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October 8, 2020

**BY FEDEX**

The Honorable Andrew M. Cuomo  
Governor of New York State  
NYS State Capitol Building  
Albany, NY 12224

**Re: Unconstitutional Discrimination Against Orthodox Jewish Community**

Dear Governor Cuomo:

This firm represents Rabbi Chaim Rottenberg, rabbi of Congregation Netzach Yisroel in Monsey, New York, and we write on their behalf concerning your imposition of a so-called “cluster action initiative” focused on purported “hot spots.” These areas largely coincide with areas of orthodox Jewish population in the metropolitan New York City area, including Rockland County but conspicuously avoiding many statistical “hot spots” of Covid-19 “case spikes.”

One of the primary features of this new set of regulations is an order, in violation of the injunction entered in *Soos v. Cuomo*, 1:20-cv-00651-GLS-DJS (N.D.N.Y. 2020), limiting gatherings for congregational worship to ten persons. There is no question that this “action” is prohibited by the order in *Soos*. Under Fed. R. Civ. P. 71, “When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.” The *Soos* injunction explicitly enjoined and restrained the State and related agencies “from enforcing any limitation for outdoor gatherings, provided that participants in such gatherings follow social distancing requirements as set forth in the applicable executive orders and guidance.” As the Second Circuit taught in *Berger v. Heckler*, 771 F.2d 1556, 1565 (2d Cir. 1985), a court order such as a consent decree—or, in this case, a ruling that certain governmental actions are unconstitutional—is intended to provide benefits to non-parties as well as litigants. Any other approach would render the *Soos* injunction a nullity except with respect to the handful of litigants who brought that action in the first place – surely not the court’s intention and certainly not the result required by the Constitution.

Besides disregarding the *Soos* order, this “action” is unconstitutional on multiple additional grounds, including by continuation and elaboration of the widely discredited distinction between “essential” and “non-essential” activities in a free country. This is especially true with respect to the characterization of public worship on such an irrational basis. The rights to freedom of religion,

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assembly, speech, and travel are fundamental rights protected by the U.S. Constitution. *See, e.g., Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964); *Kent v. Dulles*, 357 U.S. 116, 127 (1958). When a government practice restricts fundamental right, as is the case here, it is subject to “strict scrutiny” and can be justified only if it furthers a compelling government purpose, and, even then, only if no less restrictive alternative is available. *See, e.g. Memorial Hospital v. Maricopa Cnty.*, 415 U.S. 250, 257-258 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 339-341 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 660 (1969); *Maher v. Roe*, 432 U.S. 464, 488 (1977).

Strict scrutiny applies to the “action” because New York State has deemed religious worship “non-essential.” This designation impinges on plaintiffs’ fundamental rights to freedom of religion, assembly, speech, and travel. These mandates are not “narrowly tailored” to further any compelling governmental interest, as the Court in *Soos* made clear. The “action” also violates the Fourteenth Amendment, both facially and as applied to our clients. The Fourteenth Amendment of the Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Equal protection requires the state to govern impartially—not draw arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Here, the objectionable classification impinges on a fundamental right, including the rights to free speech and assembly, and the right to travel, among others, and is clearly based on unproved, and in fact largely disproved, assertions and assumptions connecting conduct by religious Jews with the spread of Covid-19. We are pained to remind Your Honor of the visit you made to Rabbi Rottenberg’s home less than a day after, in that very place, a machete-wielding man slashed five congregants attending a Hanukkah celebration on December 28<sup>th</sup> of last year.

Governor Cuomo, Rabbi Rottenberg’s pain concerning your actions cannot adequately be stated. Nor can his disappointment concerning the failure here to recognize that what the State deems “non-essential” is, for him and other religious faithful, not only an essential thing. It is the only thing, to which all other considerations short of literal threats to human life, which cannot be said to be at stake here, come far behind.

As you know, following the Hannukah attack, Congregation Netzach Yisroel continued with its planned post-Sabbath “Melave Malkah” celebration for the same night. To non-members of the community, this commitment and strength was a wonder; to Hasidim and others familiar with and who share the values of this community, it was no less heroic for being entirely characteristic. It is the community—the *kehillah*—that felt the pain of the tragic attack; it was the *kehillah* that came together to show its resolution never to be dissuaded, much less terrorized, from its way; and it is the *kehillah*, sadly, both in Monsey and throughout the region, that feels targeted unfairly by the new regulations planned to go into effect tomorrow.

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The *Soos* court was not alone, Governor Cuomo, in recognizing that not only decency but our Constitution require more than this. In opinions such as *County of Butler v. Wolf*, 2:20-cv-677 (W.D. Pa. 2020) courts are properly beginning to question both the rationality and constitutionality of sweeping shutdowns long justified under an anachronistic reading of *Jacobson v. Massachusetts* 197 U.S. 11 (1905). *Jacobson* was about mandatory vaccines, but your “action” is the latest, and perhaps most egregious, example of what Attorney General Bill Barr has called “the greatest intrusion on civil liberties in American history.” As U.S. District Judge Stickman IV wrote in *Butler*:

Broad population-wide lockdowns are such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional unless the government can truly demonstrate that they burden no more liberty than is reasonably necessary to achieve an important government end.

There is, notwithstanding the claim to the contrary, no scientific or epidemiological justification for the promulgation of these regulations and doing so on the eve of the Jewish holiday of Simchas Torah is a particular offensive abuse of power. We write to urge Your Honor that these this action be withdrawn and permanently shelved, and to advise the State that, absent such action, our clients, as well as other allied rabbis and congregations, will take appropriate legal action, including the filing of a civil action seeking relief, inter alia, under 42 U.S. Code § 1983 because of the violation of our client’s constitutional rights.

Very truly yours,



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