

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

REV. STEVEN SOOS,
REV. NICHOLAS STAMOS,
DANIEL SCHONBRUN,
ELCHANAN PERR and
MAYER MAYFELD,

DECLARATION

20-CV-00651

Plaintiffs,

(GTS)(DJS)

-against-

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.

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

1. I am an Assistant Attorney General of counsel in this matter to Letitia James,
Attorney General of the State of New York, attorney for defendants Governor Andrew M. Cuomo
and Attorney General Letitia James (“State defendants”).

2. I submit this declaration on behalf of the State defendants in opposition to plaintiffs' application for a temporary restraining order in the above-captioned action.

3. Plaintiffs are two Catholic priests who perform "priestly ministries" in the North Country region¹ of New York State, and three practitioners of the Orthodox Jewish Faith in New York City. Dkt. No. 1 at ¶¶3-7, 103.

4. Plaintiffs challenge limitations placed on mass gatherings pursuant to Executive Orders of Governor Cuomo in response to the COVID-19 pandemic, alleging that such limitations unconstitutionally² affect their ability to perform and attend congregate religious services.

5. Plaintiffs' present application seeks an order granting the following temporary preliminary relief:

Restraining Defendants from enforcing any gathering limits on Plaintiffs' religious gatherings, or, in the alternative, from enforcing any gathering limits on Plaintiffs' religious gatherings greater than Defendants have imposed on essential retail businesses and the mass demonstrations approved by Defendants Cuomo and de Blasio.

Dkt. No. 7.

NEW YORK'S RESPONSE TO THE COVID-19 PANDEMIC

6. On March 7, 2020, in order to combat the burgeoning COVID-19 pandemic³, Governor Cuomo issued Executive Order No. 202 ("EO 202"), implementing the State

¹ The North Country region includes Jefferson, Lewis, St. Lawrence, Franklin, Clinton, Essex and Hamilton Counties. Brendan J. Lyons, *Cuomo says North Country among four regions ready to open Friday*, TIMES UNION, available at <https://www.timesunion.com/news/article/Cuomo-says-North-Country-among-four-regions-ready-15267304.php>.

² Plaintiffs also allege that the limitations violate New York State law. Dkt. No. 1, Count IV.

³ The COVID-19 pandemic is discussed in the declaration of Brad Hutton, submitted herewith.

Comprehensive Emergency Management Plan and declaring a statewide disaster emergency until September 7, 2020. By Executive Order No. 202, pursuant to New York State Executive Law § 29, the Governor suspended all state and local laws, rules, and regulations to the extent necessary to cope with the COVID-19 disaster emergency. A copy of EO 202 is annexed hereto as **Exhibit 0**.

7. Following the issuance of EO 202, Governor Cuomo issued several supplemental Executive Orders, continuing the temporary suspension and modification of certain laws relating to the state of emergency. To date, the Governor has issued over thirty additional executive orders (Nos. 202.1 through 202-40) related to the COVID-19 disaster emergency, each of which suspends or modifies specified legal provisions pursuant to Executive Law § 29 and makes declarations related to the disaster emergency.

8. Those Executive Orders are annexed hereto as follows:

- Exhibit 1:** Executive Order No. 202.1 (“EO 202.1”);
- Exhibit 2:** Executive Order No. 202.2 (“EO 202.2”);
- Exhibit 3:** Executive Order No. 202.3 (“EO 202.3”);
- Exhibit 4:** Executive Order No. 202.4 (“EO 202.4”);
- Exhibit 5:** Executive Order No. 202.5 (“EO 202.5”);
- Exhibit 6:** Executive Order No. 202.6 (“EO 202.6”);
- Exhibit 7:** Executive Order No. 202.7 (“EO 202.7”);
- Exhibit 8:** Executive Order No. 202.8 (“EO 202.8”);
- Exhibit 9:** Executive Order No. 202.9 (“EO 202.9”);
- Exhibit 10:** Executive Order No. 202.10 (“EO 202.10”);

- Exhibit 11:** Executive Order No. 202.11 (“EO 202.11”);
- Exhibit 12:** Executive Order No. 202.12 (“EO 202.12”);
- Exhibit 13:** Executive Order No. 202.13 (“EO 202.13”);
- Exhibit 14:** Executive Order No. 202.14 (“EO 202.14”);
- Exhibit 15:** Executive Order No. 202.15 (“EO 202.15”);
- Exhibit 16:** Executive Order No. 202.16 (“EO 202.16”);
- Exhibit 17:** Executive Order No. 202.17 (“EO 202.17”);
- Exhibit 18:** Executive Order No. 202.18 (“EO 202.18”);
- Exhibit 19:** Executive Order No. 202.19 (“EO 202.19”);
- Exhibit 20:** Executive Order No. 202.20 (“EO 202.20”);
- Exhibit 21:** Executive Order No. 202.21 (“EO 202.21”);
- Exhibit 22:** Executive Order No. 202.22 (“EO 202.22”);
- Exhibit 23:** Executive Order No. 202.23 (“EO 202.23”);
- Exhibit 24:** Executive Order No. 202.24 (“EO 202.24”);
- Exhibit 25:** Executive Order No. 202.25 (“EO 202.25”);
- Exhibit 26:** Executive Order No. 202.26 (“EO 202.26”);
- Exhibit 27:** Executive Order No. 202.26 (“EO 202.27”);
- Exhibit 28:** Executive Order No. 202.26 (“EO 202.28”);
- Exhibit 29:** Executive Order No. 202.26 (“EO 202.29”);
- Exhibit 30:** Executive Order No. 202.26 (“EO 202.30”);
- Exhibit 31:** Executive Order No. 202.26 (“EO 202.31”);
- Exhibit 32:** Executive Order No. 202.26 (“EO 202.32”);

- Exhibit 33:** Executive Order No. 202.26 (“EO 202.33”);
- Exhibit 34:** Executive Order No. 202.26 (“EO 202.34”);
- Exhibit 35:** Executive Order No. 202.26 (“EO 202.35”);
- Exhibit 36:** Executive Order No. 202.26 (“EO 202.36”);
- Exhibit 37:** Executive Order No. 202.26 (“EO 202.37”);
- Exhibit 38:** Executive Order No. 202.26 (“EO 202.38”);
- Exhibit 39:** Executive Order No. 202.26 (“EO 202.39”); and
- Exhibit 40:** Executive Order No. 202.26 (“EO 202.40”).

9. A number of these Executive Orders concern gathering limits and physical distancing, which are relevant to the instant application.

10. On March 12, 2020, the Governor directed cancellations of gatherings in excess of five hundred people, directed that smaller gatherings be limited to 50 percent capacity, and directed closure of theaters in large cities. Exh. 1.

11. On March 16, 2020, the Governor restricted the size of gatherings to 50 or fewer participants and directed the indefinite closure of all bars, restaurants, gambling establishments, gyms, and movie theaters. Exh. 3. The same order directed that no local jurisdiction should issue laws or declarations in conflict with the COVID-19 Executive Orders, and suspended or modified any conflicting local provision. Id.

12. Also on March 16, 2020, the Governor directed all non-essential state and local government workers to work from home or take paid leave, “except for those personnel essential to the . . . response to the COVID-19 emergency.” Exh. 4. The Governor further directed all schools closed until no earlier than April 1, 2020 (extended to April 15, 2020). Id.; Exh. 12.

13. On March 18, 2020, the Governor directed the closure of malls and places of public amusement. Exh. 5.

14. Also on March 18, 2020, the Governor ordered all businesses and not-for-profit entities in the State to “utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize” and for non-essential businesses to reduce their workforce by 50 percent. Exh. 6.

15. On March 19, 2020, the Governor ordered all non-essential businesses to reduce their workforce by 75 percent. Exh. 7. EO 202.7 listed what businesses and services in New York State were deemed essential and directed Empire State Development (“ESD”) to issue guidance to further clarify which businesses would be considered essential or non-essential. Exh. 7.

16. “[E]ssential services or functions” are excluded from the orders to reduce workplace staffing. According to the Executive Order, “Essential services or functions” include:

essential health care operations including research and laboratory services; essential infrastructure including utilities, telecommunications, 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 operation 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.

Exh. 6. In general, “essential businesses” include businesses that provide, at least in part, goods or services that are essential to human life: food, beverage, shelter, healthcare, and transportation.

Id.

17. By EO 202.11, the Governor directed that violations of Executive Order restrictions

related to facility operation or capacity be deemed violations of law, and specifically, but without limitation, violations “of the Uniform Code or other local building code in effect in the jurisdiction in which the facility or space is located,” enforceable by any authorized state or local official. Enforcement may include issuing “an appearance ticket, a Notice of Violation, an Order to Remedy such violations, . . . and/or a DO Not Occupy Order to any owner, operator, or occupant of any such facility or space.” Exh. 11.

18. EO 202.8 provides that violations of the workplace restrictions will be enforced by Public Health Law §12, which provides for a penalty up to \$2,000 and enforcement by injunctive action referred by the Commissioner of Health to the Attorney General. Exh. 8. See also Exhs. 14, 28.

19. On March 23, 2020, the Governor barred all non-essential gatherings of any size. Exh. 10.

A. New York City in Phase 1

20. New York City is currently in Phase 1 of New York’s Reopening Plan.

21. In Phase 1, pursuant to EOs 202.32 and 202.33, gatherings of ten or fewer individuals are permitted, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to. Exhs. 32, 33.

22. Additionally, any drive-in or remote religious service may continue in excess of the 10-person limit so long as there is no in-person contact between participants. Id.

23. During Phase 1, non-essential businesses in the following industries are permitted to reopen:

- Construction;

- Agriculture, Forestry, Fishing and Hunting
- Retail (limited to curbside or in-store pickup or drop off);
- Manufacturing; and
- Wholesale Trade.

Hutton decl. at ¶ 46.

24. Those businesses, and essential businesses previously permitted to continue operation, must comply with physical distancing restrictions, ensure the use of protective equipment, and comply with hygiene and sanitization requirements, among other requirements.

Id. at ¶ 47.

25. In Phase 1, the following physical distancing protocols must be followed by retail businesses:

- Ensure 6 ft. distance between personnel, unless safety or core function of the work activity requires a shorter distance.
- For any work occurring indoors, limit workforce presence to only the employees necessary to conduct curbside and in-store pickup activities, but no more than 50% of the maximum occupancy for a particular area set by the certificate of occupancy, inclusive of customers picking up an order who must maintain 6 ft. of space from others or wear an acceptable face covering.
- Any time personnel are less than 6 ft. apart from one another or a customer and without a physical barrier (e.g., plexiglass), personnel must wear acceptable face coverings.
- Tightly confined spaces (e.g., elevators, small stock rooms, behind cash registers, narrow merchandise aisles) should be occupied by only one individual at a time, unless all employees are wearing face coverings. If occupied by more than one person, keep occupancy under 50% of maximum capacity.
- Post social distancing markers using tape or signs that denote 6 ft. of spacing in commonly used and other applicable areas (e.g., clock in/out stations, health screening stations, cash registers).

- Limit in-person gatherings as much as possible and use tele- or video-conferencing whenever possible. Essential in-person gatherings (e.g., meetings) should be held in open, well-ventilated spaces with appropriate social distancing among participants.
- Establish designated areas for pick-ups and deliveries, limiting contact to the extent possible

Id. at ¶ 48.

B. The North Country Completes Phase 2

26. At the time of the filing of the complaint and application for preliminary injunctive relief, the North Country region of New York State was in Phase 2 of New York’s Reopening Plan. Hutton decl, at ¶ 49.

27. In Phase 2, pursuant to Executive Order 202.38, religious gatherings of 25% of a house of worship’s maximum indoor capacity are permitted, provided that social distancing protocols and cleaning and disinfection protocols required by the Department of Health are adhered to. Id. at ¶ 50; Exh. 38.

28. Pursuant to the Governor’s Executive Orders, the following businesses must remain closed during Phase 2:

- Any indoor common portions of retail shopping malls with 100,000 or more square feet of retail space available for lease must remain closed to the public; however, any stores without their own external entrance(s) may operate via curbside pickup in Phase 1 and 2 providing purchased items to customers at or near the general mall entrance and any stores with their own external entrance(s) separate from the general mall entrance (e.g., strip malls, anchor tenants), may open for curbside and in-store pickup in Phase 1 and all in-store retail activities in Phase 2;
- Indoor on-premise restaurant and bar service, excluding take-out or delivery for off-premise consumption in Phase 1 and outdoor on-premise restaurant and bar service in Phase 2;

- Large gathering/event venues, including but not limited to establishments that host concerts, conferences, or other in-person performances or presentations in front of an in-person audience;
- Gyms, fitness centers, and exercise classes, except for remote or streaming services;
- Video lottery and casino gaming facilities;
- Movie theaters, except drive-ins; and
- Places of public amusement, whether indoors or outdoors, including but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, arcades, fairs, children's play centers, funplexes, theme parks, bowling alleys, family and children's attractions.

Hutton decl. at ¶ 53.

29. Other non-essential retail businesses are permitted to open during Phase 2 with restrictions. Id. at ¶ 54.

30. Physical distancing requirements for retail businesses permitted to open in Phase 2 include the following:

- Ensure 6 ft. distance between individuals, unless safety or core function of the work activity requires a shorter distance.
- Reduce interpersonal contact and congregation through methods such as limiting workforce presence to only the employees necessary to conduct retail activities.
- The workforce and customer presence must be limited to no more than 50% of the maximum occupancy for a particular area set by the certificate of occupancy, inclusive of customers, who must maintain 6 ft. of space from others and, in all cases, wear an acceptable face covering.
- Tightly confined spaces (e.g., elevators, small stock rooms, behind cash registers, narrow merchandise aisles) should be occupied by only one individual at a time, unless all individuals are wearing face coverings. If occupied by more than one person, keep occupancy under 50% of maximum capacity.

- Post social distancing markers using tape or signs that denote 6 ft. of spacing in commonly used and other applicable areas (e.g., clock in/out stations, health screening stations, break rooms, cash registers, merchandise aisles).
- Limit in-person gatherings (e.g., meetings) as much as possible and use tele-or video-conferencing whenever possible. If a meeting is necessary, it should be held in an open, well-ventilated space with appropriate social distancing among participants.
- Establish designated areas for deliveries, limiting contact to the extent possible.
- Ensure fitting rooms are equipped with appropriate cleaning/hygiene supplies for employee and customer use, including hand sanitizer.
- Close amenities including self-serve bars and samplers.

Id. at ¶ 55.

C. The North Country Region in Phase 3

31. On June 12, 2020, the North Country Region began Phase 3 re-opening. Id. at ¶ 56.

32. In Phase 3, restaurants and personal care services businesses are added to the non-essential businesses permitted to resume operation. Id.

33. Food services businesses must comply with the following physical distancing requirements:

- Limit indoor capacity to no more than 50% of maximum occupancy, exclusive of employees.
- Limit outdoor capacity to the number of tables that can be safely and appropriately arranged, such that each table is a minimum of 6 ft. away from another.
- All indoor and outdoor tables with seating for customers must be separated by a minimum of 6 ft. in all directions. Wherever distancing is not feasible between tables, physical barriers must be enacted between such tables. Barriers must be at least 5 ft. in height and not block emergency and/or fire exits.

- Regardless of physical distance, employees must wear an acceptable face covering at all times.
- Patrons must wear face coverings at all times, except while seated; provided that the patron is over the age of 2 and able to medically tolerate such covering.
- Individuals seated at the same table must be members of the same party (but may be from different households), with a maximum of 10 people per table. Seating in bar areas and communal tables are only permitted if at least 6 ft. can be maintained between parties.
- Clearly signal 6 ft. spacing in any lines for customers waiting to order, pick-up food, be seated, or use the restroom, as well as in any pick-up or payment location.
- Designate entrances/exits for customers and separate entrances/exits for employees, where possible.
- Limit in-person gatherings (e.g., staff meetings) to the greatest extent possible.
- Establish designated areas for vendor pickups and/or deliveries, limiting contact to the extent possible.

Id. at ¶ 57.

34. Personal care services businesses must comply with the following physical distance protocols:

- Limit the workforce and customer presence to no more than 50% of the maximum occupancy, inclusive of customers, who must maintain 6 ft. of separation from others, except during the service, and, in all cases, only be permitted entry if wearing an acceptable face covering; provided that the customer is over age 2 and medically able to tolerate one.
- Ensure 6 ft. distance between individuals at all times, unless safety or the core activity requires a shorter distance (e.g., performing a piercing/tattoo, providing a massage, performing a manicure/pedicure). Employees must wear face coverings any time they interact with customers (e.g., performing a service, ringing up a purchase) and any time they come within 6 ft. of another person.

- Ensure that customer seating allows customers to maintain a 6 ft. distance from all others except for the employee providing service (e.g., tattoo and piercing workstations, massage tables, or salon workstations must be 6 ft. apart from each other), unless a physical barrier is in place in accordance with OSHA guidelines.
- Ensure that employees at appointment desks/cash registers maintain 6 ft. of distance from others, unless there is a physical barrier (e.g., plexiglass) between them, or the employee is wearing a face covering; however, even with a barrier, employees must wear a face covering any time they interact with a customer.
- Close waiting rooms.
- Put in place practices for adequate social distancing in small areas, such as restrooms and breakrooms.
- Establish designated areas for pickups and deliveries, limiting contact to the extent possible.

Id. at ¶ 58.

35. For the reasons discussed in the accompanying memorandum of Brad Sutton and memorandum law, plaintiffs have failed to demonstrate their entitlement to temporary preliminary injunctive relief because (1) they have failed to demonstrate a likelihood of success on the merits of their claims; (2) they have not shown that they will suffer irreparable harm in the absence of the granting of such relief; (3) the equities balance in favor of the State and (4) such relief would not be in the public interest.

WHEREFORE, the State defendants respectfully request that the court issue an order denying plaintiffs' application for temporary preliminary injunctive relief in its entirety.

Dated: June 15, 2020
Wynantskill, New York

s/ Adrienne J. Kerwin

Adrienne J. Kerwin