

20-3572-CV

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

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

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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

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<i>Anti-Semitic Incidents Reach 40-Year High With Most Cases In New York, New Jersey</i> , CBS New York, May 12, 2020, https://newyork.cbslocal.com/2020/05/12/anti-semitic-incidents-reach-40-year-high-with-most-cases-in-new-york-new-jersey/	4, 14
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INTEREST OF *AMICUS*¹

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹ *See supra* n. 2.

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

CONCLUSION

This Court should enjoin the order pending appeal.¹¹

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

CERTIFICATE OF COMPLIANCE

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

October 27, 2020

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

CERTIFICATE OF SERVICE

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

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

October 27, 2020

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay