

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

YITZCHOK LEBOVITS and  
CHANA SHAPIRO-LEBOVITS, *et al.*

*Plaintiffs,*

v.

ANDREW M. CUOMO, individually and  
in his official capacity as Governor of the  
State of New York; *et al.*

*Defendants.*

Civil No. 1:20-cv-01284-GLS-DJS  
Hon. Gary L. Sharpe

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

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## INTERESTS OF AMICUS CURIAE<sup>1</sup>

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. MPAC's view is that America is enriched by the vital contributions of American Muslims. MPAC works diligently to offer the public a portrayal that goes beyond stereotypes and shows that Muslims are part of a vibrant American pluralism.

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 explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both in places where Muslims are a majority and where they are a minority, and partnering with the Institute's other teams in advocacy. IRF believes that the Islamic faith teaches Muslims to want for others what they want for themselves, and that supporting the Jewish school in this case is in the interest of the common good.

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<sup>1</sup> *Amicus* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus*, its members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

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, and highlighting the way that New York's policy fits into that troubling pattern.

### **SUMMARY OF 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 schools in predominantly Jewish communities harsher than those on schools outside those communities, despite his frank acknowledgment that schools pose little risk of COVID spread. The existence of a general public health emergency does not render important constitutional rights unenforceable or unimportant, nor does it call for unreflecting deference to government policies, as myriad cases arising from the current pandemic show. Policies like these

are not neutral—they are expressly and admittedly targeted at Orthodox Jewish communities. Nor are they generally applicable—they impose more onerous restrictions on those communities than on others similarly situated. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–33 (1993).

What’s more, the Government’s interest here in blaming Jews and shuttering their schools simply to manage the “anxiety” of its constituents doesn’t come close to surviving strict scrutiny. *Cf. Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (“[A] bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review.”). Worse yet, in New York City today hate crimes against Jewish Americans are at their highest levels since 1992. 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.

Thankfully, this type of religious bigotry is anathema to the First Amendment. This Court should strike down policies with such ignoble causes and such odious potential effects.

## ARGUMENT

### **I. Religious Minorities Face Heightened Risks of Government Scapegoating 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: And the goat shall bear upon him all their iniquities unto a land not inhabited: and he shall let go the goat in 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,” both regularly at a yearly festival and during times of trouble, such as famine, drought, and plague. *Id.* at 300–301. Though at times one finds kings and princesses serving as scapegoats in myths, in actual 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 whole Jewish communities. *Id.* Jews were blamed for an outbreak of leprosy and massacred in France around the same period. *Id.* at 94. Even the most cursory study of history reveals dozens of similar examples, many of which occurred when society was at its most vulnerable.

The United States is not immune from this tradition of religious discrimination. It, too, has a history of government officials unjustly targeting minority religious communities for political gain in times of crisis. These actions are often seen as “popular” or “convenient” responses. But, in reality, they are instances of religious



discrimination that threaten the protections guaranteed by the First Amendment.

These threats can come in the form of allegedly neutral laws meant to address public safety concerns. *A.L.A. Schechter Poultry Corp. v. United States* provides an example of this type of veiled threat. 295 U.S. 495 (1935). Following the fear and uncertainty of the Great Depression, President Roosevelt enacted the National Industrial Recovery Act as part of the New Deal. This Act broadly empowered the President to create “codes of fair competition . . . in furtherance of the public interest,” and for the protection of the public’s health. *Id.* at 521 n.4. 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.<sup>2</sup>

However, the government selectively enforced this Act against businesses engaging in live-butchered chickens. As it happened, “[a]t the time, minority groups dominated the purchase of live-butchered chickens in New York City: 80 percent of these chickens were sold to Jewish families, the rest to African Americans, 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. Federal prosecutors hoped that their selective prosecution would play on negative public sentiments about the poultry industry, which would in turn highlight the health benefits of the Act. Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* 203–04 (2007).

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–

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<sup>2</sup> *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.

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* Shlaes, *supra* at 223–24. Nevertheless, the government was able to use its prosecution to reinforce the narrative that its regulations were necessary to protection public health. *See id.* at 203. The government had succeeded in its goal by scapegoating a minority religion.

When government shows hostility towards certain religious groups, or refuses to protect them, this often correlates with an increase in private anti-religious bigotry and violence. One example of this type of hostility came in the aftermath of the Supreme Court's decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). The conflict in that case arose in the wake of World War I and at the outset of World War II; a period filled with fear, uncertainty, and a sense of obligatory patriotism. Two Jehovah's Witness children had requested that they be excused from performing a flag salute ceremony due to their religious convictions. *Id.* at 591–92. The Court refused, expounding on the importance of patriotism and rejecting the idea that the Constitution provided "exceptional immunity . . . to dissidents." *Id.* at 599–600. 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. Within days, Jehovah's Witnesses were subjected to physical violence and persecution for their religious beliefs. *See* David R. Manwaring, *Render Unto Caesar: The Flag Salute Controversy* 164–65 (1962). Across the country, Jehovah's

Witnesses were beaten, mutilated, and even killed, and angry mobs attacked and burned their homes and places of worship. *See id.* They were often arbitrarily imprisoned by public authorities who were complicit in the persecution. *Id.* at 166. Even schoolchildren were subjected to abuse. Local and state governments across the country adopted similar statutes, expelling any non-compliant Witness students. Feldman, *supra* at 185. The government’s casual dismissal of the rights of this minority religion led to an even greater deterioration of their rights to religious freedom and even to peace and safety. Perhaps based in part on this recognition, the Court reversed its approach and offered protections to Jehovah’s Witnesses who objected to flag salutes just three years later. *See W. Va. State Bd of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

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. Undercover officers infiltrated mosques to record imams’ sermons and informants infiltrated Muslim businesses and schools to record conversations in which they deliberately tried to bait Muslims into making inflammatory statements that would

bring them under government suspicion. *See id.* at 232–35. 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) (holding that the federal No-Fly List procedures violated the Due Process Clause); *Elhady v. Kable*, 391 F. Supp. 3d 562, 585 (E.D. Va. 2019) (holding that the federal government’s Traveler Redress Inquiry Program for listings in the Terrorist Screening Database violated the Due Process Clause).

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. Dep’t of Justice, *Confronting Discrimination in the Post-9/11 Era; Challenges and Opportunities Ten Years Later* 4 (2011). And, even as the number of violent incidents decreased, they were “soon replaced by other bias-related incidents, including discrimination in education employment, and religious land use.” *Id.* The Justice Department has documented “particularly severe discrimination faced by Muslims in land use.” U.S. Department of Justice, *Update on the Justice Department’s Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010–2016* 6 (2016), <https://www.justice.gov/crt/file/877931/download>. Sikh Americans have also suffered from this scourge of religious discrimination and hate crimes.<sup>3</sup> Once

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<sup>3</sup> Since 2001, there have been thousands of reports of hate crimes, workplace discrimination, school bullying, and racial and religious profiling against the Sikh community. *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>. Examples of these crimes include the targeted murders of Sikh Americans, the fire-bombing of a Sikh-owned convenience store, verbal and physical abuse, death threats, and intimidation at places of worship. *Id.*

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.

## **II. The First Amendment Prohibits Governor Cuomo From Targeting and Unjustly Blaming the Orthodox Jewish Community in New York City.**

The targeting of religious minorities during times of crisis is nothing new. But this case provides a particularly egregious example. As an initial matter, New York government officials have shuttered schools in predominantly Orthodox Jewish neighborhoods, identified as COVID hot spots. But they have failed to impose similar restrictions on COVID hot spots that lack such Jewish populations. TRO Mem. at 5.

These officials didn't just stop with policies that had the effect of targeting the Jewish communities—the Governor described his policy in ways that were, by the Governor's express admission, “targeting” certain “unique clusters” with “religious organizations.” *Id.* at 7–8. The Governor referred repeatedly to “the Orthodox community” and the “Jewish community,” accusing them of failing to “live with the[] rules.” *Id.* at 6. 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. *Id.* 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 “[i]ssue[] to [s]olve.” *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.<sup>4</sup>

Nor have government officials even pretended that this new policy is driven primarily by public health concerns. The Mayor has acknowledged that the City had “seen very little coronavirus activity in . . . schools.” *Id.* at 6. Indeed, the Plaintiff school in this case hasn’t experienced a single positive COVID case to date. *Id.* Yet the Governor refused to take a more effective, carefully tailored approach because “the fear [was] too high” in the City, there was a “real problem with fear and anxiety,” and he would use a blunt policy to help “the anxiety come[] down.” *Id.* at 7.

Thankfully, the First Amendment does not sanction religious bigotry as a form of anxiety management. Under the Supreme Court’s current approach, to avoid heightened scrutiny a law must be neutral and generally applicable. *Emp. Div. v. Smith*, 494 U.S. 872, 881–82 (1990). The Government’s actions here are not “neutral,” because by their own admission they have targeted the Orthodox Jewish community for especially onerous treatment. *Cf. Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–33 (1993). And the Government’s actions are not “generally applicable” because officials have not treated institutions in similar COVID-threat zones in a similar way. *Id.* Indeed, the Government treats more favorably other secular activities that “threaten [their] interest in slowing the spread of COVID-19 to as similar or greater degree.” *Soos v. Cuomo*, No. 1:20-cv-651, 2020 WL 3488742, at \*11 (N.D.N.Y. 2020).

Nor does the existence of a public health issue mean that this Court can simply defer to the Government’s unfounded judgments in this case. As one court addressing a

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<sup>4</sup> 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/>.

similar issue in the COVID-context 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, or that the Constitution is any less important or enforceable.” *Denver Bible Church v. Azar*, No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994, \*1 (Oct. 16, 2020). Specifically, courts upholding the First Amendment must be vigilant in ensuring that government officials do not “treat religious worship as any less critical or essential than other human endeavors.” *Id.* Moreover, “the existence of a crisis does not mean that the inalienable rights recognized in the Constitution become unenforceable.” *Id.* at \*6. Indeed, “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) (“[W]hen a crisis stops being temporary, and as days and weeks turn to months and years, the slack in the [judicial] leash eventually runs out.”); *Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020) (per curiam) (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”).

Government officials in this case should be particularly cautious of the way in which their actions can fan the flames of an already precarious position for New York’s Orthodox Jewish community. The City is currently experiencing a “record number” of anti-Semitic hate crimes—the highest number since 1992. *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/>. And in 2019 when New York experienced a measles outbreak, Orthodox Jews were frequently berated in public and blamed for the spread of the sickness. 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/>. Continuing down the path of scapegoating the Jewish community, simply to alleviate public fear, could have deadly consequences for New York's Jews. Mack Rosenberg, WCBS 880 Newsroom, *NYC Jewish Community Leaders Worry About Rise in Anti-Semitism Connected to COVID Hot Spots*, October 2, 2020, <https://www.radio.com/wcbs880/news/local/jewish-leaders-worry-about-anti-semitism-connected-to-covid>. This Court should strike down government policies that are rooted in and encourage such dangerous religious bigotry. The First Amendment demands nothing less.

### CONCLUSION

This Court should grant temporary, preliminary, or permanent injunctive relief.<sup>5</sup>

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<sup>5</sup> MPAC, IRF, and Ms. Uddin thank Daniel Judge, Daniel Loesing, Alyson Cox, and Alexandra Howell for their work in preparing this brief as student participants in the Notre Dame Religious Liberty Initiative.



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Respectfully submitted,

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702235)  
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