

5) In the last nine months, I have been personally involved in the development and implementation of what is known as the "New York State on PAUSE" initiative—restrictions implemented through a series of executive orders and associated guidance designed to stop the transmission of the novel coronavirus (COVID-19)—and I am also familiar with the detailed plan

that the State adopted to allow the safe reopening of each New York industry, including all gatherings. I am familiar with the facts set forth herein based upon personal knowledge, discussions with Department staff, and Department records.

6) I make this declaration – based upon, among other things, my personal knowledge; my studies and research on matters related to infectious diseases; and my work and discussions with other infectious disease experts and public health officials – to, among other things, further clarify the process and the creation, designation, and monitoring of the zones through the Governor’s Cluster Action Initiative (“Initiative”); the tracking of the disease; and the State’s response generally to this global pandemic.

7) The data throughout New York shows the State has maintained an average transmission rate around 1% or below since March 22, 2020, when the New York State on PAUSE plan was initiated, but there have been outbreaks and spikes in areas necessitating immediate attention to contain the virus and mitigate spread throughout the community.

8) The intention is to create an aggressive and targeted approach to contain and control the spread of the virus from the immediate area where the cluster is located and to a larger region.

#### **COVID-19 Mapping**

9) The Initiative was created to divide clusters and the areas around them into three categories with successively higher restrictions within each one: Red Zone - cluster itself; Orange Zone - warning zone; and Yellow Zone - precautionary zone.

10) The creation of the Zones is intended to be a short-term, but aggressive, approach to contain the threat of the virus spreading throughout a community and creating a larger potential super-spreader event.

11) Members of my team in the Department closely track the metrics related to COVID-19 on a daily basis to determine areas of particular concern that may need additional resources such as increased testing access, compliance enforcement, or targeted pause on economic and/or social activities. My staff and I work with members of the Governor's COVID-19 Response and Recovery Task Force ("COVID-19 Task Force"), by, among other things, providing case data and rates to help inform decisions on what steps the State needs to take to address areas of concern with higher positivity rates.

12) An area may be placed in a "Red Zone" if the following factors are met:

- The area is a defined geographic area (which may or may not align to geopolitical or other common geographic subdivisions, such as county, zip codes, or contiguous neighborhoods) has a 7-day rolling average positivity rate of 3% or higher for a sustained period of time (metrics adjusted for population size and population density);
- Positive cases reflect community spread and cannot be solely explained by a contained cluster in a single institution (e.g., nursing home, factory, college, etc.); and
- The Department, in consultation with the local departments of health, finds that it is in the best interest of public health for the area to be placed in Red Zone status.

13) Once an area has been designated as a "Red Closure Zone," the following steps are taken:

- The Department, in coordination with local health authorities, uses case incidence and mapping data to refine boundaries that balance epidemiological priorities with geographic realities;
- The Department, in coordination with local health authorities, uses case incidence and mapping data to refine and establish boundaries for "buffer zones" around the Red Closure Zone to ensure spread

from the closure zone does not broaden into the wider community. In densely populated urban areas, two buffer zones – an Orange Warning Zone and a Yellow Precautionary Zone -- may be required; and

- The Department issues guidance specific to each warning zone and the status of activities within the zone (i.e., mass gatherings, businesses, schools, etc.).

14) After 14 days, the Department, in coordination with local health authorities and in consultation with global health experts, determines whether data sufficiently demonstrate that the area has successfully reduced viral spread to a level able to be contained given testing, contact tracing, and other health system metrics. Based on this data and expert advisement, the Department decides whether the Red Closure Zone will be extended, modified, or ended.

#### **Mapping Data**

15) The creation of the cluster zones is map-based and formulated from data submitted to the Department and analyzed by Department staff.

16) We rely upon data submitted to the State's Electronic Clinical Laboratory Reporting System ("ECLRS") to map the zones. Laboratories in New York State use this system for secure and rapid transmission of reportable disease information to the Department, county health departments, and the New York City Department of Health and Mental Hygiene ("NYCDOHMH").

17) A laboratory is required to report all COVID-19 tests results to the State and will upload data files related to these tests. It is this data analyzed and used to generate a map indicating the location of these cases (COVID-19 positive test results). The cases are represented as dots on a map and indicate areas with high positivity percentages. My team

works with members of the Task Force to look first at the zip codes with the highest positivity rates and then break that down further based on individual addresses using the data pulled from ECLRS.

18) The Red Zone contains the highest level and concentration of positive cases, which is the cluster itself and is created by analyzing the mapping of the positivity rates and using streets as a boundary.

19) The Red Zone is created by pulling data form ECLRS and analyzing it to map out cases as dots. It is the concentration of dots that indicate a high level of virus in an area which in turn delineates the boundaries of the red zone. When we are mapping the positive cases and creating the zones, we are not looking at the businesses or entities located within those zones, only the number and grouping of positive cases. We look solely at the data and do not take into account who or what are located in that zone – whether it is a non-essential business, school, yeshiva, church, synagogue, or a car dealership – as they all face restrictions, if justified by the scientific data, whether or not that particular school, car dealership, or religious group has positive cases within it. The data drives the zone.

20) There is no specific percentage or threshold to determine when an area should be designated as an Orange or Yellow Zone, as it is a nuanced process that takes multiple factors into account and not solely the positivity percentage. It is important, for instance, to consider the population density of the area. The Department analyzes the number of cases within the Orange and Yellow Zones to determine the rates positive cases. The positivity percentages within those zones indicate the level of spread beyond the cluster and require some level of mitigation to prevent any further spread of the virus.

21) The Orange Zone serves as a buffer to the Red Zone and is generally a five block or quarter mile boundary around the Red Zone tracked by streets. The goal of having such an area, which is given more scrutiny, is to prevent the cluster zone from expanding further and keep it contained.

22) The Yellow Zone serves as a buffer to the Orange Zone with the same goal of containing the virus and not allowing the cluster to expand.

#### Positivity Rates

23) The positivity rates are pulled daily from ECLRS, are mapped out, and are analyzed to determine if a particular cluster is improving or getting worse. The positivity rates in all red zones as of October 15, 2020 is 4.8% a reduction of the 7.9% positivity rate the week of September 20 through September 26 and reducing each subsequent week. While this indicates that the targeted restrictions are having the desired effect to mitigate and control the spread of the virus, this is still approximately 4 times the overall state positivity rate, which is still highly concerning since it is over 1%.

24) Any re-evaluation for a reduction in restrictions would not occur before 14 days since that is the incubation period for the virus. This data and analysis are provided to the Governor and his team on a daily basis, including the COVID-19 Task Force.

25) Any reduction or increase in restrictions will occur based on the analysis of all of the available data. While we do not speculate on what future actions will be taken since this is an ever-evolving process, driven by the positivity rates and trends over time, the goal is clearly to mitigate community spread and continue the phased reopening throughout the state.

26) Many different actions can be taken based on an analysis of the data and due to its

evolving nature. This is a highly calibrated process to ensure that the most precise restrictions are in place. The Department receives new data throughout the day creating fluctuations in numbers and rates. The data is continually reassessing to fine tune the statistics to ensure that we, the Task Force, and the Governor have the most current data available to indicate progress, or lack thereof, in the zones.

**Modification of the Zones**

27) The Department and the Task Force are continually monitoring and testing the data related to transmission, including the positivity rates and population density, to inform decisions on zone designation and possible modification.

28) Where the data shows sustained decrease in community transmission in the cluster, the Department, the Task Force, and the Governor assess the change in transmission rates and all available relevant information related thereto to determine whether zone modification is warranted and would protect the public health of New Yorkers.

29) With respect to any easing of restrictions in the Red Zone, the Department, the Governor's team, and the Task Force will continue to monitor and assess the current decreasing trend in that zone to ensure that it a sustained downward trend. Upon this review, if the operation has been successful, the designation of a Red Zone may be modified or lifted altogether.

Dated: October 16, 2020  
Albany, New York

  
Howard A. Zucker, M.D., J.D.

UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

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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,

No. 20-3572

*Plaintiffs-Appellants,*

v.

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

*Defendant-Appellee.*

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**DEFENDANT-APPELLEE'S MEMORANDUM OF LAW IN  
OPPOSITION TO PLAINTIFFS-APPELLANTS' EMERGENCY  
MOTION FOR AN INJUNCTION PENDING APPEAL**

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October 27, 2020



**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT .....	1
QUESTION PRESENTED .....	3
STATEMENT OF THE CASE .....	4
A. The COVID-19 Pandemic and the State’s Early Response .....	5
B. New York’s Phased Reopening .....	6
C. The Latest Spike in Cases .....	9
D. Proceedings Below .....	14
ARGUMENT .....	16
POINT I	
THE MOTION SHOULD BE DENIED FOR FAILURE TO COMPLY WITH F.R.A.P. 8(A) .....	16
POINT II	
THE DISTRICT COURT SOUNDLY EXERCISED ITS DISCRETION IN REFUSING TO PRELIMINARILY ENJOIN EXECUTIVE ORDER 202.68 .....	17
A. Plaintiffs Are Not Clearly or Substantially Likely to Succeed on Their First Amendment Claim. ....	18
B. The District Court Correctly Found That a Preliminary Injunction Should Not Issue Because Plaintiffs Meet None of the Other Requirements for Preliminary Relief. ....	28
CONCLUSION .....	30

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Calvary Chapel Lone Mountain v. Sisolak</i> , No. 20-cv-00907, 2020 WL 3108716 (D. Nev. June 11, 2020) .....	21
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993) .....	18, 19, 23
<i>Elim Romanian Pentecostal Church v. Pritzker</i> , 962 F.3d 341 (7th Cir. 2020) .....	21, 23
<i>Employment Div., Dep’t of Human Resources of Oregon v. Smith</i> , 494 U.S. 872 (1990) .....	18, 26
<i>Harvest Rock Church, Inc. v. Newsom</i> , No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020) .....	21, 29
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905) .....	19
<i>Lynch v. City of New York</i> , 589 F.3d 94 (2d Cir. 2009) .....	17
<i>Maryville Baptist Church, Inc. v. Beshear</i> , 957 F.3d 610 (6th Cir. 2020) .....	21
<i>Phillips v. City of New York</i> , 775 F.3d 538 (2d Cir. 2015) .....	26
<i>Roberts v. Neace</i> , 958 F.3d 409 (6th Cir. 2020) .....	21
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , No. 20-cv-04844, 2020 WL 6120167 (E.D.N.Y. Oct. 16, 2020) .....	21, 24
<i>Salinger v. Colting</i> , 607 F.3d 68 (2d Cir. 2010) .....	28
<i>Soos v. Cuomo</i> , No. 20-cv-651, 2020 WL 3488742 (N.D.N.Y. June 26, 2020) .....	21

<b>Cases</b>	<b>Page(s)</b>
<i>South Bay United Pentecostal Church v. Newsom</i> , 140 S. Ct. 1613 (2020).....	19, 20, 25
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Fed. R. App. P. 8 .....	16, 17
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Brooklyn, NY, COVID Cluster Zones (as of Oct. 21, 2020), <a href="https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Brooklyn_HiRes2.pdf">https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Brooklyn_HiRes2.pdf</a> .....	26
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<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
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Empire State Dev. Corp., <i>Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Recent Executive Orders</i> (updated Oct. 23, 2020), <a href="https://esd.ny.gov/guidance-executive-order-2026">https://esd.ny.gov/guidance-executive-order-2026</a> .....	5
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<b>Miscellaneous Authorities</b>	<b>Page(s)</b>
New York State Dep’t of Health, <i>Fatalities</i> , <a href="https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?:embed=yes&amp;:toolbar=no&amp;:tabs=n">https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?:embed=yes&amp;:toolbar=no&amp;:tabs=n</a> .....	4
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Press Release, N.Y. State Office of the Governor, Governor Cuomo Announces Five Regions on Track to Enter Phase IV of Reopening Friday (June 24, 2020), <a href="https://www.governor.ny.gov/news/governor-cuomo-announces-five-regions-track-enter-phase-iv-reopening-friday">https://www.governor.ny.gov/news/governor-cuomo-announces-five-regions-track-enter-phase-iv-reopening-friday</a> .....	23
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## PRELIMINARY STATEMENT

The State of New York, like the rest of the world, continues to confront the greatest public-health crisis in living memory. The COVID-19 pandemic has caused over 16,000 deaths in New York City alone—an enormous number that could have been far higher had the State not taken urgent action to halt the spread of the virus. Indeed, New York has been enormously successful in controlling the virus’s spread and is now working toward lifting restrictions in a measured way, balancing the lives, health, and safety of New Yorkers with the need to protect their other interests. But the danger of a resurgence in cases remains clear and present; not only are many states around the country now experiencing record numbers of new cases,<sup>1</sup> but certain communities within the State are once again experiencing troubling spikes in new cases. In response, Governor Cuomo issued Executive Order (“EO”) 202.68 to impose heightened restrictions in these communities to stop the rise in cases before they increase exponentially.

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<sup>1</sup> <https://www.nytimes.com/2020/10/23/us/covid-worst-day.html>.

Under EO 202.68, houses of worship are treated more favorably than comparable secular activities. In communities with the most troubling spikes, labeled “Red Zones,” houses of worship may remain open, but are limited to the lesser of 25% of occupancy capacity or 10 people. In outlying areas labeled “Yellow Zones,” houses of worship are limited to 50% of occupancy capacity with no numerical limit on the number of persons who may be present.<sup>2</sup> Comparable secular activities, however, such as concerts and other events where attendees arrive and leave at the same time to congregate and mingle for an extended period of time, are completely prohibited.

In a lawsuit before the U.S. District Court for the Eastern District of New York, plaintiffs-appellants (“Plaintiffs”)—an Orthodox Jewish organization, synagogues, and rabbis—sought a temporary restraining order and preliminary injunction to enjoin application of EO 202.68’s restrictions on them. The court (Matsumoto, J.) denied the motion. In a

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<sup>2</sup> The Order also created a buffer area in between, an “Orange Zone.” As of October 22, due to an improvement of conditions in affected areas, there are no Orange Zones in New York City, where Plaintiffs are located. Because the restrictions applicable in those zones can provide no basis for injunctive relief at this time, we do not address them further.

thorough ruling, the court found that because EO 202.86 is a neutral and generally applicable restriction that was not motivated by religious animus, it is subject to rational basis review, which it readily satisfies. Plaintiffs therefore failed to demonstrate a likelihood of success on the merits. The court additionally found that the other factors relevant to a grant of injunctive relief did not favor Plaintiffs.

Plaintiffs waited 11 days after the district court's ruling to move this Court for an injunction pending appeal without seeking that same relief first in the district court. The Court should deny Plaintiffs' motion.

### **QUESTION PRESENTED**

To address troubling spikes in new COVID-19 cases in various communities in the State, the Governor issued EO 202.68, which imposes gathering restrictions on houses of worship in those communities, while imposing (or leaving in place) more onerous restrictions on comparable secular activities. The question presented is:

Did the district court abuse its discretion in denying a preliminary injunction to enjoin enforcement of EO 202.68's restrictions against Plaintiffs?



## STATEMENT OF THE CASE

The ongoing COVID-19 pandemic has caused over 25,000 deaths in New York State, over 16,000 of which were in New York City alone,<sup>3</sup> and hundreds of thousands of deaths worldwide. For much of this past spring, New York was the epicenter of the global crisis.<sup>4</sup> Thanks to the lifesaving efforts of medical professionals, essential workers, and state and local governments; ordinary New Yorkers who heeded calls to shelter in place and practice social distancing; and New York's aggressive restrictions on gatherings and businesses, the State's daily death toll has been reduced from a peak of approximately 800 per day to an average of less than 10 per day.<sup>5</sup> The threat is not over, however, as states across the nation report record numbers of new cases and hundreds of New Yorkers remain hospitalized.<sup>6</sup> Continued vigilance is essential to prevent a deadly resurgence of the pandemic in the State.

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<sup>3</sup> <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?:embed=yes&:toolbar=no&:tabs=n>.

<sup>4</sup> See <https://nyti.ms/3kUJgbs>.

<sup>5</sup> See <https://covidtracking.com/data/state/new-york#historical>.

<sup>6</sup> See *id.*

## A. The COVID-19 Pandemic and the State’s Early Response

COVID-19 is a highly infectious and potentially deadly respiratory disease caused by a newly discovered coronavirus that spreads easily from person-to-person through droplets or aerosols released when infected individuals cough, sneeze, speak, and breathe. Emergency Mot. of Pls.-Appellants for Inj. Pending Appeal (“Mem.”), Ex. E, Decl. of Howard A. Zucker, (“Zucker Decl.”) ¶¶8, 13 & Ex. B (Oct. 9, 2020).

On March 7, 2020, Governor Cuomo issued EO 202, implementing the State Comprehensive Emergency Management Plan and declaring a statewide disaster emergency. Zucker Decl. ¶20 & Ex. I. Multiple supplemental EOs followed. *See, e.g., id.* ¶¶27-37. Among many important measures the Governor adopted as part of the “New York State on PAUSE” initiative were restrictions on non-essential gatherings and businesses. EO 202.10, issued on March 23, banned “[n]on-essential gatherings of any size for any reason” and required non-essential businesses to close. *Id.* ¶¶30-31 & Ex. M.<sup>7</sup>

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<sup>7</sup> “Essential” services and functions are listed in EO 202.6 and in related guidance issued by the Empire State Development Corporation (“ESDC”). *See* <https://esd.ny.gov/guidance-executive-order-2026>. They

## B. New York’s Phased Reopening

These measures worked. In May and June, the State’s rates of new cases and fatalities slowly stabilized and then declined, and New York was able to start easing restrictions. EO 202.32, issued on May 21, 2020, permitted non-essential outdoor gatherings of up to ten people for religious services or Memorial Day observance, provided that participants followed social-distancing, masking, and cleaning and disinfection protocols established by the State’s Department of Health (“DOH”). Zucker Decl., Ex. N. The State also announced the “New York Forward” initiative, a multi-phased plan to guide the reopening of the various sectors of the economy. *Id.* ¶¶39-42. This initiative was designed to permit a reopening in a slow, measured way that would prevent new spikes in COVID-19 cases. *See id.*

In June and July 2020, the restrictions on non-essential gatherings were eased further as regions of the State progressed through the phases

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include services and functions essential to public health and safety, such as hospitals, airports, public utilities, child-care services, law enforcement, and grocery stores (including stores, like Target, that have grocery stores inside them). Gatherings necessary to perform these services and functions would reasonably be understood to be “essential.”

of the State's reopening plan, so that gatherings of up to 25 and then 50 were permitted, with social-distancing and other protocols still in place. *Id.*, Exs. P-Q.

Large gatherings still present a severe risk of spread, however, because a single individual—even one who is asymptomatic—can infect many others. The larger the gathering and the longer it lasts, the greater the risk, with large indoor gatherings presenting the greatest risk of becoming super-spreader events. *Id.* ¶¶66, 68-72. The spread of the disease expands out from the gathering as people who contract it thereafter interact with others, potentially at other mass gatherings. *Id.* ¶69.<sup>8</sup>

Social occasions and religious services and ceremonies where large numbers of people arrive and leave at the same time for the very purpose of mingling, worshipping, or celebrating together for an extended period of time present a heightened risk of transmission, as compared to retail establishments, restaurants, or workplaces. And raising voices, singing,

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<sup>8</sup> New York's first super-spreader events were gatherings that occurred at a synagogue. *See* <https://www.lohud.com/story/news/politics/2020/03/13/coronavirus-timeline-new-york-how-we-got-here-and-where-were-headed/5045463002/>.

or chanting only further increases the risk of spread. *Id.* ¶66. Not surprisingly, then, mass transmissions have occurred at weddings, temples, bars, and karaoke parties. *Id.* ¶¶66, 79-80 & Ex. U.

As a result of the State’s measured reopening plan, which has been data-driven and guided by public health experts, the number of new infections and deaths has remained relatively flat, while much of the nation has seen a spike in cases. *Id.* ¶¶38, 42. Indeed, after reaching a peak in early April of the positive test rate (positive test results as a percentage of tests administered) of around 48%, the rate was reduced to a low of 0.7% in mid-August, and remained relatively stable through early September.<sup>9</sup>

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<sup>9</sup> <https://forward.ny.gov/percentage-positive-results-region-dashboard>.

### C. The Latest Spike in Cases

Since early September 2020, DOH has observed clusters of spikes in certain areas, including one large area in Brooklyn; two smaller areas in Queens; and one area in each of Broome, Orange, and Rockland Counties. Zucker Decl. ¶81. In the 20 most problematic zip codes, the positive test rate was 5.5% on October 6, 2020, far exceeding the 1.2% rate for the rest of the State.<sup>10</sup> At an October 5 press conference, Governor Cuomo expressed frustration that local authorities and some leaders in the religious community writ large—including the Orthodox Jewish community—in these zip codes appeared to be failing adequately to enforce mandatory masking and other requirements, given the potential for super-spreader events at mass gatherings.<sup>11</sup> The Governor emphasized that the same rules apply to everyone, including churches and parade organizers, and that he would take dramatic action to combat the spread

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<sup>10</sup> <https://www.nytimes.com/2020/10/06/nyregion/cuomo-shutdown-coronavirus.html>.

<sup>11</sup> <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-1>.

of COVID-19 at churches and parades, as well, if sufficiently high positive test rates required such action.<sup>12</sup>

On October 6, the Governor announced the “Cluster Action Initiative” to address what he termed COVID-19 “hotspots.”<sup>13</sup> The initiative is composed of three steps: (1) take dramatic action within the cluster; (2) take action in the area surrounding the cluster to stop the spread; and (3) take precautionary action in the outlying communities. Zucker Decl. ¶92. The clusters were based on scientific and other data showing the areas with elevated positive test rates.<sup>14</sup>

In EO 202.68, the Governor directed DOH 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.” “Red Zones” are those with the sharpest increase in COVID-19 cases—the rate of positive tests in these zones was

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<sup>12</sup> *Id.*

<sup>13</sup> <https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative#initiativemaps>.

<sup>14</sup> *See* <https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative/>.

approximately 8%, while the rate in the rest of the City hovered around 1%. Zucker Decl. ¶82. Since the implementation of EO 202.68, those figures have already dropped significantly, with positive test rates across all Red Zones dropping from 7.9% during the week of September 20 to 4.8% as of October 15, and 2.91% as of October 19.<sup>15</sup> See Decl. of Howard A. Zucker ¶23, *Roman Catholic Dicoese of Brooklyn v. Cuomo*, No. 20-cv-04844 (E.D.N.Y. Oct. 16, 2020), ECF No. 29-1 (“*Diocese Zucker Decl.*”). The Red-Zone positive test rate nonetheless remains more than twice the statewide rate in areas outside the Red Zones.<sup>16</sup>

The most restrictive mitigation measures are thus imposed in “Red Zones,” with gradually fewer restrictions in surrounding areas labeled “Orange Zones” and outlying areas labeled “Yellow Zones.” Zucker Decl. ¶87-90 & Ex. DD.

In Red Zones, DOH adopted mitigation measures that postpone or cancel all non-essential gatherings and largely close non-essential businesses, restaurants, and schools:

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<sup>15</sup> See <https://www.governor.ny.gov/news/governor-cuomo-announces-travel-advisory-requiring-14-day-quarantine>.

<sup>16</sup> See *id.*



- “Non-essential gatherings of any size shall be postponed or cancelled”;
- “[A]ll non-essential businesses...shall reduce in-person workforce by 100%”;
- “[A]ny restaurant...shall cease serving patrons food or beverages on-premises and may be open for takeout or delivery only”; and
- “[T]he local Department of Health shall direct closure of all schools for in-person instruction, except as otherwise provided in” the EO.

*Id.* ¶ 88 & Ex. DD.

Houses of worship in Red Zones can continue in-person religious services, but under heightened restrictions. Specifically, they “shall be subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer.” *Id.* ¶88.

The least restrictive zone restrictions apply in the Yellow Zones, where non-essential gatherings are limited to 25 people, and houses of worship are limited to “a capacity limit of 50% of its maximum occupancy,” with no numerical limit on the number of persons who may be present.

*Id.* ¶90 & Ex. DD.

Explaining the new initiative, Governor Cuomo stated that, “[w]orking with the top public health experts, New York State developed

a science-based approach to attack 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.”<sup>17</sup> The EO mitigates infection risk and reduces transmission by reducing density in places where people gather, including houses of worship. Zucker Decl. ¶¶91-96.

On October 21, 2020, Governor Cuomo announced the target metrics that DOH, in consultation with local departments of health, uses to determine whether to designate an area as a specified zone or change its zone designation. For example, an area will no longer qualify as a red zone once it demonstrates a decline in positivity over a 10-day period and a positive test rate of under 3% (4% in less populated areas) for at least 3 consecutive days at the end of the 10-day period.<sup>18</sup> Among the additional factors that DOH considers before changing a zone designation are whether

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<sup>17</sup> See <https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative>.

<sup>18</sup> See <https://www.governor.ny.gov/news/governor-cuomo-details-covid-19-micro-cluster-metrics>.

new hospitalizations are trending downward and whether the local government has undertaken effective enforcement measures.<sup>19</sup>

Applying these metrics, DOH has since re-designated all of New York City's Orange Zones as Yellow Zones. And the Red Zones in Queens County have since been re-designated as Yellow Zones. For affected businesses and houses of worship, these changes became effective October 22.<sup>20</sup> Accordingly, there are no areas in New York City currently designated as Orange Zones, and Plaintiffs have no basis for preliminary relief arising from restrictions in those zones.

#### **D. Proceedings Below**

Plaintiffs commenced this action by filing a complaint on October 8, 2020. ECF No. 1. The Complaint alleged only one count: that EO 202.68 violates Plaintiffs' rights under the First Amendment's Free Exercise Clause.

Also on October 8, 2020, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction to enjoin enforcement of EO

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<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

202.68's restrictions against Plaintiffs no later than sundown on October 9, 2020, when the first of three successive Jewish holidays—during which congregants hoped to gather en masse—began. ECF No. 2.

The district court (Matsumoto, J.) conducted a hearing on Plaintiffs' motion via telephone conference on October 9, 2020, in which it extensively questioned both parties. *See* Mem., Ex. H (“Tr.”). In a ruling from the bench, the district court denied Plaintiffs' motion, holding that the State was likely to succeed on the merits. The court found that EO 202.68 is neutral and generally applicable and, thus, should be reviewed under the deferential rational basis standard. *Id.* 58-64. The court concluded that the EO met that standard given its “very real and substantial relation to protecting the public health.” *Id.* 48.

The court rejected Plaintiffs' claim that EO was motivated by religious animus and, thus, should be reviewed under strict scrutiny. The court found “no evidence” that selected comments from the Governor—which the court found were “taken...out of context”—reflected “an animus” against the Orthodox Jewish community or a “deliberate imposition of a requirement directed at thwarting the [community's] religious practices.” *Id.* 65.

The court further found that the other factors relevant for injunctive relief favored the State, as well. It reasoned that it was in the public interest to deny the motion; that the balance of equities favored the State; and that the Plaintiffs would suffer unfortunate, but not irreparable, harm from the denial of the motion. *Id.* 53-54, 65-66.

Plaintiffs waited until October 19 to file a notice of appeal, and the next day—11 days after the district court denied them relief—they filed the present motion. Plaintiffs did not move in the district court for an injunction pending appeal before seeking that relief from this Court.

## ARGUMENT

### POINT I

#### **THE MOTION SHOULD BE DENIED FOR FAILURE TO COMPLY WITH F.R.A.P. 8(A)**

This Court should deny Plaintiffs’ motion for failure to comply with Rule 8(a) of the Federal Rules of Appellate Procedure (“F.R.A.P.”). “A party must ordinarily move first in the district court for” an order “granting an injunction while an appeal is pending.” F.R.A.P. 8(a)(1)(C). Plaintiffs did not move for that relief in the district court before filing the present motion with this Court. Contrary to their argument (Mem. at 11 n.19), the injunction they sought in the district court was a different one,

a preliminary injunction pending the district court's final judgment. Plaintiffs also make no showing, as required, that "moving first in the district court would be impracticable." F.R.A.P. 8(a)(2)(A). Nor could they have done so given that they let 11 days elapse after the district court's ruling before seeking relief from this Court.

## POINT II

### **THE DISTRICT COURT SOUNDLY EXERCISED ITS DISCRETION IN REFUSING TO PRELIMINARILY ENJOIN EXECUTIVE ORDER 202.68**

The district court did not abuse its discretion in denying Plaintiffs' motion for a preliminary injunction.<sup>21</sup> See *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009). First, the district court correctly concluded that Plaintiffs are unlikely to prevail on their sole claim, that EO 202.68's gathering restrictions on houses of worship violate Plaintiffs' free exercise rights. Second, the district court providently exercised its discretion to conclude that the other factors relevant to a grant of injunctive relief did not favor Plaintiffs, either.

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<sup>21</sup> The State's memorandum of law in the *Roman Catholic Diocese of Brooklyn* case sets out more fully the standard for a preliminary injunction and the applicable abuse of discretion standard of review.

**A. Plaintiffs Are Not Clearly or Substantially Likely to Succeed on Their First Amendment Claim.**

Plaintiffs are not clearly or substantially likely to prove that EO 202.68 violates Plaintiffs' First Amendment free exercise rights. The court correctly concluded that EO 202.68 is subject to rational basis review, which it readily satisfies, because it is a neutral and generally applicable restriction that treats religious gatherings alike or better than secular comparators and was not motivated by religious animus.

1. Generally, and as the district court correctly recognized, rational basis review applies to free exercise challenges to “neutral, generally applicable law[s].” *Employment Div., Dep’t of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990); Tr. 54-55. That is true even when a law incidentally imposes a burden on the exercise of religion by, for example, effectively prohibiting a denomination’s churchgoers from possessing a controlled substance they ingest as a sacrament. *Smith*, 494 U.S. at 874, 878.

On the other hand, laws whose “object or purpose ... is the suppression of religion or religious conduct” are “not neutral or not of general application,” and accordingly are subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,

533, 546 (1993). For example, a Florida municipality's ordinances that "were gerrymandered with care to proscribe religious killings of animals" only by Santeria church members were specifically directed at a religious practice and thus strict scrutiny applied. *Id.* at 542.

The district court also properly recognized (Tr. 46) that under *Jacobson v. Massachusetts*, a "community has the right to protect itself against an epidemic of disease which threatens the safety of its members," 197 U.S. 11, 27 (1905), and in such times judicial scrutiny is reserved for a measure that "has no real or substantial relation to" the object of protecting the public "or is, beyond all question a plain, palpable invasion of rights secured by the fundamental law," *id.* at 31.

2. As the district court recognized, laws like EO 202.68 that treat religious gatherings the same as, or more favorably than, secular comparators, are for purposes of the Free Exercise Clause treated as neutral, generally applicable laws, even if they apply distinct restrictions to religious gatherings. Tr. 56-62.

Indeed, that conclusion is compelled by the most recent Supreme Court decision in the *Jacobson* line, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). There, the Supreme Court



denied the plaintiffs' application for preliminary injunctive relief from a California executive order limiting attendance at places of worship to 25% of a building's capacity or 100 attendees, whichever was fewer. *Id.* at 1613 (Roberts, C.J., concurring). In his concurrence to the Court's denial of injunctive relief, Chief Justice Roberts explained that "the restrictions appear consistent with the Free Exercise Clause" because "[s]imilar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Id.* at 1613-14. Meanwhile, "the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id.*

Chief Justice Roberts also admonished that the restrictions "should not be subject to second-guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *Id.* at 1614 (quotation marks omitted).

“Since *South Bay*, nearly every court to consider the issue has...applied a rational basis analysis to free exercise challenges to COVID-related restrictions on religious gatherings.”<sup>22</sup> *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-cv-04844, 2020 WL 6120167, at \*7 & n.7 (E.D.N.Y. Oct. 16, 2020), citing, e.g., *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020); *Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020); *Calvary Chapel Lone Mountain v. Sisolak*, No. 20-cv-00907, 2020 WL 3108716, at \*4 (D. Nev. June 11, 2020). Each of these cases involved gathering restrictions specific to houses of worship, belying Plaintiffs’ argument (Mem. at 17) that all gathering restrictions that expressly apply to “houses of worship” are subject to strict scrutiny.

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<sup>22</sup> The Sixth Circuit cases on which Plaintiffs rely (Mem. at 13, 19, 21, 23) predated *South Bay*. See *Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020). Plaintiffs’ reliance (Mem. at 5, 21-23) on *Soos v. Cuomo*, No. 20-cv-651, 2020 WL 3488742 (N.D.N.Y. June 26, 2020), is also misplaced. *Soos*, which is currently on appeal to this Court, turned on allegations that houses of worship were treated *less* favorably than comparable *non-essential* businesses, and that facially neutral restrictions were being selectively enforced. *Id.* at \*11-\*12. Neither allegation is present here.

Indeed, E.O. 202.68 treats religious institutions *more* favorably than their secular comparators, “congregate functions” like concerts and performances—where attendees similarly arrive and leave at the same time to congregate and mingle for an extended period—which remain banned entirely. *See* Tr. 62-64. One of Plaintiffs’ temples is currently in a Red Zone, where “public gatherings are prohibited outright” and “restaurants and bars cannot seat patrons,” while houses of worship “need only reduce capacity.”<sup>23</sup> Tr. 60. While schools remain open in Yellow Zones (Mem. at 18), as the district court recognized, schools, unlike houses of worship, are subject to other more onerous requirements, such as being required to test “their students and personnel.” *See* Tr. 60. And mounting scientific evidence shows that, in contrast to houses of worship, COVID-19 outbreaks are not occurring in schools.<sup>24</sup>

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<sup>23</sup> Schools are also required, to the extent practicable, to limit group (or “cohort”) sizes and prevent intermingling between cohorts. *See* [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Pre-K\\_to\\_Grade\\_12\\_Schools\\_MasterGuidance.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Pre-K_to_Grade_12_Schools_MasterGuidance.pdf).

<sup>24</sup> *See* <https://www.nytimes.com/2020/10/22/health/coronavirus-schools-children.html>; <https://www.nytimes.com/2020/10/19/nyregion/schools-coronavirus.html>. In addition, the 50% capacity limit at houses of worship in Yellow Zones is *more* generous than the 33% capacity limit that otherwise applies to

Plaintiffs repeatedly note that *essential* businesses (and associated gatherings) are subject to less onerous restrictions. Mem. at 2, 8, 14, 17. It is hard to see how services vital to public health and safety could be halted. *Elim*, 962 F.3d at 347 (making this point). But Plaintiffs have not in any event satisfied their burden to show that the comparison is apt. Unlike religious gatherings, at essential businesses, like grocery stores, pharmacies, and hardware stores, “people neither congregate in large groups nor remain in close proximity for extended periods.” *Id.* (quoting *South Bay*).

3. Plaintiffs additionally argue that EO.202.68 is not neutral because it was motivated by religious animus. Mem. at 14-19. While recognizing that heightened scrutiny is warranted when reviewing laws whose aim is “the suppression of religion or religious conduct,” see *Lukumi*, 508 U.S. at 533, the district court soundly exercised its discretion to find that targeting Orthodox Jews was “not the object of

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houses of worship in the current phase (Phase 4) of reopening. <https://www.governor.ny.gov/news/governor-cuomo-announces-five-regions-track-enter-phase-iv-reopening-friday>.

[EO] 202.68,” and that the record was “absent of any evidence that the State’s measures...are a pretext” (Tr. 49, 57-58).

The court chose instead to credit DOH Commissioner Dr. Howard Zucker’s statement that “the data indicated that immediate action” was required in the affected areas “to contain the virus and to prevent [a] superspreader event,” and found that the EO was formulated based on “medical, epidemiological and other expertise.” Tr. 50, 52; Zucker Decl. ¶¶81-87, 92-96; *see also Roman Catholic Diocese*, 2020 WL 6120167, at \*10 (finding same).

Plaintiffs falsely assert that the State used “no objective metrics” to establish zone designations for particular areas. *See* Mem. at 3. The very support they cite for this assertion explains that to qualify as a Red Zone, an area must have had a 7-day rolling average positive test rate of 3% or higher for a sustained period. *Diocese Zucker Decl.* ¶12. Indeed, the State relied on data from the Electronic Clinical Laboratory Reporting System “to generate precise maps to allow for microtargeting of neighborhoods with high positivity rates and evidence of community spread.” *Roman Catholic Diocese*, 2020 WL 6120167, at \*10; *Diocese Zucker Decl.* ¶¶12, 16. And the State looked “solely at the data” to determine which areas

qualified for a given zone, regardless of “who or what are located in that zone.” *Diocese Zucker Decl.* ¶19. Then, on October 21, the State announced the specific empirical metrics for designating areas as Red, Orange, or Yellow Zones.<sup>25</sup> See *supra* at 13-14. These metrics cover counties statewide.<sup>26</sup> *Contra Mem.* at 6-7 (asserting restrictions apply only to five counties). While the State’s metrics afford the Governor and DOH some discretion, the State has “especially broad” latitude “to act in” this area “fraught with medical and scientific uncertainties.” See *South Bay*, 140 S.Ct. at 1613 (Roberts, C.J., concurring) (quotation marks omitted).

Nor is it true that the zones designated by EO 202.68 “encircle[] only members of the Orthodox Jewish community” (*Mem.* at 7). The parallel action by the Roman Catholic Diocese of Brooklyn proves as much, as do the cluster maps, which cover broad swaths of counties that include vast numbers of populations and businesses apart from the

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<sup>25</sup> <https://www.governor.ny.gov/news/governor-cuomo-details-covid-19-micro-cluster-metrics>.

<sup>26</sup> *Id.*

Orthodox Jewish community.<sup>27</sup> Indeed, a law firm and a car dealership have also initiated suits challenging EO 202.68. *See Plaza Motors of Brooklyn, Inc. v. Cuomo*, No. 20-cv-4851 (E.D.N.Y.); *Turturro Law, P.C. v. Cuomo*, No. 20-cv-4824 (E.D.N.Y.).

To the extent Governor Cuomo advised “religious institutions” and “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” (Mem. at 5, 14 (quotation marks omitted)), that was simply to explain that houses of worship would not be exempt from a generally applicable Executive Order. The Governor did not single out this community for negative treatment, but clarified that this community would not receive special treatment. His statement is entirely consistent with the Constitution and the First Amendment. *See Smith*, 494 U.S. at 879 (free exercise rights do not relieve an individual or entity of obligation to comply with a “valid and neutral law of general applicability” (quotation marks omitted)); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir.

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<sup>27</sup>

*See* [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Brooklyn\\_HiRes2.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Brooklyn_HiRes2.pdf).

2015) (“The right to practice religion freely does not include liberty to expose the community...to communicable disease” (quotation marks omitted).).

4. Because EO 202.68 is a neutral and generally applicable law, and was not motivated by religious animus, the district court correctly found it subject to deferential review. Tr. 46-47. And the rational basis for the order is manifest: the State’s continuing exercise of its police power to mitigate the ongoing public health crisis of Covid-19. *See* Tr. 48 (finding EO 202.68 has “a very real and substantial relation to protecting the public health”). Indeed, Plaintiffs in effect concede the point by not challenging the rational basis for the order.



**B. The District Court Correctly Found That a Preliminary Injunction Should Not Issue Because Plaintiffs Meet None of the Other Requirements for Preliminary Relief.**

The district court soundly exercised its discretion to find that a preliminary injunction would not serve the public interest and that Plaintiffs would not suffer irreparable harm in the absence of preliminary relief. *See* Tr. 65-66. Because this Court must find both factors in Plaintiffs' favor to award preliminary injunctive relief, the district court's findings provide two additional independent bases for denying injunctive relief. *See Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010).

Plaintiffs do not address the two reasons the district court gave in support of its finding that Plaintiffs will not suffer irreparable harm: that (a) Plaintiffs previously complied with comparable and more onerous restrictions, and (b) Plaintiffs could still observe their religion with modifications. *See* Tr. 66. That Plaintiffs waited 11 days after the district court denied an injunction before seeking relief in this Court weighs further against a finding of irreparable harm. Though Plaintiffs insist (at 4 n.10) they were waiting for the *Diocese* district court to rule, the *Diocese* plaintiff sought only as-applied relief, which would not have redressed any purported harm (irreparable or otherwise) to Plaintiffs.

And, as the district court found, “[t]he balance of equities and the public interest weigh strongly in favor of New York’s mission to protect its citizens from this global pandemic,” especially given that COVID-19 is fatal and can lead to significant bodily injuries. Tr. 65-66; *contra* Mem. at 22 (asserting “no harm” to public interest from granting injunctive relief). Plaintiffs’ interest in having indoor, in-person religious gatherings of potentially hundreds of people in the very areas where positive test rates have spiked does not outweigh the need to prevent infection spikes from rapidly increasing and spreading further. *See* Zucker Decl. ¶¶77-80; *see Harvest Rock*, 2020 WL 5835219, at \*2 (injunction pending appeal not in public interest when restrictions not “materially different from those presented” in *South Bay*); Order Granting Stay Pending Appeal, *DiMartile v. Cuomo*, No. 20-2683 (2d Cir. Sept. 8, 2020) (staying August 2020 preliminary injunction barring State from enforcing 50-person limit on the size of gatherings as applied to plaintiffs’ wedding). Furthermore, whether or not COVID-19 was initially spread by Plaintiffs’ congregations (*see* Mem. at 22-23) is immaterial to the significant risk that congregants could catch COVID-19 *now* in these neighborhoods—which presently have exceptionally high COVID-19 positive test rates—

and then spread it at the religious services they attend, even if asymptomatic.

## CONCLUSION

Plaintiffs' motion should be denied.

Dated: New York, New York  
October 27, 2020

Respectfully submitted,

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*State of New York*  
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## CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure, Joshua M. Parker, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this document, the document contains 5,155 words and complies with the typeface requirements and length limits of Rules 27(d) and 32(a)(5)-(6).

*/s/ Joshua M. Parker*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the accompanying memorandum of law by using the CM/ECF system on October 27, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 27, 2020  
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**Avi Schick**

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November 13, 2020

**VIA ECF**

The Honorable Kiyo A. Matsumoto  
United States District Court for the Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

**Re: *Agudath Israel of America, et al. v. Andrew M. Cuomo*, No. 1:20-cv-4834 (E.D.N.Y.)**

Dear Judge Matsumoto:

We represent Plaintiffs in the above-referenced case. On October 8, 2020, Plaintiffs filed a complaint asking this Court to enjoin Defendant from enforcing New York Executive Order No. 202.68 (the "Order") and to declare the Order unconstitutional because it violates Plaintiffs' Free Exercise rights. Dkt. 1. That same day, Plaintiffs filed a motion for temporary restraining order and preliminary injunction, Dkt. 2, which the Court denied on October 9, Tr. 66. On October 19, Plaintiffs filed a notice of appeal from that denial. Dkt. 16.

Pursuant to Federal Rule of Civil Procedure 62(d) and Federal Rule of Appellate Procedure 8(a)(1)(C), Plaintiffs hereby move this Court for an injunction pending appeal of its order denying preliminary injunctive relief. In support of their request, Plaintiffs rely on the arguments stated in their motion for temporary restraining order and preliminary injunction and accompanying documents, Dkt 2, as well as at the October 9 hearing. Plaintiffs acknowledge the prior rulings by this Court and the Second Circuit Court of Appeals, which denied their request for an injunction pending appeal. In light of those rulings, Plaintiffs respectfully request this Court's ruling on this request for an injunction pending appeal by the close of business today.

Plaintiffs respectfully ask this Court to accept this submission as Plaintiffs' letter motion for an injunction pending appeal, and to enter an expedited ruling based on the parties' prior submissions and the prior rulings in this matter. Pursuant to Local Rule 37.3, we have met and conferred with counsel for Defendant, who opposes the request for an injunction pending appeal.

Hon. Kiyo A. Matsumoto  
November 13, 2020  
Page 2



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Respectfully,

s/ Avi Schick  
Avi Schick

Cc: Counsel for Defendant (via ECF)

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**CAPITOL HILL BAPTIST  
CHURCH,**  
525 A Street NE  
Washington, DC 20002

**Plaintiff,**

v.

**MURIEL BOWSER, in her official  
capacity as Mayor of the District  
of Columbia,**  
John A. Wilson Building  
1350 Pennsylvania Avenue, NW  
Washington, DC 20004

**DISTRICT OF  
COLUMBIA,**  
c/o Karl A. Racine, Attorney General  
400 6th Street, NW  
Washington, DC 20001

**Defendants.**

Civil Action No. 1:20-cv-2710  
**THE HONORABLE TREVOR  
MCFADDEN**

**BRIEF *AMICUS CURIAE* OF THE  
BECKET FUND FOR RELIGIOUS  
LIBERTY IN SUPPORT OF  
PLAINTIFF**



**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

INTEREST OF THE *AMICUS*..... 2

ARGUMENT ..... 3

    I. Unless the District can meet strict scrutiny, the Court should  
    grant an injunction under RFRA. .... 3

    A. RFRA’s clear standards allow the Court to reach a  
    workable solution in this case. .... 3

        1. Substantial burden..... 3

        2. Compelling interest. .... 5

        3. Least restrictive means. .... 6

    B. Under RFRA, the District must provide evidence for why it  
    cannot follow the less-restrictive approaches adopted by  
    other jurisdictions..... 7

CONCLUSION..... 9

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Brown v. Ent. Merchs. Ass’n</i> , 564 U.S. 786 (2011) .....	5, 6
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014) .....	2, 4, 6, 9
<i>Espinoza v. Mont. Dep’t of Revenue</i> , 140 S. Ct. 2246 (2020) .....	6
<i>Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006) .....	3, 5, 6
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015) .....	<i>passim</i>
<i>Little Sisters of the Poor Saints Peter &amp; Paul Home v. Pennsylvania</i> , 140 S. Ct. 2367 (2020) .....	2, 3
<i>McCullen v. Coakley</i> , 573 U.S. 464 (2014) .....	7
<i>Soos v. Cuomo</i> , No. 1:20-cv-651, 2020 WL 3488742 (N.D.N.Y. June 26, 2020) .....	9
<i>Zubik v. Burwell</i> , 136 S. Ct. 1557 (2016) .....	2
<b>Statutes</b>	
42 U.S.C. § 2000bb-1 <i>et seq.</i> .....	<i>passim</i>
<b>Other Authorities</b>	
Capitol Hill Baptist Church, Service Times .....	4
City of Boston, Places of Worship Overview (Updated Sept. 22, 2020) .....	9
Federal Communications Commission, Low Power Radio – General Information .....	4
Montgomery County Executive Order 117-20 .....	8
Prince George’s County CR-90-2020, Attachment A .....	8
Seamus Hasson, <i>The Right to Be Wrong</i> (2d ed. 2012) .....	1

## INTRODUCTION

This brief has one simple point: on the current record, RFRA requires an injunction because the overwhelming majority of other U.S. jurisdictions—forty-two states, including Virginia—allow religious worship gatherings to occur outdoors without any statewide capacity restrictions at all. The District’s strict limits have turned Church members into modern-day Roger Williamses, banished to another state to practice their faith.<sup>1</sup> Because other jurisdictions have addressed the same interests in a less restrictive way, the District “must, at a minimum, offer persuasive reasons” why it cannot do the same. *Holt v. Hobbs*, 574 U.S. 352, 369 (2015). The District cannot prevail unless it meets this burden, and so far it has not.

The clash between COVID-19 restrictions and religious liberty has produced contentious litigation across the country. That litigation has often proceeded under the First Amendment, and has forced courts to try to identify the best comparator for worship services so as to determine whether restrictions are neutral and generally applicable. Is going to church more like indoor dining? Gambling at a casino? Grocery shopping? Attending a political protest? Courts, including the Supreme Court, have been divided over these questions as they try to determine whether to subject COVID-19 restrictions to strict scrutiny under the First Amendment.

Thankfully, this Court need not wade into that thicket to resolve this motion. That is because Congress has made the Religious Freedom Restoration Act (RFRA) applicable to the District of Columbia, and RFRA requires strict scrutiny here *regardless* of the comparator questions that have divided other courts. RFRA therefore allows this Court to put knottier First Amendment questions to the side and simply determine whether the District of Columbia has carried its burden of proving that a hard-and-fast numerical cap of 100 people on even outdoor, socially-distant, mask-wearing

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<sup>1</sup> Seamus Hasson, *The Right to Be Wrong* 34-35 (2d ed. 2012) (describing the exile of Roger Williams, regarded as one of the earliest Baptists in the Americas, from Massachusetts Bay Colony to what would become Rhode Island).

worship, *see* D.C. Mayor’s Order 2020-075, is the least restrictive means of serving a compelling interest.

To meet its burden, the District would need to provide evidence to show why its 100-person limit on outdoor religious gatherings is justified even though it is a national outlier. Forty-two states have no statewide capacity restrictions on the kind of outdoor, masked, and distanced religious gatherings at issue here. Indeed, thirty-one states do not limit the size of masked, distanced religious worship *even when it is held indoors*. Even California, where notoriously strict worship restrictions have been imposed, has no statewide size restriction on outdoor religious gatherings. And none of the Maryland or Virginia jurisdictions surrounding the District—from which thousands of residents commute every day—limit outdoor gatherings as severely. Under RFRA, the District must demonstrate why these less restrictive alternatives are not enough. *See Holt*, 574 U.S. at 369.<sup>2</sup> Until it does so—and it hasn’t yet—it cannot prevail.

### **INTEREST OF THE AMICUS**

*Amicus* the Becket Fund for Religious Liberty is a non-profit law firm dedicated to protecting the free exercise of all religious traditions. To that end, it has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. Most relevant here, Becket has litigated RFRA and RLUIPA cases in the Supreme Court, including one merits RFRA case last term. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Holt v. Hobbs*, 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Becket offers its RFRA expertise to help guide the Court’s

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<sup>2</sup> *Holt* was decided under RFRA’s companion statute RLUIPA, but for most purposes, the analysis is the same.

analysis.<sup>3</sup>

## ARGUMENT

### I. Unless the District can meet strict scrutiny, the Court should grant an injunction under RFRA.

RFRA helpfully allows this motion to be resolved by answering a single question: whether the government can produce evidence to carry its heavy burden of satisfying strict scrutiny. This is by design—Congress wrote RFRA to “provide very broad protection for religious liberty,” a right which Congress described as “unalienable.” *Little Sisters of the Poor*, 140 S. Ct. at 2383. RFRA mandates that a “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless “it demonstrates that application of the burden . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(a)-(b). “[T]he term ‘demonstrates’ means meets the burdens of going forward with the evidence and of persuasion.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (quoting 42 U.S.C. § 2000bb-2(3)). The District of Columbia, as a federal enclave, must comply with RFRA. 42 U.S.C. § 2000bb-2(2).

#### A. RFRA’s clear standards allow the Court to reach a workable solution in this case.

##### 1. Substantial burden.

The District asserts that its 100-person limit on religious worship, D.C. Mayor’s Order 2020-075, does not impose a substantial burden on the Church. It admits that the Church sincerely believes that its congregation should gather as one and that this is a religious exercise. D.C. Opp. at 34. But it points out that other faith communities

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<sup>3</sup> *Amicus* has sought leave to file this brief under LCvR 7(o)(1) in a motion filed with this brief. No party’s counsel has authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amicus*—contributed money that was intended to fund preparing or submitting the brief. See LCvR 7(o)(5).

in the District have adopted other ways of worshiping during the pandemic. D.C. Opp. at 23. And it then suggests that the Church is not burdened because it may still “hold multiple services, host a drive-in service, or broadcast the service online or over the radio.”<sup>4</sup> D.C. Opp. at 34.

This will not do. Under RFRA, the “substantial burden” inquiry “asks whether the government has substantially burdened religious exercise . . . not whether [the Church] is able to engage in other forms of religious exercise.” *Holt*, 574 U.S. at 361-62. “[I]t is not for [the government] to say that [the Church’s] religious beliefs” about a particular religious exercise “are mistaken or insubstantial.” *Hobby Lobby*, 573 U.S. at 725. Instead, this Court’s “narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction,’ and there is no dispute that it does.” *Id.* (internal citations omitted). The Church has a sincere conviction that its members should, whenever possible, gather in person on Sundays to worship. The District’s 100-person limit on religious worship prevents the Church from engaging in this religious practice and has done so for months. That is a substantial burden under RFRA.

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<sup>4</sup> The District’s assertion that holding multiple services is an acceptable alternative is based on an apparent misunderstanding: prior to the pandemic, the Church held three to four different religious gatherings a week for the *same* 1,200 congregants. See Capitol Hill Baptist Church, Service Times, <https://perma.cc/MDE4-M98S> (listing Sunday School, Sunday Morning Service, Sunday Evening Prayer & Praise, and Wednesday Evening Bible Study).

The District’s view that the Church is not burdened because it already broadcasts its services over the radio appears to rest on a similar misunderstanding: it cites to a Church bulletin discussing a short-range radio broadcast available to Church members who planned to attend a parking lot church service in Virginia but who wished to stay in their cars. Such low-power, non-licensed transmissions are limited by law to an effective service range of 200 feet. Federal Communications Commission, Low Power Radio – General Information, <https://perma.cc/4U3Y-ZE3M>. A short-range broadcast to church members parked in nearby cars does not show that the Church’s religious objection to broadcasting its services to remote listeners is insincere.

## 2. Compelling interest.

Once the Church has established a substantial burden, the District must demonstrate, with evidence, that applying its challenged rule to the Church is necessary to further a compelling interest. “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *O Centro*, 546 U.S. at 430-31 (emphasis added). Put differently, even when the government has identified a problem in need of solving, “the curtailment of [First Amendment rights] must be actually necessary to the solution.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011). “That is a demanding standard.” *Id.* And “because [the government] bears the risk of uncertainty, ambiguous proof will not suffice.” *Id.* at 799-800 (internal citations omitted).

Under this standard, the District cannot simply rest on its undoubtedly sincere and generally praiseworthy efforts to stop the deadly spread of COVID-19. Instead it must show that it has a compelling interest in banning the *specific religious practice* here: gathering for religious worship outdoors while maintaining social distance and wearing masks. What it may not do is assert generalized interests in protecting public health to categorically deny all worship-related waiver requests. Compl. at ¶65; see *O Centro*, 546 U.S. at 436 (“The Government’s argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I’ll have to make one for everybody, so no exceptions.”).

Instead of engaging in the individualized analysis that RFRA requires, the District argues that ruling for the Church “would prevent the District from restricting the size of religious gatherings in any way” (D.C. Opp. at 1), that presumably unmasked, indoor “choir practices and religious services” have been associated with COVID-19 outbreaks, and that “every in-person meeting carries some risk of spreading COVID-19.” *Id.* at 21, 24. It does this while citing analysis conceding that this

summer’s mass protests—which were in-person meetings, not limited to 100 participants—did not “ignite . . . outbreaks” of COVID-19. *Id.* at 21 (emphasis added).

This is a classic straw man argument. The District’s failure to engage with the Church’s actual request, while simultaneously defending its decision to allow protestors to engage in substantially similar activities, is fatal to its claims. “A law does not advance an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020) (internal quotation marks omitted). That is because “[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *Brown*, 564 U.S. at 802. The underinclusiveness is particularly stark in this case, since the District has allowed religious people to engage in political protests in groups over 100, but will not allow the *same people* to engage in group outdoor religious worship. D.C. Opp. at 21. The District could introduce evidence (such as infection rates over time and evidence that masked and distant outdoor worship is particularly dangerous) to explain the different treatment, but it has chosen not to do so. As a result, on this record, the District has not shown that it has a compelling interest in applying its 100-person religious worship rule to the Church’s request to hold socially-distanced outdoor services with masks.

### **3. Least restrictive means.**

Even if the District could show that it has a compelling interest in applying its 100-person limit to the outdoor, distanced, masked religious services at issue here, it would still have to demonstrate that there is no less-restrictive alternative to its current policy. “The least-restrictive-means standard is exceptionally demanding,” *Hobby Lobby*, 573 U.S. at 728, and to meet it, the District must provide evidence, not just argument. *O Centro*, 546 U.S. at 428. It has not done so here. *See, e.g.*, D.C. Opp. at 27 (baldly asserting that “[n]arrower ways to promote public safety would be less



effective in preventing the spread of the virus” and that there is “not evidence” that communal spread will not occur if the Church is allowed to meet).

When “many” other jurisdictions offer a particular religious accommodation, the Government “must, at a minimum, offer persuasive reasons why it believes it must take a different course.” *Holt*, 574 U.S. at 369. “If a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *Id.* at 365 (cleaned up).

In *Holt*, the Supreme Court held that Arkansas’ state prison system could not maintain its no-beard policy, in part because it failed to explain why “the vast majority of States and the Federal Government permit inmates to grow 1/2 -inch beards” but it did not. *Id.* at 368. “That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks.” *Id.* at 368-69.

So too here. As explained below, the vast majority of states—including Virginia, where thousands of residents commute into the District every day—permit outdoor religious worship with higher limits or none at all. *Infra* at I.B. The District has not made any effort to show, with evidence, why these alternatives are unworkable. The District’s failure to address other jurisdictions fails even intermediate scrutiny (*McCullen v. Coakley*, 573 U.S. 464, 490 (2014)), much less the strict scrutiny that applies here. *Holt*, 574 U.S. at 369.

**B. Under RFRA, the District must provide evidence for why it cannot follow the less-restrictive approaches adopted by other jurisdictions.**

The District has not explained why it must “take a different course” from the dozens of states and cities that have accommodated religious worship more generously. *Holt*, 574, U.S. at 369. So, for example, the District has not addressed why it cannot follow the practice of the 42 states that allow religious worship gatherings to occur

outdoors without any statewide capacity restrictions at all.<sup>6</sup> The majority approach, followed by 31 states, is to not set any numerical caps on religious worship gatherings, regardless of whether they are held indoors or outdoors.<sup>7</sup> An additional 11 states have capacity restrictions on indoor religious worship, but not outdoor worship.<sup>8</sup> Under RFRA, the District must justify its more restrictive approach, or its arguments will fail.

The District has likewise failed to address the examples of Virginia and Maryland, where thousands of residents commute into the District every day. Virginia does not cap religious services at all, regardless of location. Ex. A at 8. Maryland has a statewide cap on *indoor* religious worship (which is limited to 75% of occupancy), but it has not established a similar cap on outdoor religious worship gatherings, which its statewide order does not address. Ex. A at 4. Even the Maryland counties surrounding the District, where gathering restrictions are greater than at the state level, allow considerably larger gatherings than the District.<sup>9</sup>

This should not come as a surprise. Nationwide, outdoor gatherings routinely receive more favorable treatment than indoor gatherings. California, for example, does not impose any size restriction on outdoor religious gatherings—even as it subjects

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<sup>6</sup> See Ex. A.

<sup>7</sup> *Id.* (Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming).

<sup>8</sup> Ex. A (California, Delaware, Kentucky, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, Vermont).

<sup>9</sup> Many states, including Maryland, allow local governments to establish stricter limits than those that apply statewide. Prince George's County CR-90-2020, Attachment A, § VI(O)(3), <https://perma.cc/BWY3-BTQA> (outdoor religious worship gatherings limited to 250 people); Montgomery County Executive Order 117-20 § 5(k)(iv), <https://perma.cc/ALZ3-G4AA> (absent a letter of approval from local government, outdoor religious gatherings limited to 150 people).

indoor religious gatherings to percentage caps that vary by a county's disease severity. Ex. A at 1. Boston, a city with a similar population and greater density than the District, also does not limit the size of outdoor religious worship gatherings.<sup>10</sup> The District, by contrast, has flatly refused to consider treating the Church's proposed outdoor services any differently than services held indoors.

Only a handful of states apply attendance caps to outdoor religious worship at all. Of these, all but one has a size limit that presently exceeds 100 people.<sup>11</sup> Some of these states, like Nevada, allow larger outdoor gatherings if a "local health authority" approves a plan in advance<sup>12</sup>—something the District has categorically refused to do. Compl. at ¶¶ 63-65.

With so many other jurisdictions—including those that border the District—embracing less-restrictive alternatives, the District must provide evidence to show why it must take a different course. *See Hobby Lobby*, 573 U.S. at 730-31 (holding that existence of "an approach" other than the one used by the government showed least restrictive means were available, even if that approach does not "compl[y] with RFRA for purposes of all religious claims"). Unless it does so, it cannot prevail.

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<sup>10</sup> City of Boston, Places of Worship Overview (Updated Sept. 22, 2020), <https://perma.cc/V9CL-XAS7>.

<sup>11</sup> Ex. A (Colorado: 175 or potentially more; Connecticut: 150, up to 50% capacity as of October 8; Minnesota: 250; Nevada: 250 or potentially more; New York: 50 persons in Phase 4; Oregon: 250; Rhode Island: 250; Washington: 200-400 depending upon county phase, but no limit on drive-in services). While New York's statewide capacity restrictions are worse than the District's, its prior indoor capacity restrictions were enjoined as unconstitutional. *See Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 3488742 (N.D.N.Y. June 26, 2020). And of course the District cannot survive strict scrutiny simply because it is less restrictive than one state in the country. *See Holt*, 574 U.S. at 368-69.

<sup>12</sup> *See, e.g.*, Ex. A at 5 (Nevada Guidance for Safe Gatherings, <https://perma.cc/W8Q4-TLW8>).

## CONCLUSION

Some COVID-19 church-closure cases have been difficult. But the combination of RFRA's clear rules and the many nearby states pursuing identical interests with far fewer restrictions on religious worship provide an easy path for deciding this case. Either the District provides actual evidence to satisfy strict scrutiny, or the injunction must be granted and the 100-person limit on outdoor, masked, distanced worship cannot be enforced.

Dated: October 6, 2020

Respectfully submitted,

/s/ Mark L. Rienzi

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the forgoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: October 6, 2020

*/s/ Mark L. Rienzi*

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief conforms to the requirements of LCvR 5.4 and does not exceed 25 pages, as required by LCvR 7(o)(4).

Dated: October 6, 2020

*/s/ Mark L. Rienzi*

# **EXHIBIT A**

**Links to Applicable State Orders and Guidance Documents on  
Nationwide Gathering Capacity Restrictions**

Alabama (no gathering capacity restriction on religious exercise as of October 5, 2020):

<https://perma.cc/WS2G-LMM8>;

<https://perma.cc/85PC-92M5>.

Alaska (no gathering capacity restriction on religious exercise as of October 5, 2020):

<https://perma.cc/5RLE-JJJZ>

Arizona (no gathering capacity restriction on religious exercise as of October 5, 2020):

<https://perma.cc/NTP8-G9Q7>.

Arkansas (no gathering capacity restriction on religious exercise as of October 5, 2020):

<https://perma.cc/65YU-RKQG>.

California (outdoor religious gatherings “should be limited naturally through implementation of strict physical distancing measures”):

<https://perma.cc/LT3P-RTL9>.

Indoor gathering restrictions based on county tier status:

<https://perma.cc/D7XG-UH6D>.

Colorado (a minimum of 175 people allowed at outdoor religious gatherings):

State instructs houses of worship to work with local authorities on capacity (Colo. Amended Public Health Order 20-35 § II(B)(2)(j)):

<https://perma.cc/EV8Y-9UKZ>.



While the “outdoor event” guidance is not meant for outdoor worship, there is a square-footage restriction with a cap of 175 people: <https://perma.cc/3EQS-X4SP>.

Connecticut (150 people allowed for outdoor religious gatherings, will move to 50% space capacity for outdoor gatherings on October 8, 2020):

<https://perma.cc/F4YR-ZAC5>.

Delaware (no outdoor gathering capacity restriction on religious exercise as of October 5, 2020):

60% capacity limit for indoor religious gatherings:

<https://perma.cc/SK4D-Y2BG>.

Florida (designating “Attending religious services” as an essential activity exempt from restrictions on public gatherings):

<https://perma.cc/4RLA-YQSN>.

Georgia (no gathering capacity restriction on religious exercise as of October 5, 2020):

Current Executive Order contains no worship-specific gathering restrictions: <https://perma.cc/9Y3E-LFWQ>.

Governor’s handout with Executive Order confirms that “in-person services at places of worship is allowed, but services must be held in accordance with strict social distancing protocols.”

<https://perma.cc/DT6N-XA97>.

Hawaii (no gathering capacity restriction on religious exercise as of October 5, 2020):

Current Executive Order: <https://perma.cc/HPC5-7L9S>.

Idaho (no gathering capacity restriction on religious exercise as of October 5, 2020):

Idaho guidance on houses of worship: <https://perma.cc/5F9H-XC8Y>.

Illinois (no outdoor gathering capacity restriction on religious exercise as of October 5, 2020):

Operative Executive Order (indoor worship should be limited to 10 people): <https://perma.cc/9GC3-UXS4>.

Indiana (no gathering capacity restrictions on religious exercise as of October 5, 2020):

“Indoor and outdoor venues of all types may open at full capacity.” <https://perma.cc/5RRV-JG85>.

Revised guidance for houses of worship: <https://perma.cc/8XLB-KGDG>.

Iowa (no gathering capacity restrictions on religious exercise as of October 5, 2020):

Effective guidance for spiritual and religious gatherings: <https://perma.cc/B52X-ER8Y>.

Kansas (no gathering capacity restrictions on religious exercise as of October 5, 2020):

“Perform or attend religious or faith-based services or activities” protected from outset: <https://perma.cc/NPJ8-C8QM>.

Kentucky (no outdoor gathering capacity restrictions on religious exercise as of October 5, 2020):

Indoor religious gatherings restricted to 50% of “building occupancy capacity.” <https://perma.cc/AUK3-RNNB>.

Louisiana (no outdoor gathering capacity restrictions on religious exercise as of October 5, 2020; indoor religious gatherings have capacity restrictions):

“Essential activity” is “[g]oing to and from one’s place of worship:” <https://perma.cc/567D-79CA>.

Interpretive memo on outdoor religious worship: <https://perma.cc/7JNW-RTYB>.

Indoor place of worship guidance: <https://perma.cc/JQ8E-DLAT>.

Maine (no outdoor gathering capacity restrictions on religious exercise as of October 5, 2020):

Indoor worship restricted to 50 persons or less, while “[o]utdoor services are encouraged” and “require adherence to physical distancing guidelines”: <https://perma.cc/8BYF-H3TH>.

Maryland (indoor religious gatherings limited to 75% of capacity; no capacity restriction on outdoor religious gatherings):

Executive Order: <https://perma.cc/Z7JD-YPQY>.

Massachusetts (no outdoor gathering capacity restrictions on religious exercise as of October 5, 2020; capacity restrictions in place on indoor religious gatherings):

Gatherings for religious worship exempted from outdoor capacity gathering requirements: <https://perma.cc/5W3R-BW82>.

Outdoor services “encouraged:” <https://perma.cc/4U9X-U2W5>.

Michigan (no gathering capacity restrictions on religious exercise as of October 5, 2020):

Michigan Supreme Court ruling invalidating executive orders on COVID-19, from October 2, 2020: <https://perma.cc/N88E-TZC8>.

Minnesota (250-person capacity for indoor and outdoor religious gatherings):

<https://perma.cc/3QAA-2ZKB>.

Mississippi (no gathering capacity restrictions on religious exercise as of October 5, 2020; indoor religious gatherings also exempted from capacity restrictions):

Executive Order exempting religious gatherings from outdoor gathering requirement: <https://perma.cc/9FVJ-C9LW>.

Missouri (no gathering capacity restrictions on religious exercise as of October 5, 2020):

In-person worship services may be attended, while “streaming services and other opportunities” encouraged:

<https://perma.cc/2U8U-J5U6>.

Montana (no gathering capacity restrictions on religious exercise as of October 5, 2020):

<https://perma.cc/XJ3B-LLDT>.

Nebraska (no gathering capacity restrictions on religious exercise as of October 5, 2020):

<https://perma.cc/AU7B-BCLC>.

Nevada (religious gatherings are limited to 250 people or 50 percent of fire code capacity, indoor or outdoor, with potential to exceed 250 people at venues with greater than 2,500 total fixed seating capacity):

<https://perma.cc/RN29-VHKU>

At venues with greater than 2,500 total fixed seating capacity and upon approval of a local health authority, the 250-person cap can be exceeded: <https://perma.cc/59QH-C34L>.

New Hampshire (outdoor religious gatherings limited only by “the highest number of attendees for which the social distancing requirements contained in this guidance can be met using the space available for the service.” Indoor religious gatherings subject to capacity restrictions):

<https://perma.cc/77UK-WGQZ>.

New Jersey (“[o]utdoor religious services are exempt from the limit on outdoor gatherings and can exceed the normal outdoor capacity of 500 people.” Indoor religious gatherings subject to capacity restrictions):

<https://perma.cc/WE5B-YCUR>.

New Mexico (no outdoor capacity gathering restriction on religious exercise; 40% capacity restraint on religious services within “an enclosed building,” while confirming that “‘Houses of worship’ may hold services and other functions, indoors or outdoors, or provide services through audio visual means”):

<https://perma.cc/XA6D-X4K9>.

New York (50 people upon entry into Phase 4):

<https://perma.cc/DSN5-6NTN>.

<https://perma.cc/LW4F-52FM>.

The 25% occupancy restriction on indoor religious gatherings was enjoined as unconstitutional in *Soos v. Cuomo*, 2020 WL 3488742 (N.D.N.Y. Jun. 26, 2020).

North Carolina (exempting “Worship, religious, and spiritual gatherings” from restrictions on public gatherings):

<https://perma.cc/6MJY-WJG3>.

North Dakota (no gathering restriction on religious exercise as of October 5, 2020):

<https://perma.cc/2FFQ-KDGP>.

Ohio (no gathering restriction on religious exercise as of October 5, 2020):

<https://perma.cc/4Q97-GMFN>.

Oklahoma (no gathering restriction on religious exercise as of October 5, 2020):

<https://perma.cc/SC5M-R4W2>.

Oregon (100 people for indoor religious gatherings, 250 people outdoor):

<https://perma.cc/ZFP5-H52W>.

Pennsylvania (exempting “religious gatherings” from restrictions on public gatherings):

<https://perma.cc/GCR6-UPUG>.

Rhode Island (services limited to lesser of 66% capacity or 125 persons indoors / 250 persons outdoors):

<https://perma.cc/L3QZ-9MVS>.

South Carolina (designating religious services as essential activities and exempting them from restrictions on public gatherings):

<https://perma.cc/35WK-6FX5>.

<https://perma.cc/3H9P-4KD8>.

South Dakota (no gathering capacity restrictions on religious exercise as of October 5, 2020):

<https://perma.cc/SS3J-3M8J>.

Tennessee (designating religious gatherings as an essential service exempt from restrictions on public gatherings):

<https://perma.cc/P78U-7S4G>.

The governor's guidance for houses of worship specifies that it provides only "suggestions" that "are not, and should not be construed as, mandates or requirements."

<https://perma.cc/JZW8-UV2V>.

Texas (exempting "religious services" from restrictions on public gatherings):

<https://perma.cc/X5S7-UDCE>.

Utah ("[F]aith groups are able to hold in-person religious services of any size as long as a distance of at least six feet is maintained between household groups."):

<https://perma.cc/K3CG-FPAJ>.

Vermont (outdoor worship limited only by social-distancing rules; no numerical cap; indoor religious gatherings subject to capacity restrictions):

<https://perma.cc/4GRG-5DNC>.

Virginia (no gathering capacity restriction on religious exercise as of October 5, 2020):

<https://perma.cc/KM2U-RX56>.

Washington (no restriction on outdoor limit on drive-in services, other outdoor services capped between 200 and 400, depending on which phase the county is in)

<https://perma.cc/B9LX-GFC5>.

<https://perma.cc/U4UM-J3X6>.

West Virginia (designating “religious gatherings” as an essential activity exempt from restrictions on public gatherings):

<https://perma.cc/G65A-K78V>.

Wisconsin (no gathering restriction on religious exercise as of October 5, 2020):

Wisconsin Supreme Court decision invalidating stay-at-home order from May 13, 2020:

<https://perma.cc/ESL3-VD8P>.

Wyoming (exempting “Religious or faith based organizations” from restrictions on public gatherings):

<https://perma.cc/MNF2-T4QE>.