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**In the Supreme Court of the United States**

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REV. KEVIN ROBINSON AND RABBI YISRAEL A. KNOPFLER,

*Applicants,*

v.

PHILIP D. MURPHY, ET AL.,

*Respondents.*

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**OPPOSITION TO EMERGENCY APPLICATION  
FOR WRIT OF INJUNCTION**

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GURBIR S. GREWAL  
*Attorney General of New Jersey*

JEREMY M. FEIGENBAUM\*  
*State Solicitor*

DANIEL M. VANNELLA  
*Assistant Attorney General*

AUSTIN HILTON

BRYAN EDWARD LUCAS

JUSTINE LONGA

ROBERT J. MCGUIRE

STEPHANIE MERSCH

JESSICA JANNETTI SAMPOLI

MICHAEL R. SARNO

*Deputy Attorneys General*

Richard J. Hughes Justice Complex  
25 Market Street, Trenton, NJ 08625  
(609) 292-4925

jeremy.feigenbaum@njoag.gov

*\* Counsel of Record*

December 3, 2020

*Counsel for Respondents*

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## PRELIMINARY STATEMENT

This case is not about the total number of individuals who can pray together during a pandemic. After all, as Applicants admit, services of the size they wish to engage in are permissible in New Jersey, a reflection of the State's efforts to accommodate worship even in these trying times. Instead, this application turns only on how *crowded* Applicants' services may be, and whether their congregants have to wear masks when they gather together indoors. But Applicants' request to pray in as crowded an indoor room as they wish, and without masks, is a far cry from any of the emergency applications this Court has resolved so far.

That distinction explains why all five judges to review free exercise challenges to New Jersey's emergency rules have rejected them. Indeed, from the beginning of the crisis, New Jersey has accommodated religious conduct—ensuring religious activities receive *at least* as much protection as secular conduct, if not more. Even at the peak of the first wave, when residents were ordered to stay at home, New Jersey allowed individuals to leave their residences for religious reasons. In the same vein, even as many stores had to shutter their premises to the public, the State never required any houses of worship to do so. Still more, while New Jersey has

maintained limits on the conduct that residents can engage in outdoors, including limits on gatherings, the State has permitted religious services to take place outdoors in any number since early June. And finally, while New Jersey began limiting indoor gatherings to ten persons at the start of its second wave, the State exempted religious gatherings.

The rules Applicants challenge differ in kind from the restrictions this Court most recently evaluated. Given the evidence that COVID-19 spreads through close, extended indoor contact, New Jersey requires that Applicants' gatherings fill no more than 25% of the room—ensuring that “the maximum attendance at a religious service” is “tied to the size of the church or synagogue.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (per curiam) (slip op., at 4) (*RCDB*). Said another way, the services in which Applicants seek to engage can take place—they simply have to take place in a larger space to reduce person-to-person contact. And there is nothing discriminatory about that: this rule applies to all venues where members of the public remain for extended periods, and the few activities subject to higher limits present substantially fewer health risks.

While New Jersey believes that Applicants have not shown a right to emergency injunctive relief, New Jersey also recognizes that the lower

courts did not have the benefit of this Court’s decision in *Roman Catholic Diocese of Brooklyn* when they so ruled. As a result, New Jersey believes that the approach this Court took earlier today in *Harvest Rock Church v. Newsom*, No. 20A94, is likewise appropriate here—treating the instant application as a petition for certiorari before judgment, granting it, and sending the case back to the Third Circuit with instructions to remand in light of *RCDB*. That will allow the district court, in the first instance, to assess Applicants’ right to relief, and it allows this Court to maintain its role as a court of review, not of first view.

## STATEMENT

### A. The COVID-19 Pandemic

COVID-19 has infected more than 13 million people in the United States and has taken the lives of over 270,000 Americans.<sup>1</sup> Such sobering numbers are getting worse: about 195,000 cases and 2,700 deaths were reported yesterday, among the highest since the start of this pandemic, and many hospitals across the country hover close to ICU capacity.<sup>2</sup> New

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<sup>1</sup> Centers for Disease Control & Prevention (CDC), Coronavirus Disease 2019 (COVID-19), *United States COVID-19 Cases and Deaths by State*, <https://tinyurl.com/qqt3aq6> (last visited Dec. 3, 2020).

<sup>2</sup> *Id.*; Johns Hopkins Univ. Sch. of Medicine, Coronavirus Resource Ctr., <https://tinyurl.com/rm7qre3> (last visited Dec. 3, 2020); COVID Tracking

Jersey is no exception: the State has seen more than 346,000 confirmed cases and lost over 15,000 New Jerseyans to the virus.<sup>3</sup> The State is also experiencing more than 4,000 additional cases daily, with 3,292 current hospitalizations—the highest numbers since May.<sup>4</sup>

Over the past few months, state officials and public health experts have learned a considerable amount about the ways COVID-19 spreads. As this Court is well aware, the virus “most commonly spreads between people who are in close contact with one another (within about 6 feet)” through “droplets and airborne particles that are formed when a person who has COVID-19 coughs, sneezes, sings, talks, or breathes.”<sup>5</sup> The virus spreads even from individuals who show no symptoms and do not know they are sick. But not every interaction is equally risky.

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Project, *U.S. Historical Data*, <https://tinyurl.com/y58wq5mm> (last visited Dec. 2, 2020); Mitch Smith, et al., *What Places Are Hardest Hit by the Coronavirus?*, N.Y. TIMES (Nov. 12, 2020), <https://tinyurl.com/y3vbpkeg>.

<sup>3</sup> N.J. Dep’t of Health, *COVID-19 Dashboard*, <https://tinyurl.com/wcnbovp> (last visited Dec. 3, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> CDC, *COVID-19 Frequently Asked Questions*, <https://tinyurl.com/vwxtxpp> (last visited Dec. 3, 2020).

*First*, person-to-person interactions that take place indoors present a significantly higher risk than those that take place outside. *See* RA395<sup>6</sup> (CDC noting “[i]ndoor spaces are more risky than outdoor spaces where it might be harder to keep people apart and there’s less ventilation”); RA400 (adding that “the virus is harder to transmit outdoors because the droplets that spread it are more easily disturbed or dispersed outside”); RA404-09 (same). Notably, in indoor venues with poor ventilation, virus-carrying particles can even affect people more than six feet away.<sup>7</sup>

*Second*, even among interactions indoors, COVID-19 is more likely to spread when more individuals are in the same space. The more people in a confined space, the more likely it is that a participant is infected with COVID-19; the more likely it is that a larger number of individuals will be exposed and spread the virus; and the more difficult it is for contact tracers to identify the spread. *See* RA400-04. And if the indoor space is fixed, an increase in the number of people in that room will necessarily make it more difficult to effectively distance and reduce close contact.

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<sup>6</sup> “RA” refers to Respondent’s Appendix, which reproduces the complete appendix the State provided to the Third Circuit below.

<sup>7</sup> CDC, Scientific Br., *SARS-CoV-2 & Potential Airborne Transmission* (Updated Oct. 5, 2020), <https://tinyurl.com/y429xgva>.

*Third*, the length and intensity of person-to-person contact matters. As multiple experts have identified in briefing to this Court, the “dose” of COVID-19 to which someone is exposed makes a difference in how likely that individual is to contract the virus, and how severe their illness will be.<sup>8</sup> And the dose to which someone was exposed depends on the closeness and length of their contacts with an infected person. As the CDC puts it, “the more closely you interact with others and the longer that interaction, the higher the risk of COVID-19 spread.”<sup>9</sup> That is why individuals are urged to quarantine if their exposure to an infected person lasted “for a cumulative total of 15 minutes or more over a 24-hour period.”<sup>10</sup>

*Fourth*, there are certain activities that are particularly conducive to spreading COVID-19, including singing. Such activities have long been associated with the spread of respiratory diseases because they create a

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<sup>8</sup> Elisabet Pujadas, *SARS-CoV-2 viral load predicts COVID-19 mortality*, LANCET RESPIR. MED. (Aug. 6, 2020), <https://tinyurl.com/yy3yutox>; see *Harvest Rock Church v. Newsom*, No. 20A94, Brief of Epidemiologists & Public Health Experts at 7-9 (summarizing the relevant data).

<sup>9</sup> CDC, *Deciding to Go Out* (Oct. 28, 2020), <https://tinyurl.com/y9wy48bv>; Christie Aschwanden, *How ‘Superspreading’ Events Drive Most COVID-19 Spread*, SCI. AM. (June 23, 2020), <https://tinyurl.com/y77xwmk8>.

<sup>10</sup> CDC, *When to Quarantine* (Updated Oct. 27, 2020), <https://tinyurl.com/yahsf3wn>.

greater exhalation and release airborne particles at further distances.<sup>11</sup> One study even found that people who sing while wearing masks spread airborne particles to the same degree as those who were speaking *without masks*,<sup>12</sup> and recent outbreaks at choir practices and houses of worship substantiate this concern. RA74, 80, 91-142, 231-35, 346-67, 664-72.

*Fifth*, experts have identified that in addition to promoting social distancing and reducing indoor crowding, a key way to slow the spread of COVID-19 is the wearing of masks. The CDC Director has confirmed that “face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus,” RA414, since they reduce both the amount and distance of virus-containing particles an infected individual produces and provide some “protection for the mask wearer” as well.<sup>13</sup> *See* RA419-518, 700-808 (studies and articles regarding efficacy of masks).

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<sup>11</sup> G. Buonanno, et al., *Quantitative assessment of the risk of airborne transmission of SARS-CoV-2 infection*, ENVT. INT’L (Sept. 6, 2020), <https://tinyurl.com/y3tu6lt2>; B.T. Mangura, et al., *Mycobacterium Tuberculosis Miniepidemic in a Church Gospel Choir*, CHEST, 113(1):234-37 (Jan. 1998), <https://tinyurl.com/y6tystde>.

<sup>12</sup> M. Alsved, *Exhaled respiratory particles during singing & talking*, AEROSOL SCI. & TECH (2020), <https://tinyurl.com/y6qeq6cu>.

<sup>13</sup> CDC, Scientific Br., *Community Use of Cloth Masks to Control the Spread of SARS-CoV-2* (Nov. 10, 2020), <https://tinyurl.com/y67fzlc9>.

## B. New Jersey's Emergency Response

As it has throughout the United States, COVID-19 required New Jersey to take unprecedented measures to protect its residents. From the beginning, those measures were designed to limit the spread of the virus, and were tailored to the extent of community spread across New Jersey. But throughout the pandemic, the State has consistently taken steps to accommodate religious conduct consistent with public health.

1. During the first wave, when community spread in New Jersey was at its peak and the least information about COVID-19 was available, the State primarily relied on three public health tools: its “stay-at-home” order, which required all residents to remain at their places of residence with few enumerated exceptions, *see* N.J. Exec. Order 107 ¶2 (Mar. 21, 2020);<sup>14</sup> the closure of a range of businesses, *id.* ¶¶6-9; and limiting the number of individuals that could be gathered together to ten, “regardless of the purpose” of the gathering, EO 148 at 5 (May 22, 2020). But the State accommodated religious conduct to a greater degree: residents were

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<sup>14</sup> The State's Executive Orders, hereinafter referred to as “EO,” can be found at <https://nj.gov/infobank/eo/056murphy/>.



explicitly allowed to leave their home for religious reasons, and no houses of worship were required to close. *See* EO 107 ¶2.

2. After the State’s response reduced total cases, hospitalizations, and deaths, and with the benefit of additional data, the State replaced its stay-at-home orders and closure orders with tailored gatherings limits, capacity limits, and mask requirements—suited to the risks presented by various venues and activities. *First*, as the State explained, the riskiest activities for spreading COVID-19 are “gatherings”—including lectures, choirs, celebrations, and social parties—that bring individuals together in close contact for extended periods, thus implicating all the risk factors noted above. *See* RA74-85, 395-413, 736-39, 750-56 (experts, studies, and guidance detailing risks of gatherings); RA85-142, 231-35, 346-68, 659-74 (identifying outbreaks tied to gatherings). New Jersey currently limits indoor gatherings to just ten persons and outdoor gatherings to 25.

*Second*, New Jersey has adopted capacity limits that govern *every* indoor business venue where members of the public remain for extended periods—increasing the length and the risk of interactions that they have with others. The limit for such venues is 25% of room capacity, designed to ensure social distancing is maintained and overcrowding is avoided.

The State imposes this 25% limit on, *inter alia*, movie theaters, concert halls, and performing centers, EO 183 ¶2 (Sept. 1, 2020); recreational or entertainment venues, EO 157 ¶7 (June 26, 2020); casinos, *id.*; gyms, EO 181 ¶1 (Aug. 27, 2020); restaurants and bars, EO 183, ¶1; personal care services, such as spas, acupuncturists, tattoo parlors, and barber shops, EO 194 ¶8 (Nov. 10, 2020); and all sporting events, including spectator sports and practices, EO 187 ¶¶1-2 (Oct. 12, 2020).

*Third*, the State has adopted a capacity limit of 50% specifically for retail stores. As multiple experts explained, interactions at a retail store do not implicate the risk factors linked with increased spread of the virus in the way that bars or theatres (among others) do. In retail businesses, patrons do not engage in close proximity with almost any other patrons for long periods of time—and so a wide range of state medical associations and private experts consistently rank retail stores as less likely to foster the spread of COVID-19 than the venues listed above.<sup>15</sup>

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<sup>15</sup> S. Chang, *Mobility Network Models of COVID-19 Explain Inequities & Inform Reopening*, NATURE (Nov. 10, 2020), <https://tinyurl.com/yy6ry25e>; Johns Hopkins Univ. Bloomberg Sch. of Pub. Health Ctr. for Health Sec., *Public Health Principles for a Phased Reopening During COVID-19: Guidance for Governors* 12, 16 (Apr. 17, 2020), <https://bit.ly/2CKc5qz>; Ill. Med. Society, *ISMS COVID-19 Risk Survey* <https://tinyurl.com/yynmujyo> (last visited Dec. 3, 2020); Tex. Med. Ass’n, *TMA Chart Shows COVID-19*

But important to this case, there is an additional limit to which all businesses are subject: whenever they host an event, they remain subject to the *gatherings* limit, rather than their traditional capacity limit. EO 157 ¶15. Unlike stores simply open for business, “gatherings bring people together to a specific location for a common reason and a common period of time,” and so they “increase[] [the] risk of person-to-person interaction and contact among those participants.” EO 157 at 5. (An example proves the point: while diners at a restaurant typically interact only with others at their table and their waiter, if a restaurant is rented out for a birthday party, there will be many more close interactions across guests even with the same number of patrons in the room.) In practice, New Jersey’s order means that while a liquor store has a 50% limit, if it hosts a wine tasting, only ten patrons may be present; an art gallery with a 50% limit can only have ten participants at an indoor auction; and a bar with a limit of 25% can only host ten persons in total for a birthday party. *See id.* at ¶15.

The State’s limits for houses of worship are far more generous. To be clear, New Jersey does not maintain blanket capacity rules for houses

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*Risks*, <https://tinyurl.com/yyv95xxa> (last visited Dec. 3, 2020); *see also* Brief of Epidemiologists, *supra* 6 n.8, at 15-16.

of worship. Instead, different room capacity limits apply depending upon the activities being engaged in—again distinguishing between individual and congregate activities. For individual activities, there is no capacity limit at all: if multiple congregants entered the chapel simultaneously to, *e.g.*, pick up a prayer book in advance of a holiday, then the chapel could be filled to capacity. These individuals would be engaging only in fleeting interactions with other parishioners, as in a retail store—though houses of worship have an even higher limit (100%) than retail (50%).

But as for businesses, if a house of worship hosts a gathering like a religious service, increasing the risks of close, extended person-to-person interaction, stricter limits kick in—though more generous than the limits for secular gatherings. Although secular gatherings outdoors are subject to a limit of 25 persons, no restrictions have applied to outdoor religious gatherings since June. *See* EO 152 at 2 & ¶2(f) (July 2, 2020) (explaining the State is exempting services and political activities because they “are particularly important to the functioning of the State and of society”). A disparity exists indoors too. While most secular gatherings are limited to just ten persons, religious services (and a few other gatherings, including political activities, weddings, and funerals) have a *floor* of ten people and

a ceiling 25% of the room’s capacity—matching the more generous limits for indoor business venues rather than the restrictive limits for indoor gatherings. *See* EO 196 ¶¶ 1-6 (Nov. 16, 2020).<sup>16</sup>

3. In addition to these capacity limits, the State is broadly requiring individuals to wear masks indoors. This order is widespread: masks must be worn at all indoor venues open to the general public, including but not limited to “retail businesses, recreational and entertainment businesses, personal care service facilities, and mass transit.” EO 165 at 6 (July 13, 2020). Masks are also required at all indoor gatherings regardless of the gathering’s purpose. EO 152 at 5 (June 9, 2020). And they are required outdoors anytime “it is not practicable for individuals in outdoor public spaces to socially distance.” EO 163 ¶1 (July 8, 2020).

New Jersey has adopted two kinds of exceptions to the mask rule: to protect an individual’s health and safety, and where an activity cannot be physically performed with a mask on. In line with the CDC advice that

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<sup>16</sup> While indoor religious services, political rallies, weddings, and funerals also have an outer numerical cap of 150 participants, that is not at issue in this case, because the *total* size of Applicants’ respective congregations falls far below that. *See* Application at 3 (Applicants’ congregations only seat 100 or 40 persons at full capacity); *see also* Dist. Ct. Dkt. 101 ¶¶116, 136 (same). In their emergency motion to the Third Circuit, Applicants explicitly stated the numerical cap is “irrelevant.” C.A. Dkt. 11 at 4.

masks “should NOT be worn by children under the age 2 or anyone who has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove the mask,” RA633, New Jersey clarified individuals need not wear masks if “doing so would inhibit the individual’s health or where the individual is under two.” EO 152, ¶1(b). The other exemption applies to situations where the mask would block the physical activity itself, such as eating. *Id.* ¶2. But New Jersey ensured that accommodation applies if a mask would block consumption for religious purposes too—including to make sure Applicants can receive Communion or drink from the Kiddush cup. *Id.* ¶¶2, 5. That exception does not apply to singing indoors.

### **C. The Instant Litigation**

On April 30, 2020, Reverend Kevin Robinson filed a complaint and motion for a temporary restraining order, which he later withdrew and converted to a motion for preliminary injunction. Dist. Ct. Dkt. 1-2, 6, 9. On May 4, he filed an Amended Complaint, now joined by Rabbi Yisrael Knopfler, Dkt. 7, alleging that New Jersey’s gatherings limits violated free exercise; the freedoms of speech, assembly, and association; equal protection and due process; and state law. Dkt. 19. On July 23, they filed a Third Amended Complaint, seeking an order enjoining enforcement of

the State's gatherings limits and its mask requirement. Dkt. 55-57, 101. Because the capacity of their congregations is less than 150, Applicants only challenged the application of New Jersey's 25% room capacity limit. Dkt. 101, ¶116 (capacity of 100 people), ¶136 (40 people).

On October 2, 2020, the district court denied Applicants' request for preliminary relief. *Robinson v. Murphy*, No. 20-5420, 2020 WL 5884801 (D.N.J. Oct. 2, 2020) (App.2-28). The district court determined that the capacity limits and the mask orders are "generally applicable and neutral laws that burden secular and religious activity alike," App.14, noting that two other judges in the District had previously rejected similar claims. App.11-13. It reasoned that the rules governing religious gatherings were consistent with or more generous than the rules for other gatherings and indoor venues where the public may congregate for extended periods, and did not violate the Free Exercise Clause. App.14-16. The court found that Applicants' case for irreparable harm was weakened by the opportunities New Jersey afforded them to engage in religious conduct, and that a court order authorizing Applicants' crowded and maskless indoor gatherings would impermissibly undercut New Jersey's interest in "preserving lives in the midst of an unprecedented pandemic." App.26-27.

Applicants appealed. App.34. Applicants filed an application for an emergency injunction pending appeal before the Third Circuit, which the court denied by unanimous order on November 10, 2020. *Id.*

## ARGUMENT

A request for injunction pending appeal “demands a significantly higher justification’ than a request for a stay, because unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’” *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). Applicants bear the burden to show their “legal rights” are “indisputably clear,” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers); a likelihood the Court would grant certiorari and reverse; irreparable harm; and that equities favor injunctive relief. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Especially in light of this posture, it makes little sense for the Court to adjudicate the import of *RCDB* to New Jersey’s distinct orders before any lower court has had the opportunity to do so. Instead, consistent with its practice in like cases, this Court should remand to the Third Circuit,



which should in turn remand the case to the district court, to allow these legal issues to be adjudicated in full. Should this Court decide to review this case in the future, it will thus have the benefit of a full record and a detailed opinion applying that decision to these facts. But if this Court does believe it should assess the application at this time, the Court must deny it. New Jersey's 25% capacity limit is tailored to reduce person-to-person contact; the State does not treat secular conduct any better than religious conduct; and the equities cut sharply against relief.

**I. THIS COURT SHOULD REMAND TO THE THIRD CIRCUIT IN LIGHT OF ITS RECENT DECISION IN *ROMAN CATHOLIC DIOCESE OF BROOKLYN*.**

Applicants' argument for emergency relief turns on the application of the Free Exercise Clause to rules limiting the capacity of, and ordering the use of masks at, indoor gatherings during a pandemic. But just last week, the Court issued a per curiam opinion in *Roman Catholic Diocese of Brooklyn* addressing the validity of another State's gatherings limits. *See* slip op., at 1. Although there are important differences between the orders at issue in *RCDB* and the tailored capacity limits and mask rules that New Jersey is implementing, *see infra* at 20-23, the Court's decision provides guidance on the issues raised here. Given the recent timing of that opinion, however, the district court and the Third Circuit did not

have the benefit of this Court’s most recent views when they adjudicated Applicants’ motion for a preliminary injunction and motion for injunction pending appeal, nor could Applicants discuss it in their application.

Because this case requires assessing meaningfully distinct orders and facts, this Court should not resolve the issues presented here in the first instance. Indeed, this Court recognized as much just this morning in resolving the pending emergency application in *Harvest Rock Church v. Newsom*, No. 20A94. That case, like this one, involved a free exercise challenge to state orders that sought to limit the spread of COVID-19. In that case, like in this one, the lower courts issued their decisions prior to the issuance of any opinion in *RCDB*, and the challengers’ application to this Court had been filed before the ruling came down. And that case, like this one, required a thorough application of this Court’s decision to more generous orders and distinct facts. This Court thus recognized the role of the lower courts in first making such assessments; it vacated the district court’s decision, sent the case back to the Ninth Circuit with instructions to remand, and required “further consideration” by the district court in light of *RCDB*. See *Harvest Rock Church*, No. 20A94 (Order, Dec. 3, 2020); cf. also *Ross v. California*, 139 S.Ct. 2778 (2019) (taking similar

action in a different context in light of *Department of Commerce v. New York*, 139 S.Ct. 2551 (2019)). Rather than resolving the issues presented on this emergency posture, the same result should obtain here.

Because this Court is a court of review, not of first view, this Court should similarly treat this application as a petition for writ of certiorari before judgment,<sup>17</sup> grant the petition, vacate the district court’s decision, and remand to the lower courts. That allows the district court to properly consider the legal and factual issues presented in light of *RCDB*.

**II. IF THIS COURT DOES NOT REMAND TO THE THIRD CIRCUIT, IT SHOULD DENY THE APPLICATION FOR EMERGENCY RELIEF.**

The First Amendment is violated whenever a State treats religious conduct worse than it treats like secular conduct, but not when religious conduct receives the same or better treatment as analogous conduct. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993); *RCDB*, slip op., at 3-4 (asking whether restrictions are “neutral and of general applicability”). To determine whether a law is neutral, this Court asks whether secular conduct “that endangers [the State’s] interests in a similar or greater degree” is better off. *Lukumi*, 508

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<sup>17</sup> Indeed, Applicants requested that this Court grant certiorari before judgment in this case. *See* Application at 35-36.

U.S. at 543; *see also id.* at 542 (mere fact that a law distinguishes between dissimilar activities is insufficient since “[a]ll laws are selective to some extent”); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting) (asking “whether a single secular *analog* is not regulated”) (emphasis added). If the law is not neutral, it “must be ‘narrowly tailored’ to serve a ‘compelling’ state interest.” *RCDB*, slip op., at 4 (quoting *Lukumi*, 508 U.S. at 546). Applying this test, Applicants fail to “clearly establish[]” that the district court abused its discretion when it denied preliminary relief. *Id.* at 2.

A. New Jersey’s 25% Room Capacity Limit Is Consistent With The Free Exercise Clause.

Because New Jersey’s 25% limit is tailored to the size of the indoor venue and does not target religious conduct, it has the hallmarks of the laws this Court recognized would be permissible.

i. *New Jersey’s 25% Room Capacity Requirement Reflects The Kind Of Restrictions Identified As Permissible.*

The emergency orders New Jersey has imposed, especially the ones that apply to religious gatherings, could scarcely be more different than the ones this Court recently confronted in *RCDB*. As this Court noted, in New York, houses of worship could admit just ten persons in red zones,

and merely 25 in orange zones. *Id.* at 3. Such caps were “more restrictive than any COVID-related regulations that have previously come before the Court” and “tighter than those adopted by many other jurisdictions hard-hit by the pandemic.” *Id.* at 4; *see also id.* at 1, 3 (Kavanaugh, J., concurring) (contrasting *RCDB* with both *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020) and *Calvary Chapel*). Here, the State *allows* religious gatherings of the size Applicants propose and only imposes a far less restrictive limit of 25% of room capacity.

These limits are precisely the kind this Court has recognized would be permissible. For one, these orders are far more generous than the ones in *RCDB*, and more generous than the orders in *South Bay* and *Calvary Chapel*. Still more, this order ties “maximum attendance at a religious service ... to the size of the church or synagogue,” exactly as this Court contemplated just last week. *See id.* at 4-5 (per curiam). Indeed, 25% of capacity is the very rule that the Roman Catholic Diocese was imposing on itself. *See id.* at 2 (per curiam). A chapel that can hold 100 and a shul that can hold 400 can host gatherings of different sizes, but whatever the total, they are required to avoid crowding during a pandemic.

The implications for the instant case are significant. In New Jersey, Applicants' proposed 100-person (or 40-person) services are lawful; while such totals would exceed the gatherings limit for secular events, services that large may still occur. The problem for Applicants is that their houses of worship are small, so bringing 100 or 40 together in *their* venues would require individuals standing too close to one another. To solve that issue, Applicants (and anyone similarly situated) could move their services to a larger indoor space, where 25% of room capacity would allow 100 persons to pray together; hold multiple services staggered across a single morning or day; hold services in multiple rooms at the same time; hold services of any size outdoors; or do some combination of the above.

That so many options remain available for services reflects a series of deliberate choices. In order after order, New Jersey has accommodated religious conduct to a greater degree than analogous secular conduct. *See supra* at 8-12 (exemptions from stay-at-home order, business closures, and outdoor and indoor gatherings limits). It did so based on the explicit belief that "certain gatherings, including religious services and political activity, are particularly important to the functioning of the State and society." EO 173 (Aug. 3, 2020), at 4-5; EO 152 at 4-5 (same); EO 183 at

4 (same). New Jersey was even sued for *favoring* religious activities over secular ones, *Nat'l Ass'n of Theatre Owners v. Murphy*, No. 20-8298, 2020 WL 5627145 (D.N.J. Aug. 18, 2020), which it rebutted by explaining it “is allowed to accord greater protection to religious activity.” No. 20-8298, Dkt. No. 26 at 37. It is thus unsurprising that New Jersey’s laws are more tailored, which easily distinguishes this case from *RCDB*.

ii. *New Jersey’s 25% Room Capacity Requirement Applies To All Analogous Secular Activities.*

To assess Applicants’ claim for relief, it is important to understand how New Jersey classifies different activities—and how it does not. While Applicants ask to be treated like “many ‘essential’ non-retail businesses, which are afforded 100% occupancy,” or at least akin to “essential retail” businesses, Application at 4, their demand reflects a misunderstanding of state law. In New Jersey, the only role the “essential” designation ever played statewide is between different kinds of retail—to determine which retail stores had to shutter at the start of the pandemic, and which ones could stay open. (That designation has no free exercise implications; New Jersey never ordered churches to close, meaning that they *were* treated as essential.) Said another way, the “essentiality” of a business or venue has nothing to do with its occupancy—another clear contrast to the orders

at issue in *RCDB*. *See slip op.*, at 3. New Jersey is thus making no value judgments when trying to avoid overcrowding indoors.

Because New Jersey seeks to prevent person-to-person contact and crowding where the risks of COVID-19 spread are highest, it maintains a series of numerical limits and/or capacity limits depending on the risk level of the activity proposed. As discussed above, the State reserves its strictest numerical limits for indoor gatherings, limiting them to just ten people, because they combine the various risk factors that lead to spread of COVID-19—such as group interactions, in indoor spaces, for extended periods of time, and even including loud talking or singing. *See supra* at 5-7. And the State maintains robust 25% capacity limits for venues where the public remains for extended periods, reasoning that “the more closely [persons] interact with others and the longer that interaction, the higher the risk of COVID-19 spread.” *Supra* at 6 & n.9. So although Applicants claim the 25% capacity limit singles them out, in reality this rule or even stricter ones prevent crowding at *any* venue where the public congregates for extended periods. *See supra* at 9-10 (listing covered venues).

New Jersey’s final capacity limit applies to retail stores, which are subject to two rules. While Applicants highlight that retail is generally



subject to a 50% capacity limit, rather than the 25% limit, they share only part of the story. It is true that retail shopping in New Jersey is generally subject to this higher limit: as described above, the fleeting interactions individuals have at the grocery store do not risk exposing individuals to the same “dose” of COVID-19 compared to interactions at a restaurant, a choir practice, or a religious service. *See supra* at 5-6, 10. The CDC treats close contact as lasting 15+ minutes over 24 hours; interactions of that length are common in bars but far rarer at the grocery store.

But when a retail store hosts events or gatherings where patrons engage in congregate activities, strict gatherings limits apply. *See supra* at 11; EO 157 at 5 & ¶15 (requiring stores to follow gatherings limit when they “bring people together to a specific location for a common reason and a common period of time”). As a result, any liquor store that is open for business generally is subject to a 50% limit, but if it hosts a wine tasting only ten persons can be involved. And an art gallery that allows patrons to peruse its collection is limited to 50% of occupancy, but when it holds an indoor auction to sell its newest pieces, the 10-person cap applies too. Because congregate activities increase the closeness and the length of the interactions even at a retail store, the gatherings limits kick in.

In New Jersey, religious activity is treated at all times the same as, or better than, its secular counterparts. While Applicants misunderstand this point, as laid out above, New Jersey maintains *no blanket capacity rules* for houses of worship. Instead, different room capacity limits apply depending on the activities proposed. In this case, Applicants are seeking to engage in congregate worship, which (1) brings individuals together in an indoor space, (2) for sustained in-person contact, (3) involving song—all activities that favor viral transmission. Even so, New Jersey took a solicitous approach: rather than subject their services to a 10-person cap, which governs analogous conduct like lectures or choirs, it subjects them to a more generous 25% capacity rule, applicable to indoor venues where members of the public remain for extended periods. Simply put, religious conduct is *avored* compared to analogous secular activities.

But if Applicants were proposing different conduct, which does not involve congregants participating in common activities for extended time, the 25% capacity limit would not apply. For example, if a shul designated a day for members to pick up a Mahzor (festival prayer book) in advance of Rosh Hashanah, any number of congregants could be in the sanctuary performing this task. Or if a priest was meeting with members of his flock

for confession, the chapel could be filled to capacity by individuals waiting in line. In New Jersey, there is no reason that someone could “walk down a grocery store aisle [to buy wine] but not a pew [to pick up a Mahzor],” or to “interact with a brave deliverywoman but not with a stoic minister.” *S. Bay*, 140 S.Ct. at 1615 (Kavanaugh, J., dissenting). When individuals are engaged in those activities, and thus any group contacts are fleeting, churches have *no* capacity limit—even as retail environments are capped at 50%. Individualized religious conduct is again favored.

The reality of how New Jersey’s law operates thus distinguishes it from the comparisons members of this Court have found troubling in the past. To take a few examples, New Jersey applies the same 25% capacity limits to its “restaurants, bars, casinos, and gyms,” *Calvary Chapel*, 140 S.Ct. at 2609 (Kavanaugh, J., dissenting), “bowling alleys, breweries, [or] fitness facilities,” *id.* at 2605 (Alito, J., dissenting), and “acupuncture facilities,” *RCDB*, slip op., at 3. Moreover, while this Court found previous state orders infirm for failing to treat houses of worship as well as retail stores, *RCDB*, slip op., at 3; *id.*, slip op., at 2 (Kavanaugh, J., concurring), that concern does not apply here. Congregate activities at retail stores—like auctions—are subject to *more* stringent limits than services, while

individual activities such as perusing the aisles of a store are subject to stricter capacity limits than walking down the pews to get a Bible.

Applicants might disagree with the distinctions New Jersey draws between prolonged, congregate activities and individual activities where person-to-person contact is fleeting, but it reflects the position of “public health experts ... with special expertise and responsibility in this area,” *id.*, slip op., at 5 (per curiam), it is consistent with the “deference [owed] to state and local authorities about how best to balance competing policy considerations during the pandemic,” *id.*, slip op., at 3 (Kavanaugh, J., concurring), and it does not discriminate against religion.

iii. *Applicants’ Remaining Comparators Fall Short.*

Applicants’ remaining comparators—outdoor rallies, schools, and manufacturing/warehousing businesses—do not call the State’s neutral and generally applicable response into question.

1. Applicants are simply wrong to contend that indoor religious gatherings may take place in as crowded a room as they wish just because some *outdoor* gatherings have no limit. The most obvious problem is that this distinction does not discriminate against religion. To the contrary, in New Jersey, outdoor religious services are not subject to any numerical

limit either. *See* EO 152 ¶2(f). That is, there is no line between indoor *religious* activity and outdoor *secular* gatherings; instead, the line exists between indoor gatherings (religious and secular) and outdoor gatherings (religious and secular). And that distinction is logical: it is by now plainly established that outdoor environments present a lower risk of COVID-19 spread. *See* RA395 (CDC stating that “indoor spaces are more risky than outdoor spaces”); *supra* at 5. States can thus distinguish between indoor and outdoor gatherings without violating the First Amendment.

2. Claims comparing the room capacity limits for gatherings and classrooms likewise fail. For one, this comparison falls short for the same reason that the comparison between indoor and outdoor gatherings fails: it has nothing to do with religion. While the State highlighted this point below, Applicants overlook that parochial schools are subject to identical classroom restrictions as public and other private schools. EO 175 ¶¶1-2 (Aug. 13, 2020). So while the State maintains different rules for schools (whether religious or secular) and gatherings (religious or secular), every comparable activity merits equal treatment. And there are good reasons to distinguish between religious schools and religious gatherings, having everything to do with public health rather than animus.

*First*, whereas COVID-19 transmission by adults is by now well-documented, it is not at all clear that children transmit the virus to the same degree, and developing evidence in fact suggests schools are *not* as conducive to COVID-19 spread as gatherings. *See* Benjamin Lee, *COVID-19 Transmission & Children: The Child is Not to Blame*, PEDIATRICS (2020), <https://tinyurl.com/y6nf2ra5> (noting that “evidence and collective experience argue that children, particularly school-aged children, are far less important drivers of SARS-CoV-2 transmission than adults,” and noting “SARS-CoV-2 transmission from children to other children or adults is ... infrequent”).<sup>18</sup> State officials can take that body of evidence into account when crafting their response.

*Second*, as the State’s orders explained, “access to school buildings is not available to the general public and the individuals present in a school building do not vary from day to day”—unlike venues that are open

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<sup>18</sup> There is growing evidence to support this distinction. *See, e.g.*, Apoorva Mandavalli, *Schoolchildren Seem Unlikely to Fuel Coronavirus Surges, Scientists Say*, N.Y. TIMES (Nov. 11, 2020), <https://tinyurl.com/y43f47ta> (adding “[t]he bulk of evidence now suggests only limited transmission from young children to adults”); Emily Oster, *Schools are not spreading covid-19*, WASH. POST, <https://tinyurl.com/y2d8okrq> (finding schools do not appear to be a significant vector for COVID-19 spread); Emily Oster, *COVID-19 School Response*, QUALTRICS, <https://tinyurl.com/y2jtbo3x> (school data-set indicating same).

to the public. That matters in two ways: it means there is “a lesser risk of COVID-19 transmission than exists in spaces generally open to the public,” because the universe of individuals who interact are more closely defined, and it “makes contact tracing substantially easier.” *Id.* at 4; *see* App.21-22 (district court finding same). Applicants disagree, but the bare conclusions they offer—for which Applicants cite no record evidence, *see* Application at 24-26—are insufficient to show that the district court had clearly erred in siding with public health officials on this fact dispute.

*Third*, New Jersey is imposing on schools a range of requirements to reduce COVID-19 risks. *See* N.J. Dep’t Of Heath, Exec. Directive 20-021 ¶¶ 1, 3 (June 30, 2020), <https://tinyurl.com/y5to6b49>. Every school must submit and obtain approval from the State on its plan before it can reopen. *See id.* The rules that a plan must comply with include enhanced social distancing and infection control; procedures to isolate symptomatic students and staff; coordination with local health departments on contact tracing; and plans to ensure indoor facilities are ventilated. *See id.*

3. Applicants get no further by comparing congregate prayer to working at a factory or in a warehouse. While Applicants create a straw man by attacking reasoning the Seventh Circuit gave to uphold Illinois’

treatment of manufacturing and gatherings, Application at 27 (accusing Judge Easterbrook of finding factories to matter more than faith), they ignore the reasons *New Jersey* is providing. For one, while factories can be vectors for the virus, the features that render Applicant’s gatherings dangerous—congregating for extended periods, intermingling *en masse*, and group singing—are not present in the manufacturing or warehousing context. For another, such workplaces are not open to the public, but are limited to defined and regulated employees—a distinction that limits the universe of persons who could be affected by an outbreak and facilitates easier contact tracing. Finally, factories and warehouses follow a range of health rules that do not cover Applicants. *See, e.g.*, 29 C.F.R. 1910.94, 1910.1000, 1904 (general OSHA regulations); EO 192 ¶1 (Oct. 28, 2020) (extensive state COVID-19 requirements for workplaces).

But those are not the only important distinctions. Applicants ignore that state capacity limits *already* operate differently for manufacturing or warehousing than houses of worship—authorizing substantially more crowding in the latter. The International Building Code (IBC), on which New Jersey relies, *see* N.J. Admin. Code 5:23-3.14, implements different limits for places of assembly (explicitly including houses of worship) than



for industrial areas or for warehouses. *See* IBC, Section 1004—Occupant Load (Aug. 2017), <https://tinyurl.com/y4hwrcee>. For the former, the IBC requires identification of the net area intended to be occupied and then calculates the occupancy limit by dividing that area by a factor of seven (if the space contains chairs) or five (if a space is used for standing). *See id.* at Table 1004.5. And if the location has pews, the occupancy limit is established by allowing one person per 18 inches of bench. *Id.* at Section 1004.6. For industrial spaces or warehouses, however, the IBC requires assessing the gross area of the room and dividing it by factors of *100* (for industrial areas) or *500* (for warehouses). *Id.* at Table 1004.5.

It makes sense that occupancy limits are lower for industrial spaces and warehouses than places of assembly: occupancy limits are intended to reflect how the space is actually used. Because factories or warehouses dedicate significant floor space to machinery, workspaces, packages, and the like, the occupancy limits keep individuals more naturally distanced than they would be sitting side-by-side in a pew or packed into a concert. *See id.* at Table 1004.5. As a result, New Jersey’s animating interest in reducing crowding is simply not as threatened by a factory or warehouse as by gatherings at capacity in a place of assembly.

Finally, Applicants ignore the rules that still apply to factories and warehouses. Under the emergency orders, employers must seek to reduce staff on site “to the minimal number necessary to ensure that essential operations can continue.” EO 107 ¶11. Such a rule would, of course, be intolerable for religious gatherings, as it would be inappropriate for state officials to question who is “essential” for a service. And Applicants would not welcome such an order, which could mean fewer individuals than are allowed under the 25% rule. The State’s intent is to allow manufacturing *and* religious worship to continue safely during a pandemic, and its rules are tailored to ensure each can do so consistent with public health.

B. New Jersey’s Mask Requirement Is Consistent With The Free Exercise Clause.

Applicants’ claim that the Constitution entitles them to participate in religious activities without wearing a mask—covered in just two pages of their emergency application—is meritless. As a threshold matter, the evidence that masks will help slow the spread of COVID-19 is legion. *See* RA414 (CDC Director stating “face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus”); *supra* at 7 (collecting studies and articles substantiating efficacy of masks). That is why widespread mask use “can help avert future lockdowns, especially if

combined with other non-pharmaceutical interventions such as social distancing, hand hygiene, and adequate ventilation.”<sup>19</sup>

Given the importance of masks, it is perhaps unsurprising that this emergency application does not point to any indoor venue where persons are exempt from this mandate. To the contrary, New Jersey’s emergency orders require individuals to wear masks at all indoor venues open to the public, including but not limited to all religious and secular gatherings; all indoor venues where the public remain for extended periods; all retail businesses; all manufacturing and warehouse facilities; all schools; and even outdoors where social distancing cannot be maintained. *See supra* at 13. Said another way, at every one of the comparators that Applicants and the State debate relative to the gatherings limits, New Jersey’s mask rule applies. The rule is plainly generally applicable.

Applicants’ primary position is that individuals must be allowed to remove their masks while participating in indoor group prayer because individuals are not required to wear masks if doing so would harm their health. That is wrong. As the CDC explained, there are persons for whom mask-wearing could be dangerous, including ones with trouble breathing

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<sup>19</sup> CDC, *Community Use of Cloth Masks*, *supra* at 7 n.13.

or those engaged in high-intensity activity (their masks could inhibit air flow); children under two (the masks could lead to suffocation); and in the water (because of the risk of drowning). *See* RA635. That is logical: if New Jersey's interest in a mask requirement is to further public health, masks should not be worn when they would *undermine* the wearer's health. By contrast, were Applicants correct that New Jersey law must allow for a religious exemption any time it protects people's health, then all neutral and generally applicable drug laws would be infirm anytime a drug was used by doctors in treating patients or for medical research.

Finally, Applicants complain that the precise contours of the State's mask requirement are insufficiently clear. Not so. The State has clarified in its Executive Orders whether and when masks can be removed. As the State noted, it is maintaining exemptions from its requirement where an action would be physically blocked by the mask—such as consuming food or water. EO 152 ¶¶ 2, 5. The State made clear the same accommodation applies where a mask would block consumption for religious purposes—to ensure Applicants can receive Communion, drink from a Kiddush cup, or perform other like activities. *Id.* ¶5. This exception does not apply to singing or praying indoors, which can be performed with a mask on, and

where the risks are at their highest. Applicants might disagree with this approach, but the rule is clear; it is a critical tool for protecting public health; and it does not discriminate against religion.

C. The Remaining Equitable Factors Also Require Denial.

Applicants also failed to “clearly establish” that the district court abused its discretion in finding that the remaining equitable factors cut against granting preliminary relief. Indeed, this Court’s recent findings in *RCDB* only emphasize that a different result is proper here.

As an initial matter, the harm worked by New Jersey’s rules differs greatly from the harms in *RCDB*. There, this Court explained that a “loss of First Amendment freedoms ... unquestionably constitutes irreparable injury,” slip op., at 5 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), and if “only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred,” *id.* But, as noted above, New Jersey endeavored to mitigate these harms. As the court below found, these Applicants *can* hold services of the size their chapels allow (100 and 40 persons) in larger rooms, App.26-27, and the State ensured that any observances involving consumption of food or drink can proceed. Further, indoor services can be

staggered, each time filling 25% of room capacity, and services can take place outdoors without limit. New Jersey acknowledges and regrets the sacrifice that Applicants are making, but it only asks for such sacrifice as is necessary during a once-in-a-century global pandemic.

By contrast, the damage to the State and the public's interest from an emergency injunction would be profound—especially in the middle of the second wave. Study after study, and expert after expert, confirm that gatherings of this kind contribute to COVID-19's spread. COVID-19 has led to over 15,000 deaths in New Jersey; 3,129 residents are hospitalized in the State, the highest number since May; cases are still rising steadily, with roughly 4,000 daily confirmed cases in New Jersey; and no vaccine is yet widely available.<sup>20</sup> Bluntly, “it is no exaggeration to recognize that the stakes for residents ... are life-or-death,” *Tolle v. Northam*, No. 20-363, 2020 WL 1955281, \*1 (E.D. Va. Apr. 8, 2020), and the district court correctly relied on New Jersey's interest in “preserving lives in the midst of an unprecedented pandemic that has resulted in [250,000] deaths.” App.27. Without capacity limits to ensure spacing indoors, and without requiring the use of masks, the State has few tools left.

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<sup>20</sup> See N.J. Dep't Of Health, *COVID-19 Dashboard*, *supra* at 4 n.3.

Most importantly, the harm from Applicants' own services would be significant. In *RCDB*, the applicants had “complied with all public health guidance,” “implemented additional precautionary measures,” and even “operated at 25% or 33% capacity for months.” Slip op., at 2. Sadly, the precautions that the applicants agreed to take in *RCDB* are the very ones Applicants are rejecting. As an initial matter, Applicants have denied the science outright, stating that “[t]here is absolutely no scientific basis for this hysterical germaphobia, which has never animated public policy during any flu season, no matter how deadly the flu,” Dist. Ct. Dkt. 101 at ¶ 100; that “it is eminently arguable that the virus was never a threat to the general population in the first place,” Dist. Ct. Dkt. 89 at 3-4; that “herd immunity must have been achieved in New Jersey” and therefore the “emergency is over,” *id.* at ¶ 103; and that rising case numbers are a mere “casedemic” that is no cause for concern, Dist. Ct. Dkt. 79 at 3-4.

The real problem is not that Applicants dispute the science, but that it has led them to categorically refuse to take the steps necessary to keep their congregants safe—or to protect those who later interact with them. Unlike the applicants in *RCDB*, Applicants contend they must be allowed to “assemble in full,” Dist. Ct. Dkt. 51-2 at ¶ 7, and stated that the State’s

“arbitrary” laws “will simply have to be ignored,” Dist. Ct. Dkt. 101 at ¶ 192. Applicants oppose contact tracing, which they call “pointless,” Dist. Ct. Dkt. 79 at 8; claim they “cannot be compelled to bar their congregants [even] where ‘social distancing’ is not practicable,” Dist. Ct. Dkt. 57 at 10; and reject the use of “crude and medically useless ‘face coverings’ such as masks,” *id.* at 17, calling them “probably unhealthy,” Dist. Ct. Dkt. 93 at 5, and going so far as to confirm that one of the applicants “will not wear a face covering at any time during the worship he leads,” Dist. Ct. Dkt. 101 at ¶ 172. Indeed, one of the applicants repeatedly has been charged with violating New Jersey’s laws. *See* Dist Ct. Dkt. 101, ¶¶ 161-65. For the reasons this Court found no risk had been shown from the services in *RCDB*, slip op., at 5, the opposite is unfortunately true here.

## CONCLUSION

The Court should either deny the application or grant the petition for certiorari, vacate the decision below, and remand.

Respectfully submitted,

/s/ Jeremy M. Feigenbaum

JEREMY M. FEIGENBAUM  
*State Solicitor*

December 3, 2020