

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

AGUDATH ISRAEL OF AMERICA,
et al.,

Plaintiffs,

-against-

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

Defendant.

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

----- X

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

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

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

BY: AVI SCHICK, ESQ.

For the Defendant: NEW YORK STATE
ATTORNEY GENERAL'S OFFICE
120 Broadway
24th Floor
New York, New York 10271

BY: TODD SPIEGELMAN, ESQ.

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

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

1 (All parties present via teleconference.)

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

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

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

11 THE COURT: All right. Thank you.

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

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

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

18 THE COURT: All right. Thank you.

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

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

6 As we know --

7 (Court reporter requested clarification.)

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

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

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

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

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

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

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

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

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

2 THE COURT: All right. Please proceed.

3 MR. SCHICK: Thank you, Your Honor.

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

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

1 the new rules.

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

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

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

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

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

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

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

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

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

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

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

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

5 THE COURT: Of course.

6 MR. SCHICK: Thank you.

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

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

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

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

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

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

15 MR. SCHICK: Exhibit B in --

16 THE COURT: Yes.

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

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

22 (Court reporter requested clarification.)

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

1 o'clock --

2 MR. SCHICK: Well, Your Honor --

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

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

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

15 MR. SCHICK: Understood, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MR. SCHICK: Sure. I just --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 One of --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. SCHICK: Absolutely.

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

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

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

15 MR. SCHICK: Right.

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

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

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

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

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

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

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

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

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

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

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

14 Mr. Spiegelman?

15

16 (Continued on the following page.)

17

18

19

20

21

22

23

24

25

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

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

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

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

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

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

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

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

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

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

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

20 MR. SPIEGELMAN: Whichever is fewer.

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

1 MR. SPIEGELMAN: Correct.

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

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

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

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

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

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

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

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

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

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

7 MR. SPIEGELMAN: I believe so.

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

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

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

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

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

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

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

12 MR. SPIEGELMAN: I don't know.

13 THE COURT: All right.

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

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

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

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

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

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

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

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

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

24 THE COURT: Yes, of course.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 three-day holiday.

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

5 THE COURT: Did you say 50 or 60?

6 MR. SPIEGELMAN: Fifty, five-oh.

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

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

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

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

1 expertise.

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

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

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

11 MR. SCHICK: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 as set forth in the Department of Health regulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 favor of the state.

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

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

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

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

24 (Continued on next page.)

25

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 capacity or a maximum of 100 people.

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

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

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

1 blossom into a full blown pandemic again.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 name?

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

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

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

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

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

3 MR. SCHICK: Understood, Your Honor.

4 THE COURT: You have a magistrate judge assigned.

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

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

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

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

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Have a nice day everybody.

MR. SCHICK: Thank you.

THE COURT: All right, take care.

(Matter concluded.)

* * * * *