

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF NEW YORK**

REV. STEVEN SOOS,)	
)	
REV. NICHOLAS STAMOS,)	
)	
DANIEL SCHONBRUN,)	
)	
ELCHANAN PERR and)	
)	
MAYER MAYERFELD)	
)	
Plaintiffs,)	Case No. 1:20-CV-0651 (GLS/DJS)
v.)	
)	
ANDREW M. CUOMO, Governor of the)	
State of New York, in his official capacity,)	
)	
LETITIA JAMES, Attorney General of the)	
State of New York in her official capacity,)	
and)	
)	
BILL DE BLASIO, Mayor of the City)	
of New York, in his official capacity,)	
)	
Defendants.)	

VERIFIED COMPLAINT
FOR CIVIL RIGHTS VIOLATIONS, INJUNCTIVE RELIEF
AND A DECLARATORY JUDGMENT

Plaintiffs, by and through their counsel, complain as follows:

NATURE OF ACTION

1. This civil rights action challenges a series of executive orders issued by defendant Governor Andrew M. Cuomo (Cuomo) and enforced by him, by defendant Attorney General Letitia James (James) and by defendant Mayor Bill de Blasio.

2. This action seeks declaratory and injunctive relief for deprivations sustained by plaintiffs, and for violations committed by said defendants, acting under color of state law,

against plaintiffs' rights as guaranteed by the First, Fifth and Fourteenth Amendments of the United States Constitution, and for violations of New York State Executive Law § 29-a, and New York Constitution Articles III, §1; IV, §§ 1 and 3; and VI.

PARTIES

3. Plaintiff Rev. Steven Soos is a Catholic priest who engages in priestly ministry in a main church and other chapels located in this District in the North Country region of the state.

4. Plaintiff Rev. Nicholas Stamos is a Catholic priest who assists Rev. Soos in said priestly ministry.

5. Plaintiff Mayer Mayerfeld is a sincere practitioner of the Orthodox Jewish faith who resides in Brooklyn, New York.

6. Plaintiff Elchanan Perr is a sincere practitioner of the Orthodox Jewish faith who resides in Brooklyn, New York.

7. Plaintiff Daniel Schonborn is a sincere practitioner of the Orthodox Jewish faith who resides in Brooklyn, New York.

8. Defendant Cuomo is and was the Governor of the State of New York and is and was acting under color of State law, and in his official capacity, at all times relevant to the allegations made by plaintiffs herein. Defendant Cuomo's principal place of business is located at the State Capitol Building, Albany, New York. He is sued in his official capacity.

9. Defendant James is and was the Attorney General for the State of New York, and is and was acting under color of State law, and in her official capacity, at all times relevant to the allegations made by plaintiffs herein. Defendant James' principal place of business is located at the State Capitol Building, Albany, New York. She is sued in her official capacity.

10. Defendant Mayor Bill de Blasio is Mayor of the City of New York and is the final decision-maker in New York City concerning enforcement of the challenged executive orders, including the gathering limits. He is sued in his official capacity.

JURISDICTION AND VENUE

11. This action raises federal questions under the First and Fourteenth Amendments of the United States Constitution and under federal law, 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgments), as well as 42 U.S.C. §§ 1983, 1988, and 1920.

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

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

14. Venue is proper in the Northern District pursuant to 28 U.S.C. § 1391, as at least one defendant resides in this District and a substantial part of the events giving rise to the claims herein arose in this District, where two of the plaintiffs reside.

INTRODUCTION

"It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria.... One hopes that this great principle—essential to any free society, including ours—will not itself become yet another casualty of COVID-19."

David F. Viviano, Chief Justice, Supreme Court of Michigan in *Department of Health v. Manke*, 2020 WL 3033312, --- N.W. 2d--- (concurring opinion).

15. In an unprecedented abuse of power, defendants have exploited the COVID-19 pandemic to create, over the past three months, a veritable dictatorship by means of a complex web of defendant Cuomo's executive orders, by which defendants have imposed and selectively

enforced “social distancing” under a “lockdown” of virtually every aspect of the social, political, religious and economic life of New York’s 8.3 million residents on the pretext of “public health,” but with numerous exceptions defendants deem permissible according to their value judgments, including mass demonstrations of thousands of people of which they approve.

16. Defendants Cuomo, James and de Blasio have enforced Cuomo’s “lockdown” by threat of criminal prosecution and actual prosecution, including \$1000.00 fines for the newly created offense of violating Cuomo’s “Social Distancing Protocol” (SDP).

17. As alleged more particularly below, Cuomo’s constantly morphing official Guidance Document for the interpretation and application of his executive orders and the SDP have specifically forbidden “congregate services within houses of worship” and “congregations of groups for religious service or ceremony,” thus singling out the free exercise of religion for strict regulation under the SDP.

18. This explicit ban on “congregate worship” was followed by a strict ban on “non-essential gatherings” of more than ten people that still applies in New York City and other regions not in “Phase Two” of defendant Cuomo’s elaborate, arbitrary and pseudo-scientific “NY Forward” Plan (NYFP) for “reopening New York and building back better.”^{1/}

19. The ten-person limit on “non-essential” gatherings has reduced the religious services that plaintiffs conduct or participate in to miniscule congregations, as more particularly alleged below.

20. On or about June 5, however, defendant Cuomo announced that he had “relaxed” his SDP to “allow” religious gatherings at 25% of the capacity of houses of worship, thereby specifically regulating religion—and only religion—once again. This “relaxation” applies only

^{1/}<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf>.

where “Phase Two” of NYFP is underway: the Finger Lakes, Central New York, Mohawk Valley, Southern Tier, and the North Country of New York, where plaintiffs Soos and Stamos preside over their Catholic congregations. The ten-person limit on “non-essential gatherings” in the *outdoors* apparently still operates in this region

21. Outside of “Phase Two” regions, the ten-person limit on “non-essential gatherings,” both indoors and outdoors, remains in effect, including New York City, where “Phase One” began only on June 8 and “Phase Two” has no specific start date in the foreseeable future. The ten-person limit thus continues to apply to the Orthodox Jewish religious gatherings in which plaintiffs Schonbrun, Perr and Mayerfeld participate.

22. Yet, while defendants jointly impose this arbitrary, pseudo-scientific regime of strict gathering limits for some groups and activities but not others, they are permitting closely packed gatherings of thousands to protest the wrongful death of George Floyd at the hands of a police officer, which have been taking place in New York City and every other major city in New York State day-after-day since Floyd’s death on May 25.

23. As more particularly alleged below, the ongoing mass gatherings in New York State have been approved by defendants Cuomo and de Blasio even though they blatantly violate the challenged executive orders, the SDP and the NYFP, including the challenged gathering limits, while de Blasio himself has personally joined and addressed at least one such gathering.

24. Defendants Cuomo and de Blasio (and governors and mayors in other states as well) have thus revealed that the SDP regime is not a neutral and generally applicable policy but rather a content-based regulation of First Amendment-protected activity, riddled with exceptions for the activities, including mass protests, defendants deem permissible according to their value judgments of what is “essential.”

25. Favored businesses, entities and activities, as well as favored mass demonstrations such as those over the death of George Floyd, are totally exempt from the challenged gathering limits, while defendants irrationally and capriciously continue to forbid religious ceremonies, high-school graduations, children playing in the park, and other comparatively tiny gatherings on the now patently specious grounds that they will cause death if allowed to occur.

26. Moreover, the absence of any “spike” in COVID-19 cases following the George Floyd protests and other mass gatherings people have joined in defiance of “social distancing” regimes in New York and other states, including Spring Break in Florida and massive partying at the Lake of the Ozarks, have shown that the “science” behind the “lockdown” was flawed at best and should no longer deter judicial intervention in defense of First Amendment liberty for all, not just the groups and activities defendants favor.

27. It is time to end New York’s experiment in absolute monarchy. Plaintiffs seek immediate judicial relief from the gathering limits in the challenged executive orders by way of a temporary restraining order, followed by a preliminary and permanent injunction and a declaratory judgment that the challenged executive orders are unconstitutional and void, both facially and as applied, because they deprive plaintiffs of the free exercise of religion, freedom of speech, freedom of assembly and freedom of expressive association without a compelling state interest or even a rational basis to justify those deprivations.

ALLEGATIONS COMMON TO ALL COUNTS

The Challenged Executive Orders

28. On March 7, 2020, defendant Cuomo issued Executive Order 202 (Order 202), which, in relevant part, declared a State Disaster Emergency for the State of New York based

upon the fact that travel-related cases and community contact transmission of COVID-19 had been documented in the State. *See* Exhibit A, p. 1.

29. Executive Order 202 (Order 202) was followed by a series of executive orders (Orders) purporting to regulate literally all social, political, religious and business activity in the State of New York. The only authority cited for this massive exercise in overnight social engineering is Section 29-a of Article 2-B of the Executive Law, Direction Of State Agency Assistance in a Disaster Emergency, which makes no provision whatsoever for limiting or prohibiting social, political, religious and business activities of the general population.

30. All of the Orders are premised on Order 202's original proclamation that "travel-related cases and community contact transmission of COVID-19 have been documented in New York State and are expected to continue..." *Id.*

31. The scheme of Orders is being enforced by "All enforcement mechanisms by state or local governments [which] shall continue to be in full force and effect until June 13, 2020 unless later extended or amended by a future Executive Order," under Section 12 of the Public Health Law, and by \$1000.00 fines for violation of the SDP set forth in Cuomo's unilaterally dictated "New York on PAUSE" plan ("PAUSE" Plan), whose latest iteration, in pertinent part, is as follows:

1. Effective at 8PM on Sunday, March 22, all non-essential businesses statewide will be closed;
2. *Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed* at this time;
3. Any concentration of individuals outside their home must be limited to workers providing essential services and social distancing should be practiced;
4. When in public individuals must practice social distancing of at least six feet from others;
5. Businesses and entities that provide other essential services must implement rules that help facilitate social distancing of at least six feet;

6. Individuals should limit outdoor recreational activities to non-contact and avoid activities where they come in close contact with other people;
7. Individuals should limit use of public transportation to when absolutely necessary and should limit potential exposure by spacing out at least six feet from other riders;
8. Sick individuals should not leave their home unless to receive medical care and only after a telehealth visit to determine if leaving the home is in the best interest of their health;
9. Young people should also practice social distancing and avoid contact with vulnerable populations; and
10. Use precautionary sanitizer practices such as using isopropyl alcohol wipes.

The maximum fine for violations of the state's social distancing protocol is \$1,000.

See Exhibit B (emphasis added).

32. The “PAUSE Plan” provides a web-based form for turning in one’s fellow citizens to defendant Cuomo’s office for enforcement action based on violations of the SDP, including forbidden “non-essential gatherings,” as to which the form requests “Estimated Number of Individuals Observed at Location.” *See* Exhibit C.

33. Defendant de Blasio has invoked the laws and law enforcement authorities of the City of New York to enforce all of defendant Cuomo’s decrees, so providing in his Executive Orders denominated EO 98, EO-103 and EO 113-116.

34. On March 12, defendant Cuomo issued Executive Order 202.1, cancelling or postponing any “gathering” over 500 individuals. Exhibit A, p. 4.

35. On March 16, the ban on “gatherings” was tightened to 50 persons under Cuomo’s Executive Order 202.3. *See* Exhibit A, p. 4.

36. On March 18, under Executive Order 202.6, defendant Cuomo decreed that all businesses and non-profits in the State must reduce their workforces by 50% *except* for a vast

array of favored businesses and entities Cuomo providing “services or functions” Cuomo deems “essential” as follows:

Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. This includes essential health care operations including research and laboratory services; essential infrastructure including utilities, telecommunication, airports and transportation infrastructure; essential manufacturing, including food processing and pharmaceuticals; essential retail including grocery stores and pharmacies; essential services including trash collection, mail, and shipping services; news media; banks and related financial institutions; providers of basic necessities to economically disadvantaged populations; construction; vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses; vendors that provide essential services or products, including logistics and technology support, child care and services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public...

See Exhibit A, p. 17.

37. On March 20, under Executive Order 202.8, defendant Cuomo ordered a 100% reduction in the workforces of “non-essential” businesses and non-profits—that is, their total closure—with violations to be punished under Section 12 of the Public Health Law. *See Exhibit A, p. 21.*

38. On March 23, in Executive Order 202.10, Cuomo decreed a total ban on “non-essential gatherings of any size for any reason.” *See Exhibit A, p. 25.*

39. The total ban on “non-essential gatherings” was pursuant to Cuomo’s updated “PAUSE” Plan, noted above.

40. On May 14, in Order 202.31, defendant Cuomo decreed that he was continuing until May 28, 2020 the closure of the aforesaid “non-essential” businesses and entities and the aforesaid “postponement or cancellation of all non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations, games, meetings or other social events), which together constitute New York On PAUSE.” *See Exhibit A, p. 69.*

41. Order 202.31 further decrees that “All enforcement mechanisms by state or local governments shall continue to be in full force and effect until June 13, 2020 unless later extended or amended by a future Executive Order.” Order 202.31 thus maintains all local law enforcement agencies as agents for the enforcement of defendant Cuomo’s Orders, including the SDP and its gathering limits, with \$1000.00 fines for violation.

42. It was not until May 21, under Executive Order 202.32, that defendant Cuomo decreed that the previous ban on all “non-essential gatherings” under Order 202.10 was “modified to permit a gathering of ten or fewer individuals *for any religious service or ceremony*, or for the purposes of any Memorial Day service or commemoration, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to...” *See*, Exhibit A, p. 71.

43. Order 202.32, further specifically targeting religious services, also provides that “any *drive-in or remote religious service* may continue in excess of the ten person limit so long as there is no in-person contact between participants.” Exhibit A, p. 71.

44. On May 22, under Executive Order 202.33, defendant Cuomo granted general “permission” for “any non-essential gathering of ten or fewer individuals, for any lawful purpose or reason, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to.” *See*, Exhibit A, p. 74 (emphasis added).

45. On May 28, under Order 202.34, defendant Cuomo continued the “required postponement, cancellation, or restriction on size of all non-essential gatherings of more than ten individuals” but allowed the “Phase One reopening” for “non-essential businesses” in numerous counties and in the North Country, where plaintiffs Soos and Stamos engage in their priestly ministry. *See* Exhibit A, p. 75.

46. On May 29, under Executive Order 202.35, the “PAUSE” Plan was yet again modified to end workplace reductions and restrictions for “non-essential businesses” in the Finger Lakes, Central New York, Mohawk Valley, Southern Tier and the North Country regions engaged in “Professional Services, Administrative Support, Information Technology, Real Estate services, Building and Property Management, Leasing, Rental, and Sales Services, Retail In-store Shopping, Rental, Repair, and Cleaning, Barbershops and Hair Salon (limited services), and Motor Vehicle Leasing, Rental, and Sales.” Said businesses need only follow “the guidance promulgated by the Department of Health”—i.e., social distancing of six feet and sanitization of the premises. *See*, Exhibit A, p. 77.

47. While plaintiff Soos’ and plaintiff Stamos’ ministry is conducted in North Country towns, still no allowance was made for gatherings of more than ten persons for *religious* services or other non-business purposes, not even with “social distancing,” and all of plaintiffs’ churches still remained under the ten-person limit for “non-essential gatherings” as of May 29.

48. On June 2, under Order 202.36, defendant Cuomo decreed: “Any region that meets the prescribed public health and safety metrics as determined by the Department of Health for Phase One reopening may allow outdoor, low-risk recreational activities and businesses providing such activities, as determined by Empire State Development Corporation, to be permitted to operate, in accordance with Department of Health guidance.” *See* Exhibit A, p. 79.

49. Order 202.36, issued nearly 90 days after defendant Cuomo invoked his alleged authority under Executive Order 202, still fails to allow “non-essential gatherings” of more than ten persons or anything other than “drive-ins” for religious services. At the same time, however, it permits unlimited in-person gatherings for all of the following businesses and activities:

Statewide:

- research and laboratory services;
- essential infrastructure including utilities, telecommunication, airports and transportation infrastructure;
- essential manufacturing, including food processing and pharmaceuticals;
- essential retail including grocery stores and pharmacies;
- essential services including trash collection, mail, and shipping services;
- news media; banks and related financial institutions;
- providers of basic necessities to economically disadvantaged populations;
- construction;
- vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses;
- vendors that provide essential services or products, including logistics and technology support; child care;
- services needed to ensure the continuing operation of government agencies and provide for the health, safety and welfare of the public;
- state beaches.

In the North Country and other selected “Phase Two” counties:

- Professional Services, Administrative Support, Information Technology,
- Real estate services, Building and Property Management, Leasing, Rental, and Sales Services,
- Retail In-store Shopping, Rental, Repair, and Cleaning,
- Barbershops and Hair Salon (limited services)

- Motor Vehicle Leasing, Rental, and Sales;
- low-risk recreational activities and businesses providing such activities.

Defendant Cuomo's "Guidance" Document Targets Religion

50. In addition to his executive orders, the SDP and the NYFP, defendant Cuomo has caused to be published a document entitled "Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Recent Executive Orders".

51. The Guidance Document, which has changed over time in sync with defendant's executive orders,^{2/} including the tightening limit on "non-essential gatherings," has repeatedly targeted religious exercise for strict regulation as follows:

- (a) From March 20-24, the Guidance Document declared that while "[h]ouses of worship are not ordered closed... it is strongly recommended no congregate services be held and social distance maintained," and "worship services" are specifically enumerated among the "businesses" that "must remain closed and are *not eligible for designation as an essential business* for purposes of this guidance." This "guidance" appears to be self-contradictory. *See* Exhibit D.
- (b) From March 25 to April 6 the Guidance Document tightened its regulation of religion by adding the requirement that "social distance must be maintained and compliance with DOH guidance" while reiterating that "worship services... are not eligible for designation as an essential business for purposes of this guidance." *See* Exhibit E.
- (c) From April 7 to April 9 the Guidance Document continued to list "worship services" as among the "businesses" that "must remain closed and are not eligible for designation as an essential business for purposes of this guidance." *See* Exhibit F.

52. From April 10 to May 20 the targeting of religion by the Guidance Document was explicit and exclusive, extending even to religious gatherings in homes and other locations outside of houses of worship:

^{2/}See <https://esd.ny.gov/guidance-executive-order-2026>. All iterations of the Guidance Document provided as exhibits to this Verified Complaint were obtained from the WayBackMachine Internet Archive at <https://archive.org/web/>.

Pursuant to Executive Order 202.10, all non-essential gatherings of individuals of any size for any reasons (e.g. *worship services*, parties, celebrations, or other social events) are canceled or postponed. *Congregate services within houses of worship are prohibited. Houses of worship may only be used by individuals* and only where appropriate social distancing of, at least, six feet between people can be maintained. Further, *individuals should not gather in houses of worship, homes, or other locations for religious services* until the end of this public health emergency. If possible, *religious leaders should consider alternative forms of worship, replacing in-person gatherings with virtual services*, such as phone or conference calls, videoconference calls, or online streaming.

See Exhibit G.

53. On April 28, by way of enforcing Cuomo’s gathering limits as explained in the Guidance Document then in effect, defendant de Blasio personally appeared in Williamsburg to ensure that a Jewish funeral gathering was broken up by the NYPD. As he declared via his Twitter account:

Something absolutely unacceptable happened in Williamsburg tonite: a large funeral gathering in the middle of this pandemic. When I heard, *I went there myself to ensure the crowd was dispersed*. And what I saw WILL NOT be tolerated so long as we are fighting the Coronavirus

See Exhibit H (emphasis added)

54. On April 28, defendant de Blasio tweeted the following warning to the Jewish community:

My message to the Jewish community, and all communities, is this simple: the time for warnings has passed. *I have instructed the NYPD to proceed immediately to summons or even arrest those who gather in large groups*. This is about stopping this disease and saving lives. Period.

See Exhibit I (emphasis added)

55. From May 21 to June 5, the Guidance Document, now reflecting Cuomo’s permission for “non-essential gatherings” of ten-or-fewer people and “drive-in” gatherings at which people remain in their vehicles the entire time, continued to target religion by specifically

regulating the conduct of religious services and specifically mentioning religious congregations as subject to the ten-person limit:

However, Executive Order 202.32 allows ten or fewer people to gather *for a religious service or ceremony*, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to, and provided further, that *any drive-in or remote religious service may continue in excess of the ten person limit so long as there is no in-person contact between participants*. Faith leaders *should continue to consider and use alternative forms of worship*, replacing in-person gatherings with virtual services, such as phone or conference calls, videoconference calls, or online streaming, wherever possible, and *congregations of groups for religious service or ceremony in excess of ten in-person participants remain prohibited*.

Exhibit J (pertinent portion highlighted)

56. On June 6, defendant Cuomo, in Executive Order 202.38, declared that he will now permit “*non-essential gatherings for houses of worship* at no greater than 25% of the indoor capacity of such location, provided it is in a geographic area in Phase 2 of re-opening, and further provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to.” Exhibit A, p. 82.

57. The ten-person limit on “non-essential” indoor gatherings remains in effect in New York City and all other regions not in Cuomo’s “Phase 2,” while the same ten-person limit appears to remain in effect *outdoors* throughout the entire State, even though none of the favored businesses and entities enumerated above are subject to any gathering limits at all.

58. In explaining his “permission” for only 25% occupancy of houses of worship, Cuomo stated:

We are going to accelerate the opening of temples, mosques, churches, In Phase 2 they can open up to 25 percent occupancy in that building....

Yes, 25% occupancy is not as easy as 100% occupancy, *but 100% occupancy is a mass gathering and you really can't do social distancing*, etc. So Phase 2, 25% occupancy. That begins immediately. Be smart. Be smart. *It doesn't mean you go to a temple or a mosque and you sit right next to a person.*

You have to socially distance. Watch on the entranceway, when people tend to congregate, going through the entrance or the exit. So, we leave it to our faith-based partners to come up with a smart strategy about how to do this, but this is an acceleration for us because we're doing so well on the metrics, but people still have to stay smart.

See Exhibit K (official transcript; highlighted).

59. Yet, as pleaded below, both defendant Cuomo and defendant de Blasio approve of totally unrestricted mass gatherings of protestors numbering in the thousands, as well as indoor gatherings of protestors in theaters that are supposed to remain closed under Cuomo's executive orders, so long as the protests and protestors meet with their approval.

**Defendants Cuomo and de Blasio Exempt Favored
Protestors From their "Social Distancing" Regime**

60. The term "non-essential gatherings" has never been defined by defendants or their agents. The vagueness of the term allows for arbitrary and capricious application.

61. Accordingly, while the challenged gathering limits continue to be enforced against religious congregations and other "gatherings" defendants deem "non-essential," over the past few days packed gatherings of hundreds or thousands, assembled in protest over the death of George Floyd at the hands of a police officer, have been allowed to demonstrate, march and even riot in the streets of all the major cities in New York State without any enforcement of the ten-person limit or the rest of Cuomo's SDP.

62. For example, this mass protest occurred in Albany without opposition from defendant Cuomo:



See Exhibit L (with photo).

63. On the contrary, during his press briefing of June 1, defendant Cuomo condemned violence at these demonstrations but otherwise approved of them even though they blatantly violate his ten-person limit on “non-essential gatherings”:

Andrew Cuomo: And we have to be smart in this moment. The violence in these protests obscures *the righteousness of the message*....

Speaker 2: Would you suggest people not go out and protest?

Andrew Cuomo: *No, I think you can protest, but do it smartly and intelligently and many places have. You look at places around the country. There were protests all across the country. Protest. Just be smart about it. With this virus, you can do many things now as long as you’re smart about it, right? You can reopen, you can go into a store and you can do a lot of things, just be smart. (emphasis added)*^{3/}.

See Exhibit M (transcript; highlighted).

^{3/} See video of June 1 briefing at https://youtu.be/7VssYZp_2Ho?t=1104 and https://youtu.be/7VssYZp_2Ho?t=2615

Speaker 3: So, what's the difference between protesting and a business, say, in the city who wants to reopen smartly if it's not at the phase yet that they're technically allowed to?

Andrew Cuomo: Well, that's where we're at, but it has to be a business where you can be smart. Be smart, meaning socially distant. You don't conduct business in a way where you have people within [sic] six feet. You have to wear the mask. You have to do the hand sanitizer. That's where we're going to be.^{4/}

Id.

64. Cuomo has not imposed on thousands of George Floyd demonstrators any requirement that they “socially distance,” wear masks (although most of them do in a ritual manner) or use hand sanitizer. Nor has he imposed any limit on the size of their gatherings, even though violence and massive property damage have occurred during these gatherings in New York and elsewhere.

65. During his press briefing of June 4, Cuomo, while displaying a slide approvingly noting mass protests in Buffalo, Rochester, Syracuse, Albany and New York City, declared: “*I want to thank the protestors*, who were mainly peaceful, which was smart because they could make their point... *I stand with the protestors* on the point that we need meaningful reform.”^{5/} (emphasis added). See Exhibit N (transcript).

66. Confronted at the same press briefing with a question from a reporter about a Pakistani family seeking Cuomo's permission for an in-person graduation ceremony “with social distancing,” rather than the “drive-in” ceremony he will allow, Cuomo replied contemptuously:

I mean, did you hear anything that we've been talking about for the past 96 days? Look, I don't want to be difficult. It's a Pakistani immigrant family that wants to have a graduation. I get it. It's not really relevant that they're from Pakistan....

^{4/} See https://youtu.be/7VssYZp_2Ho?t=2646 at 45:20.

^{5/} See <https://youtu.be/hijWxWO1oc4?t=166> at 2:46.

That's not the issue. The issue is a public health issue. You don't want people sick and dead. That's the issue, right? *It's about death.* It's about *balancing the risk versus the reward*; balancing the desires and wants versus the consequences. Right?

We went through New Rochelle, Westchester. People went to a ceremony. They were having celebration and *a religious ceremony*... Yeah, people died. People died, right? So, yeah I know, everybody wants to go to a high school graduation. I get it. Not if they're gonna die. Right?^{6/} (emphasis added)

67. It is apparent that defendant Cuomo has arrogated to himself the power to determine which gatherings among 8 million New Yorkers are “essential”—demonstrations over police brutality being one example—and which are “non-essential,” including high school graduations and religious ceremonies, according to their subjective judgment of “risk versus reward.” Cuomo’s claim that a high school graduation ceremony will kill people, while mass marches and demonstrations will not, is patently disingenuous.

68. Defendant de Blasio has likewise allowed Floyd protests without adherence to the ten-person limit, as seen in a demonstration near the Manhattan Bridge.^{7/} See Exhibit O (photo):



^{6/} See <https://youtu.be/hijWxWO1oc4?t=2112> at 35:12.

^{7/} See image of gathering on roadway to Manhattan Bridge taken Sunday, May 31, 2020: <https://www.nydailynews.com/resizer/YI9dB6EItDTHIKMXU9BcnBdoAAU=/800x533/top/cloudfont-us-east-1.images.arcpublishing.com/tronc/UZ4VLUWR2JHK5EHYDY4BE2VOSA.JPG>

69. Another Floyd demonstration involved thousands who crowded the entire span of the Brooklyn Bridge as seen [here](#).^{8/}

70. Expressing solidarity with defendant Cuomo, during his press briefing of June 2, defendant de Blasio rambled on about the supposed critical difference between the Floyd protests on the one hand and disfavored “non-essential gatherings” on the other, offering only a vague assurance that someday religious services would no longer be restricted as “non-essential”:

Question: While you’ve recommended that protestors stay home, for others in the city, you’ve enforced gathering bans, not recommendations.

The retail store owner who has been closed for two months and is experiencing financial ruin has been banned from opening his store. People for whom attending houses of worship are a regular part of life have been banned from doing so with more than 10 people.

Now, you’ve expressed solidarity with this particular protest cause. Is that why it’s been given dispensation to disregard all pandemic guidelines?

I know you were asked about this yesterday. And you said there’s such pain and anger, and [banning protests may be construed as] not hearing their concerns. *What about the retail store owner facing imminent financial ruin, or the religious person who can’t attend a house of worship – what about their pain and anger?*

So, Mr. Mayor are we in a pandemic or not? And do we have one set of rules for protestors and another for everyone else?

Thank you.

Answer: We’re in the middle of a national crisis, a deep-seated national crisis [over Floyd’s death].... And I want to say: *state and city, governor and I, have been totally united*, that we had to have a strict, strong approach to get to these numbers. Didn’t happen by accident....

So you could say, Oh, couldn’t we have done stores, *and I appreciate how painful it’s been for people to be missing religious observance*, but I’ll tell you the religious leaders of this city have stood as one and said *we are not going to do things prematurely, that will endanger lives....*

^{8/} See video at <https://youtu.be/q5UPIVITEdM?t=149>

But this is other piece of the equation: When you see a nation, an entire nation, simultaneously grappling with an extraordinary crisis seeded in 400 years of American racism, I'm sorry, *that is not the same question as the understandably aggrieved store owner or the devout religious person who wants to go back to services....*

The religious services come back, that does not have to be far away, if we do the work together. And we will.^{9/}

See Transcript, Exhibit P (highlighted; emphasis added).

71. On June 4, de Blasio, who in late April had threatened the Jewish community with arrests and prosecutions for “illegal” mass religious gatherings and personally appeared on scene to ensure the NYPD’s dispersal of a Jewish funeral, *attended and addressed* a mass political gathering at Cadman Plaza in memory of George Floyd where neither the ten-person limit nor the social distancing he and Cuomo prescribe for “non-essential gatherings” were in the least observed.^{10/} He was not wearing the mask he requires of others:^{11/}



^{9/}Reuvain Borchardt, “De Blasio: Only Protest Gatherings OK, Due to ‘400 Years of American Racism’,” June 2, 2020, <https://hamodia.com/2020/06/02/de-blasio-allowing-protestors-defy-social-distancing-due-angst-400-years-american-racism/>. A video of the encounter is found at <https://youtu.be/StY9WQZtWmQ?t=3157>

^{10/} See video of gathering: <https://youtu.be/hmRM7FA3ZJ4?t=42>

^{11/}See <https://nypost.com/2020/06/04/mayor-de-blasio-booded-off-stage-at-brooklyn-george-floyd-rally/>

See Photo at Exhibit Q.

72. Days later, in Williamsburg, a small group of Hasidic children was kicked out of a park by a police officer enforcing Cuomo’s and de Blasio’s ten-person limit on “non-essential gatherings.” See, Exhibit R (photo). ^{12/}

73. At the same time, without objection by de Blasio or Cuomo, theaters in New York that are supposed to be closed until “Phase Four” of Cuomo’s reopening plan have opened their premises to George Floyd demonstrators for rest, use of Wi-Fi and bathrooms, and provision of water and snacks—with instructions to keep police out of the premises. See Exhibit S.

74. The special rules applied in these contexts, with the evident approval of defendants Cuomo and de Blasio, are: (1) Gathering limits and social distancing for thee, but not for me; and (2) Gathering limits and social distancing for thee, but not for we, who are engaged in a cause more important than worship services.

75. In sum, defendant Cuomo’s restrictions on “non-essential gatherings,” enforced by \$1000 fines and other criminal penalties imposed by local law enforcement at defendants’ command, now stand exposed as a sham—dispensable for some but not others at defendants’ whim, rather than a neutral law of general application rationally related to public health and safety.

76. As the pandemic rapidly wanes, defendants’ “social distancing” dictatorship, put to a test of neutrality and general application, instantly revealed itself as an exercise in social control for its own sake, applied selectively according to defendants’ value judgments rather than “science” or “metrics.”

^{12/}“AGAIN IN WILLIAMSBURG: Hasidic Children Kicked Out of Park Days After Tens of Thousands Attend Protest,” *The Yeshiva World*, June 8, 2020; see: <https://www.theyeshivaworld.com/news/featured/1869301/again-in-williamsburg-hasidic-children-kicked-out-of-park-days-after-tens-of-thousands-attend-protest.html>

THE INFRINGEMENT OF PLAINTIFFS'
CONSTITUTIONAL RIGHTS

Plaintiffs Soos and Stamos

77. Plaintiff Rev. Steven Soos is a duly ordained Catholic priest, ordained in 1994, who offers Mass and provides the other Sacraments of the Catholic Church to congregations located Glens Falls, Massena and Nicholville, all located in this District.

78. Plaintiff Soos belongs to an international fraternity of Catholic priests with seminaries and Mass centers throughout the world that is not affiliated with any particular diocese.

79. Rev. Nicholas Stamos, a Catholic priest ordained in 2016, belongs to the same priestly fraternity and assists Father Soos in saying Mass at said locations, along with another priest.

80. The Holy Sacrifice of the Mass is the very heart of Catholic worship without which the Catholic faith would not exist.

81. In addition to offering Mass, both plaintiff Soos and plaintiff Stamos perform baptisms, preside at weddings, and offer funeral Masses for their flocks.

82. In Massena, where the chapel has a capacity of 350 persons, the Catholic congregation is generally 40 worshipers on a Sunday at the present time, including 18 nuns, but would expand to around 170 when students return to the Catholic school at that location.

83. In Glens Falls the congregation is about 80 in number in a chapel whose capacity is 80 persons.

84. In Nicholville, at Saint Therese Church, which is the main church to which plaintiffs Soos and Stamos minister, the Sunday congregation numbers approximately 260 worshipers, divided between two Sunday Masses in a church that has a capacity of 204.

85. On June 6, in Executive Order 202.38, defendant Cuomo’s previous ten-person limit on worship gatherings, or else “drive-in” services, was “expanded” in the “Phase Two” region, where plaintiffs Soos and Stamos conduct their priestly ministry, to “allow” worship services at 25% of building capacity—a limitation not imposed on numerous businesses and entities under the challenged Orders.

86. This limitation continues severely and without justification to burden plaintiffs’ exercise of religion as follows:

87. Forbidding Catholics to be physically present for worship beyond an arbitrary, state-imposed strict numerical limit on the size of congregations, 75% below the normal occupancy of their churches or chapels, is a serious deprivation of their exercise of the Catholic religion and a grave interference in plaintiffs’ religious ministry and priestly mission to their flocks.

88. It is a Catholic teaching that one cannot receive Sacraments without being physically present for their administration. Sacraments cannot provide their graces by “remote” video link as defendant Cuomo also “allows” under his dictate in Order 202.32.

89. Under defendant Cuomo’s new “25% of capacity” decree in Order 202.38, plaintiffs would have to offer multiple Masses on the same day in Saint Therese Church at Nicholville, where the total congregation for both Sunday Masses numbers 260 and building capacity is 204.

90. For a High Mass, the Church norms provide for five altar servers to assist the priest, which would reduce the congregation at Saint Therese Church to around 45 members at each Mass, given the 25% of capacity limitation imposed by defendant Cuomo. This would

require the offering of five Sunday Masses at Saint Therese Church in order to accommodate 260 worshipers.

91. For a Low Mass, Church norms provide for two altar servers to assist the priest, which would reduce the congregation at Saint Therese Church to around 47 at each Mass, given the 25% capacity limitation. This limitation would likewise require five Low Masses to accommodate 260 worshipers.

92. Sunday is a Holy Day of Obligation in the Catholic Church on which all Catholics are obliged under pain of mortal sin to attend Mass unless they are ill, or some other grave reason prevents attendance. But it is physically impossible for one priest to offer that many Masses on a Sunday or any other day. Moreover, Church law precludes offering more than two Masses on a given day (“bination”) except under extraordinary circumstances, when three Masses may be offered by the same priest on the same day.

93. Consequently, on Sunday, June 7, plaintiffs Soos and Stamos, dividing the Masses between them with another priest, were forced to offer five Masses at Saint Therese Church—6 a.m., 7 a.m., 9 a.m., 11 a.m. and 12:30—instead of the normal two Masses under normal occupancy in order to accommodate their total flock of around 260 persons.

94. At Glens Falls, where the chapel holds only 80 persons, this past Sunday, June 7, plaintiff Stamos was forced to offer three “drive-in” Masses rather than the four in-person Masses that would have been needed if the chapel were used under defendant Cuomo’s arbitrary 25% capacity rule.

95. At Massena, where the chapel holds 350, the 25% capacity rule will not permit a single daily Mass for 120-130 students when they return to school, which will severely disrupt

the school's schedule come September—assuming defendant Cuomo even permits plaintiffs' Catholic school to reopen, failing which another First Amendment deprivation would arise.

96. Weddings in the churches over which plaintiffs Soos and Stamos preside would likewise be impacted by the 25% capacity rule, as plaintiffs would be forced to prohibit family members and friends from attending what are usually large gatherings for the Sacrament of Holy Matrimony.

97. The “drive-in” Masses that defendant Cuomo has allowed since May 21 also involve major and unjustified burdens on plaintiffs and their congregations, including the following:

- a. Because they are forbidden by defendant Cuomo from leaving their cars during a “drive-in” Mass, congregants are unable to kneel during the Canon of the Mass for the Consecration of the elements of Holy Communion, bread and wine, which Catholics believe become the Body, Blood, Soul and Divinity of Christ at the moment of the Consecration such that kneeling in the divine Presence is commanded by their religion.
- b. Many of the congregants who have attended the few drive-in Masses attempted at Nicholville and Glens Falls have to drive 1 to 2 hours each way. Some are elderly people who find it difficult to remain in their cars during a Mass that lasts an hour or longer after driving for an hour or more, followed by another drive of an hour or more to return home. Others arrive in vans or SUVs packed with large families who are required to be cooped up in their vehicles for the same amount of time

- c. In order to administer Holy Communion to the “drive-in” congregants while kneeling, as required by the rubrics of the Masses plaintiffs offer, plaintiffs must set up outdoor kneelers which the congregants, leaving their vehicles, must approach two at a time rather than kneeling in a row at the Communion rail as they would inside the church. But even this is forbidden by Cuomo’s “drive-in” restrictions, which prohibit “in-person contact between participants” and thus prohibit reception of Holy Communion itself—the very essence of the Mass—except under threat of prosecution and fines.
- d. The “drive-in” Masses on May 31 were held in 40-degree weather, with snow squalls and rain, to which the priest and the altar servers were exposed.

98. The aforesaid restrictions on Catholic worship under defendants’ social distancing regime impose extreme burdens on plaintiffs’ free exercise of religion in ministering to their flocks, which burdens are not imposed on the businesses, social activities (including beachgoing) and the mass demonstrations for George Floyd defendants have selectively permitted.

99. Furthermore, the original ten-person limit on *outdoor* gatherings, necessitating “drive-in” religious services for larger-than-ten gatherings outdoors, apparently remains in effect even in plaintiffs’ “Phase Two” region.

100. Thus, although in-person outdoor Masses in warm weather, with full congregations, would be feasible at Nicholville, which has six acres of open land in front of Saint Therese Church, defendant Cuomo’s ten-person limit on outdoor gatherings—not applicable to the George Floyd demonstrations—still makes that impossible at Nicholville.

101. The still-operative ten-person outdoor limit also burdens the practice of plaintiffs’ religion respecting outdoor burial services, where plaintiffs—in an unjustified compromise of

their ministry to the grieving—would be forced to bar family members and friends from attending the graveside as their loved ones are laid to rest, while thousands of people march in the streets with defendants’ approval, and even participation in the case of defendant de Blasio.

102. While all of the aforesaid restrictions should be entirely stricken down as arbitrary and unconstitutional, as pleaded below, plaintiffs Soos and Stamos would be willing to minister to their congregations following the same “social distancing” requirements applied to the “Phase Two” businesses and entities now operating in the North Country and the same outdoor protocol applied to defendants’ favored political demonstrations, which are unlimited in size.

Plaintiffs Schonbrun, Perr and Mayerfeld

103. Plaintiffs Schonbrun, Perr and Mayerfeld are sincere practitioners of Orthodox Judaism who attend synagogues in Brooklyn, where they all reside.

104. The synagogue prayers required by their religion must have a minimum quorum of ten adult males (age thirteen or older), called the *minyan*, and several of the congregants, a few times a week, must gather closely around the Torah for a reading from the Torah.

105. Members of their congregations also gather to pray and study the Torah and the Talmud together, especially young men.

106. These religious activities require physical presence in the synagogue and cannot be conducted by video.

107. Limiting the size of synagogue congregations to ten persons or mandating that the congregants attend “drive-in” services in closed motor vehicles, as provided in Orders 202.32 and 202.33, when numerous secular gatherings and the mass demonstrations now occurring are exempted from any such restrictions, unduly burdens plaintiffs’ sincerely held religious beliefs and practices, as follows:

108. If Jewish services are limited to the presence of a *minyan* of 10 adult men, then no one else can attend the services under the ten-person limit. Thus a young man could not attend his own Bar Mitzvah, which is usually held the week *before* the thirteenth birthday (meaning the boy would not count toward the *minyan*), or a bride-to-be her own wedding, or a newborn his own circumcision, nor could plaintiffs themselves attend such services unless they were part of the *minyan*.

109. Defendant Cuomo’s allowance of “drive-in” gatherings of more than ten persons also fails to accommodate plaintiffs’ religion as the *minyan* must all be present in the same room, not in various motor vehicles, so that a “drive-in” service would not be possible in Orthodox Jewish worship.

110. Moreover, any type of operation of a vehicle is prohibited on the Sabbath, which is the day the main weekly services take place.

111. While women attend services in plaintiffs’ synagogues, they are not counted towards the minimum quorum of ten adult males, just as a woman cannot act as a priest in the Catholic religion.

112. Thus, the challenged Orders forbid plaintiffs to participate in any congregation beyond the *minyan* if they are not part of the *minyan* but merely a congregant.

113. Defendant Cuomo’s ten-person limit on religious gatherings has devastated the spiritual life of plaintiffs’ respective synagogue communities as it is now impossible for families to attend services or even for men alone to do so beyond the strict minimum of ten.

114. The challenged Orders effectively render illegal any but miniscule Jewish congregations, either indoors or outdoors, yet Kosher grocery stores and bakeries in Brooklyn,

and numerous other businesses, are allowed to operate without any state-imposed limit on the number of persons inside.

115. At the same time, defendants de Blasio and Cuomo not only allow but approve massive demonstrations of thousands of people in protest over the death of George Floyd, including demonstrations in the same Borough, Brooklyn, where religious gatherings of more than ten, either indoors or outdoors, are deemed illegal under the challenged Orders and where defendant de Blasio personally appeared in Williamsburg to be sure a Jewish funeral gathering was dispersed by the NYPD.

116. In addition, each plaintiff has been affected by the challenged Orders in particular ways, as pleaded below.

Plaintiff Daniel Schonbrun

117. Daniel Schonbrun has been a congregant of Chabad of Marine Park in Brooklyn since 2009.

118. By mid-March 2020, when most synagogues in Brooklyn had shut down, the Rabbi of Chabad of Marine Park, Rabbi Hendel, decided to remain open with social distancing.

119. Plaintiff Schonbrun's congregation was thereafter harassed by a member of the Jewish community who holds himself out as a liaison with local authorities and an enforcer of "social distancing."

120. On the first Sabbath after Rabbi Hendel decided to keep his synagogue open, this individual appeared and began yelling at the congregants to leave because they were supposedly putting the community in danger.

121. Plaintiff Schonbrun's congregation thereafter moved its thrice-daily prayer services outdoors to the 5,000 square foot backyard of the synagogue. On April 4, before the full

quorum for prayers could assemble, the same individual entered the backyard without permission and berated the eight congregants present, informing them that they were engaged in an “illegal gathering” and that they must disperse.

122. When the congregants failed to disperse, this individual called 911. A police officer arrived minutes later, entered the backyard and informed plaintiff Schonbrun and the other congregants present that they were an illegal gathering and must disperse, even though only eight people were present and were at least 20 feet apart from each other.

123. When the congregants declined to disperse, the officer went to each of them, one by one, and threatened them with fines and arrest, thereby intimidating five of the congregants to disperse, leaving only three, including plaintiff Schonbrun.

124. While plaintiff Schonbrun was remonstrating with the officer, four more police officers appeared in the synagogue’s backyard, including a Sergeant from the 61st Precinct. The officers continued to maintain that the gathering was “illegal” and refused to deal with the individual who had called them, who was trespassing. When plaintiff Schonbrun asked the police officers why they were allowing him to be on private property, the officers claimed that he works for the NYPD.

125. Plaintiff Schonbrun informed the officers that as of that date, April 4, no order by defendant Cuomo or defendant de Blasio actually prohibited religious gatherings as “non-essential.” The officers continued to insist that defendant de Blasio had made it illegal for “non-essential” religious groups to gather for worship and spent about ten minutes on their cell phones trying to find the law or rule they were invoking

126. By this time, only plaintiff Schonbrun and one other congregant were left, and they decided to leave as there was no *minyan* or any way to continue praying as police had

totally disbanded the gathering. The police remained on the scene until they were certain plaintiff Schonbrun and the other remaining congregant had left.

127. Six days later, on April 10, defendant Cuomo published the aforesaid “Guidance Document,” stating that “all non-essential gatherings of individuals of any size for any reasons (e.g. *worship services*, parties, celebrations, or other social events) are canceled or postponed. *Congregate services within houses of worship are prohibited.*”

128. By this time plaintiff Schonbrun’s *minyan* had to change locations constantly because they were afraid that police officers would arrive at any time to demand that they disperse. Consequently, plaintiff Schonbrun and his fellow congregants missed many religious services, including during Passover, which began on April 8 and ended on April 16.

129. Because of the ten-person limit, plaintiff Schonbrun’s son, who is not old enough to be part of a *minyan*, has not been able to attend synagogue for months, which is one way in which defendant Cuomo’s executive orders have destroyed the spiritual life of families in the Jewish community.

130. Plaintiff Schonbrun now lives in constant fear of police intervention in what remains of Jewish worship under the ten-person limit, especially after defendant de Blasio’s warning on April 29 that “My message to the Jewish community, and all communities, is this simple: the time for warnings has passed. I have instructed the NYPD to proceed immediately to summons or even arrest those who gather in large groups....”

131. Plaintiff Schonbrun has frequently observed that during all the weeks he and his congregation have been harassed by the police for “illegal gatherings,” the “essential” stores were all open with lines around the block as throngs of people were trying to get in. There was

no limit on numbers in these gathering and no “social distancing,” nor any police intervention to require adherence to the challenged orders by people who were gathered to shop.

132. Chabad of Marine Park has a total indoor capacity of about 70 people, including women and children in a separate room. With social distancing of six feet between congregants, the synagogue can hold about 30 people.

133. An outdoor service in the 5,000-square-foot backyard could accommodate some 200 people, or approximately 70 people with social distancing.

Plaintiff Elchanan Perr

134. Plaintiff Perr is a regular member of a Congregation in the Flatbush-Midwood section of Brooklyn. He has been a congregant there for the past three years.

135. At the very beginning of the “social distancing” regime reflected in defendant Cuomo’s orders, even before “congregate worship” was prohibited outright between April 10 and May 20, police were advising members of the Jewish community in Flatbush-Midwood that synagogues must close outright, and the police were actively seeking out rabbis to so inform them.

136. Because of the general synagogue closings, plaintiff Perr began to attend another synagogue, Congregation Zichron Aryeh Leib.

137. On many occasions from late March and throughout April, police cars would arrive to surveil and intimidate the few remaining congregants at Congregation Zichron Aryeh Leib, including plaintiff Perr, many other congregants having been scared away by the Governor’s orders and the constant police presence.

138. On these occasions the police would try to gain entry and would bang on the doors of the synagogue. A few times they did gain entry to “check” on the worship proceedings.

On one such occasion, in March, plaintiff Perr confronted two officers in front of the synagogue who were trying to enter. They informed him that they had orders that all synagogues had to close, even though—as plaintiff told the officers—as of that date “congregate worship” had not been forbidden, which would not happen till around April 10, as pleaded above.

139. The result of this constant police presence and interference was a climate of fear that prevented the tranquility of worship among plaintiff and the remaining congregants, who were constantly apprehensive about police intrusions into their synagogue.

140. A self-styled “community activist” who claims to be coordinating with the City government, who periodically flashes a badge of some kind, has repeatedly summoned the police to houses of Jewish worship in the Flatbush-Midwood area to intimidate rabbis and congregants into suspending their worship and even closing their synagogues.

141. For example, on March 26, at Congregation Sasregen in the same neighborhood, plaintiff Perr was present for prayers in the early morning when the police, summoned by the aforesaid “community activist,” arrived and demanded that worship not proceed. A week later plaintiff observed that this synagogue had been locked and that there was a notice on the door from the Health Department that the synagogue had been closed and that no services could be conducted there. Exhibit T.

142. Also, on that date, the NYPD broke up a funeral gathering in honor of Rabbi Cohn, in front of his home, in which plaintiff Perr participated, with social distancing of those in the gathering. The street had been closed with permission from the police, who decided, however, that the gathering should end and proceeded to disperse the gathering by driving into its midst with their cars, in the middle of a eulogy, forcing everyone onto the sidewalks, where they could *not* socially distance.

143. During the first week in April, plaintiff Perr was advised by a 311 operator that all synagogues in Flatbush-Midwood were to be closed.

144. On April 10, as plaintiff Perr and another congregant were locking up after a synagogue service during Passover at Congregation Zichron Aryeh Leib, four NYPD vehicles pulled up in front of the synagogue, apparently in response to a complaint. A group of officers exited these vehicles and two of them confronted plaintiff Perr and a fellow congregant, threatening them with arrest for “illegal” prayer services. Plaintiff was not arrested only because he was already leaving and did not wish to argue with a platoon of armed police officers.

145. The remaining congregants at Congregation Zichron Aryeh Leib devised a text messaging system to warn each other of impending police presence so they could scatter or wait until the police had left so that they could begin morning services without harassment. The windows of the synagogue were shuttered and the front window, made of plate glass, was covered in black paper so that the police could not determine whether anyone was inside.

146. On another occasion, in or about the second week of April, the Rabbi of Congregation Zichron Aryeh Leib told police, in plaintiff Perr’s presence, that he had closed the synagogue to congregations as such—“congregate worship” having just been banned by the Governor’s latest “guidance” on enforcement of his orders—but that individuals were arriving there solely as individuals, which was not “congregate worship” as such.

147. By this date, Executive Order 202.10, as explained by defendant Cuomo’s Guidance Document, had prohibited “Congregate services within houses of worship” as opposed individuals entering the synagogue under the ten-person limit but without worship as a “congregation.”

148. Because of the ten-person gathering limit imposed by defendant Cuomo, plaintiff Perr was unable to have a Bar Mitzvah for his son that had been scheduled for May 2 at his original synagogue, which had also been closed due to the Governor's orders and local police enforcement. Further, his wife and four daughters and two boys have been unable to attend services since the closure of local synagogues in March, given the still-prevailing ten-person limit.

149. The synagogues in Flatbush-Midwood, including plaintiff Perr's original synagogue, are still laboring under defendant Cuomo's ten-person limit for "gatherings."

150. Plaintiff Perr and his fellow congregants are constantly aware of the potential for harassment and prosecution if the ten-person limit is exceeded. Consequently, attendance at services has plummeted from 100-120 persons to the ten men comprising the *minyan*, with any other man showing up being sent to the Women's Balcony, where the women would sit before the Governor's "lockdown."

151. Throughout the COVID-19 outbreak, Congregation Zichron Aryeh Leib has observed "social distancing," including more than six feet between the ten or so congregants and hand sanitizing. With social distancing, the synagogue could accommodate approximately 45 people. Its maximum capacity is around 140 people, including children, and women who pray in the upper level.

Plaintiff Mayer Mayerfeld

152. There are four synagogues within a two-block distance of plaintiff Mayerfeld's home, and he would attend all of them on a daily basis at various times of the week and the Sabbath depending on the times of the services and how they fit into his schedule.

153. The two main ones he attended were Shaarei Zion and Congregation Bnai Torah. There are at least dozen other Synagogues within a 10-block radius of his home, but were all shut about the same time due to the COVID-19 crisis—around the Sabbath of March 14th.

154. After about two weeks of attending a Sephardic synagogue that closed due to fears of being padlocked by the NYC Sheriff, plaintiff Mayerfeld began attending Congregation Zichron Aryeh Leib, where he and the congregants were subjected to intimidation by the NYPD at the behest of the Mayor and the Governor.

155. As alleged above, this synagogue, also attended by plaintiff Perr, has been repeatedly harassed by a police presence, with officers surveilling the synagogue, sometimes entering the synagogue, and other times attempting to gain entry.

156. On Tuesday, April 7, while plaintiff Mayerfeld was waiting outside for someone to come and unlock the door at Congregation Zichron Aryeh Leib, an NYPD patrol car parked in front of the synagogue and a second patrol car appeared to be circling the block. Two officers got out of the car and tried gaining access to the synagogue from the front and side doors. One of them engaged plaintiff Mayerfeld in conversation in order to ascertain if anyone was inside.

157. Plaintiff Mayerfeld objected that he did not appreciate the NYPD harassing people engaging in their constitutionally protected religious freedom and trying to intimidate people from going to Synagogue. He told this officer there is still a constitution in this country. The officer responded: “We’re just trying to make sure people are ‘safe.’”

158. In order to be sure of having Saturday services on the Sabbath, the principal day of Orthodox Jewish worship, plaintiff Mayerfeld also arranged for a *minyan* of ten persons in his backyard in the hope of avoiding police harassment. With his four four boys included, plaintiff

Mayerfeld had half a *minyan* and with the help of several other people was able to have Sabbath services in a socially distant manner in his yard.

159. On several occasions, however, neighbors came and attempted to disrupt the yard services or screamed nasty comments at plaintiff Mayerfeld for holding the *minyan* in his backyard, which is enclosed by hedges.

160. This social ostracizing and bullying is being incited by defendant de Blasio, who vowed to crack down on the Jewish community for failing to observe Cuomo's ban on religious gatherings, as alleged above. Community activists and non-profits are assisting in this effort at intimidation, while defendants De Blasio and Cuomo actively encouraged New Yorkers to turn their neighbors in during their daily press meetings and were actively denigrating anyone who did not follow their rules as being selfish and spreading disease, despite the fact there is no scientific evidence that attending a prayer service is any more hazardous than attending donut shops or bagel stores, all of which have remained open.

161. Plaintiff Mayerfeld ended the Sabbath services in his backyard at the end of May, when his neighborhood synagogue, Congregation Shaarei Tzion, reopened.

162. Worship at Congregation Shaarei Tzion is still severely hampered by the ten-person limit. Although the capacity of the synagogue is approximately 80, including the Women's Balcony, under the ten-person limit only ten men are allowed in the main sanctuary and if a few others show up, they are sent to the Women's Balcony. As a result, Plaintiff Mayerfeld's wife and daughter are not able to attend the services. This is the case in all the Orthodox synagogues that have reopened, to plaintiff Mayerfeld's knowledge.

163. Since worship is thus still limited to the *minyan*, worship by family members and other congregants beyond the *minyan* remains impossible without violating the challenged Orders.

COUNT I

Violation of the First and Fourteenth Amendments to the U.S. Constitution (Free Exercise of Religion) 42 U.S.C. § 1983

164. Plaintiffs re-allege and incorporate by reference the factual allegations in ¶¶ 1-163.

165. Plaintiffs' sincerely held religious beliefs compel them to preside over or participate in religious gatherings in keeping with the teachings and requirements of their respective religions.

166. The Free Exercise Clause of the First Amendment to the U.S. Constitution protects plaintiffs' religious activities.

167. The challenged limits on gatherings under defendant Cuomo's executive orders, SDP and NYFP (hereafter "the challenged regulations"), substantially burden plaintiffs' free exercise of religion by forbidding them to preside over or participate in any religious gathering in their respective houses of worship or elsewhere in the State of New York, save under arbitrarily oppressive conditions that strictly limit the size of their congregations.

168. The challenged regulations are impermissibly underinclusive because they are riddled with exceptions while purporting to be facially neutral, fail to prohibit secular activity that endangers the purported state interest in "public health" equally or to a greater degree than the prohibited religious conduct, and burden religious conduct while not affecting substantial categories of conduct that are not religiously motivated.

169. The challenged regulations are therefore not a neutral policy or law of general applicability and cannot be sustained unless narrowly tailored to serve a compelling state interest of the highest order.

170. The challenged regulations are not rationally related to a compelling state interest, nor are they the least restrictive means of accomplishing the purported compelling state interest of reducing the rate of community spread of COVID-19.

171. The undefined term “non-essential gatherings” has no rational relation to the goal of “social distancing,” which can be accomplished even more readily in a church setting, where people can sit apart in the pews than in the mass demonstrations defendants condone or in retail or office environments rife with direct interpersonal contacts and contact with common surfaces touched by innumerable other people.

172. The challenged regulations irrationally undermine the purported state interest by favoring numerous forms of secular activity that pose a greater risk of viral transmission than the prohibited religious gatherings.

173. Defendants have less restrictive means of achieving any legitimate interest served by the challenged regulations, those being the same conditions on which they allow retail and non-retail businesses to operate: i.e., “social distancing” and sanitization.

174. As the pleaded facts demonstrate, the challenged regulations irrationally, invidiously, and without any legitimate, much less compelling, state purpose discriminate against religious activities in favor of secular and commercial activities, including mass demonstrations that violate the same regulations.

175. Both facially and as applied to plaintiffs, the challenged regulations violate the Free Exercise Clause of the First Amendment as made applicable to the States by the Fourteenth Amendment.

176. In the absence of declaratory and injunctive relief, plaintiffs will be irreparably harmed.

177. Plaintiffs have no adequate remedy at law for the violation of their constitutional rights.

COUNT II

Violation of the First and Fourteenth Amendments to the U.S. Constitution (Violation of Freedom of Speech, Assembly and Expressive Association) 42 U.S.C. § 1983

178. Plaintiffs re-allege and incorporate by reference the allegations in ¶¶ 1-163.

179. The First Amendment protects plaintiffs' right to peaceably assemble together with the members of their congregations.

180. Plaintiffs' religious assemblies are intertwined with speech and expressive association, meaning the right to associate with others of like mind for a protected purpose.

181. Because the undefined term "non-essential gatherings" employed in the challenged regulations has no rational relationship to the goal of "limiting the spread" of COVID-19 by "social distancing," which can be practiced more easily, or no less easily, in a church or synagogue than in the retail and office environments and mass demonstrations the defendants favor, the challenged regulations operate solely to discriminate arbitrarily against groups of people based on their social, political or religious purposes rather than any alleged lack of "social distancing."

182. Defendants have less restrictive means of regulating gatherings for the stated purpose of “reducing the rate of community spread of COVID-19.”

183. The challenged regulations do not serve any compelling or even significant government interest and are not narrowly tailored to achieve any legitimate state purpose.

184. The challenged regulations impermissibly infringe freedom of speech, assembly and expressive association without serving any compelling or even significant government interest.

185. In the absence of declaratory and injunctive relief, plaintiffs will be irreparably harmed.

186. Plaintiffs have no adequate remedy at law for the violation of their constitutional rights.

COUNT III

Violation of the Fourteenth Amendment (Equal Protection – Substantive Due Process) 42 U.S.C. § 1983

187. Plaintiffs re-allege and incorporate by reference the allegations contained in ¶¶ 1-184.

188. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws, which requires that the State not treat the “suspect class” of religion differently from the class of similarly situated people or pass laws that burden First Amendment rights.

189. The challenged regulations treat the class or subclass of people who exercise freedom of religion by gathering with others for that purpose, including plaintiffs, differently

from the similarly situated class of people who gather with others for secular purposes, including the mass demonstrations defendants have exempted from their regulatory regime.

190. Moreover, the class of those who gather for religious purposes in churches, chapels and synagogues is plainly less subject to the risk of infection or transmission than those engaged in mass demonstrations, commercial transactions involving crowded offices, large crowds every day of the week, physical exchanges, and common surfaces touched by potentially millions of people, which makes the suspect classification targeted by the challenged regulations even more irrational and invidious.

191. The challenged regulations cannot survive the strict scrutiny required of suspect classifications under the substantive due process component of the Equal Protection Clause as they are far from neutral and generally applicable and are not narrowly tailored to serve a compelling state interest.

192. The challenged regulations, both facially and as applied, also violate plaintiffs' fundamental rights to freedom of speech, assembly and expressive association as alleged above.

193. Even if the challenged regulations did not involve a suspect classification or violate fundamental rights, their severe restriction of religious gatherings, while permitting numerous secular and commercial gatherings unrestricted as to size, including the mass demonstrations of which defendants approve, is not even rationally related to a legitimate state interest and thus cannot survive even rational basis analysis under the Equal Protection Clause.

194. Alternatively, the challenged regulations cannot survive heightened scrutiny under the "hybrid-rights" theory the United States Supreme Court has recognized for purposes of Equal Protection analysis when, as here, multiple rights are violated by a purportedly neutral law.

195. The challenged regulations thus violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, including its substantive component.

196. In the absence of declaratory and injunctive relief, plaintiffs will be irreparably harmed.

197. Plaintiffs have no adequate remedy at law for the violation of their constitutional rights.

COUNT IV

Ultra Vires State Action in Violation of Federal Rights

198. Plaintiffs re-allege and incorporate by reference the allegations contained in ¶¶ 1-195.

199. Defendant Cuomo relies on New York State Executive Law § 29-a as the basis for the challenged regulations. Said statute provides in pertinent part as follows:

1. *Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.*

2. Suspensions pursuant to subdivision one of this section shall be subject to the following standards and limits:

a. no suspension shall be made for a period in excess of thirty days, provided, however, that upon reconsideration of all of the relevant facts and circumstances, the governor may extend the suspension for additional periods not to exceed thirty days each;

b. no suspension shall be made which does not safeguard the health and welfare of the public and *which is not reasonably necessary* to the disaster effort;

c. any such suspension order shall specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension;

d. the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such statute, local law, ordinance, order, rule or regulation suspended, and may include other terms and conditions;

e. any such suspension order shall provide *for the minimum deviation from the requirements of the statute, local law, ordinance, order, rule or regulation* suspended consistent with the disaster action deemed necessary... (emphasis added).

200. Executive Law § 29-a provides no authority for the plethora of detailed positive edicts Cuomo has promulgated by executive fiat, regulating virtually every aspect of the lives of some 8 million people in the State of New York, including plaintiffs' exercise of First Amendment rights as pleaded above.

201. Rather, Executive Law § 29-a expressly limits its scope according "to the state constitution, the federal constitution and federal statutes and regulations..." *Id.*

202. The challenged regulations are *ultra vires* the statute on which defendant Cuomo relies in that Cuomo has legislated rather than confining himself to the limited process of temporarily suspending certain laws, orders, rules or regulations by executive order.

203. The New York State Constitution provides for a complete separation of powers among the three "co-ordinate and co[-]equal branches" of government: the executive, the legislative, and the judicial. N.Y. Const., art. III, sec. 1; art. IV, sec. 1; and art. VI.

204. Article III, Section 1 of the New York State Constitution provides: "The legislative power of this state shall be vested in the senate and assembly." N.Y. Const., art. III, sec. 1.

205. Nowhere in the New York State Constitution is the Chief Executive, defendant Cuomo, given or delegated any legislative authority. Rather, "The [G]overnor shall have power to convene the legislature, or the senate only, on extraordinary occasions. At extraordinary

sessions convened pursuant to the provisions of this section no subject shall be acted upon, except such as the [G]overnor may recommend for consideration.” N.Y. Const., art. IV, sec. 3.

206. The Governor’s exercise of emergency power during the COVID-19 outbreak required that defendant Cuomo convene the legislature on an extraordinary basis in order to take whatever legislative measures were deemed reasonably necessary according to the separation of powers. Defendant Cuomo has never convened the legislature.

207. As another challenger of Cuomo’s reign by executive fiat in this District has alleged (*HoganWillig v. James, et al.* Case 1:20-cv-00577), which allegations plaintiffs hereby adopt and adapt to this pleading:

- a. [T]he COVID-19 challenge is similar to what the public has faced many times before. New Yorkers have weathered floods and braved hurricanes; outlasted droughts and survived economic depressions; and, yes, they have persisted in the face of diseases more contagious and detrimental to the public welfare than the one we countenance today.
- b. Once Defendant Cuomo was convinced that his unilateral, unprecedented actions were necessary, a convenient presumption arose that the danger the public faced, too, was unprecedented. Had the public gone about its business as usual, there is not a single reason to believe that there would be a need for commercial lockdowns or home isolation orders.
- c. In short, Defendant Cuomo has been unconstitutionally legislating from the very exigency he created. It is a self-fulfilling prophecy of the most dangerous sort.
- d. As Defendant Cuomo sees it, the proof of the severity of the COVID-19 pandemic is that we have been compelled to “shelter in place” and don medical masks at all hours of the day. And, Defendant Cuomo would permit us to shed these restrictions only by showing that the COVID-19 pandemic has subsided.
- e. In the United States, the burden is always on the government to justify its actions, not on the citizenry to wait out its deprivations; this is the ingenious method we have devised to ensure that our laws are cloaked with good faith and founded in rational purpose.

208. Defendant Cuomo's *ultra vires* acts, as enforced by him and defendants James and de Blasio, should be declared void and unenforceable, as they constitute state action in violation of all the constitutional rights the challenged regulations infringe, as pleaded above.

209. In the absence of declaratory and injunctive relief voiding and enjoining defendants' *ultra vires* acts, plaintiffs will be irreparably harmed.

210. Plaintiffs have no adequate remedy at law for the violation of their constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court grant the following relief:

- A. A temporary restraining order, followed by a preliminary and final injunction restraining defendants, and all those acting in concert with them, from enforcing any gathering limits on plaintiffs' religious gatherings, including the ten-person limit on "non-essential gatherings," the "drive-in" requirement for larger "non-essential gatherings," and the limitation of occupancy of houses of worship to 25% of building capacity;
- B. In the alternative, compelling defendants to apply to plaintiffs' religious gatherings no greater limits than they have placed on essential retail businesses and the mass demonstrations approved by defendants Cuomo and de Blasio;
- C. A declaratory judgment that (1) the challenged regulations, including the ten-person limit on "gatherings," the "drive-in" requirement for larger "gatherings," and the limitation of occupancy of house of worship to 25% of building capacity are unconstitutional, both individually and taken together, both facially and as applied to plaintiffs; and (2) that defendant Cuomo's gathering limits imposed by

executive order are *ultra vires* his authority under Executive Law § 29-a, void and unconstitutional both facially and as applied to plaintiffs.

D. An award of costs of this litigation, including reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988.

E. Such other and further relief as this Court deems just and proper.

Dated: June 10, 2020

Respectfully submitted,



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Counsel for Plaintiffs

VERIFICATION

I, **REV. STEVEN SOOS**, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on June 9, 2020


REV. STEVEN SOOS

VERIFICATION

I, **REV. NICHOLAS STAMOS**, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on June 9, 2020.



REV. NICHOLAS STAMOS

VERIFICATION

I, **DANIEL SCHONBRUN**, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on June 9, 2020.



DANIEL SCHONBRUN

VERIFICATION

I, **MAYER MAYERFELD**, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on June 9, 2020.


MAYER MAYERFELD

VERIFICATION

I, **ELCHANAN PERR**, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on June 10, 2020.



ELCHANAN PERR