APPENDIX

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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****NOT FOR PUBLICATION****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