

## RELIGION, LAW AND COVID-19 EMERGENCY

# A case of conflict between religious freedom and the protection of public health.

The challenge to directives aimed at containing the spread of the Covid-19 pandemic from Hasidic communities in Israel and the US

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### 1. Introduction

It is not only pandemic deniers and conspiracy theorists in general who challenge and doubt the measures put in place by governments and health authorities to combat the SARS-CoV-2 pandemic<sup>1</sup>. There are even some *enclaved*

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<sup>1</sup> In March 2020, in order to combat online fake news on the Covid-19 outbreak, the European Commission launched a section of its website entitled “fighting disinformation”, which is available at [https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/fighting-disinformation\\_it](https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/fighting-disinformation_it). Another important source to consult to debunk fake news in general, thus, even on the Covid-19 pandemic, is <https://euvsdisinfo.eu/category/blog/coronavirus/>. The European Union is very active in the fight against disinformation on social media and it has introduced a new code of conduct, which has been signed by some of the main digital platforms, such as Google, Microsoft, Facebook, Instagram, Twitter and Tik Tok. Since the beginning of 2020, thanks to this new code, millions of news, posts, tweets (even some by the US President, Donald Trump), as well as false or misleading announcements about the progress of the pandemic, its causes and the development of a possible cure have been removed or reported and signalled; in Vitale I., *Commissione Ue: bene l’impegno degli OTT nel rimuovere le fake news, ma “resta molto da fare”*, online on the 8<sup>th</sup> October 2020, (last accessed on the 3<sup>rd</sup> December 2020), URL: <http://notiziario.uspi.it/commissione-ue-bene->

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religious communities that have been drawing attention because of their rebellious behaviour: they are the Hasidic communities in Israel and New York City. The latter is home to a Satmar community<sup>2</sup> that is known to the general public thanks to the television miniseries *Unorthodox*, which is distributed by the digital streaming platform *Netflix*<sup>3</sup>.

The impact of the behaviour of these enclaved religious communities was particularly relevant in Israel, where *Haredi* people are only about a tenth of the total population. The collected data show that in these communities the virus has twice the incidence reported in the rest of the population (28.6% compared to 13.4% in the Arab population and 11.6% of the rest of Israel's population)<sup>4</sup>. Similar data have been recorded in New York, where the rate of positive tests in the Hasidic community of Kiryas Joel is about 28%, against an average of 1% in the rest of the state<sup>5</sup>.

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limpegno-degli-ott-nel-rimuovere-le-fake-news-ma-resta-molto-da-fare/, Licata P., *Covid-19 e fake news, nuova stretta di Bruxelles sui social media*, online on the 8<sup>th</sup> June 2020, (last accessed on the 3<sup>rd</sup> December 2020), URL: <https://www.corrierecomunicazioni.it/digital-economy/covid-19-e-fake-news-nuova-stretta-di-bruxelles-sui-social-media/>; and Huffington Post online, *Twitter segnala il post di Trump sull'immunità al Covid*, online on the 11<sup>th</sup> October 2020 (last accessed on the 3<sup>rd</sup> December 2020), URL: [https://www.huffingtonpost.it/entry/twitter-segnala-il-post-di-trump-sullimmunita-al-covid\\_it\\_5f834ad6c5b6e5c32000043e](https://www.huffingtonpost.it/entry/twitter-segnala-il-post-di-trump-sullimmunita-al-covid_it_5f834ad6c5b6e5c32000043e). In order to counter the spread of online misinformation, the European Union is working on *ad hoc* legislation (the *Digital Service Acts*) which, among the other things, will regulate the duties of news providers, so as to be able to protect the final users, i.e., the readers of the news published by these providers; in Berti and Zumerle, *Digital Services Act, le risoluzioni dal Parlamento europeo e il loro impatto*, online on the 26<sup>th</sup> October 2020 (last accessed on the 3<sup>rd</sup> December 2020), URL: <https://www.agendadigitale.eu/mercati-digitali/digital-services-act-tre-nuove-risoluzioni-dal-parlamento-europeo-le-novita/>.

2 The Satmar movement was founded by Yoel Teitelbaum (1887-1979), the *rebbe* (“the community leader”) of the then town of Szatmár Németi, in the Kingdom of Hungary, which Jews used to call Satmar. Now, this town is located in Romania and it is known by its Romanian name of *Satu Mare*, in Gersh H., and Miller S., (1959), *Satmar in Brooklyn. Commentary*, 28, 389, available at: <https://search.proquest.com/scholarly-journals/satmar-brooklyn/docview/1290154192/se-2?accountid=9652> (last access on the 3<sup>rd</sup> December 2020).

3 <https://www.netflix.com/it/title/81019069>.

4 Rosenberg D. E., *The Government can't save Ultra-Orthodox Jews from COVID-19. Religious leaders can*, in *Foreign Policy*, online on the 12<sup>th</sup> October 2020 (last access on the 28<sup>th</sup> November 2020); Rainews, *Coronavirus. Israele, il virus dilaga tra gli ultraortodossi*, online on the 1<sup>st</sup> October 2020 (last access the 24<sup>th</sup> November 2020).

5 *Ibid.*

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Hasidic devotees' stubborn refusal to abide by the rules has not only caused the resentment of the secular Israeli majority, which suspects of *Haredi* people not only because of their current behaviour, but above all also because of their refusal to serve in the army. Their disobedient behaviours have also made the relations between the Hasidic Jews and the US and Israeli authorities increasingly more tense, to the point that, in the two New York neighbourhoods of Borough Park and Midwood, the police have been forced to intervene several times to disperse crowds of people who gathered during funerals or other religious ceremonies<sup>6</sup> – it has even happened that journalists have been attacked by a group of unmasked Hasidic men who shouted and denied the seriousness of the epidemic<sup>7</sup>.

In order to understand the reason for such aversion and hostility to state norms, it may be useful to quickly recall the salient features that distinguish Hasidim, starting with an analysis of the adjective ultra-Orthodox<sup>8</sup>. As suggested by the prefix *ultra*, these religious communities are characterised by a very conservative approach to the Holy Scriptures and an extremely rigid interpretation of *Halakha*, the Jewish law<sup>9</sup>. In practice, these communities tend to self-isolate, so as to avoid “any contamination” with external and foreign

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6 Reich A., *Hundreds gather together in the street for Rabbi Feinstein's funeral*, Jerusalem Post, online on the 9<sup>th</sup> November 2020 (last access on the 3<sup>rd</sup> December 2020), and Hanaujta S., *NY Hasid Jews continue to hold large weddings despite COVID rules*, online on the 25<sup>th</sup> November 2020 (last access on the 26<sup>th</sup> November 2020).

7 Stack L. and Goldstein J., *New York threatens Orthodox Jewish Areas with Lockdown over Virus*, The New York Times, online on the 25<sup>th</sup> September 2020 (last access 28<sup>th</sup> November 2020). It should be noted that relations between the Satmar community and the New York City Department of Public Health were already tense because of clashes over the issues of ritual circumcision and measles vaccination.

8 Ultra-Orthodox Jews refer to themselves using the aforementioned term *Haredi*, a Hebrew word that could be translated into “the truly pious people”. Indeed, the word *Haredi* refers to the reverence and the fear of God that distinguishes them. In this regard, see Myers D. N., (2013), *“Commanded War”: Three Chapters in the “Military” History of Satmar Hasidism*, Journal of the American Academy of Religion, 1-46. (p. 3 in note). In this doctrinal work the two terms ultra-Orthodox and *Haredi* are used as perfect synonyms.

9 For information on the Hasidic law and justice, see Anello G., *L'uomo abitato da Dio. Chassidismo e giustizia*, Genoa, 2020.

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realities. This is mainly due to the fact that modernity is considered to be incompatible with their own way of life. Thus, they stay away not only from “gentiles”, but also from the other Jewish communities<sup>10</sup>. In numerical terms, (both Hasidic and *Yeshivish*) ultra-Orthodox Jews only account to 6-8% of the total Jewish population<sup>11</sup>.

As know, the Jewish world is not at all a monolithic entity<sup>12</sup>. This diversity is mirrored in the attitude of the members of the numerous Jewish communities, and especially in the behaviour of their respective religious *leaders*. The latter’s role is fundamental to guide their communities of reference, especially when there are emergency situations, but it is also significant in this specific case with respect to the anti-Covid directives. One must always bear in mind this numerical data to understand that, when Hasidic communities are involved, it is actually a small part of the Jewish world that we are dealing with. This means that only a tiny portion of the complex Jewish world actively oppose the anti-contagion directives, whilst the vast majority of Jews accept and abide by them (or, at least, they do not raise any opposition because of religious reasons)<sup>13</sup>.

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10 Berman (2009), in Gallagher P. (2009), *Identification and analysis of Orthodox Jewish enclaves in Brooklyn, New York: A GIS based approach*, Middle States Geographer, vol. 42, pp. 83-89. Gallagher considers the expression “orthodox Judaism” as an all-encompassing term – i.e., as if it were intended to generically refer to a whole series of movements that may significantly differ in terms of theological interpretation and in practical norms of daily life (how to dress, how to pray, etc.). Moreover, the Hasidic galaxy is not at all a homogeneous reality: there are hundreds of more or less numerous Hasidic communities and each of them has its own peculiar traditions, rituals, teachings, etc. (Myers, 2013, cit.).

11 Pew Research Center, (2013), *A Portrait of Jewish Americans*, p. 48. However, it must be pointed out that the data “may fluctuate” for two reasons: first, because of methodological reasons. It is indeed necessary to consider which definition of Jew has been chosen as basis of the research. Second, religious affiliation cannot be asked in censuses (the only ways to obtain such data are deductions from behaviour and habits, such as clothing, diet, spoken language, etc., or self-declarations).

12 For information on the history and the different partitions of Hebraism, see Hayoun M.R., *L’ebraismo: storia e identità*, Milano, 2010.

13 Obviously, behaviour is not uniform even within the Hasidic world itself. In some cases, rabbis have asked devotees to behave cautiously, in order to preserve public health, but, in general, going on with normal studying and praying activities is considered to be both the basic element of their own identity and an act of resistance towards the outside world, modernity and something that Hasidim perceives as the worst of all threats: the homologising forces. In

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Who are actually the members of this *Haredi* minority? The Hasidic movement was set up by Rabbi Israel Baal Shem Tov (Besht) in Eastern Europe (in present-day southern Poland) at the end of the 18<sup>th</sup> century. He sought to revive and regenerate the local Jewish communities devastated by the recurrent *pogroms* that took place in the area over those years. Originally, Hasidism was a pietistic movement aimed at restoring the dignity and reviving the religious spirit of the poor Jews who could not materially devote their lives to the study of the *Torah* – an activity that was reserved for a small number of privileged people, and which, over time, became a means of “cultural discrimination”. Hence, in addition to the study of the Holy Scriptures (whose role in fundamental also in Hasidim), believers were asked to seek God in every aspect of their daily lives and to do so with *joy*, which is a fundamental element in Hasidic practice because “the fervour, the enthusiasm with which one must apply [*to the study of the Torah*] and prayers are the true driving forces of religious life”<sup>14</sup>.

Eventually, despite the opposition raised by the rabbis of pre-existing branches, the movement managed to establish itself and gain a large following in the Jewish population of Eastern Europe. However, it was almost completely wiped out by the tragedy of the Holocaust. The survivors of the Shoah found refuge either in Israel, or in the United States. Indeed, it is in North America,

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practice, Hasidic people have developed a rhetoric of “us vs them”, where “us” is represented by their Hasidic community and its traditions, while “them” refers to the outside world – in this specific case the directives of the public health department. It should be borne in mind that this reading of events was coupled with the narratives of the US presidential election campaigns and this mix resulted, given outgoing President Trump’s undisguised scepticism about the seriousness of the health situation, in increased support for him by the Hasidic community – in Rosenberg, 2020, *The Government...*, cit.; Stack and Goldstein, 2020, cit.

14 Myers, 2013, cit.; Faierstein M. M., (1991), *Hasidism – the last decade in research*, in *Modern Judaism*, 11, pp. 111-124; quote from *Correnti dell’ebraismo*, in [www.e-brei.net/index.php?mact=CGBlog,cntnt01,detail,0&cntnt01articleid=382&cntnt01returnid=18](http://www.e-brei.net/index.php?mact=CGBlog,cntnt01,detail,0&cntnt01articleid=382&cntnt01returnid=18), online on the 23<sup>rd</sup> August 2002 (last access on the 4<sup>th</sup> December 2020; Italian in original, *my translation*).

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more precisely in Brooklyn (New York City), that the most populous Hasidic community in the world can be found: Satmar<sup>15</sup>.

### 2. “God loves us, he won’t bring us corona”

In late summer, due to numbers that demonstrated the Covid-19 infection rate was once again on the rise, the Israeli government and the New York authorities were forced to introduce restrictions and to close schools and non-essential businesses in an attempt to curb the spread of the virus. The Israeli authorities enforced a new three weeks long lockdown from the 18<sup>th</sup> of September (after the first lockdown that was ordered in spring)<sup>16</sup>, while on the 7<sup>th</sup> of October the New York authorities closed nine boroughs in the City – one of these nine boroughs wherein New York Mayor, Bill De Blasio, imposed closures was Borough Park, where the Satmar community lives<sup>17</sup>. The measures imposed in both countries can be summarised as follows: closure of schools, restaurants and non-essential businesses, the obligation to wear personal protective equipment (face masks) and to respect social distancing, as well as the prohibition to gather<sup>18</sup>. Nonetheless, given that data did not show significant

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15 Myers, 2013, cit.

16 Tamarro M. and Speranza F., *Cronavirus: un nuovo lockdown in Israele da venerdì*, Vaticanews, online on the 14<sup>th</sup> September 2020 (last access on the 24<sup>th</sup> November 2020).

17 <https://stream24.ilsole24ore.com/video/mondo/coronavirus-de-blasio-da-mercoledì-nuovo-lockdown-9-quartieri-new-york/ADX0set>.

18 New York State Governor Andrew Cuomo has devised a new strategy to deal with the Covid emergency: the *cluster action initiative*. In practice, the territory is divided into different colour zones on the basis of the number of recorded cases: red (*micro-cluster zone*), if the area has a high infection rate; orange for both *buffer zones* around the red areas and *warning zones*, where the number of infections is high and specific restrictions are needed to prevent the virus from spreading any further. Finally, there are yellow zones, which are parted into *buffer yellow zones*, around the orange buffer zones and which act as a further precautionary measure (the double buffer only applies to areas with high population density), and *precautionary yellow zones*, where the infection is less pervasive and the measures implemented are aimed at preventing the situation from worsening. The colour zones are decided every 14 days on the basis of infection data. Further information on the specific restrictions for each individual colour zone and up-to-date data on the zoning of New York City and New York State can be found on the website: <https://forward.ny.gov/>.

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improvement, the Israeli government was forced to extend the duration of the measures, which had been initially imposed only until the 14<sup>th</sup> October – meantime, the government also added restrictions on religious worship within a maximum of 1 km from own house<sup>19</sup>.

Why the norms enforced to curb contagion are overtly opposed and slightly respected by Hasidic communities?<sup>20</sup> Basically, Hasidic believers refuse to respect these restrictions because such norms prevent them from carrying out their community activities<sup>21</sup>. Taking part to community life is, in a certain sense, the very essence of Hasidism, “which demands that each person participates in the life of fellow believers and does not leave them alone either in despair, or in joy”<sup>22</sup>. To fully understand this aversion, it is also necessary to focus attention on the fact that for Hasidic Jews, the *fulcrum* of existence is spiritual life, rather than material existence. As a consequence, religious rituals are not just ancillary activities, but they are the very foundation of the devotee’s existence. In line with this logic, the leaders of *Haredi* communities in general, and those of Hasidic ones in particular, are opposing the restrictions enforced by governments, because they fear that the forced closure of synagogues will alienate young people from practice and faith. From the Hasidic perspective,

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19 These measures were coupled with severe restrictions on public demonstrations. Critics of the Netanyahu government consider them to be a measure to prevent the weekly protests against the Israeli prime minister to go on, in Rainews, *Coronavirus. Israele, il virus dilaga tra gli ultraortodossi*; online on the 1<sup>st</sup> October 2020 (last access on the 24<sup>th</sup> November 2020)

20 New York’s Hasidic Jews do not seem to want to comply with the rules, thus, the authorities did not grant the authorisation for a wedding that could have (potentially) attracted up to 10,000 participants – it was the wedding of one of the grandsons of the community’s chief rabbi, Aaron Teitelbaum. The Hasidic community responded to the bans imposed by the New York authorities and organised a “secret” wedding, which was attended by about 7,000 people, who were all crowded into a synagogue and did not wear any personal protective equipment. Invitations to the ceremony were made by word of mouth, as neither posters, nor official announcement were hung up in the synagogue. See ANSA, *Maxi matrimonio ebrei ortodossi a NY, l’ira di Cuomo*, online on the 23<sup>rd</sup> November, (last access on the 25<sup>th</sup> November 2020). The event obviously spurred reaction by Governor Cuomo and New York Mayor De Blasio, who threatened legal action and fines of up to \$15,000; in Hanaujta, 2020, *NY Hasid Jews ...*, cit.

21 *One sector of the society does not care about others: the haredim*, Jerusalem Post, online on the 18<sup>th</sup> October 2020, (last access on the 24<sup>th</sup> November 2020).

22 *Correnti dell’ebraismo*, 2002, cit.

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“taking care of their souls prevails over the protection of their physical health” because the spiritual dimension of existence prevails over the material aspect of life<sup>23</sup>. The religious norm requires men to pray three times a day – and it should be pointed out that, in order to validly pray, there must be at least a group of ten faithful men gathered together. This religious provision poses serious problems as it leads to a direct conflict between religious rule and state rule, given the recent restrictions imposed on gatherings<sup>24</sup>. Lastly, the *Sabbath* dinner is an important occasion of socialisation and common prayer for the community members<sup>25</sup> – once again, travel restrictions and the ban on gatherings represent huge obstacles to the observance of this practice.

Yet, *Halakha*, the Jewish law, prescribes that Jews take all necessary precautions to face and overcome dangerous situations. It also warns that believers safeguard their loved ones and all members of the community in general, and it remands them that health risks demand greater attention and stricter behaviours than those commanded by other types of prohibitions and prescriptions because “one must be careful not to hurt oneself and others. Even when one does not mean to do so”<sup>26</sup>. The protection of human life is indeed a fundamental tenet of *Halakha*, which clearly prescribes that all religious obligations are suspended in case of danger to human life – e.g., in such

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23 Baquis A., *Coronavirus, l'autonomia ribelle dell'enclave chassidica*, BET, magazine mosaico, online on the 10<sup>th</sup> November 2020 (last access on the 4<sup>th</sup> December 2020; Italian in original, *my translation*).

24 While gatherings are strictly forbidden in red zones, gatherings in the orange zones are allowed up to a maximum of 10 people (which is also the minimum presence required to validly celebrate a Jewish religious rite), in <https://forward.ny.gov/cluster-action-initiative>.

25 Berman 2009, in Gallagher, 2009, cit.

26 Rav Arbib A., *Teshuvà, tefillà e tzedakà per uscire dalla crisi*, BET, magazine mosaico, online the 12<sup>th</sup> March 2020 (last access on the 4<sup>th</sup> December 2020; Italian in original, *my translation*). It is precisely on the basis of this divine imperative that most Jewish communities have closed their schools and have stopped meeting to study the *Torah*, so as to protect the health of their own members, as well as that of their fellow citizens.

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circumstances, Jews are allowed to eat non-*kosher* food and not to respect the *Sabbath* rest<sup>27</sup>.

As for actions to take in an effort to cope with the SARS-CoV-2 pandemic, Bavà Qammà, 60, is the most important passage of the Sacred Scriptures to consider. It states that “*if there is a pestilence in the town, [you should] withdraw your steps*”. In other words, you should stay at home. Three verses in the Talmud support this statement: Shemot (12:27); Yesha’yahu (26:20) and Devarim (32:25). The combined message that can be derived from these three verses is that in the case of disease (here, pestilence), it is better to stay at home and to avoid any contact with other people, in order not to fall ill and not to spread it to other people<sup>28</sup>. This means that from the point of view of the Sacred Jewish law, the governmental measures to contain the spread of Covid-19 are perfectly sensible and in line with the divine precepts. Thus, as Rav Alberto Somekh points out, people who violate the anti-Covid measures are not only violating state law, but they are also violating a clear order from God<sup>29</sup>. How can the leaders of Hasidic communities reconcile their aversion to norms (which are *de facto* in line with divine precepts) with divine law itself? According to the approach developed by Rabbi Yissachar Rokach, it is necessary to make a distinction between physical life (that is, the life of the body) and the life of the spirit. In a general framework that sees life as an asset to be preserved at all costs, the care and the salvation of the spirit obviously takes precedence over the body’s health<sup>30</sup>.

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27 Martinelli E., *The communities of ultra-Orthodox Jews in the 'storm' of Covid-19*, Diresom, Religion, Law and Covid-19 Emergency, online on the 28<sup>th</sup> October 2020 (last access on the 16<sup>th</sup> December 2020).

28 Rav Somekh A., *Talmud: “Se in città c’è una pestilenza ritira i tuoi passi”*, cioè: *chiuditi in casa*, BET, magazine mosaico, online on the 12<sup>th</sup> March 2020 (last access on the 4<sup>th</sup> December 2020).

29 Ibid.

30 Baquis, 2020, cit. Martinelli suggests a different reason behind the refusal of Haredi communities to comply with the anti-contagion norms imposed by governmental authorities. To understand this reason, one has to consider that Haredi Jews see state authorities as an enemy (this is especially true in the case of the State of Israel, which they see as a real aberration) because, from their point of view, the ultimate authority is God and the Law is His

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There are also material and logistical aspects to consider. As far as domestic life is concerned, Hasidic families are usually very numerous (on average, there are between 6 and 8 children per couple; this high fertility rate means that, for example, the Satmar community in New York doubles around every 20 years)<sup>31</sup>. Clearly, confinement at home is not an option to them. It can be said that the Hasidic family institution is not “conceived” to spend most of its time at home, on the contrary, it is meant to carry out community life in places of gathering such as the common areas of schools or synagogues<sup>32</sup>. Therefore, their life takes place mainly and *ab origine* in a community regime of shared space<sup>33</sup>. This fact led to reticence, which is not only due to religious factors, but also to material and logistical difficulties in self-isolating and in respecting social distancing that are due to their family structure.

Furthermore, the Hasidic communities are led by charismatic leaders, the *rebbe* (or *tsadik*), who are supposed to have not only real spiritual powers, but

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law (Halakha), which must be followed to the letter. This innate mistrust towards governmental authorities leads Haredi Jews to continuous conflicts with state governments, especially when rules issued by the state hamper their prayer activities (as in the case of the anti-gathering rules imposed to cope with the spreading of the SARS-CoV-2 contagion). Indeed, Hasidic members (especially their most eminent rebbe) did not hesitate to define the Coronavirus “an anti-Semitic conspiracy devised to prevent community prayer, which is essential for “God-fearing” devotees”. According to Modern Orthodox Jews, there is also another factor to take into account: the endemic lack of scientific education in the Haredi ranks, which would prevent Haredi Jews from understanding the seriousness of the health situation and from appreciating and respecting the measures implemented by their governments to safeguard public health. For a more comprehensive discussion on this topic, see, Martinelli, (2020), *The communities of...*, cit. Regarding the education of young Hasidic men and the socio-economic consequences it has, see also Rosenberg, 2020, *The Government can't...*, cit.

31 Hoover 2006, in Gallagher, 2009, cit.

32 It should also be noted that Hasidic laws severely restrict the usage of tablets and mobile phones. For this reason, the faithful generally use the so-called “*kosher* phones”, that is, phones with blocked internet access. However, it is still possible to install other instant messaging programmes on such devices. It is precisely these mobile news services that were used by the Israeli government to spread information on the prevention campaign to local Hasidic communities during the first wave of Covid-19 in the past spring – in Sokoljta, 2020, cit.

33 Rosenberg, 2020, *The Government can't...*, cit.

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also the ability to intercede for their followers with God<sup>34</sup>. A recent survey by the Center for Religion and the State of the Israel Democracy Institute reported that, although members of the Hasidic community are aware of the danger of the virus and its possible effects, almost half of them (42%) have no confidence in the anti-Covid action carried out by the Ministry of Health. On the contrary, the rabbis are (obviously) held in high esteem by the community and 61% of respondents considers them to be the most trustworthy personalities on the current scene, and almost 93% of people would like them to be involved in decisions to tackle the epidemic<sup>35</sup>.

Given the role of the *rebbe* for his community and the trust he enjoys among his followers, it is obvious that the latter tend to imitate his behaviour and conform to his opinions, rather than follow the directives of secular bodies such as the public health department. Consequently, if the *rebbe* is sceptical and shows any doubt or hesitation about the seriousness of a possible Covid-19 infection, and he does not pay much attention to containment measures, neither will his followers. And unfortunately, the most important Hasidic rabbis have very often given their followers instructions that clearly contradict the health measures imposed by the state – for example, *rebbe* have encouraged communal prayer in places of worship, they have reassured devotees about sending their children to school (not to mention their opposition to the closure schools and *yeshiva*<sup>36</sup>). Moreover, they have also refused to observe social distancing and to

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34 Myers, 2013, cit. *Rebbe* is an yiddish word – yiddish is a language that derives from German, but which is written in the Hebrew alphabet. Originally, it was spoken by Jews who lived in East Europe. *Rebbe* can be translated as “leader, guide, chief”. The word shares its root (*rav*) with the word *rabbi*, the scholar of the *Torah* and Mosaic law, who guides the community of Jewish believers. On the meaning of the term *rabbi* and its etymology, see Treccani online, URL: <https://www.treccani.it/vocabolario/rabbi> (last access on the 4<sup>th</sup> December 2020).

35 Sharon J., *Ultra-Orthodox trust rabbis on COVID-19 far more than medical officials*, Jerusalem Post, online on the 24<sup>th</sup> November 2020 (last access on the 27<sup>th</sup> November 2020). The interviewed pool comprised members of the biggest *Haredi* communities (Hasidic, Ashkenazi and non-Hasidic).

36 In March, during the first wave of Covid-19, while state schools and universities and educational institutions of other religious denominations were being closed, the Israeli

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wear personal protective equipment – however, faced with the worsening health situation and the rising number of deaths, some prominent rabbis have changed their minds<sup>37</sup>.

Another important element to take into account to understand the reticence towards anti-contagion measures is the fact that these restrictions were imposed (especially in Israel) when the most important Jewish holidays took place: *Rosh Hashanah*, the Jewish New Year (which this year was celebrated in the period from 18<sup>th</sup> to 20<sup>th</sup> September), *Kippur* and *Sukkot* (the Feast of Tabernacles). During this period of the year, Hasidic believers usually make a ritual pilgrimage to the tomb of Rabbi Nachman of Breslov in Uman, Ukraine. However, this year, due to the spread of the Covid-19 pandemic, Ukraine and Israel asked Hasidic Jews not to leave to Uman. Ukraine even imposed a ban on foreigners entering its territory in the period from 26<sup>th</sup> August to 28<sup>th</sup> September to curb the spread of the infection in its territories. Nevertheless, many Hasidic believers left to Uman, and there were cases of refolement at the Belarus-Ukraine border, which led to tensions and exchanges of accusations between the two countries over which one was to blame for the events<sup>38</sup>.

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Government and the rabbi-leaders of the *Haredi* communities reached an agreement to leave the Hasidic schools open, up to a maximum of 10 students per class – in Sokoljta, 2020, cit.

37 One of the most significant cases is that of the recently deceased *Rebbe* Chaim Kanievsky, who, at the end of March, called on the faithful to pray in solitude and to abide by the state directives aimed at countering the spread of Covid-19 (but, no more than 15 days earlier, together with Rabbi Gershon Edelstein, he had decided not to close schools and *yeshiva*, and he had declared that “*Torah* studying by young Jews also provides physical protection to the Jewish community”, in Sharon J., *Leader of Ultra-Orthodox world calls for lone prayers due to coronavirus*, in Jerusalem Post, online on the 29<sup>th</sup> March 2020 (last access on the 28<sup>th</sup> November 2020).

38 Reuters, *Ukraine, Israel urge Hasidic Jews to cancel pilgrimage due to coronavirus*, online on the 18<sup>th</sup> August 2020 (last access on the 29<sup>th</sup> November 2020), Zhegulev I., *Hasidic Jewish pilgrims stranded at Ukraine airports after travel ban*, Reuters, online on the 28<sup>th</sup> August 2020 (last access on the 29<sup>th</sup> November 2020), and Williams M. and Zhegulev I., *Ukraine and Belarus argue over Hasidic Jewish stranded at border*, Reuters, online on the 16<sup>th</sup> September 2020 (last access on the 29<sup>th</sup> November 2020).

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### 3. Normative ban on gatherings and religious freedom

As demonstrated in the previous paragraphs, the refusal by the Hasidic communities to comply with the anti-contagion measures is based on the fact that these rules prevent the devotees from praying together with other members of their religious communities – therefore, this is a (temporary) limit to individual religious freedom<sup>39</sup>. This issue affects not only the relations between state authorities and Hasidic people, but also the life of any religious community during these months of pandemic. Nonetheless, the various religious elite have reacted in very different ways, just as the various governments have implemented more or less strict measures<sup>40</sup>.

As far as the Jewish world is concerned, while the Israeli and the New York Hasidic communities have always refused to renounce the celebration of their religious rites – as the wedding celebrated on the 22<sup>nd</sup> October in Kfar Qasim, an Arab town east of Tel Aviv, and the other one officiated in New

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39 For an analysis of the status of religious freedom in the current emergency context due to SARS-CoV-2 pandemic, see Consorti P., *La libertà religiosa travolta dall'emergenza*, in *Forum di Quaderni Costituzionali*, 2, 2020, available at: [www.forumcostituzionale.it](http://www.forumcostituzionale.it) (last access on the 16<sup>th</sup> December 2020). For a description, and a more general and more comprehensive analysis of the concept of individual and collective religious freedoms, see, Consorti P., *Diritto e religione. Basi e prospettive*, (2020), Gius. Laterza & Figli Spa, Bari-Rome.

40 Describing the situation in the United States, Madera speaks of a real normative “patchwork”, because the management of anti-contagion actions is not entrusted to the federal government, but it is competence of the government of each individual member states of the Union. Therefore, they have issued regulations and directives that are often very different from each other; in Madera A., 2020, *Some preliminary remarks on the impact of COVID-19 on the exercise of religious freedom in the United States and Italy*, in *Stato, Chiesa e pluralismo confessionale*, vol. 16, available at [www.statoechiese.it](http://www.statoechiese.it). A similar regulatory *patchwork* can also be found in the European Union, where each member state has tackled the emergency by issuing its own regulatory measures on the basis of data showing the trend of contagion on its own territory. From this point of view, it is relevant the (even huge) difference between the regulations implemented in geographically close territories – e.g., the difference between the measures implemented in Italy and those issued in the small Republic of San Marino (an enclave state of the Italian territory) to regulate the access to places of worship, in De Oto A., *La Serenissima Repubblica di San Marino e l'esercizio del culto nell'era del Covid-19: tra storia, diritto comune e decreti emergenziali*, *Diresom papers, Religion, Law and Covid-19 emergency*.

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York with more than 7000 participants demonstrate<sup>41</sup> – many rabbis, rabbinical organisations and Jewish communities all over the world have taken a stand in favour of the measures wanted by their respective governments<sup>42</sup>.

At this point, however, it is interesting to note that the attitude of the Hasidic communities of New York has *indirectly* led to a significant legal implication: the appeals against the State of New York separately filed by Agudath Israel of America<sup>43</sup> (a grassroots group representing *Haredi* Jews, two synagogues in New York City and two private entities) and the Roman Catholic Diocese of Brooklyn. In both cases, the charge was violation of the First Amendment to the US Constitution<sup>44</sup>, which enshrines, among other things, the right to individual religious freedom – i.e., the free exercise of worship<sup>45</sup>.

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41 The Times of Israel, *Ultra-Orthodox wedding held in Arab town in effort to avoid detection*, online on the 23<sup>rd</sup> October 2020 (last on the 5<sup>th</sup> December 2020). The marriage between two members of the Hasidic community was celebrated in an Arab town in the hope that the Israeli police would have not tracked the gathering there (the article reports that in an attempt to cover the event, Arab music was used to replace traditional *Haredi* music). In other cases, marriages were celebrated in Palestinian villages in the West Bank, once again, in the hope that the Israeli police would have not come to check these areas – in The Times of Israel, *Police break up another ultra-Orthodox wedding for flouting virus restrictions*, online on the 19<sup>th</sup> March 2020 (last access on the 5<sup>th</sup> December 2020).

42 Although, of course, reluctantly – see, for example, the contribution by Rav Somekh, 2020, cit.; see also Baquis, 2020, cit.

43 Further information on the history and the activities carried out by the organisation are available at <https://agudah.org/>.

44 The First Amendment to the Constitution of the United States holds that “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*”, (National Archives, 2020 o.l., URL: <https://www.archives.gov/founding-docs/bill-of-rights-transcript>; last access on the 14<sup>th</sup> December 2020).

45 Liptak A., *Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo’s Virus Shutdown Order*, The New York Times, online on the 26<sup>th</sup> November 2020 (last access on the 30<sup>th</sup> November 2020). As to the freedom of religion guaranteed by the First Amendment, American doctrine speaks about the *Free Exercise Clause (of the First Amendment of the United States Constitution)*. For an analysis of the origins of the concept of religious freedom in the United States, see McConnell M. W., (1989), *The Origins and Historical Understanding of Free Exercise of Religion*, Harvard Law Review, 103(7), pp. 1409-1517. For a brief *excursus* on the interpretation of the Free Exercise Clause in US doctrine in general, and by the Supreme Court in particular, over the last few decades, see Madera, 2020, *Some preliminary remarks...*, cit.

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But what happened and why did the behaviour of the Hasidic community lead to an action in court? In practice, as explained above, given that data were showing a continuous and significant increase in contagion, the New York state authorities decided to enforce the *cluster action initiative* from the 7<sup>th</sup> October. The territory of New York has been divided into areas of various colours [*zones*] according to the recorded rate of contagion (the change of colour is decided every 14 days on the basis of data from the previous two weeks). Each colour (red, orange and yellow) corresponds to a specific infection risk exposure (high, medium, moderate), hence, to specific containment measures. As far as worship is concerned, the limitation to gatherings is particularly important. While in the red zones (with high infection risk) gatherings are always prohibited, in the orange zones and in the yellow zones, they are significantly limited to a maximum of 10 or 25 people, respectively – it is worth noting that the maximum number of worshippers allowed to attend services personally always remains 10 or 25 *regardless* of the size of the place of worship.

The archbishop of Brooklyn, Monsignor Di Marzio, did not wait to negatively comment on the policies implemented by Cuomo, and he described them as “arbitrary and unjust closures” because they did not take into account two important factors: first, the fact that during services devotees must respect the safety distances required for closed environments, and they are required to wear face masks. Second, the prelate also complained that no account had been taken of the fact that specific safety protocols had already been put in place to prevent contagion from SARS-CoV-2, in order to ensure a safe reopening after the precautionary closures ordered during the past spring<sup>46</sup>.

It is worth pointing out that Governor Cuomo probably conceived the measure primarily to contain the potential danger posed by the growing number

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46 AGESIR, agenzia d'informazione, *Stati Uniti: diocesi di Brooklyn, “limitazioni ingiuste e arbitrarie per le chiese cattoliche” dopo aumento casi Covid in alcuni quartieri*, online on the 14<sup>th</sup> October 2020 (last access on the 30<sup>th</sup> November 2020; Italian in original, *my translation*).

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of cases in the *Haredi* community, but this action ended up being *indiscriminately* applied to all places of worship<sup>47</sup>. This led to appeals by the Diocese of Brooklyn and Agudath Israel of America on the grounds that, while places of worship, such as churches and synagogues, are obliged to comply with strict limits on the number of people who may be allowed in, shops and other businesses are not subject to so strict limitations<sup>48</sup> (despite the fact that places of worship have proved to be much safer than comparable secular activities)<sup>49</sup>. In addition, Agudath Israel, citing a number of statements by Cuomo himself, accused the Governor of drawing the boundaries of the various zones of the *cluster action* in such a way as to artificially include in the red and orange zones those areas where there is the highest density of Orthodox Jews<sup>50</sup>.

After having been discussed in the lower courts, the matter was submitted to the US Supreme Court, which issued its final decision on Wednesday, the 25<sup>th</sup> November, almost at the stroke of midnight. Its decision is in favour of the plaintiffs; thus, the restrictions imposed by the Governor of the State of New

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47 Liptak, 2020, cit.

48 In this regard, it would be necessary to determine what secular activities can legitimately be compared to religious services, given that it is undeniable the legislator's duty to consider both types of activities at the same level even and especially in exceptional contexts. This is one of the questions that emerges from Madera's analysis of the opinions of the Supreme Court on the closures imposed on churches by the Governor of California as part of a plan to contain the spread of the SARS-CoV-2 virus in the US state; vedere Madera, 2020, *Some preliminary remarks...*, cit.

49 Supreme Court of the United States, No. 20A87, *Roman Catholic diocese of Brooklyn, New York vs. Andrew M. Cuomo, Governor of New York on application for injunctive relief*, online on the 25<sup>th</sup> November 2020 (last access on the 30<sup>th</sup> November 2020).

50 "Citing a variety of remarks made by the Governor [*Cuomo*], Agudath Israel argues that the Governor specifically targeted the Orthodox Jewish community and *gerrymandered* the boundaries of red and orange zones to ensure that heavily Orthodox areas were included" (*emphasis added*), in Supreme Court of the United States, No. 20A87, cit. Governor Cuomo defended himself against Agudath Israel's accusations and stated that cluster action zones are in no way designated to disfavour the prayer activities of Jewish communities, rather to counteract the gatherings themselves, as these are events of super-spreading of the virus, in AGUDATH ISRAEL OF AMERICA, et al., vs ANDREW M. CUOMO, Governor of New York, F. 3d, 2020 WL 6750495, \*5 (CA2, Nov. 9, 2020).

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York on access to places of worship are to be relieved<sup>51</sup>. As reported in the New York Times, the Supreme Court's decision is striking because it conflicts with the decisions the same Court took on restrictions on church attendance in California and Illinois in late spring-early summer this year<sup>52</sup>. In May and in July, the Court ruled in favour of Governors, and it certified their power to limit the number of worshippers in places of worship<sup>53</sup>.

But in the New York case, the Court justified its decision on the grounds that “the challenged restrictions violate the ‘minimum requirement of neutrality’ to religion [*by the state*]”<sup>54</sup>, because they impose on places of worship a treatment that is discriminatory in comparison to measures taken for other public places (especially schools), or certain categories of shops. This means that these measures violate the *Free Exercise Clause* of the First Amendment<sup>55</sup>. Hence, denying their appeal would cause “irreparable harm” to religious freedom, even

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51 Supreme Court of the United States, No. 20A87, cit. As stated at the beginning of the opinion, since both appeals concern the same matter, the opinion expressed on the injunction filed by the Diocese of Brooklyn applies to both motions (“This emergency application and another, *Agudath Israel of America, et al. v. Cuomo*, No. 20A90, present the same issue, and this opinion addresses both cases”). However, the Supreme Court appeared to be divided on the issue, because four of its nine justices voted against the religious groups’ appeal. Conservative judges and newly-appointed Justice Amy Coney Barnett voted in favour, in ANSA, *Corte Suprema azzerà restrizioni luoghi di culto New York*, online on the 26<sup>th</sup> November 2020 (last access on the 30<sup>th</sup> November 2020) and Walsh M., *U.S. Supreme Court Blocks New York State COVID-19 Limits on Religious Services*, in The School Law Blog (Education week), online on the 26<sup>th</sup> November 2020 (last access on the 30<sup>th</sup> November 2020).

52 Supreme Court of the United States, *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California, et al.*, 29 May 2020, N. 19A1044, 590 U.S., and *Elim Romanian Church, et al. v. Pritzker, Governor of Illinois*, 29 May 2020, N. 19A1046, 590 U.S., in [www.supremecourt.gov](http://www.supremecourt.gov). On this issue, it is worth noting the significant change in the composition of the Supreme Court after the death, on 18<sup>th</sup> September 2020, of Justice Ruth Bader Ginsburg, who was replaced by “traditionalist Catholic” Justice Amy Coney Barrett, appointed by outgoing President Trump a week before the presidential elections that took place in November. See Barlaam R, *Il Senato approva la nomina lampo della giudice Amy Coney Barrett*, il Sole24Ore, online on the 27<sup>th</sup> October 2020 (last access on the 16<sup>th</sup> December 2020), URL: <https://www.ilsole24ore.com/art/il-senato-approva-nomina-lampo-giudice-amy-coney-barrett-ADdoFUy>.

53 Liptak, 2020, cit.

54 In Supreme Court of the United States, No. 20A87, cit.

55 “The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment’s guarantee of religious liberty” in Supreme Court of the United States, No. 20A87, cit.

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by virtue of the fact that, as the Diocese of New York and Agudath Israel have shown, a relief of the restrictions imposed on them would not be detrimental to public health<sup>56</sup>.

Specifically, Justices found that the operational lines of the *cluster action initiative* discriminate against places of worship in two cases. Firstly, if they are compared to the treatment given to food shops and other activities deemed to be essential (a category that comprises even bicycle shops and liquor stores!), because the latter are not subject to any restriction as to the number of people who may be present on the premises *at the same time*. Furthermore, schools in yellow zone are allowed to reopen “*at full capacity*” (while they must stay closed if they are located in orange or red zones), while places of worship, even though they are located in a yellow zone, must comply with a restriction of 50% of their maximum capacity. In line with the words used by Archbishop Di Marzio to announce the appeal against the Governor of New York, the Court pointed out that, although Cuomo himself had declared that schools and industries are the main places where the infection spread, they were treated more leniently than places of worship in general, which, however, had recorded very low infection rates<sup>57</sup>, especially Catholic churches and synagogues affiliated with Agudath Israel of America – they reached this goal thanks also to the security protocols put in place for their reopening after the first wave of infection in the spring<sup>58</sup>.

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56 “[*The diocesi di New York and Agudath Israel*] tell us without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak”, in Supreme Court of the United States, No. 20A87, cit.

57 “[T]he diocese’s churches and Agudath Israel’s synagogues, which have *admirable safety records*”, Supreme Court of the United States, No. 20A87, cit. (emphasis added).

58 Moreover, the Court points out that “[n]ot only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue”. In this way, the Court accepted the claim by the archbishop of Brooklyn, mons. Di Marzio.

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According to the Supreme Court, these differences in treatment must be regarded as a violation of the First Amendment, as pointed out in the respective opinions of Justice Gorsuch and Justice Kavanaugh. As Justice Gorsuch claims: “[i]t is time – past time – to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques”, while, according to Kavanaugh, the restrictions on access to places of worship due to Cuomo’s *cluster action initiative* are not only more serious and more restrictive than those imposed in late spring and early summer in California and Illinois, but they also represent a possible instance of discrimination on religious and racial grounds<sup>59</sup>. And, as Justice Alito himself pointed out in his recent speech to the Federalist Society “[w]henver fundamental rights are restricted, the Supreme Court and other courts cannot close their eyes”<sup>60</sup>.

In this regard, the Court points out that the restrictions on freedom of worship wanted by Cuomo as part of his plan to contain the pandemic represent an “*irreparable injury*” to religious freedom because they cause the (albeit temporary) loss of a right guaranteed by the First Amendment. Indeed, given the strict limits imposed on access to places of worship, the vast majority of members of each religious community will have no choice but to follow religious services on television<sup>61</sup>. However, as the Court pointed out, «remote

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59 [Kavanaugh] “[t]o be clear, the COVID-19 pandemic remains extraordinarily serious and deadly, but judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised”, in Supreme Court of the United States, No. 20A87, cit..

60 In Walsh M., 2020, cit.

61 As to the methods put in place to guarantee religious services to the faithful, among which there are even *religious drive-ins*, see Faggioli M, *Pandemic and Religious Liberty in the USA; Between Privatization of the Church and Neo Integralism*, in *Diresom*, URL: <https://diresom.net/2020/04/08/pandemic-and-religious-liberty-in-the-usa-between-privatization-of-the-church-and-neo-integralism/>, online on the 8<sup>th</sup> April 2020 (last access on the 4<sup>th</sup> December 2020).

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viewing is not the same as personal attendance»<sup>62</sup> because, as far as Catholics are concerned, they cannot receive communion, while, as far as Orthodox Jews are concerned, they must traditionally attend certain religious rites in person.

As it can be seen, there are two opposing interests at the basis of the Supreme Court's decision: the interest in guaranteeing religious freedom, by virtue of the protection of the *Free Exercise Clause* of the First Amendment, and the duty to protect the public interest, understood in this specific case as the obligation of state authorities (which are represented by the Governor of the State of New York, Andrew M. Cuomo) to ensure the well-being of the population of New York (in this case, to enforce measures to stop the spread of SARS-CoV-2 contagion). This juxtaposition is worth analysing in order to understand the extent to which governmental authority can limit the fundamental right to religious freedom in extreme and emergency contexts, such as the current pandemic<sup>63</sup>. This possibility of a temporary restriction is indeed possible, provided that limitations do not have a character of religious discrimination; on the contrary, they must apply to a generality of recipients. Furthermore, these rules must be *narrowly tailored* (namely, proportionate) so as to satisfy a *compelling state interest*<sup>64</sup>. As Justice Kavanaugh pointed out, the *cluster action initiative* is not at all neutral towards believers. Moreover, the Court underlines that Governor's decisions, despite responding to a compelling state interest (of ensuring population's safety and health), cannot be considered to be proportionate<sup>65</sup>. As a matter of fact, the norm enforced by Governor Cuomo "are far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many

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62 In Supreme Court of the United States, No. 20A87, cit. and Supreme Court of the United States, *Agudath Israel of America, et al. v. Cuomo*, No. 20A90, 20 November 2020, online on 20<sup>th</sup> November 2020 (last access on the 15<sup>th</sup> December 2020).

63 The topic is thoroughly analysed in Madera, 2020, *Some preliminary remarks...*, cit.

64 *Church of Lukumi*, 508 U. S., at 546, in Supreme Court of the United States, No. 20A87, cit.

65 In Supreme Court of the United States, No. 20A87, cit.

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other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services<sup>66</sup>.

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<sup>66</sup> The previous cases brought to the attention of the Court were *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. (2020) and *South Bay United Pentecostal Church v. Newsom*, 590 U.S. (2020) in Supreme Court of the United States, No. 20A87, cit.