NO. 20-_____

In the Supreme Court of the United States

REVEREND KEVIN ROBINSON AND
RABBI YISRAEL A. KNOPFLER,

Applicants,

v.

PHILIP D. MURPHY, IN HIS OFFICIAL CAPACITY AS
THE GOVERNOR OF NEW JERSEY, ET AL.,

Respondents.

On Emergency Application Justice for an Injunction to the United States Court of Appeals for the Third Circuit

EMERGENCY APPLICATION TO JUSTICE ALITO FOR AN INJUNCTION PENDING APPELLATE REVIEW

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QUESTIONS PRESENTED

1. Whether New Jersey's COVID-19 restrictions limiting houses of worship to 25% of capacity or a numerical cap, whichever is less, while imposing less restrictive limits on secular activities that evidently pose the same or greater risk of viral transmission, violate Applicants' rights to the Free Exercise of Religion and Free Speech and Assembly.

2. Whether New Jersey's "mask mandate" violates Applicants' right to the Free Exercise of Religion by allowing numerous open-ended exemptions from mask-wearing for secular reasons such as feasibility, health, exercise, eating, and safety, while allowing only "brief" or "momentary" removal of the mandated masks in religious settings.

LIST OF PARTIES

The Applicants (plaintiffs-appellants below) are Reverend Kevin Robinson and Rabbi Yisrael A. Knopfler. Fr. Robinson is pastor of Saint Anthony of Padua Church in North Caldwell, New Jersey. Rabbi Knopfler presides over a synagogue in Lakewood, New Jersey.

The Respondents (defendants-appellees below) are Philip Murphy, in his official capacity as Governor of New Jersey; Colonel Patrick J. Callahan, in his official capacity as Superintendent of New Jersey State Police and State Director of Emergency Management; Gurbir S. Grewal, in his official capacity as Attorney General of New Jersey; Kevin Dehmer, in his official capacity as interim New Jersey Commissioner of Education; and Judith M. Persichilli, in her official capacity as Commissioner of the New Jersey Department of Health.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

EMERGENCY APPLICATION TO JUSTICE ALITO FOR AN INJUNCTION PENDING APPELLATE REVIEW 2

STATEMENT OF THE CASE 6

A. New Jersey's Gathering Limits Privilege "Essential" Businesses and Activities Over Religious Activities 6

B. The Exemption-Ridden Mask Mandate 11

C. Father Robinson and Rabbi Knopfler 13

D. Lower Court Proceedings 16

ARGUMENT 19

I. GOVERNOR MURPHY'S RESTRICTIONS ON RELIGIOUS GATHERINGS ARE NOT NEUTRAL OR GENERALLY APPLICABLE BECAUSE THEY FAIL TO PROHIBIT COMPARABLE SECULAR CONDUCT 21

A. Schools 24

B. Manufacturers, Warehouses, Food Processing Centers, Shelters, Etc ... 26

C. Outdoor Crowds 27

D. Other Comparators 28

II. NEW JERSEY'S FACE-COVERING MANDATE IS RIDDLED WITH EXCEPTIONS AND MUST ALSO SURVIVE STRICT SCRUTINY 30

III. THE GOVERNMENT'S ORDERS FAIL STRICT SCRUTINY 31

IV. GOVERNOR MURPHY'S ORDERS VIOLATE FREEDOM OF SPEECH AND ASSEMBLY 32

V. *JACOBSON* DOES NOT CHANGE THE ANALYSIS 33

VI. THE APPLICANTS MEET THE REMAINING FACTORS FOR AN INJUNCTION 34

VII. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT CERTIORARI 35

TABLE OF CONTENTS – Continued

Page

CONCLUSION 36

APPENDIX 38

APPENDIX TABLE OF CONTENTS

Appendix A. Opinion of the United States District Court, District of New Jersey (October 2, 2020) App.1

Appendix B. Opinion of the United States District Court, District of New Jersey (October 28, 2020) App.29

Appendix C. Order of the United States Court of Appeals for the Third Circuit Denying Appellants' Motion for Injunction (November 10, 2020) App.33

TABLE OF AUTHORITIES

Page

CASES

Agudath Israel of Am. v. Cuomo,
No. 20-3572, 2020 WL 6559473 (2d Cir. Nov. 9, 2020) 22

Am. Trucking Associations, Inc. v. Gray,
483 U.S. 1306 (1987) 20, 21

Calvary Chapel Dayton Valley v. Sisolak,
140 S.Ct. 2603 (2020) ..... passim

Cassell v. Snyders,
No. 20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020) 25

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) ..... passim

Denver Bible Church v. Azar,
2020 WL 6128994 (D. Colo. Oct. 15, 2020) 28, 32

Elim Romanian Pentecostal Church v. Pritzker,
962 F.3d 341 (7th Cir. 2020) 22, 27, 28

Elrod v. Burns,
427 U.S. 347 (1976) 35

Employment Div., Dep't of Human Res. of Oregon v. Smith,
494 U.S. 872 (1990) ..... passim

First Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi,
959 F.3d 669 (5th Cir. 2020) 22

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,
170 F.3d 359 (3d Cir. 1999) 21, 26, 28, 32

Gish v. Newsom,
No. EDCV 20755, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020) 25

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,
546 U.S. 418 (2006) 33

Harvest Rock Church, Inc. v. Newsom,
977 F.3d 728 (9th Cir. 2020) 4, 22, 24, 30

Jacobson v. Massachusetts,
197 U.S. 11 (1905) ..... passim

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134 S.Ct. 1022 (2014) 21

TABLE OF AUTHORITIES—Continued

Page

Mandel v. Bradley,
432 U.S. 173 (1977) 24

McCullen v. Coakley,
573 U.S. 464 (2014) 21, 33

Roberts v. Neace,
958 F.3d 409 (6th Cir. 2020) ..... passim

Robinson v. Murphy,
No. 20-3048, Dkt. 11 (3d Cir. Nov. 10, 2020) 22

Robinson v. Murphy,
No. CV 20-5420, 2020 WL 5884801 (D.N.J. Oct. 2, 2020) 1

Solid Rock Baptist Church v. Murphy,
No. CV 20-6805, 2020 WL 4882604 (D.N.J. Aug. 20, 2020) 2, 16

South Bay United Pentecostal Church v. Newsom,
140 S.Ct. 1613 (2020) ..... passim

Turner Broadcasting System, Inc. v. FCC,
507 U.S. 1301 (1993) 21

Ward v. Polite,
667 F.3d 727 (6th Cir. 2012) 31

Wheaton Coll. v. Burwell,
573 U.S. 958 (2014) 21

Yashica Robinson v. Atty Gen., State of Alabama,
957 F.3d 1171 (11th Cir. 2020) 34

Yellowbear v. Lampert,
741 F.3d 48 (10th Cir. 2014) 33

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 2, 19, 33

STATUTES

28 U.S.C. § 1651 ..... 1, 4, 20

28 U.S.C. § 2101(e) 36

TABLE OF AUTHORITIES—Continued

Page

JUDICIAL RULES

Fed. R. Evid. 201(b)(2) 7

Sup. Ct. R. 20 4

Sup. Ct. R. 22 4

Sup. Ct. R. 23 4

EXECUTIVE ORDERS

EO 107, ¶ 2 (March 21, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf ..... passim

EO 122, ¶ 1 (April 8, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-122.pdf 8, 11

EO 149, ¶ 6 (May 29, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-149.pdf 11

EO 152, ¶ 2(f) (June 9, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-152.pdf 9, 10, 13, 31

EO 157, ¶ 2 (June 26, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-157.pdf 12

EO 163, ¶¶ 1-3 (July 8, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-163.pdf 12, 13, 31

EO 165 (July 13, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-165.pdf 11

EO 175 (Aug. 13, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-175.pdf 11, 25

EO 183, ¶ 4 (September 1, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-183.pdf 10, 13

EO 187, ¶ 2 (Oct. 12, 2020),
https://nj.gov/infobank/eo/056murphy/pdf/EO-187.pdf 12

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https://nj.gov/infobank/eo/056murphy/pdf/EO-192.pdf ..... passim

Page

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"Why Meat Processing Plants Have Become COVID-19 Hotbeds,"
CNN Health (June 27, 2020)
https://www.cnn.com/2020/06/27/health/meat-processing-plants-coronavirus-intl/indApp.html 26

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"What lessons can other sports learn from MLB's COVID-19 outbreak?,"
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https://www.chicagotribune.com/sports/ct-mlb-covid-19-outbreaks-lessons-20200803-tw445ixzwjeovh23mwlhpal7rm-story.html 29

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https://fox2now.com/sports/st-louis-county-identifies-covid-19-outbreaks-tied-to-youth-sports-explains-restrictions/ 29

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https://coronavirus.jhu.edu/testing/individual-states
(last visited Nov. 17, 2020) 34

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Generally Applicable Law and the Free Exercise of Religion,
95 Neb. L. Rev. 1 (2016) 5, 23

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"Why Meatpacking Plants Have Become COVID-19 Hotspots,"
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https://www.wired.com/story/why-meatpacking-plants-have-become-covid-19-hotspots/#:~:text=Frigid%20temperatures%2C%20cramped%20conditions%2C%20and,for%20contracting%20the%20novel%20coronavirus 26

Page

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https://www.startribune.com/covid-19-risk-lurks-as-mshsl-considers-restart-of-prep-football-volleyball/572465751/ 29

Rachel Schraer,
"Coronavirus: Tests 'could be picking up dead virus,'"
BBC News (Sept. 5, 2020)
https://www.bbc.com/news/health-54000629 34

Shaylah Brown,
"'The sun shines again:' Teaneck rally turns into celebratory Biden victory march," NorthJersey.com (Nov. 7, 2020) https://www.northjersey.com/story/news/bergen/teaneck/2020/11/07/teaneck-nj-rally-turns-into-celebratory-joe-biden-victory-march/6204351002/ 27

Soumya Karlamangla,
"California hospitals face a 'war zone' of flu patients—and are setting up tents to treat them," Los Angeles Times (Jan. 16, 2018)
https://www.latimes.com/local/lanow/la-me-ln-flu-demand-20180116-htmlstory.html..... 34

The COVID Tracking Project, Our Data (Nov. 16, 2020)
https://covidtracking.com/data..... 34

OPINIONS BELOW

The district court's unreported order denying Fr. Robinson's and Rabbi Knopfler's motion for a temporary restraining order or preliminary injunction is available at *Robinson v. Murphy*, No. CV 20-5420, 2020 WL 5884801 (D.N.J. Oct. 2, 2020) and is reprinted in Appendix ("App.") A. The district court's unreported order denying Fr. Robinson's and Rabbi Knopfler's motion for an injunction pending appeal is reprinted in App. B. The Third Circuit's unreported order denying Fr. Robinson's and Rabbi Knopfler's motion for an injunction pending appeal is reprinted in App. C.

JURISDICTION

Applicants have a pending interlocutory appeal before the United States Court of Appeals for the Third Circuit. This Court has jurisdiction pursuant to 28 U.S.C. § 1651.

EMERGENCY APPLICATION TO JUSTICE ALITO FOR AN INJUNCTION PENDING APPELLATE REVIEW

TO THE HONORABLE SAMUEL ALITO, AS CIRCUIT JUSTICE
FOR THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The First Amendment protects religious exercise from discriminatory value judgments by public authorities in the exercise of "emergency powers." More than eight months into the era of COVID-19, however, religious gatherings in New Jersey (and several other states) are still being treated unequally relative to numerous comparable secular activities, including attending school, working at a meatpacking plant, getting a facial, shopping at Costco, playing contact sports, casino gambling, and mass celebrations after a presidential election.

Under the New Jersey Governor's web of COVID-19 pandemic regulations, imposed solely by his will, houses of worship are strictly limited to the lesser of 25% of capacity or 150 people, but, strangely enough, never fewer than 10 people even if greater than 25% of capacity.[1]

[1] EO 183, ¶ 4 (Sept. 1, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-183.pdf. As discussed *infra*, the curious 10-person floor has prompted one court to observe that the Governor appears to have gerrymandered his religious restrictions in an effort to evade the claims of Orthodox Jewish worshipers, who require a minimum of 10 adult males in the same room even to commence Jewish worship services for a congregation. *See Solid Rock Baptist Church v. Murphy*, No. CV 20-6805, 2020 WL 4882604, at *9, n.11 (D.N.J. Aug. 20, 2020).

The official rationale for these restrictions is "containing the virus"—an effort that, however nobly intended, has been of uncertain benefit while producing a great deal of panic and socioeconomic damage over the past eight months.

Under these unprecedented state-imposed burdens on the free exercise of religion, Fr. Robinson can have in-person Mass for only approximately 20 people at a time in a church that holds approximately 100 worshipers. He is thus precluded from ministering to his 175-member congregation according to Catholic norms. Rabbi Knopfler can only gather as one member of the "minyan" of 10 adult males required even to initiate Jewish temple worship, thus reaching the allowed limit for his 30-person synagogue. Rabbi Knopfler is thus prohibited from conducting in-person worship for his integral congregation.

At the same time, "essential" retail businesses and "essential" non-retail businesses and numerous other secular activities, including schools, are afforded either 100% or 50% of indoor capacity without numerical caps.

In addition, under the Governor's "mask mandate" the Applicants and their congregations must wear face masks during services, which they may only "briefly" or "momentarily" remove to receive communion, or (when outdoors) for other "religious reasons." Yet numerous open-ended exemptions from mask-wearing are afforded for secular reasons such as health, practicability, exercise, office work, and more, with no temporal limitation to a brief moment.

New Jersey's scheme is a blatant violation of this Court's promise of equality for religious observers. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

508 U.S. 520, 542 (1993). Applicants are not ignoring recent headlines about a rise in COVID cases (along with tests) and hospitalizations, nor are they denying the government's right to respond with appropriate measures. But as the eminent Judge O'Scannlain recently declared, "the Constitution, emphatically, does not allow a State to pursue such measures against religious practices more aggressively than it does against comparable secular activities." *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 731 (9th Cir. 2020) (O'Scannlain, J., dissenting).

Therefore, pursuant to this Court's Rules 20, 22, and 23, and 28 U.S.C. § 1651, Applicants respectfully request that this Circuit Justice or the full Court issue a writ of injunction providing the following relief:

(a) Forbidding respondents from imposing on Applicants any occupancy limitation on their houses of worship greater than that imposed on many "essential" non-retail businesses, which are afforded 100% occupancy; or

(b) In the alternative, forbidding respondents from imposing any occupancy limitation greater than that imposed on "essential" retail businesses, which are afforded 50% occupancy; and

(c) Given New Jersey's numerous open-ended, temporally unlimited secular exemptions from mask-wearing, forbidding respondents from limiting any religious exemption to an arbitrary "brief" or "momentary" period.

Applicants initially sought an injunction in the District of New Jersey and in the Third Circuit, both of which denied relief. Accordingly, the Applicants seek this Court's grant of relief to address a widespread issue of national importance: the "indisputably clear" violation of Applicants' right to equal treatment. *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)). Indeed, this Court would likely grant certiorari and reverse, thus

resolving an ever-deepening circuit split over the constitutionality of COVID-19 lockdown restrictions on religion.

The district court, like other courts across the country, denied relief on the theory that Applicants are treated the same as or "better" than some secular activities, such as movie theaters. The court also exercised virtually total deference to the government's "emergency" powers under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), an anachronism pre-dating this Court's Free Exercise precedents. The Third Circuit provided no rationale at all for its summary denial of Applicants' motion for an injunction pending appeal.

But the State cannot point to restrictions on popcorn and a movie, for example, to justify its somewhat less draconian restrictions on Free Exercise. The Free Exercise Clause is violated when even "a single secular analog is not [so] regulated." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting) (quoting Laycock & Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 22 (2016) (emphasis in original)). Such is the case here, when only 10 or 20 people at a time can attend Applicants' religious services while hundreds or thousands can gamble at casinos, patronize superstores, work at meatpacking plants, attend schools, or pour into the streets to celebrate an election without the least observance of "social distancing."

Even *Jacobson* made clear that "no rule prescribed by" the government may "infringe any right granted or secured by" the U.S. Constitution in the name of police

powers. *Jacobson*, 197 U.S. at 25 (emphasis added). Therefore, *Jacobson* is no warrant for denying the relief requested, which is the minimum required by the Free Exercise Clause.

STATEMENT OF THE CASE

A. New Jersey's Gathering Limits Privilege "Essential" Businesses and Activities Over Religious Activities.

On March 21, 2020, Governor Murphy issued Executive Order 107 ("EO 107") pursuant to his emergency powers under the New Jersey Civil Defense and Disaster Control Act, N.J.S.A. App. A: 9-33, *et seq.* and New Jersey's Emergency Health Powers Act, N.J.S.A. 26:13-1, *et seq.* (Dist. Ct. Dkt. 56 at ¶ 4.)[2] EO 107, the foundation of New Jersey's subsequent COVID-19 executive order regime, mandated all New Jerseyans to stay at home and prohibited all undefined "gatherings." EO 107 exempted particular enumerated activities, such as obtaining goods or services from "essential retail businesses," "reporting to, or performing, [one's] job," or for "educational, religious, or political reason[s]."[3] The order closed schools for in-person education.[4] It

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[2] This Court may take judicial notice of Governor Murphy's executive orders and online news articles cited throughout this motion, some of which were published after the completion of the record below, as adjudicative facts "from sources whose accuracy cannot reasonably be questioned." Fed. R. Ev. 201(b)(2).

[3] Governor Murphy, Executive Order 107, ¶ 2 (March 21, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf.

[4] *Id.* at ¶ 12.

also required "brick and mortar" operations of all "non-essential retail businesses" to close, including dining, recreational and entertainment establishments.[5]

"Essential retail businesses," however, were permitted to remain open, as long as they provided pickup services whenever practicable and obeyed any additional directives by the State Director of Emergency Management.[6] "Essential" retail included hardware stores, convenience stores, liquor stores, pet shops, laundromats, and many more.[7] (Governor Murphy later required essential retail businesses to limit occupancy to 50% of indoor capacity, a limit which remains in place today.)[8] EO 107 also generally allowed in-person work for "essential operations" at a "business or non-profit" such as law enforcement, cashiers, construction workers, custodial staff, and warehouse workers.[9] The order made this allowance only if working from home is not possible and only to the extent necessary to ensure essential operations can continue, but imposed no upper limit on indoor capacity.[10]

Meanwhile, EO 107 simply prohibited outright Applicants' religious services as disfavored "gatherings." (*See* Dist. Ct. Dkt. No. 56 at ¶¶ 118-121, 141-158 (documenting

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5 *Id.* at ¶¶ 6, 9, and 10.

6 *Id.*

7 *Id.*

8 EO 122, ¶ 1 (April 8, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-122.pdf.

9 EO 107, *supra* n.3 at ¶ 11 (This exemption effectively captures essential non-retail businesses or activities that were not otherwise expressly prohibited by EO 107, such as professional offices, factories, food processing centers, and homeless shelters.)

10 *Id.*

enforcement actions against Applicants' religious services under EO 107 and its progeny).)

Finally, EO 107, and the subsequent executive orders, provided that violation of any of its provisions is subject to arrest and prosecution for disorderly conduct under N.J.S.A. App. A: 9-49 and 50.[11]

As the COVID-19 emergency morphed into an indefinitely extended suspension of constitutional rights, Governor Murphy's executive orders partially lifted his ban on indoor "gatherings." (*See* Dkt. 56 at ¶¶ 31-46.) Chief among these is EO 152, issued June 9, 2020, days after Murphy—in direct violation of his then-current orders limiting outdoor gatherings to 25 people—personally participated in two massive, non-socially distanced outdoor protests over the death of George Floyd. (*Id.* at ¶¶ 40-42.)

EO 152 authorized outdoor gatherings without any limits on gathering size or any requirement of social distancing if they were for "a religious service or a political activity, such as a protest."[12] All other outdoor gatherings were limited to 100 people with social distancing unless smaller than 25 people.[13] EO 152, was plainly tailored to permit precisely what Governor Murphy had just done in violation of his own prior

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[11] *Id.* at ¶ 25.

[12] EO 152, ¶ 2(f) (June 9, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-152.pdf.

[13] *Id.* at ¶¶ 2(a)-(e).

orders, suggesting that political expediency rather than "saving lives" was the impetus for at least some of his commands.

EO 152 also authorized indoor gatherings of up to 25% of room capacity or 50 people, whichever is less,[14] and further provided that indoor gatherings of up to 10 people would be allowed regardless of room size.[15] That curious allowance followed Applicants' First Amended Complaint, alleging that EO 107 had prohibited the minimum 10-person quorum (*i.e.*, "minyan") required under Jewish law for religious worship and thus Jewish worship as such. (Dist. Ct. Dkt. No. 7 at ¶ 113.)

Today, nearly two dozen executive orders and five months later, Governor Murphy authorizes 25% of capacity or 150 people, whichever is less, for indoor "gatherings" for religious services, weddings, funerals, memorial services and political events. (All other indoor gatherings are limited to 25% of capacity or 25 people, whichever is less.)[16] The 10-person minimum, no matter how small the room, remains in effect in an apparent (and futile) effort to evade the religious infringement claims of Orthodox Jews, particularly Rabbi Knopfer with his 30-seat synagogue.[17]

Meanwhile, Governor Murphy affords far greater freedom to numerous activities and businesses, even though they all involve large groups of people and/or close

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14 *Id.* at ¶ 1(a).

15 *Id.*

16 EO 183, ¶ 4 (September 1, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-183.pdf.

17 *Id.*

personal contact and thus pose similar (or greater) risks of viral spread. These include:

100% of capacity, no numerical cap:

- Schools/in-person education;[18]
- Non-retail businesses such as law firms, accounting firms, Fortune 500 companies, and more;[19]
- Manufacturers, warehouses, food processing centers, and meatpacking plants;[20]
- Media services;[21]
- Childcare centers;[22]
- Public and private carriers;[23] and
- Homeless shelters, drop-in centers, and other social service venues.[24]

50% of capacity, no numerical cap:

- "Essential" retail such as grocery stores, hardware and home improvement stores, and liquor stores.[25]

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18 EO 175 (Aug. 13, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-175.pdf.

19 EO 107, *supra* n. 3 at ¶ 11.

20 *Id.* at ¶ 11; *see also* Executive Order 122, ¶ 4 (April 8, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-122.pdf.

21 EO 107, *supra* n. 3 at ¶ 19.

22 EO 149, ¶ 6 (May 29, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-149.pdf.

23 EO 165 (July 13, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-165.pdf.

24 EO 107, *supra* n. 3 at ¶ 11.

25 *Id.* at ¶ 6; *see also* EO 122, *supra* n. 8 at ¶ 1.

25% of capacity, no numerical cap:

- Casinos;[26]
- Personal care services.[27]

25% of capacity, but minimum of 150 people allowed:

- Professional and other contact sports if each individual is necessary for participation.[28]

These favored businesses and activities are capriciously spared designation as "gatherings" and thus are all allowed greater freedom than houses of worship under the Governor's edicts.

B. The Exemption-Ridden Mask Mandate.

New Jersey generally mandates that all people two years of age or older wear a "face covering" in public spaces, indoors or outdoors.[29] Like the gathering limits, this mandate is riddled with exceptions. They include the following:

Indoor public spaces (including gatherings): Masks are not required when:

- They would "inhibit the individual's health";
- The individual is under two years old;
- They would be "impracticable" to wear, "such as" when eating, drinking, or smoking;
- It is not feasible for organizers or supervisors of "gatherings" to wear them (provided they maintain social distancing); and

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[26] EO 157, *supra* n. 23 at ¶ 11.

[27] EO 157, ¶ 2 (June 26, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-157.pdf.

[28] EO 187, ¶ 2 (Oct. 12, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-187.pdf.

[29] *See, e.g.*, EO 163, ¶¶ 1-3 (July 8, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-163.pdf.

- They are removed "momentarily" to "place or receive an item in [the] mouth . . . if done for religious purposes" or health and safety. [30]

Indoor private commercial spaces: Masks are not required when:

- Staff are in office buildings or other non-public spaces unless in "prolonged proximity to others" (*i.e.*, less than six feet away).[31]

Outdoor public spaces: Masks are not required when:

- Social distancing is possible;
- One is with immediate family members, caretakers, household members, or romantic partners;
- They would inhibit individual health, such as during high intensity aerobic or anaerobic activities, in the water or in other situations involving a safety risk;
- Individuals cannot "feasibly" wear a mask, "such as" when eating or drinking; and
- "[T]o briefly remove their face coverings for religious reasons."[32]

These exemptions were further complicated by Governor Murphy's late-arriving EO 192, which purports to provide comprehensive health and safety protocols for New Jersey businesses.[33] EO 192 adds an exemption when masks would "interfere with" the duties of first responders, court personnel, transit workers, housing and shelter personnel, emergency responders, and more.[34]

The order also provides that neither the mask mandate nor the social distancing requirement applies "to religious institutions to the extent the application of the health and safety protocols would prohibit the free exercise of religion."[35] Thus does

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[30] EO 183, *supra* n. 1 at ¶ 5; EO 152, *supra* n. 12 at ¶¶ 1(c), 5.

[31] EO 163, *supra* n. 29 at ¶ 3.

[32] *Id.* at ¶¶ 1-3.

[33] EO 192 (Oct. 28, 2020), https://nj.gov/infobank/eo/056murphy/pdf/EO-192.pdf.

[34] *Id.* at ¶ 2.

[35] *Id.* at ¶ 3.

New Jersey implicitly recognize that Governor Murphy's dictates do interfere with divine worship. But the vagueness of the purported exemptions requires the State to make individual determinations about what constitutes "momentary" removal of masks for "religious reasons" (when outdoors)—terms and conditions not applied to the secular exemptions—and what constitutes a "prohibition" of free exercise. As the government's own orders provide no guidance, the government should be required to provide an official clarification of its position in response to this application, not mere suggestions in defense briefing as to what these vague exemptions might mean.[36]

C. Father Robinson and Rabbi Knopfler.

For Father Robinson and Rabbi Knopfler, the current occupancy limits on houses of worship to 25% or 150 persons, whichever is less, are effectively no different from those of five months ago, given that their houses of worship can hold only 100 people and 30 people, respectively. They both remain subject to the 25% limit and 10-person floor, no matter how high the irrelevant numerical ceiling.

Both Applicants regularly conduct indoor worship for their congregations, and Rabbi Knopfler's 10 school-age children regularly attend in-person Jewish education. Both sincerely believe that in-person worship and religious education are required by their respective faiths. (*See* Dist. Ct. Dkt. No. 56 at ¶ 132.)

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36 The New Jersey defendants commented below that "religious reasons" include acts "such as" receiving "communion or drink[ing] from the Kiddush cup," even though nothing in the text so expounds the exemption. (Dist. Ct. Dkt. No. 71 at ECF p. 8 of 46.)

Father Robinson offers Mass, presides over weddings and funerals, and administers other Catholic sacraments to his congregation. (*Id.* at ¶ 113.) He offers two Masses on Sundays: Low Mass, assisted by two altar servers, and High Mass, with five altar servers. (*Id.* at ¶ 115.) His church holds about 100 people (*see Id.* at ¶ 116), but his total congregation currently numbers about 175. (*Id.*)

Catholic teaching requires physical presence to receive the Sacraments. (*Id.* at ¶ 117.) And Church law forbids a priest from offering more than two Masses a day except for extraordinary circumstances. (*Id.* at ¶ 126.) Under a 25% of capacity limitation, Father Robinson's congregation is limited to 22 worshipers at most, which would require an impossible eight (Low) Masses on Sunday in order to accommodate his flock. (*Id.* at ¶¶ 125-26.) His congregation cannot worship outdoors, given the orientation of Catholic worship to the Sanctuary, Altar, and Tabernacle (*Id.* at ¶ 132) and also the obvious impediment of inclement weather.

Additionally, Father Robinson cannot in conscience wear a mask while exercising his ministry or compel his congregants to wear them throughout Mass if they are socially distanced from other individuals or families, given that masks interfere with many aspects of Catholic worship—from preaching, to the reception of Communion, to wedding vows, baptisms, and more. (*Id.* at ¶ 129-31.)

Rabbi Knopfler presides over a synagogue in Lakewood, N.J. (*Id.* at ¶ 133.) His total congregation is about 50 people, and his synagogue can hold about 30 worshipers. (*Id.* at ¶¶ 134-35.) Rabbi Knopfler typically conducts two services on Saturday mornings, and prayer services three times a day during the week. (*Id.* at

¶¶ 136-37.) Synagogue prayers require a minimum quorum of 10 adult males, called the "minyan." (*Id.* at ¶ 138.) Under a 25% of capacity limit, Rabbi Knopfler could only minister to six people at a time, although the government—in an obvious attempt to evade his claims—allows minimum gatherings of 10 people indoors no matter how small the room. (*Id.* at ¶ 167); *cf. Solid Rock Baptist Church v. Murphy*, No. CV 20-6805, 2020 WL 4882604, at *9, n.11 (D.N.J. Aug. 20, 2020) (noting that 10-person minimum seems gerrymandered to avoid lawsuits from Jewish worshippers). Further, Rabbi Knopfler's children attend Jewish schools (which have no capacity limit) that typically conduct prayer for the whole student body in appurtenant synagogues—impossible under a 25% of capacity limit. (*Id.* at ¶¶ 202-203.)

Like Catholic worship, Jewish religious services require physical presence in the synagogue. (*Id.* at ¶ 140.) Jewish worship, too, is oriented to the Temple, and praying outside is not possible at all on the Sabbath because the Torah scrolls are easily damaged by the elements, as happened when Rabbi Knopfler temporarily moved his services outside pursuant to the government's COVID edicts and the scrolls were damaged by heat and humidity. (*Id.* at ¶ 169-70.) The upcoming winter will only exacerbate this burden on Orthodox Jewish worship.

The mask mandate is also incompatible with Jewish worship and religious education. (*Id.* at ¶¶ 170-71.) The rabbi's countenance must be visible during worship and instruction, as the Talmud requires that students "see your teacher's mouth," as when Moses removed the veil when he spoke to the people of Israel. (*Id.* at ¶¶ 195-201.)

D. Lower Court Proceedings.

After enduring more than a month of COVID lockdowns, Father Robinson filed his initial complaint on April 30, 2020 and moved for a temporary restraining order. (Dist. Ct. Dkt. No. 1.) Father Robinson alleged that Governor Murphy's orders violated multiple constitutional rights, including the free exercise of religion, freedom of speech, and freedom of assembly. (*Id.* at 10, 12.) Father Robinson withdrew his motion for a temporary restraining order without prejudice and filed an amended complaint on May 4, 2020, with Rabbi Knopfler joining as a plaintiff. On May 6, 2020, plaintiffs moved for a preliminary injunction on a fuller record. (Dist. Ct. Dkt. Nos. 6-10.) On July 23, after the district court had failed to act on the pending motions, Applicants filed a proposed third amended complaint and a renewed motion for injunctive relief (Dist. Ct. Dkt. Nos. 55-56), which is the subject of the instant application.

The district court failed to act on the original motion for a preliminary injunction on April 30, a Motion for Expedited Proceedings on June 2, 2020 (Dist. Ct. Dkt. No. 36) and the renewed Motion for Preliminary Injunction on July 23, 2020 (Dist. Ct. Dkt. No. 56). Given the evident denial of relief, applicants filed a Notice of Appeal on September 17, 2020. The appeal was withdrawn by stipulation on September 18 after the district court committed to a prompt hearing not later than September 25 and a decision not later than October 2. At the district court's direction, briefing was extended (*see* Dist. Ct. Dkt. No. 85) and the court heard oral arguments on September 25, 2020, (*see* Dist. Ct. Dkt. No. 95).

On October 2, 2020, the district court denied Applicants' motion for a preliminary injunction while granting their unopposed motion to file the third amended complaint. (App. A). The district court held that Governor Murphy's challenged orders were neutral and generally applicable and satisfied rational basis scrutiny. (Dist. Ct. Dkt. App. A at 13.) The court viewed *Jacobson*, along with Chief Justice Roberts's concurring opinion in *South Bay United Pentecostal*, as requiring deference to New Jersey's restrictions on religious gatherings. (*Id.* at 14.) The court opined that the "gathering restrictions and mask requirements . . . attempt to allow New Jersey citizens freedom to participate in important activities, such as religious worship" while acting to contain the virus. (*Id.*)

The district court also held that the challenged orders were not substantially underinclusive because they "contain similar exceptions for religious purposes and for secular purposes, indoor religious gatherings have higher maximum capacities than secular indoor gatherings," and the mask mandate has exemptions for both secular and religious reasons. (*Id.*) The court opined that because movie theaters and concert halls are more restricted than houses of worship, the latter were not treated less favorably than their "closest comparators." (*Id.* at 15.)

The court rejected Applicants' argument that in-person education at schools, allowed for the 2020-21 school year without capacity limitations, is yet another valid comparator. (*Id.* at 20.) The court opined that schools are distinguishable from churches and synagogues because (a) schools have the same daily attendees and exclude the general public; (b) schooling "take[s] place across the full day and [is] therefore

difficult to stagger"; and (c) "it is difficult to teach and supervise children outside." (*Id.* (emphasis added).) The district court also noted "a laundry list of requirements" for schools, including health screenings, masks, hygiene practices, and proper air filtration systems (*Id.* at 21). Houses of worship, however, were not provided any opportunity to adopt such mitigation practices as a condition of further reopening.

The court further opined that contact tracing is "substantially easier" in schools than in houses of worship (*Id.*), but cited no evidence to support this claim. Nor did the court explain why difficulty in contact tracing is not also a concern for numerous businesses that pose a similar or greater threat of viral spread.

The district court also distinguished homeless shelters, casinos, mass transit, liquor stores, and pet stores, holding that these "do not involve large groups of people congregating closely together, in one location, for extended periods of time, and for the same purpose" (*Id.*), even though most of them involve precisely that. The court ignored Applicants' comparison to meatpacking plants and factories.

The district court also denied the Applicants' speech and assembly claims, holding the challenged restrictions content-neutral and applying intermediate scrutiny. (*Id.* at 15.) The court found narrow tailoring in part because the government "continued to relax restrictions on religious gatherings in response to the changing conditions" of COVID (*Id.* at 18), even though the restrictions imposed on Applicants have not relaxed since early June. Moreover (as discussed below), the government's own evidence shows that non-restricted outdoor gatherings transmit the virus as readily as socially distanced indoor religious gatherings. The district court also held

that ample alternative means of communication exist because Applicants can supposedly worship outdoors, or remotely, or acquire a larger worship space (*Id.* at 16-17), all of which Applicants find impossible or a violation of their religious beliefs. (*See, e.g.*, Dist. Ct. Dkt. 79 at ECF p. 21 of 158).

Applicants filed a notice of appeal to the Third Circuit on Oct. 6, 2020 (Dist. Ct. Dkt. No. 99), and a motion for injunction pending appeal with the district court on Oct. 12, 2020 (Dist. Ct. Dkt. No. 100). For the reasons it had already expressed, the district court denied the motion on October 28, 2020. (App. B; Dist. Ct. Dkt. No. 108.) Applicants filed their motion for an injunction pending appeal with the Third Circuit on November 2, 2020. (Appell. Ct. Dkt. No. 11.) A two-judge panel issued a one-sentence denial, without explanation, on November 10, 2020. (App. C; Appell. Ct. Dkt. No. 27.) The Applicants then filed this application.

ARGUMENT

Under the All Writs Act, 28 U.S.C. § 1651(a), this Circuit Justice or the full Court may issue an injunction "[i]f there is a significant possibility that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (internal quotation marks omitted). "To obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that 'the legal rights at issue are

"indisputably clear."'" *Id.* at 1306 (quoting *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J.).

This Court also has broad discretion to issue an injunction pending appeal "based on all the circumstances of the case [without] express[ing] . . . the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver v. Sebelius*, 134 S.Ct. 1022, 1022 (2014). And "a traditional ground for certiorari," such as a "divide" among the Circuit Courts as to "whether to enjoin the requirement," also supports a grant. *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014).

New Jersey's violation of Applicants' First Amendment rights is an "indisputably clear" failure to obey this Court's precedents on equality of treatment for religious observers. *See Lukumi*, 508 U.S. at 542. The government's arguments to the contrary are merely *post hoc* attempts to justify secular value judgments in favor of "essential" and other approved businesses and activities in violation of the Free Exercise Clause. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

Even assuming (without conceding) the government's restrictions are content-neutral, they still clearly burden far more speech than necessary to accomplish the government's interests, *McCullen v. Coakley*, 573 U.S. 464, 486 (2014), as the Applicants are willing to practice social distancing and hygiene on the same terms and conditions as favored businesses and activities, including the noted exemptions.

Given the aforementioned Circuit split, there is at least a "significant possibility" this Court would grant certiorari to resolve the Circuits' divided approach to COVID-

related restrictions on houses of worship in various states. Thus far, the Fifth[37] and Sixth Circuits[38] agree with the Applicants. The Second,[39] Third,[40] Seventh,[41] and Ninth[42] Circuits agree with the government. It is also highly likely this Court would reverse the decision below, given that not even *Jacobson* deference justifies blatantly unequal treatment of Applicants' religious gatherings.

I. GOVERNOR MURPHY'S RESTRICTIONS ON RELIGIOUS GATHERINGS ARE NOT NEUTRAL OR GENERALLY APPLICABLE BECAUSE THEY FAIL TO PROHIBIT COMPARABLE SECULAR CONDUCT.

Laws burdening religion that are not neutral or generally applicable must undergo strict scrutiny. *Lukumi*, 508 U.S. at 532; *see also Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990). A law is not neutral if its "object . . . is to infringe upon or restrict practices because of their religious

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37 *First Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi*, 959 F.3d 669, 670 (5th Cir. 2020) (granting appellant's motion for injunction pending appeal based on the Church's assurances it would "satisf[y] the requirements entitling similarly situated businesses and operations to reopen").

38 *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (granting injunction pending appeal and concluding houses of worship are comparable to Kentucky's exempted "life-sustaining" businesses such as law firms, laundromats, liquor stores, and more).

39 *Agudath Israel of Am. v. Cuomo*, No. 20-3572, 2020 WL 6559473, at *1 (2d Cir. Nov. 9, 2020); *but see Id.* at *4 (Park, J., dissenting).

40 *Robinson v. Murphy*, No. 20-3048, Dkt. 11 (3d Cir. Nov. 10, 2020).

41 *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020).

42 *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020); *but see id.* at 940 (Collins, J., dissenting); *Calvary Chapel Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 4274901 (9th Cir. July 2, 2020); *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 730 (9th Cir. 2020); *but see Id.* at 731 (O'Scannlain, J., dissenting).

motivation," *Lukumi*, 508 U.S. at 533. Non-neutrality can be evident from the text of the law or by "the effect . . . in its real operation." *Id.* at 535 (emphasis added). A law is not generally applicable if it "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree than [religious practice] does." *Id.* at 543.

Governor Murphy's orders are neither neutral nor generally applicable because they are riddled with exemptions for secular activities endangering the government's interest at least as much as tightly restricted religious activities.[43]

In *South Bay* and *Calvary Chapel*, this Court exhibited internal disagreement over whether various exempted businesses and activities endangered the government's interest in "containing the virus" to the same extent as houses of worship. *See S. Bay*, 140 S.Ct. at 1613, 1614 (Roberts, C.J., concurring; Kavanaugh, J., dissenting); *Calvary Chapel*, 140 S.Ct. at 2603-2615 (Alito, J. dissenting; Gorsuch, J., dissenting; Kavanaugh, J., dissenting). For example, while Chief Justice Roberts in *South Bay* did not find grocery stores comparable to churches, *see S. Bay*, 140 S.Ct. at 1613 (Roberts, C.J., concurring), nearly two months later Justice Kavanaugh in *Calvary Chapel* deemed grocery stores a key comparator in evaluating general applicability. *See Calvary Chapel*, 140 S.Ct. at 2615 (Kavanaugh, J., dissenting) (stating

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[43] It is undisputed that Applicants' sincerely held religious beliefs require them to provide in-person worship for their religious congregations, which is not feasible under a 25% capacity limitation. As exceeding this limit would constitute disorderly conduct punishable by fines or imprisonment (*see* Dist. Ct. Dkt. No. 56 at ¶ 32), there is no doubt the challenged orders substantially burden Applicants' religious exercise.

the government "did not persuasively distinguish religious services from several of the favored secular organizations, particularly restaurants and supermarkets").[44]

Here, the district court concluded the government's orders are not substantially underinclusive merely because they allegedly treat religious gatherings more leniently than some secular indoor gatherings, *i.e.*, their so-called "closest comparators," such as movie theaters. (App. A at 14-15) But that is not the controlling standard. Rather, the question is whether *any* unprohibited activities are at least as risky as religious activities. *See Lukumi*, 508 U.S. at 543 (exempted animal killings endangered professed interest in public health and preventing animal cruelty at least as much as prohibited ritual sacrifice). *See also Calvary Chapel*, 140 S.Ct. at 2613 (Kavanaugh, J., dissenting) ("The question is whether a single secular analog is not regulated." (emphasis added) (quoting Laycock & Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 22 (2016)).

As Judge O'Scannlain recently put it: "[T]he State cannot evade the Free Exercise Clause merely by linking its restrictions on worship attendance to those imposed on one or two categories of comparable secular activity," but rather must "justify its decision to treat more favorably a host of comparable activities which so evidently raise the State's same express concerns about the disease." *Harvest Rock*, 977 F.3d at 736 (O'Scannlain, J., dissenting).

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[44] As neither *South Bay* nor *Calvary Chapel* contained an opinion of the Court, they are "precedential only as to 'the precise issues presented and necessarily decided.'" *Harvest Rock*, 977 F.3d at 732 (O'Scannlain, J., dissenting) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)).

Under Governor Murphy's spate of executive orders, a vast swath of permitted secular activities manifestly endanger the government's interest—"containing the virus"—to the same or greater degree as houses of worship, and yet none are as restricted as houses of worship. Some examples, by no means exhaustive, follow:

A. Schools.

As one federal court recently put it, "education and worship are both activities where people sit together in an enclosed space to share a communal experience, exacerbating the risk of contracting the coronavirus." *Cassell v. Snyders*, No. 20-cv-50153, 2020 WL 2112374 at *10 (N.D. Ill. May 3, 2020). Because the COVID order at issue there "impose[d] the same restrictions on schools as it does on churches, synagogues, mosques, and other places of worship," the court deemed it generally applicable and thus constitutional. *Id.*; *see also Gish v. Newsom*, No. EDCV 20755, 2020 WL 1979970 at *6 (C.D. Cal. Apr. 23, 2020) (noting that religious gatherings are "more analogous to attending school or a concert—activities where people sit together in an enclosed space to share a communal experience") (emphasis added).

That New Jersey schools are open without limitation on capacity or the total number of students and staff[45] in itself extinguishes general applicability. While the district court opined that schools are not comparable because they have the same daily attendees and are closed to the public (App. A at 20), in reality students and

[45] *See* EO 175, *supra* n.18.

staff alike mix with the world outside before returning to school and are not kept in a bubble.

The district court also found that it is too "difficult" to stagger classes and supervise children outdoors. (App. A at 20.) But an exemption for "difficulty" is precisely the kind of discriminatory "value judgment in favor of secular motivations . . . but not religious motivations" that "must survive heightened scrutiny." *Fraternal Order*, 170 F.3d at 366 (Alito, J.) (holding that medical exemption from no-beard policy triggered strict scrutiny of refusal to grant religious exemption).

The district court opined that schools are not comparable because religious schools are also open (App. A at 21), but that dodges the real issue: school assemblies are comparable to, and endanger the government's interest at least as much as, in-person religious worship. The district court also cited EO 175's "laundry list of requirements" for school reopening, essentially health protocols. (*Id.*) But the government's orders fail to provide houses of worship a viral mitigation option for full reopening. Religious gatherings are denied more than 25% occupancy no matter what additional health restrictions they take on. Nor has the government shown that the elaborate protocols for schools are necessary or appropriate for small houses of worship to operate at 100% or even 50% capacity.

Finally, there is no evidence that Applicants' smaller, stable congregations would be more difficult to contact trace than school students and staff. Nor does ease of contact tracing explain numerous exemptions for essential and other businesses open

to the public like hardware stores, supermarkets, pharmacies, convenience stores, public transit, and more.

In sum, New Jersey's exemption for schools but not houses of worship indubitably triggers strict scrutiny.

B. Manufacturers, Warehouses, Food Processing Centers, Shelters, Etc.

The Seventh Circuit has acknowledged "that warehouse workers and people who assist the poor or elderly may be at much the same risk [of catching the virus] as people who gather for large, in-person worship." *Elim Romanian v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020). Factories and food processing centers, including meatpacking plants, have been a locus of COVID-19 outbreaks throughout the country, due primarily to the close proximity of numerous workers for long periods of time (often in cool temperatures, as in meatpacking plants). (*See* Dist. Ct. Dkt. No. 79 at ECF pp. 14-15 of 158.)[46]

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46 *See also* Megan Molteni, "Why Meatpacking Plants Have Become COVID-19 Hotspots," Wired (May 7, 2020) (noting that according to the CDC, "the chief risks to meatpackers come from being in prolonged close proximity to other workers," as often "[a] thousand people might work a single eight-hour shift, standing shoulder to shoulder . . . breath[ing] hard and hav[ing] difficulty keeping masks properly positioned on their faces") (emphasis added), https://www.wired.com/story/why-meatpacking-plants-have-become-covid-19-hotspots/#:~:text=Frigid%20temperatures%2C%20cramped%20conditions%2C%20and,for%20contracting%20the%20novel%20coronavirus; Anna Stewart, et al., "Why Meat Processing Plants Have Become COVID-19 Hotbeds," CNN Health (June 27, 2020) (noting that people must "stand close to each other and shout to make themselves heard"), https://www.cnn.com/2020/06/27/health/meat-processing-plants-coronavirus-intl/indApp.html; Jessical Lussenhop, "Coronavirus at Smithfield Pork Plant: The Untold Story of America's Biggest Outbreak," BBC News (Apr. 17, 2020), https://www.bbc.com/news/world-us-canada-52311877.

The Seventh Circuit erroneously discarded these comparators on the theory that they involve activities "too difficult" to conduct remotely, while church services (in that court's view) can supposedly be conducted via the internet. *Id.*, 962 F.3d at 347. But once the Seventh Circuit (rightly) admitted that warehouses and homeless shelters may be just as risky as houses of worship, its privileging the "difficulty" of working remotely is merely a secular value judgment implicitly demoting the value of in-person worship according to the sincere religious beliefs that require it. *See Fraternal Order*, 170 F.3d at 366; *see also Denver Bible Church v. Azar*, 2020 WL 6128994, at *12 (D. Colo. Oct. 15, 2020) ("with due respect for . . . the Seventh Circuit, this court does not believe government officials . . . have the power to tell churches and congregants what is necessary to feed their spiritual needs"), *motion for stay pending appeal granted* No. 20-1377 (10th Cir. Oct. 22, 2020).

The district court here simply ignored these comparators, despite Applicants having raised them below. (*See, e.g.*, Dist. Ct. Dkt. No. 79 at ECF pp. 14-15.) Given the obvious and documented risks of viral spread inside these facilities, the district court's silence on the matter is telling.

C. Outdoor Crowds.

The government's own exhibits below acknowledge that outdoor crowds (beyond mere outdoor activity simpliciter) are potential viral vectors and that even backyard gatherings and barbeques have caused COVID-19 outbreaks. (*See* Dist. Ct. Dkt. No. 71-5 at ECF pp. 4-6, 8-11.) Citing the danger of outdoor gatherings, Anthony Fauci

declared President Trump's Rose Garden announcement of the nomination of Amy Coney Barrett to this Court was a "super-spreader" event.[47]

Yet here the government's orders totally exempt outdoor political and religious gatherings from both gathering-size and social distancing limits (*see* EO 152, *supra* n. 12 at ¶ 2(f)), an exemption many New Jerseyans exercised earlier this month by pouring into the streets to celebrate Joe Biden's putative electoral victory.[48] Yet Father Robinson can have no more than 19 parishioners for a high Mass, while Rabbi Knopfler can gather with only nine others as one member of a 10-person "minyan" beyond which no congregation at all is allowed.

Accordingly, New Jersey's allowance for outdoor crowds without social distancing also triggers strict scrutiny.

D. Other Comparators.

New Jersey permits still more exemptions for "large groups of people gather[ed] in close proximity for extended periods of time." *S. Bay*, 140 S.Ct. at 1614 (Roberts, C.J., concurring). All of them involve close personal contact and/or raised voices, posing supposedly high risks of viral spread. These include contact and professional sports (up to 150 people indoors beyond 25% of capacity), personal care services such

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47 Dartunorro Clark, "Fauci calls Amy Coney Barrett ceremony in Rose Garden 'superspreader event,'" NBC News (Oct. 9, 2020), https://www.nbcnews.com/politics/white-house/fauci-calls-amy-coney-barrett-ceremony-rose-garden-superspreader-event-n1242781.

48 Shaylah Brown, "'The sun shines again:' Teaneck rally turns into celebratory Biden victory march," NorthJersey.com (Nov. 7, 2020), https://www.northjersey.com/story/news/bergen/teaneck/2020/11/07/teaneck-nj-rally-turns-into-celebratory-joe-biden-victory-march/6204351002/.

as getting a haircut or a facial (25% capacity with no upper limit), retail shopping (up to 50% of capacity), working in an office environment (100% of capacity), or traveling on a bus, train or airplane (100% of capacity) packed with people. Such activities "are carried out in close proximity with others [and] simply cannot be undertaken while also practicing six-foot social distancing and wearing a mask," or else involve "an indoor practice facility or locker room filled with dozens of professional athletes and coaches shouting instructions to each other." *Harvest Rock*, 977 F.3d at 736 (O'Scannlain, J., dissenting). "Yet, despite sharing these supposedly critical features of church attendance, these activities are all more open and available to [New Jerseyans]." *Id.* It is thus no surprise that contact sports, for example, have been a locus of COVID-19 outbreaks in recent months.[49]

In sum, the government's gathering-size limits on Applicants' religious worship services are undermined at every turn by exceptions for favored secular activities. The government has failed to "articulate a sufficient justification for treating some secular organizations or individuals more favorably than religious organizations or individuals." *Calvary Chapel*, 140 S.Ct. at 2613 (Kavanaugh, J., dissenting) (emphasis

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[49] *See, e.g.*, Paul Klauda, "Sports cause outbreaks. Restart sports anyway?," Minnesota Star Tribune (Sept. 21, 2020), https://www.startribune.com/covid-19-risk-lurks-as-mshsl-considers-restart-of-prep-football-volleyball/572465751/; Joe Millitzer, "St. Louis County identifies COVID-19 outbreaks tied to youth sports, explains restrictions," (Sept. 18, 2020), https://fox2now.com/sports/st-louis-county-identifies-covid-19-outbreaks-tied-to-youth-sports-explains-restrictions/; Jamal Collier, "What lessons can other sports learn from MLB's COVID-19 outbreak?," Chicago Tribune (Aug. 3, 2020), https://www.chicagotribune.com/sports/ct-mlb-covid-19-outbreaks-lessons-20200803-tw445ixzwjeovh23mwlhpal7rm-story.html.

in original). Governor Murphy's limits on Applicants' religious gatherings must undergo strict scrutiny.

II. NEW JERSEY'S FACE-COVERING MANDATE IS RIDDLED WITH EXCEPTIONS AND MUST ALSO SURVIVE STRICT SCRUTINY.

Governor Murphy's face-covering mandate is a classic example of "an exception-ridden policy [that] takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy." *Roberts*, 958 F.3d at 413-14 (quoting *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012)). The mandate's numerous broad, open-ended, and temporally unlimited exemptions, detailed above, allow for "individualized government assessment of the reasons" for the relevant conduct, *Smith*, 494 U.S. at 884, without providing a comparably broad exemption for religious worship, but only a "momentary" or "brief" reprieve to receive communion or (when outdoors) for "religious reasons." (EO 152, *supra* n. 12 at ¶ 5; EO 163, *supra* n. 29 at ¶ 2).[50]

Take the "health" exemption, for example. The orders do not define when a mask would "inhibit" an individual's "health," thus requiring an individual evaluation of innumerable reasons for invoking the exception. Allowing undefined "health" to include a physical reason such as a skin condition or mental or emotional health is presumably sound policy, but it undermines the professed interest in stopping the

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[50] But *see also* EO 192, *supra* n. 31 at ¶ 3, vaguely exempting religious observers from the mask mandate to the extent it "prohibits the free exercise of religion," but without guidance as to the scope of the purported exemption, thus likewise inviting individualized governmental assessment of claims for exemption.

spread of COVID-19. (*See* Dist. Ct. Dkt. No. 79 at ECF p. 18 of 158 and n.14 (noting CDC's recognition that face coverings "may exacerbate a physical or mental health condition").)

Just as the medical exemption undermined the police department's no-beard policy in *Fraternal Order*, triggering strict scrutiny, so too does the "health" exemption from the mask mandate here—along with the plethora of additional mask exemptions noted above. *Cf. Denver Bible Church*, 2020 WL 6128994, at *11 (Colorado's COVID regulations "provide[] various exemptions from the face-mask requirement that do not apply to houses of worship, even those who might view removing a mask as necessary to their religious worship," triggering strict scrutiny), *mot. for stay granted*, No. 20-1377 (10th Cir. Oct. 22, 2020).

III. THE GOVERNMENT'S ORDERS FAIL STRICT SCRUTINY.

Where the government's orders fail to meet the Free Exercise requirements of *Smith*, "[t]he compelling interest standard that [courts] apply . . . is not 'water[ed] . . . down' but 'really means what it says.'" *Lukumi*, 508 U.S. at 546 (ellipses and last alteration in original) (quoting *Smith*, 494 U.S. at 888). Of course, "[i]t is established in [this Court's] strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547 (internal quotation marks omitted). As one of this Court's Justices once put it, "[a] law's underinclusiveness—its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest—can raise with it the inference that the government's claimed

interest isn't actually so compelling after all." *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.).

Here, the government cannot demonstrate that its gathering limits and mask mandate, as imposed on Applicants' worship services, truly serve an "interest of the highest order" because, as shown above, the executive order scheme patently authorizes "appreciable damage"—indeed, vast damage—to that professed interest via a web of expedient exemptions not afforded to Applicants. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (requiring "more focused" compelling interest test based on pre-*Smith* Free Exercise scrutiny rather than merely formulaic official recitations).

Even assuming a genuine compelling interest, the government's Swiss-cheese-like array of secular exemptions demonstrates there is no credible argument against a more narrowly tailored approach for religious services that would merely place them on equal footing with favored non-religious activities. If social distancing, proper hygiene practices, and other health and safety protocols are sufficient to allow numerous secular gatherings above 25% of capacity, they are good enough for Applicants' religious gatherings, too.

IV. GOVERNOR MURPHY'S ORDERS VIOLATE FREEDOM OF SPEECH AND ASSEMBLY.

Assuming (without conceding) that the government's orders are content-neutral speech restrictions, they fail intermediate scrutiny for the reasons already discussed. The government's orders "burden substantially more speech than is necessary to further the government's interest," *McCullen*, 573 U.S. at 477, given the vast array

of exemptions for activities posing similar or greater risks of viral spread. The patent lack of narrow tailoring violates Applicants' rights to Free Speech and Freedom of Assembly.

V. *JACOBSON* DOES NOT CHANGE THE ANALYSIS.

Under *Jacobson*, states have broad latitude to protect public health during a pandemic, provided those "broad limits are not exceeded." *S. Bay*, 140 S.Ct. at 1613-14 (Roberts, C.J., concurring) (emphasis added). Numerous courts have recognized that *Jacobson* does not justify plain violations of constitutional rights in the name of COVID-19. *See, e.g.*, *Roberts*, 958 F.3d at 414 (granting injunction pending appeal against Kentucky's ban on in-person religious worship notwithstanding *Jacobson*); *Yashica Robinson v. Atty Gen., State of Alabama*, 957 F.3d 1171, 1179 (11th Cir. 2020) (upholding preliminary injunction against state orders restricting abortion for purposes of slowing COVID, and stating *Jacobson* "was not an absolute blank check for the exercise of governmental power"); *see also Calvary Chapel*, 140 S.Ct. at 2614 (Kavanaugh, J., dissenting) ("COVID-19 is not a blank check for a State to discriminate against . . . religious services").

As this Circuit Justice noted earlier this year, *Jacobson* deference likely does not even apply where, as here, "statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case." *Calvary Chapel*, 140 S.Ct. at 2608 (Alito, J., dissenting). But even if *Jacobson* applies, the government's restrictions on Applicants' religious services, while allowing a vast array of lesser-restricted but just-as-risky secular activities, are not substantially

related—that is, narrowly tailored—to further the interest of containing the spread of a virus. Rather, they are indisputably plain, palpable violations of Applicants' constitutional rights, precluding even *Jacobson* deference. *Jacobson*, 197 U.S. at 31.

VI. THE APPLICANTS MEET THE REMAINING FACTORS FOR AN INJUNCTION.

This Court's canonical principle is that "[t]he loss of First Amendment freedoms, for even minimal periods of times, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Forbidding Applicants from serving their integral congregations on the same terms and conditions as comparable exempted activities "assuredly inflicts irreparable harm." *Roberts*, 958 F.3d at 416.

As to the balance of harms, an injunction would cause the government no real harm to any legitimate interest as its own web of exemptions for favored activities shows. What is good for schools, factories, homeless shelters, outdoor crowds, professional sports, and barber shops is good for worship, too. Nor is the rise in COVID-19 cases and hospitalizations reason to conclude otherwise. Recent data shows the current rise in COVID cases corresponds to a significant spike in COVID testing, which likely includes positive results for dead (*i.e.*, non-infectious) viral particles.[51] And a rise in

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[51] Johns Hopkins University & Medicine, State-by-State Testing Trends, https://coronavirus.jhu.edu/testing/individual-states (last visited Nov. 17, 2020); The COVID Tracking Project, Our Data (Nov. 16, 2020) (showing record number of cases closely tracks record number of COVID tests), https://covidtracking.com/data; *see also* Dist. Ct. Dkt. No. 89 at 4, n.4 (noting recent New York Times expose revealing that anything more than 30 cycles of "PCR" testing is worthless because it detects only remnants of viral RNA not even classifiable as infections, much less a threat to public health); *see also* Rachel Schraer, "Coronavirus: Tests 'could be picking up dead virus,'" BBC News (Sept. 5, 2020), https://www.bbc.com/news/health-54000629.

hospitalizations for viral strains is not a new phenomenon for public health systems.[52] That has never before justified discriminatory restrictions on religious gatherings, and the same holds true today.

Finally, "treatment of similarly situated entities in comparable ways serves public interests at the same time it preserves bedrock free-exercise guarantees." *Roberts*, 958 F.3d at 416. Because Applicants seek only equal treatment with comparable secular activities, the public interest weighs in favor of an injunction.

VII. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT CERTIORARI.

Under 28 U.S.C. § 2101(e), Fr. Robinson and Rabbi Knopfler may submit an application to the Supreme Court for a writ of certiorari before the Third Circuit Court of Appeals renders judgment. Therefore, in the alternative to granting Applicants' motion for an injunction pending appeal, this Court should grant certiorari and enjoin Governor Murphy's discriminatory restrictions on the Applicants' houses of worship. COVID restrictions on worship remain an ongoing phenomenon in many states with no end in sight. Because these restrictions so clearly infringe on free exercise, they are a matter of exigent national importance justifying this Court's full review.

Moreover, the current Circuit split requires this Court's resolution. The Sixth Circuit, finding houses of worship comparable to exempted "life-sustaining" businesses such as law firms, liquor stores, and grocery stores, has rightly concluded that failing to

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[52] *See, e.g.*, Soumya Karlamangla, "California hospitals face a 'war zone' of flu patients—and are setting up tents to treat them," Los Angeles Times (Jan. 16, 2018), https://www.latimes.com/local/lanow/la-me-ln-flu-demand-20180116-htmlstory.html.

offer a similar exemption for houses of worship violates the Free Exercise Clause under *Smith*. *See Roberts*, 958 F.3d at 411-415. The Second, Seventh, and Ninth Circuits have all opined that similar restrictions in other states are constitutional as long as houses of worship are treated the same as or better than select "non-essential" activities such as movie theaters, concerts, and lecture halls. (*See supra* at nn. 37-42 and accompanying text). But three of these decisions were by split 2-1 panels. (*See supra*. at nn. 40-42.)

Here, the district court denied relief simply because Applicants' religious services are treated the same as or better than some secular activities, which has never been the correct legal standard. The Third Circuit's refusal to enjoin that errant decision pending appeal ignores this Court's constant teaching on religious equality under the law. This case is an ideal vehicle for granting certiorari.

CONCLUSION

Applicants respectfully request that this Court issue an injunction pending appeal (or after granting certiorari) that allows them to host indoor, in-person religious worship for their respective congregations on the same terms and conditions allowed for comparable secular activities. That is, either the 100% of capacity afforded "essential" non-retail businesses or, in the alternative, the 50% of capacity allowed for "essential" retail businesses, with the same health and safety protocols and exemptions applicable to comparable secular activities. (*See* EO 192, *supra* n. 33.)

Applicants also request that this Court separately enjoin the mask mandate as applied to their religious services. Alternatively, while reserving their right to maintain a challenge to the mask mandate, Applicants would agree to abide by it to the extent any religious exemption, as clarified by the State in this proceeding, does not apply.

Respectfully submitted,

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NOVEMBER 19, 2020

APPENDIX

Appendix A. Opinion of the United States District Court,
District of New Jersey (October 2, 2020) App.1

Appendix B. Opinion of the United States District Court,
District of New Jersey (October 28, 2020) App.29

Appendix C. Order of the United States Court of Appeals for the Third Circuit
Denying Appellants' Motion for Injunction (November 10, 2020) App.33

APPENDIX A

****NOT FOR PUBLICATION****

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REV. KEVIN ROBINSON, *et al.*,

Plaintiffs,

v.

PHILIP D. MURPHY, GOVERNOR OF THE STATE OF NEW JERSEY, IN HIS OFFICIAL CAPACITY, *et al.*,

Defendants.

Civil Action No.: 20-5420

OPINION

CECCHI, District Judge.

I. INTRODUCTION

This case arises out of executive orders issued by Defendant Philip D. Murphy, Governor of the State of New Jersey ("Governor Murphy"), in response to the global COVID-19 pandemic. Plaintiffs Reverend Kevin Robinson and Rabbi Yisrael A. Knopfler (collectively, "Plaintiffs") filed a Motion for Leave to File a Third Amended Complaint and Temporary Restraining Order (With Notice) and Preliminary Injunction,[1] seeking to enjoin enforcement of executive orders that limit the number of individuals who may gather indoors for religious purposes and that extend certain mask requirements to religious services. ECF No. 55. Defendants Governor Murphy and Patrick J. Callahan oppose Plaintiffs' motion for injunctive relief but do not object to the application for leave to file a Third Amended Complaint. ECF No. 71.[2] The Court heard oral

[1] Plaintiffs' counsel indicated at oral argument that he presently seeks only a preliminary injunction. Sept. 25, 2020 Hearing Transcript ("Tr.") at 86:21–24.

[2] At oral argument, counsel for Defendants indicated that he had no objection to entry of the Third Amended Complaint. Tr. at 88:19–20. As Rule 15 of the Federal Rules of Civil Procedure

argument on the matter on September 25, 2020. ECF No. 95. After consideration of the entirety of the record, for the reasons set forth below, Plaintiffs' application for preliminary injunctive relief is **DENIED** and Plaintiffs' application for leave to file the Third Amended Complaint is **GRANTED**.

II. BACKGROUND

A. Factual Background

On March 9, 2020, Governor Murphy declared a State of Emergency and Public Health Emergency due to the "public health hazard posed by COVID-19," a contagious and at times fatal respiratory disease that has claimed the lives of at least 14,344 New Jersey residents. N.J. Exec. Order 103 at 1, 3–4 (Mar. 9, 2020). Thereafter, to address the ongoing public health risks associated with COVID-19, Governor Murphy signed a series of executive orders restricting gatherings and mandating the use of face masks in various indoor and outdoor spaces.

As of September 1, 2020, New Jersey limits the number of individuals who may gather indoors for religious services to 25 percent of a room's capacity or 150 people, whichever is lower (with an allowance for at least 10 people to gather). N.J. Exec. Order 183 at 5 (Sept. 1, 2020). Congregants are required to wear masks while attending indoor religious services, although they may remove their masks for religious purposes. N.J. Exec. Order 152 at 10 (June 9, 2020). Outdoor religious gatherings have no limit on attendance. N.J. Exec. Order 161 at 5 (July 2, 2020). Masks must be worn when social distancing is impracticable at outdoor religious gatherings, but masks may be removed for religious purposes. N.J. Exec. Order 163 at 5 (July 8, 2020).

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instructs that leave to amend should be granted freely when justice so requires, the Court grants Plaintiffs' application to file the Third Amended Complaint and considers it as the operative pleading in this matter. The Third Amended Complaint names as defendants Governor Murphy, Patrick J. Callahan, Lamont O. Repollet, Gurbir S. Grewal, and Judith M. Persichilli (referred to collectively as, "Defendants").

Plaintiffs Reverend Robinson and Rabbi Knopfler preside over religious congregations in New Jersey. They argue that Governor Murphy's current orders are unconstitutional under the First and Fourteenth Amendments. ECF No. 56 at 3, 20–21.

1. Initial COVID-19 Executive Orders

Before addressing the constitutionality of the current measures, the Court will provide a brief overview of Defendants' COVID-19 executive orders. On March 9, 2020, after presumptive-positive cases of COVID-19 were reported in New Jersey, Governor Murphy began enacting public health measures aimed at combating the spread of COVID-19. N.J. Exec. Order 103, at 2, 4 (Mar. 9, 2020). First, on March 16, 2020, he ordered the closure of all recreational facilities, amusement centers, shopping malls, bars, restaurants (except for take-out and delivery services), gyms, and fitness centers. N.J. Exec. Order 104 at 6–7 (Mar. 16, 2020). Then, on March 21, 2020, Governor Murphy issued a superseding executive order that required all New Jersey residents to remain home except for certain enumerated reasons, including religious purposes, and mandated the closure of all non-essential retail businesses. N.J. Exec. Order 107 at 5–6 (Mar. 21, 2020). The March 21 executive order also limited the number of persons who could participate in a gathering—for any purpose—to 10 people, and required all individuals to practice social distancing and remain six feet apart when in public (excluding household members, family members, caretakers, and romantic partners). *Id.* at 3, 5. Governor Murphy also implemented a statewide contact tracing system, recognizing that "robust and consistent contact tracing state-wide is critical" to New Jersey's efforts to respond to COVID-19. N.J. Exec Order 141 at 3 (May 12, 2020).

2. State Reopening

By late May 2020, when "the rate of reported new cases of COVID-19 in New Jersey [had] decrease[d]" but "ongoing risks" remained, Governor Murphy began relaxing restrictions on outdoor gatherings. N.J. Exec. Order 148 at 2–3 (May 22, 2020). Specifically, on May 22, 2020, he issued Executive Order 148, which increased the limit on outdoor in-person gatherings to 25 people. *Id.* at 4. Executive Order 148 also permitted any number of individuals to participate in a gathering where all participants remained in their vehicles. *Id.* at 5.

The following month, Governor Murphy eased restrictions on indoor gatherings and permitted some recreational and entertainment businesses, restaurants, and bars to reopen, subject to a 25 percent room capacity limitation, not to exceed 100 people, and mask mandates. *See, e.g.*, N.J. Exec. Order 152 (June 9, 2020); N.J. Exec. Order 156 (June 22, 2020); N.J. Exec. Order 157 (June 26, 2020). On July 2, 2020, he increased the capacity limit for outdoor gatherings to 500 people, with political protests and religious services exempt from this restriction. N.J. Exec. Order 161 at 5 (July 2, 2020).

In early August 2020, in response to an uptick in COVID-19 cases in the State, Governor Murphy issued Executive Order 173, which lowered the indoor gatherings limit from 100 people to 25 people. N.J. Exec. Order 173 at 5 (Aug. 3, 2020). The executive order specifically exempted religious services and celebrations from this limit. *Id.*

3. Current Gathering Restrictions and Mask Requirements

At present, gathering restrictions and mask use requirements remain in effect in New Jersey for religious and secular activity, subject to certain exceptions as indicated below.

a. Religious Worship

Executive Order 183 increased limits on indoor religious gatherings to 25 percent of the room's capacity, but not to exceed 150 persons. N.J. Exec. Order 183 at 9 (Sept. 1, 2020). The order also states that where 25 percent of room capacity would be lower than 10, the gathering can still include up to 10 persons. *Id.* Individuals must wear masks at indoor gatherings, but they may remove their masks for religious purposes. N.J. Exec. Order 152 at 10 (June 9, 2020). For outdoor religious gatherings, there is no limit on attendance. N.J. Exec. Order 161 at 5 (July 2, 2020). At outdoor religious gatherings, masks must be worn when social distancing is impracticable, but masks may be removed for religious purposes as well. N.J. Exec. Order 163 at 5 (July 8, 2020).

b. General Measures

Schools—both religious and secular—may open for in-person instruction, subject to various restrictions such as: mandatory social distancing, mask-wearing, cleaning protocols, hand washing at frequent intervals, and student and faculty health screenings. N.J. Exec. Order 175 at 7–9 (Aug. 13, 2020). Furthermore, certain indoor dining and entertaining may resume at reduced capacity. N.J. Exec. Order 183 (Sept. 1, 2020). Specifically, under Executive Order 183, indoor dining may resume at 25 percent of capacity. *Id.* at 4. Entertainment centers may reopen at 25 percent capacity, but not to exceed 150 persons. *Id.* at 5. With limited exceptions, all patrons and staff at indoor dining and entertainment establishments must wear masks. *Id.* at 5, 8. Indoor gatherings that are not religious gatherings, political activities, wedding ceremonies, funerals, or memorial services are limited to 25 percent of the room's capacity, but not to exceed 25 persons, and are subject to mask requirements. *Id.* at 9. More generally, with respect to mask requirements, face coverings are required in public with exemptions, including for children under two, health and safety concerns, feasibility issues for individuals organizing gatherings, when wearing a mask

makes an activity physically impossible or impracticable (such as swimming, eating, or drinking), and religious worship, as discussed above. *See* N.J. Exec. Order 152 (June 9, 2020); N.J. Exec. Order 163 (July 8, 2020); N.J. Exec. Order 183 (Sept. 1, 2020). Executive Order 183 continues to instruct businesses and venues to ensure social distancing is observed. *Id.*

4. Plaintiffs

Plaintiff Reverend Robinson is a Catholic priest at Saint Anthony of Padua Church in North Caldwell, New Jersey. ECF No. 56 ¶ 113. The capacity of the Saint of Anthony of Padua worship space is approximately 100 people and each mass usually has approximately 50 attendees (plus Reverend Robinson and altar servers), although the total congregation has recently expanded to 175 people. *Id.* ¶ 116. Reverend Robinson desires to confer sacraments in person as instructed by Catholic teaching. *Id.* ¶ 117.

Plaintiff Rabbi Knopfler presides over Congregation Premishlan in Lakewood, New Jersey. *Id.* ¶ 133. Rabbi Knopfler's congregation has 45 to 50 members, his synagogue accommodates 30 people, and there must be a quorum of 10 adult males present for synagogue prayers. *Id.* ¶¶ 134, 136, 138. Rabbi Knopfler seeks to conduct prayers in the synagogue and is concerned about holding services outside. *Id.* ¶¶ 140, 170.

5. Risks Posed by COVID-19

The parties dispute the degree of risk posed by COVID-19. According to Plaintiffs, "[t]he pandemic is over." ECF No. 79 at 3. They maintain that the number of deaths associated with COVID-19 peaked in April 2020 and has not exceeded double digits since June 2020. ECF No. 89 at 3. Plaintiffs further note that the percentage of daily positive tests in New Jersey has drastically declined in recent months, and that the positivity rate was two percent on September 16, 2020. *Id.* at 4. Plaintiffs highlight that the majority of the deaths that occurred in New Jersey are traceable

to senior living facilities and nursing homes. ECF No. 89 at 3. While they acknowledge that "every death is a tragedy," they argue that there is "no emergency" because "people are not dying in" what they deem to be "statistically significant" numbers. Tr. at 8:11–16.

Defendants counter that the COVID-19 pandemic continues to pose an "unprecedented public health threat" to both New Jersey and the nation at large. ECF No. 91 at 1. They emphasize that over 200,000 people have died from COVID-19 nationally, and recent trends show an increase in positive cases across the country. *Id.* at 2. On September 21, 2020 alone, Defendants note that 54,874 new cases and 428 new deaths were reported in the United States. *Id.* at 2. They also note that while New Jersey's statistics have improved due to the very public health measures that Plaintiffs challenge in this case, states without similar restrictions have seen large spikes in positive cases and deaths. *Id.* at 4–5. Relatedly, Defendants stress that "outdoor environments present lower risk of COVID-19 spread than indoor ones," (ECF No. 71 at 7) and that "medical experts have strongly reaffirmed that mask wearing is an effective strategy to prevent the spread of the virus, and scientific studies confirm the propriety of that recommendation." ECF No. 91 at 5 (citing to statements from both the Director of the Centers for Disease Control and Prevention and the Director of the National Institutes for Health, as well as modeling from University of Washington Institute for Health Metrics). Defendants further direct the Court to modeling that predicts a total of 375,000 COVID-19-related deaths by January 1, 2021. *Id.* at 2.

According to the State of New Jersey Department of Health, as of October 2, 2020, New Jersey has 206,629 total cases. State of New Jersey Department of Health, *New Jersey COVID-19 Dashboard*, https://nj.gov/health/cd/topics/covid2019_dashboard.shtml (last visited Oct. 2, 2020).

B. Procedural Background

Plaintiff Reverend Robinson commenced this action on April 30, 2020 by filing a complaint and moving for a temporary restraining order to enjoin enforcement of the COVID-19 executive orders and to declare the orders unconstitutional.[3] ECF Nos. 1–2. After multiple conferences with the Court and the parties, Reverend Robinson withdrew his motion for a temporary restraining order. ECF No. 6. Thereafter, the Court denied Defendants' motion to consolidate this matter with other cases pending in this District (ECF No. 41), and the parties engaged in unsuccessful discussions to resolve this matter. Plaintiffs filed the instant motion for injunctive relief on July 23, 2020 (ECF No. 55), Defendants filed a brief in opposition on August 17, 2020 (ECF No. 71), and Plaintiffs replied in support of the motion on August 27, 2020 (ECF No. 79). After the parties' continued attempts to resolve this matter were unsuccessful, the Court ordered them to submit supplemental briefs updating the Court with respect to the current facts on COVID-19 in New Jersey and developments in relevant caselaw. ECF Nos. 89, 91. The parties filed reply briefs on September 23, 2020. ECF Nos. 92–93. The Court held several status conferences with the parties, and heard oral argument on the motion on September 25, 2020. ECF Nos. 86, 95. Defendants filed a notice of supplemental authority on October 1, 2020. ECF No. 96.

Plaintiffs assert four claims against Defendants under 42 U.S.C. § 1983 in the Third Amended Complaint: (1) Count I - Violation of the First and Fourteenth Amendments to the U.S. Constitution (Free Exercise of Religion – Establishment Clause); (2) Count II - Violation of the First and Fourteenth Amendments to the U.S. Constitution (Violation of Freedom of Speech,

[3] Rabbi Knopfler was added as a Plaintiff in the first amended complaint filed on May 4, 2020. ECF No. 7.

Assembly and Expressive Association[4]); (3) Count III - Violation of the Fourteenth Amendment (Equal Protection – Substantive Due Process); and (4) Count IV - Violation of the First and Fourteenth Amendments (*Ultra Vires* State Action Under the DCA). ECF No. 56.

III. LEGAL STANDARD

There are four factors that must be shown to justify the issuance of a preliminary injunction: "(1) a likelihood of success on the merits; (2) that [the moving party] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (citation omitted). If the moving party cannot show a likelihood of success on the merits, that "must necessarily result in the denial of a preliminary injunction." *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982). A preliminary injunction is an "extraordinary remedy" and the moving party "bears a particularly heavy burden in demonstrating its necessity." *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994); *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988).

IV. DISCUSSION

A. Likelihood of Success on the Merits

The Court begins its analysis by evaluating Plaintiffs' likelihood of success on the merits of their claims. To satisfy this factor, Plaintiffs must "make a [p]rima facie case showing a

[4] Plaintiffs note in their latest submission that "[a]s to expressive association, although plaintiffs pled this claim in their proposed Third Amended Complaint, they did not develop it in their Memo in Support of their Renewed Motion for a Temporary Restraining Order and Preliminary Injunction (ECF No. 57) and do not press it at this time." ECF No. 93 at 9. Although the Court need not resolve Plaintiffs' expressive association claims at this time, it notes that those claims are not likely to succeed on the merits for the same reasons set forth *infra*. *See also Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 658 (10th Cir. 2006) (noting expressive association is "implicitly" protected by the First Amendment and analyzing Freedom of Speech and Expressive Association Claims together).

reasonable probability that [they] will prevail on the merits." *Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975) (citation omitted).

To determine whether Plaintiffs have shown a likelihood of success on the merits of their claims, the Court must first determine what level of constitutional review to apply. The Court begins by reviewing recent decisions addressing similar issues in the context of the COVID-19 pandemic to determine how the claims at issue here should be analyzed.

1. Recent COVID-19 Decisions

In *Dwelling Place Network, et al. v. Philip D. Murphy, et al.*, a number of different churches throughout New Jersey sought to preliminarily enjoin enforcement of the indoor gatherings restrictions on similar grounds to those presented here, arguing that the restrictions unfairly targeted religious activity and that the regulations were not necessary to combat the COVID-19 pandemic. At a hearing on the motion, the Honorable Robert B. Kugler, U.S.D.J., found that the "executive order . . . currently under challenge and the other executive orders are laws of general applicability that impose equal burdens on religious and non-religious activities. Thus, they are subject to rational review basis." *Dwelling Place Network, et al. v. Philip D. Murphy, et al.*, No. 20-6281, June 15, 2020 Tr. at 68:19–23. Judge Kugler made this finding based on the equal application of the indoor gatherings restrictions to religious and secular activity, and noted that New Jersey has consistently made efforts to accommodate religious activity that are reflected in the executive orders. Judge Kugler observed that the State never closed houses of worship, exempted individuals from curfew and travel restrictions for religious purposes, allowed unlimited outdoor religious services, and placed exceptions in the mask requirements for religious services. *Id.* at 68:23–69:16. Judge Kugler found that the indoor gatherings restrictions easily

passed rational basis review and denied the plaintiffs' motion for a preliminary injunction. *Id.* at 69–72.

On August 18, 2020, the Honorable Brian R. Martinotti, U.S.D.J., issued an opinion denying a preliminary injunction to plaintiffs challenging New Jersey's COVID-19 restrictions on movie theaters in *National Association of Theatre Owners, et al. v. Philip D. Murphy, et al.* Judge Martinotti held that New Jersey's indoor gatherings restrictions satisfied rational basis review as there were no differences in the restrictions' application to various groups based on animus and because the State had shown that any distinctions were based on a "conceivable justification that keeping movie theaters closed while opening churches, shopping malls, and libraries, is rationally related to the goal of stopping the transmission of COVID-19." *Nat'l Assoc. of Theatre Owners, et al. v. Philip D. Murphy et al.*, No. 20-8298, slip op. at 29–30 (D.N.J. Aug. 18, 2020). Notably, the plaintiffs in that case, movie theater owners and associated organizations, complained that religious groups were being treated more favorably than other groups under the COVID-19 executive orders despite the risks posed by congregants gathering indoors for religious services. *Id.* at 27. Judge Martinotti found that, with respect to the theater owners' freedom of speech claims, the relevant executive order was a "content-neutral regulation that passes muster under intermediate scrutiny." *Id.* at 23.

On August 20, 2020, the Honorable Reneè Marie Bumb, U.S.D.J., issued an opinion denying a preliminary injunction sought by a group of church plaintiffs, finding that "Governor Murphy's restrictions on indoor gatherings are neutral and generally applicable on their face" and that the orders were constitutional because "Plaintiffs have been unable to demonstrate that the restrictions on indoor gatherings were crafted with religious animus, have been applied unequally, or lack a rational relationship to a legitimate government objective." *Solid Rock Baptist Church,*

et al. v. Philip D. Murphy, et al., No. 20-6805, slip op. at 23, 30 (D.N.J. Aug. 20, 2020). In so finding, Judge Bumb acknowledged that "such limitations are hard to swallow for those who turn to prayer and fellowship, especially in times of hardship and suffering," and that some might question the "precise limitations" imposed by New Jersey, but ultimately concluded that "Supreme Court precedent counsels that States should be given broad deference when enacting regulations to protect public health and safety." *Id.* at 26–27.

There have also been two cases involving very similar issues that reached the Supreme Court of the United States during the pandemic. In May, the Supreme Court received an appeal requesting injunctive relief against California's emergency order limiting indoor religious gatherings to 25 percent of capacity or a maximum of 100 people, but allowing stores to remain open without similar restrictions. *S. Bay Pentecostal United Church v. Newsom*, 140 S. Ct. 1613 (2020). The appeal was denied without a written majority opinion, but Chief Justice Roberts filed a concurring opinion in which he noted that state officials must be given broad latitude to protect public health during an emergency based on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). According to Chief Justice Roberts, "[w]here those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *S. Bay Pentecostal United Church*, 140 S. Ct. at 1613–1614 (May 29, 2020) (Roberts, C.J., concurring) (internal citation omitted).

On July 24, 2020, the Supreme Court also declined to overturn the denial of a preliminary injunction sought by a church challenging Nevada's COVID-19 orders. *See Calvary Chapel Dayton Valley v. Sisolak, et al.*, 140 S. Ct. 2603 (2020). In that case, Nevada's restrictions limited attendance at religious services to no more than 50 people regardless of building capacity, while

allowing casinos and entertainment venues to operate at 50 percent of their maximum capacity with no numerical limit. *Id.* at 2603. Despite the restrictions on indoor religious services at issue in that case, the Supreme Court denied the Nevada church's request for injunctive relief.

Applying the guidance of these recent decisions, the Court will now review the Plaintiffs' likelihood of success on the merits for each of their claims.

2. Free Exercise of Religion Claims

Plaintiffs contend that Defendants' indoor gatherings restrictions and mask requirements violate the Free Exercise Clause because they are neither neutral nor generally applicable and fail strict scrutiny review. ECF No. 57 at 2. In the alternative, Plaintiffs argue that even if the executive orders are neutral and generally applicable, they still do not survive rational basis review. ECF No. 93 at 8. Defendants counter that these measures are subject to, and satisfy, rational basis review because they are valid laws of neutral and general applicability and are consistent with the State's authority to address emergencies. ECF No. 92 at 5. The Court agrees with Defendants.

"[A] free exercise claim can prompt either strict scrutiny or rational basis review. If a law is 'neutral' and 'generally applicable,' and burdens religious conduct only incidentally, the Free Exercise Clause offers no protection." *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (internal citation omitted). "[A] regulation will pass muster under a rational basis review if there is a plausible policy reason for the justification, based on the science available at the time—whether or not that science or those reasons ultimately turn out to be incorrect." *See Nat'l Assoc. of Theatre Owners, et al.*, No. 20-8298, slip op. at 29 (citation omitted).

Here, the Court finds that the challenged measures are subject to rational basis review because they are generally applicable and neutral laws that burden secular and religious activity alike. The State's policies are designed to combat the spread of COVID-19 in New Jersey given

the current understanding of the virus which the Court finds is undoubtedly a legitimate governmental interest. *See id.* at 29. In addition, under *Jacobson*, courts accord deference to the State when it is dealing with public health emergencies as Chief Justice Roberts noted in his *South Bay United Pentecostal Church* concurrence. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (quoting *Jacobson*, 197 U.S. at 38) (Roberts, C.J., concurring) ("The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"). The indoor gatherings restrictions and mask requirements clearly surpass this standard as they attempt to allow New Jersey citizens freedom to participate in important activities, such as religious worship, while implementing measures to contain outbreaks of COVID-19 and limit the number of COVID-19 deaths based on the best available information. *See Harvest Rock Church Inc. v. Newsom*, No. 20-6414, 2020 WL 5265564, at *3 (C.D. Cal. Sept. 2, 2020) ("Because the Orders restrict indoor religious services similarly to or less than comparable secular activities, it is subject to rational basis review, which it easily passes.").[5]

Furthermore, contrary to Plaintiffs' assertions, the Court finds that the laws are not substantially underinclusive requiring the application of strict scrutiny, as the indoor gatherings restrictions contain similar exceptions for religious purposes and for secular purposes, indoor religious gatherings have higher maximum capacities than secular indoor gatherings, and, as Plaintiffs themselves acknowledge, there are both feasibility and religious purpose exceptions included in the mask requirements. *See* ECF No. 89 at 5; *Legacy Church, Inc. v. Kunkel*, No. 20-

[5] On October 1, 2020, the Court of Appeals for the Ninth Circuit denied plaintiffs' motion for an injunction pending appeal. *Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 5835219, at *2 (9th Cir. Oct. 1, 2020).

0327, 2020 WL 3963764, at *109 (D.N.M. July 13, 2020), *appeal filed*, *Legacy Church Inc. v. Kunkel*, No. 20-2117 (10th Cir. Aug. 12, 2020) ("[R]eligious organizations have received preferential treatment relative to their closest comparators -- in terms of physical set-up and risk, not necessarily meaning. Movie theatres and concert halls are spaces where people gather and sit together for a period of time similar to Legacy Church's auditorium. . . . Thus, the April 11 Order is not underinclusive even though it has different restrictions for places of religious worship than it does for essential services necessary for everyday life and survival that cannot be done remotely."). Thus, Plaintiffs have not shown a likelihood of success on the merits of their Free Exercise of Religion claims.

3. Freedom of Speech and Assembly Claims

Plaintiffs argue that the challenged measures violate their rights to Freedom of Speech and Freedom of Assembly because they are content-based regulations that fail strict scrutiny review. ECF No. 93 at 9. Plaintiffs also maintain that their claims would succeed even if the regulations are deemed content-neutral and intermediate scrutiny is applied. *Id.* Defendants respond that the subsidiary Freedom of Speech and Freedom of Assembly claims lack merit because they are dependent on Plaintiffs' failed Free Exercise claims. ECF No. 92 at 6. In the alternative, Defendants assert that the measures are permissible content-neutral regulations subject to intermediate scrutiny. *Id.* The Court agrees with Defendants that the challenged measures are permissible content-neutral regulations.

Plaintiffs' Freedom of Speech and Freedom of Assembly claims must be reviewed under intermediate scrutiny because the challenged regulations are content-neutral. *See Nat'l Assoc. of Theatre Owners, et al.*, No. 20-8298, slip op. at 20. The Court finds that the challenged orders are content-neutral because they do not "distinguish favored speech from disfavored speech on the

basis of the ideas or views expressed." *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643 (1994). The indoor gatherings restrictions and mask requirements satisfy intermediate scrutiny review as they are narrowly tailored, serve a significant governmental interest, and allow ample alternative means of communication. *See Startzell v. City of Phila.*, 533 F.3d 183, 201 (3d Cir. 2008).

As an initial matter, the orders permit masks to be removed at indoor gatherings: (1) for religious purposes; and (2) when wearing one is not feasible for the individuals organizing or maintaining the gathering. *See* N.J. Exec. Order 152 (June 9, 2020). Under the first exception, congregants may remove their masks to engage in certain religious activities like accepting communion and drinking from a Kiddush cup. ECF No. 71 at 34. Under the second exception, organizers and maintainers of religious gatherings need only wear masks "whenever feasible" and "whenever they are within six feet of another individual, except where doing so would inhibit the individual's health." N.J. Exec. Order 152 (June 9, 2020). As Defendants noted in their opposition brief, the feasibility exception for organizers and maintainers "applies to religious gatherings too, meaning that it once again does not discriminate against religion in favor of secular gatherings, but continues to treat the two alike." ECF No. 71 at 34 n.12.

Furthermore, the challenged orders serve a significant government interest in protecting public health in the midst of the COVID-19 pandemic. They have been continually adapted and modified to ensure they are narrowly tailored to serve that interest, and they allow ample alternative means of communication such as holding outdoor services (with protective coverings for persons or equipment, if needed), staggering indoor services, holding services in available larger buildings, or streaming services digitally. *See* Tr. at 51:1–10 ("And I know they've indicated that . . . they cannot engage in their services outdoors although many other religious organizations

have been doing that. But even if that option is not available to them and even if virtual worship services are not available to them, even though that is another option that many organizations have partaken in, it is not an undue burden for them to be able to accommodate their two services per day, which is what each of them say they would do anyway by finding a larger worship space."); *Nat'l Assoc. of Theatre Owners, et al.*, No. 20-8298, slip op. at 22 (finding that outdoor movie theaters and at-home movie streaming options qualified as "ample alternative methods of communication" to indoor movie screenings) (internal citation and quotation marks omitted). Although these alternatives may not be Plaintiffs' preferred channels of communication and may require additional planning, the Court is persuaded that Plaintiffs are able to practice their religions in alternative ways under the challenged orders.

Plaintiffs urge the Court to follow *County of Butler v. Wolf*, No. 20-677, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020), an out-of-district case involving constitutional challenges to Pennsylvania's gathering restrictions, business closure orders, and stay-at-home orders, to find that Defendants' executive orders fail intermediate scrutiny.[6] Contrary to Plaintiffs' assertions, however, *County of Butler* is of little instructive value here. First, unlike the instant case, *County of Butler* did not involve claims related to religious activities. Indeed, the *County of Butler* court expressly noted that Pennsylvania's "gathering limits specifically exempt religious gatherings." *Id.* at *11. Second, the gathering limits at issue in *County of Butler* were more restrictive than the orders challenged by Plaintiffs here. The Pennsylvania orders placed restrictions on both indoor *and* outdoor gatherings; indoor gatherings were limited to 25 people, while outdoor gatherings

[6]On October 1, 2020, the Court of Appeals for the Third Circuit stayed the district court's order in *County of Butler* pending appeal. *Cnty. of Butler, et al. v. Governor of Pa.*, No. 20-2936 (3d Cir. Oct. 1, 2020).

were limited to 250 people. *Id.* at *1 n.1. Here, by contrast, Defendants' operative executive orders restrict indoor religious services to the lower of 25 percent room capacity or 150 people, and permit an unlimited number of people to gather outdoors for religious services. *See* N.J. Exec. Orders 152, 183. Third, as Defendants properly note, the *County of Butler* court relied on comparisons to retail operations, which Chief Justice Roberts has indicated are "dissimilar" from houses of worship. *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

Finally, and in any event, the record indicates that the orders here are narrowly tailored to serve a significant government interest. As Plaintiffs acknowledge in their moving brief, the executive orders have been amended multiple times over the course of the past few months. *See, e.g.*, ECF No. 78 at 1. The enactment history of the executive orders reveals that Defendants have continued to relax restrictions on religious gatherings in response to the changing conditions of the unprecedented public health crisis. For example, by executive order dated March 21, 2020, Governor Murphy directed New Jersey residents to "remain home or at their place of residence," except for certain enumerated reasons, including religious reasons, and canceled "[g]atherings of individuals" to "mitigate community spread of COVID-19." N.J. Exec. Order 107 at 3, 6 ¶ 5 (Mar. 21, 2020). Two months later, when "the rate of reported new cases of COVID-19 in New Jersey decrease[d]" but "ongoing risks" remained, Governor Murphy issued an executive order increasing the capacity limit on outdoor gatherings to 25 people. N.J. Exec. Order 148 at 2, 6 ¶ 1 (May 22, 2020). By June 9, 2020, the State permitted indoor gatherings of up to 25 percent of a room's capacity, but never larger than 50 people. N.J. Exec. Order 152 at 6 ¶ 1 (June 9, 2020). The State noted that the gathering restrictions were "tailored to the harms that each gathering presents, meaning that indoor in-person gatherings must comply with a more stringent limitation than outdoor in-person gatherings." *Id.* at 4–5 (explaining that "because public health experts have

identified that outdoor environments present reduced risks of transmission as compared to indoor environments, it is appropriate to adjust the restrictions relative to gatherings that happen outdoors even more considerably"). In September 2020, the restrictions were further relaxed. N.J. Exec. Order 183 (Sept. 1, 2020). As it is clear that Defendants have continued to loosen gathering restrictions as conditions warrant, the restrictions satisfy intermediate scrutiny. Plaintiffs have failed to show a likelihood of success on the merits of their Freedom of Speech and Assembly claims.

4. Equal Protection – Substantive Due Process Claims

Plaintiffs claim that the challenged measures violate the Equal Protection Clause because they burden Plaintiffs' fundamental free exercise rights while treating similarly situated activities more favorably, and therefore fail strict scrutiny, or, in the alternative rational basis review. ECF No. 57 at 22–23; ECF No. 93 at 9–10. Defendants argue that rational basis review applies because the challenged orders do not involve a suspect classification and do not target fundamental rights. ECF No. 92 at 8. The Court agrees with Defendants.

Plaintiffs' Equal Protection and Substantive Due Process claims are reviewed under the rational basis standard because the indoor gatherings restrictions and mask requirements are not based on a suspect or quasi-suspect classification and are evenly applied to religious and secular activity. *See L.A. v. Hoffman*, 144 F. Supp. 3d 649, 673 (D.N.J. 2015). The Court finds that the challenged orders satisfy rational basis review because Defendants have provided adequate justifications for their treatment of religious activity and comparable activity and they are rationally related to the legitimate governmental interest of protecting citizens against COVID-19. *See In re Asbestos Litig.*, 829 F.2d 1233, 1238 (3d Cir. 1987) (internal citations omitted) ("As a general rule, classifications that neither regulate suspect classes nor burden fundamental rights

must be sustained if they are rationally related to a legitimate governmental interest."). The state has accommodated religious services throughout the pandemic by placing feasibility and religious purpose exceptions in the mask requirements, allowing houses of worship to remain open, and exempting travel for religious purposes from the statewide curfew and travel restrictions. Defendants have also continuously allowed people to gather indoors for religious purposes while initially closing places that host secular activities such as movie theaters, concert halls, and other indoor entertainment and gathering places. Currently, as noted above, indoor gatherings for religious services have a 25 percent capacity limit not to exceed 150 people, while indoor gatherings that do not involve religious services have a 25 percent capacity limit not to exceed 25 people. *See* N.J. Exec. Order 183.

While Plaintiffs argue that the opening of schools (and childcare centers)[7] is "the most obvious" comparator that shows the indoor gatherings restrictions and mask requirements are not being applied neutrally and generally, the Court is not persuaded. ECF No. 79 at 7. Defendants have pointed to differences between these activities and religious services that rationally explain the varied limitations that apply to each activity, including: schools have the same attendees every day and are not open to the general public, they take place across the full day and are therefore difficult to stagger, and it is difficult to teach and supervise children outside. ECF No. 71 at 28–

[7] The Court notes that childcare centers have been re-opened subject to a litany of COVID-19 measures, such as: screening staff and children for COVID-19 symptoms prior to entry each day, minimizing group sizes to 10 children, ensuring 10 feet of separation between groups at all times, avoiding crowding at pick up and drop off times, and strictly limiting the sharing of supplies, food, toys, and other items. *See* N.J. Exec. Order 149 (June 9, 2020); New Jersey Department of Health Children and Safety Guidelines, May 29, 2020, available at https://www.nj.gov/dcf/news/Final.CC.Health.and.Safety.Standards.pdf. While childcare centers are, like schools, imperfect comparisons to indoor religious services, the Court nonetheless finds that the restrictions imposed on childcare centers are similar in scope to those placed on indoor religious services and rationally based on the type of activity that occurs in such places.

29. Plaintiffs' insistence on comparing indoor religious gatherings to schools is not persuasive because both indoor religious gatherings and schools are subject to analogous orders that alter the normal way these activities are conducted and require adaption in light of the pandemic at hand. For instance, the executive order that allowed schools to open contains a laundry list of requirements, such as additional required health screenings, compliance with the mask requirements, frequent hand washing breaks, intense cleaning protocols, and requirements for air filtration system standards. N.J. Exec. Order 175 (Aug. 13, 2020). Executive Order 175 also explains that in schools "contact tracing [is] substantially easier in the event of an outbreak." *Id*. That these orders are not exactly the same does not sway the Court's conclusion, as those differences are rational and fall well within the State's discretion under the current circumstances. *See Solid Rock Baptist Church*, No. 20-6805, slip op. 30 ("Plaintiffs have not met their burden of demonstrating that the restrictions on indoor religious gatherings have been applied discriminatorily or lack a rational relationship to a legitimate government interest.").

Plaintiffs further attempt to compare such disparate activities and venues as homeless shelters, casinos, mass transit, liquor stores, and pet stores to indoor religious gatherings. These comparisons are unpersuasive. Unlike houses of worship, the referenced activities and venues generally do not involve large groups of people congregating closely together, in one location, for extended periods of time, and for the same purpose. Religious services, in fact, are precisely designed to foster fellowship and communal interactions. *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758, 770 (E.D. Cal. 2020), *appeal dismissed*, No. 20-15977, 2020 WL 4813748 (9th Cir. May 29, 2020) (citation omitted) ("In-person church services, on the other hand, are 'by design a communal experience, one for which a large group of individuals come together at the same time in the same place for the same purpose.'"). When examining houses of worship, Chief

Justice Roberts noted that more comparable venues are "lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time" and "dissimilar activities [are] operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Plaintiffs' wide-ranging comparisons are thus unavailing here.

In addition, the Court notes that the secular indoor gatherings restriction is more restrictive than the religious indoor gatherings restriction (allowing 25 percent of capacity only up to 25 people for secular indoor gatherings instead of up to 150 people for religious indoor gatherings) and applies to any "gatherings" that could potentially take place in the establishments that Plaintiffs proffer as comparators. *See* ECF No. 92 at 2–3 ("[G]atherings in retail stores or *any* of the other businesses that have reopened are subject to the same limits as they are in any other venue—very much including restaurants. For another, the heart of Plaintiffs' challenge is to the 25 percent restriction on gatherings, and restaurants (like a long list of other venues) are similarly subject to a 25 percent restriction at all times, whether or not they are hosting a gathering."); N.J. Exec. Order 157 at 19 (June 26, 2020) (emphasis added) ("Individuals who are at any of these businesses at a specific time, a specific location, and for a common reason, such as a poker tournament at a casino, a wedding at a restaurant, or an outdoor concert or movie screening, are ***subject to the State gathering limits in effect at that time***."). For these reasons, the Court finds that Plaintiffs have not shown a likelihood of success on the merits of their Equal Protection claims.

5. Establishment Clause Claims

Plaintiffs assert that the orders violate the Establishment Clause because Defendants are attempting to dictate the precise manner in which Plaintiffs and their congregants worship. They

further contend that "by mandating crude and medically useless face coverings," Defendants have made it difficult to say mass or teach the Jewish faith. ECF No. 56 at 54; ECF No. 57 at 17. The Court finds that the indoor gatherings restrictions and mask requirements pass constitutional muster.

Plaintiffs contend that their Establishment Clause claims should be reviewed under a test to determine "whether defendants' restrictions violate the principal of internal church governance and autonomy." ECF No. 93 at 8 (citing *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)). During the September 25, 2020 hearing, Plaintiffs also argued that their Establishment Clause claims additionally succeed under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Tr. at 90:16–22. Under *Lemon*, the challenged law must have a secular legislative purpose, its primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. 403 U.S. at 612–613. Defendants contend that the restrictions and orders pass under both *Our Lady of Guadalupe School* and *Lemon*. ECF No. 92 at 7; Tr. at 90:24–91:12.

The Court finds that the challenged orders easily satisfy both tests set forth by the parties. *Our Lady of Guadalupe School*, cited by Plaintiffs, holds that the independence of church and state "does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." 140 S. Ct. at 2060. In that case, the Supreme Court found that hiring and firing of religious teachers fell within the purview of the Establishment Clause and ruled that "judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* at 2069. In contrast, the indoor religious gatherings restrictions under COVID-19 are no more of an intrusion into matters

of internal religious governance than safety laws set forth by the State that both Plaintiffs must abide by at all times. Similarly, the mask requirements are a general public health measure directed at all citizens of the State of New Jersey. These orders are not attempts to reach into Plaintiffs' internal matters of religious governance, faith, or doctrine.

The indoor gatherings restrictions and mask requirements pass muster under the *Lemon* test for largely the same reasons, as their legislative purpose of slowing the spread of COVID-19 is secular, their primary effect is advancing public health, and they do not foster an excessive government entanglement with religion as they apply to all activity. *Lemon*, 403 U.S. at 612–13. Plaintiffs have therefore not shown a likelihood of success on the merits of these claims.

6. *Ultra Vires* State Action Claims

Finally, Plaintiffs allege that that their Due Process *Ultra Vires* claims must be reviewed to see if the challenged orders "were closely tailored to the magnitude of the emergency" and must fail if they are "arbitrary and capricious and without rational basis under the Fourteenth Amendment." ECF No. 93 at 10 (internal citations omitted). Defendants urge the Court not to consider these claims as they are prohibited based on the State of New Jersey's sovereign immunity barring such claims under the Eleventh Amendment. ECF No. 92 at 9 (citing *King v. Christie*, 981 F. Supp. 2d 296, 310 n.12 (D.N.J. 2013)).

The Court notes Defendants' strong argument that the State Action claims are barred under sovereign immunity ensconced in the Eleventh Amendment to the United States Constitution. ECF No. 92 at 9. Even if the Court were to consider these claims, Plaintiffs argue that the challenged orders must be closely tailored to the emergency at hand and must pass rational basis review under the Fourteenth Amendment. As discussed at length above, the Court finds that the restrictions are closely tailored to the ongoing public health emergency and satisfy rational basis review. Given

these two points, Plaintiffs' *ultra vires* state action claims also do not appear likely to succeed on the merits.

B. Irreparable Harm

Although Plaintiffs' motion for a preliminary injunction cannot be granted without showing a likelihood of success on the merits, the Court will briefly analyze the remaining factors here. The second factor, whether Plaintiffs will suffer irreparable harm if the injunction is denied, is closely linked to the first factor in this case because Plaintiffs argue that the irreparable harm they will suffer is their continued loss of constitutional rights. ECF No. 57 at 23–24. As Plaintiffs have failed to show a likelihood of success on the merits of their constitutional speech and religion claims, the Court finds that they have not shown they will suffer irreparable harm if injunctive relief is denied. *Brown v. U.S. Dept. of Homeland Sec.*, No. 20-0119, 2020 WL l1911506, at *8 (M.D. Pa. Apr. 20, 2020) (internal citation omitted) ("The requirements of irreparable harm and likelihood of success on the merits are correlative: that is, the weaker the merits showing, the more will be required on the showing of irreparable harm, and vice versa."). Defendants have set forth convincing arguments on this factor. They note that they have taken great pains to allow houses of worship to engage in the very important right of religious expression during the pandemic by allowing multiple staggered services with smaller numbers of attendees, services held outdoors (with protective coverings, if necessary), services streamed digitally, and services with full congregations of up to 150 people if they are held in rooms with large enough capacities. They further noted that even if the above options are not available to them, Plaintiffs can also move their services to a larger worship space. Tr. at 51:4-10; ECF No. 71 at 38. The Court finds that, based on the record before it, Plaintiffs have been afforded opportunities to practice their religions despite the State's COVID-19 response. *See Nat'l Assoc. of Theatre Owners, et al.*, No. 20-8298, slip op.

at 31–32; *Legacy Church, Inc.*, 2020 WL 3963764, at *99 (internal citation omitted) ("Requiring plaintiffs to demonstrate that they are likely to suffer irreparable injury also tends to collapse the irreparable harm factor in the likelihood of success on the merits factor -- at least where a plaintiff alleges constitutional harms. . . . As before, without a constitutional violation to point to, Legacy Church has not demonstrated that irreparable injury was likely."). The second factor of irreparable harm has therefore not been met.

C. Balance of Equities and Public Interest

The last two factors, whether granting preliminary relief will result in even greater harm to the nonmoving party and whether the public interest favors such relief, also weigh against granting a preliminary injunction. While the Court is sympathetic to Plaintiffs' contentions and recognizes the great importance of the rights at issue in this matter, the interests of the Defendants and the general public at stake here—namely, preserving lives in the midst of an unprecedented pandemic that has resulted in the deaths of over 200,000 Americans and one million people worldwide—are particularly difficult to overcome. *See Dwelling Place Network, et al.*, No. 20-6281, June 15, 2020 Tr. at 70:19–24 ("As to the balance of the equities, I think the State's argument is a good argument. We're here, whether we're doing it the right way or the wrong way, the State is trying to reduce the number of infections, the number of hospitalizations, the number of deaths that are coming from this unprecedented pandemic."); *Legacy Church, Inc.*, 2020 WL 3963764, at *100. Under the latest executive orders, Plaintiffs are allowed to attend indoor religious services and remove their masks for religious purposes while remaining in compliance with the challenged orders. They may also attend outdoor religious services with no capacity limitations, and the outdoor mask requirement, only applicable where social distancing is impracticable, contains a religious purpose exception. These orders are, in Defendants' view, necessary to prevent further mass outbreaks of

infections and death across the state of New Jersey. As such, the Court finds that Defendants will suffer greater harm if injunctive relief is granted and finds that the public interest does not favor the requested relief.

V. CONCLUSION

As the preliminary injunction factors have not been met here, Plaintiffs' application for a preliminary injunction is **DENIED**. Plaintiffs' application for leave to file the Third Amended Complaint is **GRANTED**. An appropriate Order accompanies this Opinion.

SO ORDERED.

DATE: October 2, 2020

CLAIRE C. CECCHI, U.S.D.J.

APPENDIX B

****NOT FOR PUBLICATION****

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REV. KEVIN ROBINSON, *et al.*, Plaintiffs, v. PHILIP D. MURPHY, GOVERNOR OF THE STATE OF NEW JERSEY, IN HIS OFFICIAL CAPACITY, *et al.*, Defendants.	Civil Action No.: 20-5420 **ORDER**

CECCHI, District Judge.

This matter having come before the Court on Plaintiffs Reverend Kevin Robinson and Rabbi Yisrael A. Knopfler's (collectively, "Plaintiffs") Motion for an Injunction Pending Appeal pursuant to Rule 62(d) of the Federal Rules of Civil Procedure and Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure (the "Motion"). ECF No. 100; and

WHEREAS Defendants Philip D. Murphy, Patrick J. Callahan, Lamont O. Repollet, Gurbir S. Grewal, and Judith M. Persichilli (collectively, "Defendants") oppose the motion. ECF No. 105; and

WHEREAS on October 2, 2020, this Court entered an Opinion and Order denying Plaintiffs' request for injunctive relief as it found that Plaintiffs failed to satisfy any of the four factors required to be met in order to obtain a preliminary injunction. *See* ECF No. 97 at 25–27 (finding that Plaintiffs failed to show a likelihood of success on the merits of their claims, irreparable harm if injunctive relief was denied, that the balance of equities favored injunctive relief, or that the public interest favored granting injunctive relief). ECF No. 98; and

WHEREAS Plaintiffs' Motion incorporates Plaintiffs' previous submissions by reference and cites to a dissent from the U.S. Court of Appeals for the Ninth Circuit, *see Harvest Rock Church, Inc. v. Newsom*, No. 20-55907, 2020 WL 5835219, at *2–6 (9th Cir. Oct. 1, 2020) (O'Scannlain, J., dissenting), and a decision from the Michigan Supreme Court, s*ee In re Certified Questions From U.S. Dist. Court , W. Dist. of Mich., S. Div.*, No. 161492, 2020 WL 5877599 (Mich. Oct. 2, 2020), to argue that injunctive relief should be granted. ECF No. 100 at 5–6; and

WHEREAS the standard for obtaining an injunction pending appeal is essentially the same as the standard for obtaining a preliminary injunction and all four factors must be met. *See Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144, 2013 WL 1277419, at *1 (3d Cir. Feb. 8, 2013) (citation and quotation marks omitted) ("[I]n assessing the present motion for a stay pending appeal, we must consider the same four factors that the District Court considered after an evidentiary hearing, ultimately concluding that preliminary relief was not warranted. Such stays are rarely granted, because in our Court the bar is set particularly high. Indeed, we have said that an injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief."); and

WHEREAS Plaintiffs' Motion incorporating prior briefing and citing to a dissent from the Ninth Circuit and a decision from the Michigan Supreme Court does not demonstrate why Plaintiffs' now satisfy the four preliminary injunction factors that the Court previously found were not satisfied. *See* ECF No. 97 at 25–27; and

WHEREAS Plaintiffs' prior submissions also rely, in part, on a district court opinion that held certain of Pennsylvania's COVID-19 restrictions unconstitutional, *Cnty. of Butler, et al. v. Wolf*, No. 20-677, 2020 WL 5510690 (W.D. Pa. Sept. 14, 2020), however, on October 1, 2020, the Court of Appeals for the Third Circuit stayed the district court's order pending appeal. *See Cnty. of Butler, et al. v. Governor of Pa.*, No. 20-2936 (3d Cir. Oct. 1, 2020); and

WHEREAS the Court finds that an injunction pending appeal is not proper here as Plaintiffs have not shown "(1) a likelihood of success on the merits; (2) that [they] will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004); *see also Conestoga Wood Specialities Corp.*, 2013 WL 1277419, at *1. The Court incorporates its reasoning set out in its October 2, 2020 Opinion and Order as the facts before it remain largely the same at this juncture.

ACCORDINGLY, it is on this 28th day of October, 2020:

ORDERED that Plaintiffs' Motion for an Injunction Pending Appeal (ECF No. 100) is **DENIED.**

SO ORDERED.

CLAIRE C. CECCHI, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ACO-010-E

No. 20-3048

Rev. Kevin Robinson;
Rabbi Yirael A. Knopfler,
Appellants

v.

Governor of New Jersey; Colonel Patrick J. Callahan,
Superintendent of State Police and State Director of
Emergency Management in his official capacities;
Attorney General of New Jersey;
New Jersey Commissioner of Education;
New Jersey Commissioner of Health

(D.N.J. No. 2-20-cv-05420)

Present: MCKEE, GREENAWAY, JR., Circuit Judges

1. Appellants' Emergency Motion for an Expedited Injunction Pending Appeal with Exhibits

2. Appellee's Response in Opposition to Appellants' Motion for Injunction

3. Amici's Response in Opposition to Appellants; Motion for Injunction

Respectfully,
Clerk/sb

_____ORDER_____

The foregoing motion for an injunction pending appeal is DENIED.

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: November 10, 2020
Sb/cc: All Counsel of Record