1

United States Court of Appeals
for the Second Circuit

August Term, 2020

(Argued: December 18, 2020   Decided: December 28, 2020)

Docket Nos. 20-3572; 20-3590
_____

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

Plaintiffs-Appellants,

v.

ANDREW M. CUOMO, GOVERNOR OF THE STATE OF NEW YORK,
IN HIS OFFICIAL CAPACITY,

Defendant-Appellee.
_____

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK,

Plaintiff-Appellant,

v.

GOVERNOR ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY,

Defendant-Appellee.
_____

1   Before:
2
3   LIVINGSTON, *Chief Judge*, PARK and MENASHI, *Circuit Judges*.
4
5   On October 6, 2020, in response to an increase in COVID-19 cases, Governor
6   Cuomo issued Executive Order 202.68 (the "Order"), which, among other things,
7   limits the maximum allowable occupancy in "houses of worship" in certain zones
8   to 10 or 25 people. Appellants Roman Catholic Diocese of Brooklyn (the
9   "Diocese") and Agudath Israel of America ("Agudath Israel") seek to enjoin the
10   Governor from enforcing the 10- and 25-person capacity limits. They argue the
11   Order violates the Free Exercise Clause of the First Amendment. The United States
12   District Court for the Eastern District of New York (Matsumoto, *J.*, & Garaufis, *J.*)
13   denied their motions for a preliminary injunction.
14
15   Appellants moved for injunctions pending appeal, which a divided motions
16   panel of this Court denied. Appellants then sought injunctive relief from the
17   United States Supreme Court, which granted writs of injunction prohibiting the
18   Governor from enforcing the Order's 10- and 25-person capacity limits pending
19   disposition of this appeal. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141
20   S. Ct. 63 (2020); *Agudath Israel v. Cuomo*, No. 20A90, 2020 WL 6954120 (U.S. Nov.
21   25, 2020). The Supreme Court found that Appellants were likely to succeed on the
22   merits, applying strict scrutiny to the Order because it is not neutral on its face and
23   imposes greater restrictions on religious activities than on other activities the
24   Governor considers "essential."
25
26   In light of the Supreme Court's decision, we hold that the Order's regulation
27   of "houses of worship" is subject to strict scrutiny and that its fixed capacity limits
28   are not narrowly tailored to stem the spread of COVID-19. Appellants have
29   established irreparable harm caused by the fixed capacity limits, and the public
30   interest favors granting injunctive relief.
31
32   With respect to the Diocese's appeal, No. 20-3590, we REVERSE and
33   REMAND with directions for the district court to issue a preliminary injunction
34   prohibiting the Governor from enforcing the Order's 10- and 25-person capacity
35   limits. With respect to Agudath Israel's appeal, No. 20-3572, we REVERSE in part
36   and REMAND for the issuance of a preliminary injunction as to those fixed
37   capacity limits. We also VACATE the district court's denial of Agudath Israel's

1 motion for a preliminary injunction as to the Order's 25% and 33% capacity limits,

2 and REMAND for the district court to determine in the first instance whether those

3 limits should be enjoined in light of the Supreme Court's decision and this opinion.

4

5   AVI SCHICK (W. Alex Smith, Misha Tseytlin,

6 *on the brief*), Troutman Pepper Hamilton

7 Sanders LLP, New York, NY & Chicago, IL,

8 *for Plaintiffs-Appellants in 20-3572*.

9

10 RANDY M. MASTRO (Akiva Shapiro, William

11 J. Moccia, Lee R. Crain, *on the brief*), Gibson,

12 Dunn & Crutcher LLP, New York, NY, *for*

13 *Plaintiff-Appellant in 20-3590*.

14

15 BRIAN D. GINSBERG (Barbara D. Underwood,

16 Solicitor General, Andrea Oser, Deputy

17 Solicitor General, Dustin J. Brockner,

18 Assistant Solicitor General, *on the brief*), *for*

19 Letitia James, Attorney General of the State

20 of New York, Albany, NY, *for Defendant-*

21 *Appellee in 20-3572 & 20-3590*.

22

23 PARK, *Circuit Judge*:

24   In response to the COVID-19 pandemic, the Governor of New York issued

25 an executive order limiting the maximum allowable occupancy in "houses of

26 worship" in certain "zones" to 10 or 25 people. Other businesses that the Governor

27 considers to be "essential," however, face no such restrictions. Appellants Roman

28 Catholic Diocese of Brooklyn (the "Diocese") and Agudath Israel of America

1   ("Agudath Israel") seek to enjoin the Governor from enforcing the capacity limits,

2   which they allege violate the Free Exercise Clause of the First Amendment.

3   The Supreme Court already found that Appellants have made "a strong

4   showing" that their claim is likely to prevail. *See Roman Cath. Diocese of Brooklyn v.*

5   *Cuomo*, 141 S. Ct. 63, 66 (2020). We agree. The Governor's order is subject to strict

6   scrutiny because it is not neutral on its face and imposes greater restrictions on

7   religious activities than on secular ones. We thus REVERSE and REMAND in part,

8   directing the district courts to enjoin the Governor from enforcing the Order's 10-

9   and 25-person capacity limits. We VACATE and REMAND in part for the district

10   court to determine in the first instance whether the 25% and 33% capacity limits

11   can satisfy strict scrutiny.

12   **I. BACKGROUND**

13   A.   <u>COVID-19 and the Governor's Response</u>

14   More than 36,000 New Yorkers have died from COVID-19, and New York

15   has had the second-highest number of deaths per capita of any state. [1] On

16   March 7, 2020, Governor Cuomo declared a disaster emergency in the State, which

17   allows him to exercise extraordinary executive powers. *See* N.Y. Exec. Law § 28.

---

[1] *United States COVID-19 Cases & Deaths by State*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker (updated Dec. 26, 2020).

1   He can "temporarily suspend any statute, local law, ordinance, or orders, rules or

2   regulations, or parts thereof, of any agency," and can "issue any directive . . .

3   necessary to cope with the disaster." *Id.* § 29-a. Suspensions and directives under

4   this law expire after 30 days, but the Governor may renew them an unlimited

5   number of times. *Id.* The legislature of New York can terminate suspensions and

6   directives "by concurrent resolution," but the Governor's actions pursuant to

7   Executive Law § 29-a do not otherwise require legislative consultation or approval.

8   *Id.*

9   Governors have historically exercised this emergency authority in a limited

10   and localized manner, most often in response to natural disasters such as severe

11   storms or flooding.[2] Governor Cuomo's executive orders during the COVID-19

12   pandemic, however, have been unprecedented in their number, breadth, and

13   duration. From March to December 2020, he has issued almost 90 executive orders

---

[2] *See, e.g.*, N.Y. Exec. Order 195 (May 20, 2019) (declaring disaster emergency in specified counties due to "high water levels on Lake Ontario and the St. Lawrence River . . . causing the potential for lakeshore flooding, widespread erosion, and water damage"); N.Y. Exec. Order 193 (Jan. 19, 2019) (same, due to a "severe winter storm").

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.

fastcase
Smarter legal research.